Faculty of Law of the University of Kragujevac

LAW IN THE PROCESS OF GLOBALISATION

Editors-in-Chief
Slavko Djordjevic
Srdjan Vladetic
Jasmina Labudovic Stankovic

Kragujevac
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FOREWORD

On the occasion of its 40th anniversary, which was celebrated in 2016, the Faculty of Law of the University of Kragujevac decided to publish a scientific book (collection of scientific papers) dealing with the theme „Law in the Process of Globalisation". The faculty formed the editorial board and appointed the editors-in-chief who performed all activities necessary for the publication of the present book. The call for contribution of scientific papers was accepted by many professors and researchers coming from Serbia and from abroad (Bosnia and Herzegovina, Russia, United Kingdom) to whom the editors and the publisher are very thankful. They have dealt with different aspects of the influence of globalisation on legal system in general as well as on particular fields of law such as public law, criminal law, private law, family law, labour law etc. The publication of scientific papers in this book aims to make their research results available to the scientific public in Serbia and worldwide and to encourage the discussion on the wide range of questions relating to the legal issues connected to the process of globalization. It should be also stressed out that all scientific papers published in this book have been submitted to a double blind peer review process and recommended for publication by reviewers.

Editors-in-Chief

Slavko Djordjevic
Srdjan Vladetic
Jasmina Labudovic Stankovic

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Branislav Simonovic*

DOI: 10.46793/LawPG.003S

THE INFLUENCES OF GLOBALISATION ON NATION STATES AND LAW

Abstract

This paper, primarily, discusses the concept of globalization. It shows general characteristics that make globalization a unique and omnipresent phenomenon. Furthermore, it investigates the influence of globalization on nation states, with particular emphasis on developing countries. Special attention was given to the question of the influence of the American legal system on European law within the process of globalization. The paper presents different stances of American authors concerning this subject. In addition, the paper presents different models of achieving globalization in the field of law. This paper demonstrates that globalization leads to reduced sovereignty of the state, legal deregulation, the weakening of states' legal jurisdiction in the field of control of business operations and the inconsistencies in the implementation of human rights.

Key words: *globalization, law, effect of globalization on law, nation state.*

1. THE CONCEPT OF GLOBALIZATION

It is not simple to define the concept of globalization considering the variety of its manifestations, its multidimensionality and omnipresence. Depending on the focus of a specific analysis and the point of view, certain characteristics can be inferred and identified. These characteristics can be valid, to a greater or lesser extent, but even so they represent only a part of the picture, a piece of the mosaic of this all-pervading modern phenomenon.

Some authors equate globalization with the internationalization of society and economy, thus referring to it as a „universalization of global culture", a "westernization" of societies based on European and American models or as a „deterritorialization of geography and social space".[1] In the widest sense, globalization represents the expanding, deepening and

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[1] J. Ku, J. Yoof, *Globalization and Sovereignty*, Berkeley Journal of International Law, 2013, vol. 31, No. 1, 212.

acceleration of global interdependence in all aspects of modern society, from culture to criminality, from finances to spirituality (Held). In a more narrow sense of the word, globalization represents the growth of transnational companies and the expansion of the global market (Soroš).[2] There are authors who believe that the basic indicator of globalization is represented by striving for profit maximization. The dictatorship of profit, as stated by these authors, is the main indicator and initiator of globalization.[3] One could make an attempt to prove a hypothesis that globalization represents a form of contemporary neocolonialism and that it, primarily, favors the big and the mighty.

It is noteworthy to mention the understanding that considers globalization a global trend within which interactions among people are intensified and the market is integrated. Its results are not coincidental, but driven by clearly recognizable political, economical and technological changes that remove barriers in order to simplify contacts across national borders. The process is not completely new, but it was intensified during the nineties of the twentieth century as a result of three significant factors,[4] which will be covered in this paper.

2. GENERAL CHARACTERISTICS OF GLOBALIZATION

There is an interdependence among the three mentioned macro-processes: economic liberalization, political liberalization and new information and communication technologies, and only when unified all three processes achieve synergy and universal effect, which in turn combined with a multitude of additional and accompanying processes and consequences forms the existing picture of globalization.

Economic liberalization is a process that leads to the opening of the market for the free flow of goods, capital, money, and business ideas. It reduces the significance of national borders and barriers in the fields of trade, production and investments. Free flow of capital and profit maximization are basic values spurred by economic liberalization. The literature indicates that

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[2] Cited from: M. Stojadinović, *Političko nasilje i globalizacija - Izazovi razvoja demokratije*, Bezbednost, 2015, 2, 94.

[3] V. Forrester, *Die Diktatur des Profits,* Deutscher Tachenbuch Verlag, München, 2002.

[4] S. Fukuda-Parr, *New Threats to Human Security in the Era of Globalization,* Journal of Human Development, Vol. 4, No. 2, July 2003, 168.

the process of economic liberalization is strongly supported by the International Monetary Fund and the World Bank.[5]

Political liberalization represents the support (additional impulse) of liberalization in the field of world trade, giving it strong support and backing it with political means. Therefore, political liberalization is the other side of the coin, and it operates in the function of economic liberalization and maximization of profit with a number of other accompanying phenomena. Roman Terrill suggests that globalization forces states to adopt economic and political reforms and to meet the demands of dominant players on the world's financial market, placing explicit emphasis on the USA.[6]

It would not be possible for the two mentioned processes (economic and political liberalization) to have the existing strength and influence in the world without the third process, which is reflected in new information and communication technologies. The appearance of the Internet and fast and inexpensive means of communication have increased the trade of goods and money transfers in real time and significantly contributed to the economic globalization, but also to the strengthening of scientific cooperation, exchange of ideas, culture and value system patterns. The literature indicates that economic liberalization, modern communication technologies and money transfer lead to „the compression of space and time and the depletion of interstate borders" (Giddens).[7]

Certain authors introduce the interesting hypothesis that the heart of globalization lies in the forming of the free world market, the appearance of non-state entities, out-of-state entities (economic and political) and entities that are above state level, and their relationship with nation states. Those entities that are out of state and above the state level (transnational economic companies, international financial institutions, organizations and associations that are above the state) become significant actors in the economic and political sense. Those entities overcome state borders (they are not limited by them) and have an ex-territorial and global orientation which results in capital, technology and investments (easily) crossing interstate borders. This process is defined in various ways: as globalization, transnationalization, postnationalization or denationalization of capital.[8]

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[5] *Ibid.*

[6] R. Terrill, *What Does "Globalization" Mean?* Transnational Law & Contemporary Problems, 1999, Vol. 9, 224.

[7] Cited from: S. Fukuda-Parr, *op.cit.,* 170.

[8] L. Cao, *The Transnational and Sub-National in Global Crimes,* Berkeley Journal of International Law, 2004, Vol. 22, issue 1, 59-60.

3. THE INFLUENCE OF GLOBALIZATION ON NATION STATES

In the globalization process, as in economic and political liberalization, developing countries willingly participate through financial deregulation of the market, that is, its opening for foreign capital and goods, even if it is against their national interests. Examples given in the literature are Mexico, Argentina and Thailand. Apart from opening the market and business opportunities for the citizens of these countries, these changes have also exposed the national economies to fierce competition from the global market, which leads to social insecurity and safety issues.[9] The Government of Serbia had done the same thing when it applied a unilateral trade agreement with the EU and liberalized import, which had a negative effect on national economy.[10]

Globalization leads to the weakening of state borders, to the reduction of protective national trade (bureaucratic) barriers (customs, contingents for the import and export, import quota, etc.),[11] whose role was to preserve domestic production and the national market. The concept of (protected) national markets is fading away, while foreign business entities appear on national markets holding the same rights as domestic ones.

Changes caused by globalization to the nation state, on a regional and local level and in the lives of ordinary (average) people are numerous and multifold. Considering the fact that globalization is a global phenomenon, it does not stop at economic and political liberalism and the opening towards the world market. It entails imposing, that is, acceptance and adoption of cultural patterns and value systems coming from abroad (fashion, music, attitudes on sexuality, marriage and family, minorities, etc). A significant role in this process is played by the Internet, the film industry, television, the political aspects of globalization as well as non-governmental organizations financed, primarily by foreign countries, etc. Globalization means a free market of ideas and values. Globalization and the import of foreign capital that has, to say the least, equal rights as national capital (sometimes even more rights), includes purchasing national media by foreign companies,

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[9] I. Warde, *The War on Terror, Crime andthe Shadow Economy in the MENA Countries,* Mediterranean Politics,Vol. 12, No. 2, July 2007, 169.

[10] Sporazum o stabilizaciji i pridruživanju i prelazni trgovinski sporazum. See http://www.pks.rs/SADRZAJ/Files/CMIP/Brosura-SSPiPrelaznitrgovinskisporazum. pdf dostupan 14.6 2016.

[11] R. Terrill, *op.cit.,* 218.

which enables them to have a direct influence on people's views and attitudes. Furthermore, when describing the influence of globalization on cultural values of people, the term „cultural hegemony" is used in the sense of spreading and domination of ideas, tastes, styles, which are present in other parts of the world, especially in the USA.[12]

It is considered that one of the consequences of globalization is the reduced sovereignty of states in the typical sense of the word, as it was understood in the nineteenth or twentieth century (as the absolute monopoly in the exercise of power and the monopoly in nation state's use of force on its territory). It is mentioned that globalization causes the erosion of nation state, provoking questions about the understanding of democracy, sovereignty and participation. Consequently, the terms „internationalization" and „transnationalization" on nation state level (from the aspect of „contemporary interpretation" by certain authors) mean bilateral or multilateral „cooperative activities of national actors", so national quality is not necessarily lost.[13]

The consequences of globalization are expressed on nation state level as a reduction of sovereignty, deregulation, that is, weakened influence of the state (government) in certain areas which were traditionally in its domain (capital flow, national currency rate, interest rates, foreign investments, earnings). To describe this situation foreign literature uses the terms „internationalization", „transnationalization" of nation states, i.e. „postantionalization". Sometimes, it even uses the term „denationalization" of nation states.[14]

Negative consequences of globalization reflected on nation state level are also the bankruptcy of companies and entire industrial branches that are unable to endure international competition on the (open) national market, and consequently, lead to the increase of unemployment, the increase of social tensions, social stratification, disappearing of the middle class, etc.

4. THE INFLUENCE OF GLOBALIZATION ON THE EXPANSION OF CRIMINALITY

The collapse of unprofitable industries, which were unable to endure international competition, leads to the increase of poverty in the world, social tensions and a dramatic rise in the unemployment rate. One of the negative

[12] *Ibid.,* 217.
[13] L. Cao, *op.cit.,* 59.
[14] *Ibid.*

consequences of globalization is the increase of social differences, the emergence of a small number of the extremely rich and a big number of the extremely poor. This reflected on the increase of criminality on local community level, primarily in developing countries. The inflow of refugees towards developed countries also caused the increase of the criminality rate in developed countries, which were previously considered safe.

The intensification of international trade facilitated international communication including the expansion of the Internet, cheaper international passenger transport; simplified bank payments and money transfers have had a strong impact on the spreading of organized crime (illegal drug trade, human trafficking, etc). The strengthening of international trade and multinational companies has significantly contributed to the rise of corruption to an international level. Intensified international trade cooperation and facilitated international financial transfers have opened up new possibilities for legalizing „dirty money" acquired through organized crime or corruption and in turn its integration (or return) into economy, especially in developing countries,[15] which is also evident in Balkan countries.[16] With the aim to control „globalized corruption", appropriate conventions were brought in the United Nations and within Europe in order to provide a standardized, that is, legally „globalized" answer to the universal problem.[17]

Furthermore, globalization has actualized the danger of international terrorism, which can, to a certain extent, be considered a consequence of the increased imperialistic policies of rich states. The intensification of international terrorism, especially Muslim fundamentalism, has had a recurrent impact on certain basic principles of globalization.

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[15] For example: B. Nurgaliyev, B. Simonović, *Police Corruption in Kazakhstan: The Preliminary Results of the Study*. Review of European studies, 2015, vol. 7, no 3, 140-148.

[16] B. Simonović, G. Bošković, *Symbiosis of Politics, the Shadow Economy, Corruption, and Organized Crime in the Territory of the Western Balkans: the Case of the Republic of Serbia,* in: Corruption, fraud, organized crime, and the shadow economy (eds M. Edelebacher, P. Kartcoski, B. Dobovšek), (Advances in police theory and practice). Boca Raton, FL: CRC Press, 2016, 111-123.

[17] B. Simonović, *Suzbijanje korupcije - standardi Ujedinjenih nacija i Evropske unije i zakonodavstvo Srbije,* u: Krivično zakonodavstvo Srbije i standardi Evropske unije (ur. S. Bejatović), Kragujevac: Pravni fakultet, Institut za pravne i društvene nauke, 2011, 95-123; C. Roelofse, B. Simonović, Ph. Potgieter, *Comparative Study of Corruption and Goverment Efforts to Combat it Across Borders: the case For South Africa and Serbia,* Internal Security, 2014, vol. 6, issue 2, 7-28.

Ward mentions that globalization has lead to the appearance of a new term that is marked as „market fundamentalism". Unhindered trade represents a dominant structural principle of the global political economy. This author suggests that this philosophy was dominant in the period from The Fall of Berlin Wall until the terrorist attack in New York of September 11, 2001, after which the questions of money laundering and the control of financing terrorism arose.[18] After the mentioned terrorist attack, discussions about the need of controlling money flow on the world market in order to prevent the financing of terrorism were intensified. Fifteen years after the New York attack this is still an open topic and has influence on globalization and money flow control on the global financial market.

5. DOES GLOBALIZATION INCLUDE THE INFLUENCE OF AMERICAN LAW ON EUROPEAN LAW?

Viewed from a historical aspect, the law has always been adjusted to go in line with the strongest political and economic influences. It has always been under the influence of powerful countries and it has followed the leading ideas of imperialistic forces. The shaping of the law was not influenced by the strength of the logic of the legal arguments and the interpretation of the law, but the strength of the sword and the political influences. Therefore, „globalizations" in accordance with the given historical, social and technological possibilities, have always influenced the law of nation states. Roman law set the foundations for the development of the law on our continent precisely owing to the strength and power of the Roman Empire and its rule over Europe. Strong European countries such as Germany, the Austro-Hungarian Empire and France had definitely shaped the law of the nineteenth and twentieth century in the European countries, including the Balkans. When the political influence of the Soviet Union started to gain momentum on this territory, the law of the Balkans changed accordingly. On the other hand, the imperialistic force and influence of Great Britain have left a lasting impression on the legal system in North America, Australia and all other countries that were under its colonial influence.

It is believed that, in recent legal history, American law influenced European law within the globalization process. In his paper covering this topic, the American jurist Wolfgang Wiegand uses the term „reception" of American law in Europe, emphasizing the analogy with the process of reception, i.e. the „spreading of Roman law as ius commune on the territory

[18] I. Warde, *op.cit.*, 233.

of legal systems of continental Europe in the middle ages".[19] The author is of the opinion that the processes of Americanization of Europe can be discerned from the end of World War II, mostly in the countries of Western Europe, and were contributed to largely by the expansion of the English language, which got the status of a second language in many countries. Apart from that, he emphasizes the influence of American universities, where many jurists were educated who later on had great influence in their home countries, which lead to the reception of American law. A political and economic domination of the USA in Europe after World War II is mentioned by this author as an additional factor.[20] Apart from that, other contributors to the Americanization of European law were new business concepts transferred to Europe from the USA (e.g. leasing, factoring, franchising) as well as multinational companies.[21] In the elaboration of his idea this author writes about „the reception of American law in Europe", the „legal hegemony of the USA", and the„legal imperialism of the USA". According to him, the reception is manifested in both the adoption of practical legal procedures and in the integration of basic legal concepts.[22]

Other American jurists also accept the idea of the convergence of European law towards the American legal model, that is to say, that the American legal style is spread on other countries of the world as a form of a globalization process in the field of law. Unlike mentioned above, these authors see other reasons for the merging, assimilation of the legal systems with the American model such as economic liberalization and political fragmentation that disrupted traditional approaches to legal regulation and as such generated functional pressures and political incentives, thus directing national law towards American legal model.[23]

Kagan, one of the most significant American authors, who has written several papers regarding this question, does not agree with the opinon that, in the globalization process, there isa significant influence of Anglo-Saxon and American law on nation state law of European countries. His arguments are that European legal culture and the political organization of European nation states generate processes that hinder their convergence with the

[19] W. Wiegand, *The Reception of American Law in Europe,* The American Journal of Comparative Law, Vol. 39, No. 2 (1991), 230.
[20] *Ibid.,* 235.
[21] *Ibid.*
[22] *Ibid.,* 240.
[23] R. Kelemen, E. C. Sibbitt, *The Globalization of American Law,* International Organization, Vol. 58, No. 1 (Winter, 2004), 103-104.

American concept of law. With this aim, he elaborates the topic further, stating six basic reasons why this claim is not valid. According to Kagan, global competition and neoliberalism demand similar legal solutions. The fact is that similar conditions appear on the market of interdependent economies and they demand similar legal solutions, which is why this context can be viewed as convergence between American and European law (legal convergence). Therefore, according to Kagan, existing similar conditions are caused by similar global processes and lead to similar legal solutions, or acceptance of those legal solutions, which have proven to be effective in solving the same problem in other legal systems. On the other hand, the difference between the American and the European approach to law will persist for many decades on.[24]

Bermann also disagrees with the idea of an Americanization of European law and starts from the premise that the cultural differences are so big that one cannot speak of a transfer of law. On the other hand, in both parts of the world, there are liberal democratic models based on the rule of law, which makes the systems similar in some aspects, so transfer of certain legal solutions is possible. Additionally, legal solutions suggested through international organizations, whose members include both the USA and Europe, open legal dialogue and exert influence on the adoption of legal solutions in both America and Europe, which also opens the question of their convergence. For instance, there are business fields as well as security issues (corporate business, bank operation, control of serious crimes and terrorism, etc.) that require a similar or exactly the same legal regulation.[25]

On the other hand and at the same time, American and English authors indicate that Anglo-Saxon law has gone through (significant) changes in the globalization process and that under the influence of European law, first of all, EU law, the countries with a Anglo-Saxon legal system were introduced with elements of European continental law. For example, Sir Williams writes about the Europeanization of the Common Law system and the national

[24] R. Kagan, *Globalization and legal change: The''Americanization'' of European law?*, Regulation & Governance (2007) 1, 99–120.

[25] G. Bermann, *Americanization and Europeanization of Law: Are there Cultural Aspects?* Source web address: http://www.lawschool.cornell.edu/international/conferences/ ASCL-2007-Annual-Meeting/upload/CornellConferenceBermann.doc. Paper available on 10. 6. 2016.

legal system of Great Britain since this country joined the EU and adopted the European Convention on Human Rights.[26]

We consider that it is valid to discuss the process of an Americanization of European law, that is, the law of European countries. Over the last two decades under the influence of Anglo-Saxon law, significant changes were introduced to European law, the Balkan region and Serbian law as well. Complete institutes were imported from the Common Law system that were previously unknown in European continental law and practice. For example, the criminal procedural law has undergone dramatic changes. Court investigation as a typical European model was abandoned and prosecution investigation started to be applied[27], the plea bargaining was implemented[28], the institute of cross-examination was introduced, the principle of truth was abandoned[29] etc. Over the last twenty years, the foundations and the basic principles of this branch of law in Serbia were changed in order to accept Anglo-Saxon legal solutions.

Here we must start a discussion with American jurist Kagan. Kagan criticizes the author's premises that speak of the Americanization of European law. He denies the existence of political pressure on Europe, or certain countries within it, to accept American legal institutes. He states that the basis of the globalization of law is market liberalization and adjusting of the states to given economic realities.[30] Attempting to prove his hypothesis, in the part dealing with criminal procedure, he states that European law has certain institutes that are similar to American institutes. However, he also suggests that they are essentially different from American models, so we

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[26] D. Williams, *Courts and Globalization,* Indiana Journal of Global Legal Studies, 2004, Volume 11, Issue 1, 65.

[27] B. Simonović, M. Šikman, *Neka iskustva u realizaciji tužilačkog koncepta istrage u Republici Srpskoj,* Pravni život, 10/2009, 453-465.

[28] B. Simonović, V. Turanjanin, *Sporazum o priznanju krivičnog dela i problem neistinitog priznanja,* Pravni život, 10/2013, 17-31; B. Simonović, V. Turanjanin, *Sporazum o priznanju krivice i problemi dokazivanja,* u: Kriminalistički i krivično procesni aspekti dokaza i dokazivanja: zbornik radova (ur. M. Matijević), Banja Luka: Internacionalna asocijacija kriminalista, 2013, 17-31.

[29] B. Simonović, *Istina, izvesnost i Zakonik o krivičnom postupku Srbije iz 2011. godine,* Pravni život, 9/2012, 801-814. B. Simonović, *Istina i Zakonik o krivičnom postupku Srbije,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Knj. 3. Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2015, 187-199.

[30] R. A. Kagan, *op.cit.*, 100.

cannot speak of direct reception of American institutes. As an example to confirm his hypothesis he mentions the plea bargaining.[31]

When it comes to Serbia and Balkan countries, it cannot be denied that there is some political pressure to adopt legal solutions typical for American law, which have fundamentally changed legal concepts in terms of certain legal solutions in the countries of the region. In the work groups for the drafting of the laws, (when there was political interest) American citizens, legal experts were very important and resourceful members of the committees, which with the help of political influence worked on the adoption of certain Anglo-Saxon solutions. An undisputable example is the adoption of the Law on Criminal Procedure of The Republic of Serbia. Kagan states that certain solutions adopted from American law are significantly different in Europe (some are fundamentally different) from the American model. When it comes to the mentioned institute - the plea bargaining - or the concept of prosecution investigation, the differences between the legal solutions in certain European and Balkan countries are minimal in comparison to ideas imported from the American legal system. „Imported" ideas have completely changed the concept of certain laws, which are no longer in line with the concept of the traditional European-continental legal system.[32]

Denying the influence of American law on European law, some authors say that these two legal systems are essentially different also in terms of the social dimension. The American model is clearly neoliberal and it has only a market and a competitive dimension (which is especially characteristic in the areas of business conditions of the market and labor law). On the other hand, the European model of globalization of law has kept its strong social dimension, which American law does not have. Rosamond lists a range of regulations adopted by European Union law, in which the social dimension of the law has to be preserved and is compulsory for member countries (he mentions the 'European social model', 'moral frame', basic labor standards', and 'corporate social responsibility').[33] It is important to notice that all the regulations that the author mentions are more than ten years old (they are from the year 2001). There is no doubt that the globalization and the

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[31] *Ibid.*, 111.

[32] See, for example: V. Turanjanin, *Sporazum o priznanju krivičnog dela,* doktorska disertacija, Pravni fakultet, Univerziteta u Kragujevcu, 2016, 265-390.

[33] B. Rosamond, *Globalization, the ambivalence of European integration and the possibilities for a post-disciplinary EU studies,* Innovation: The European Journal of Social Science Research, Volume 18, Issue 1, 2005.

Americanization of European law have their own course. European law lost its social dimension after 2010 and it has been accepting the characteristics of neoliberal law. The best proof of this hypothesis are the protests in some European countries (France and Belgium in the spring of 2016), where the laborers protested on the streets strongly opposing the introduction of legislation to abolish their social and working rights, of which Europe was very proud of in the past. The laws and regulations on the rights of workers in Balkan countries have undergone the same changes, and they have a neoliberal character since recently, although most countries from the region are not EU members yet.

6. MODALITIES OF GLOBALIZATION OF LAW AND NATIONAL LAW

Processes of globalization affect every aspect of people's lives, including the law. Global influences are mostly visible in the areas of international business, trade and finance, human resources, environment protection, health, nutrition, pharmacology, international communication and transport, safety, organized crime control, corruption, international terrorism, etc.

It is necessary to bear in mind that adopting foreign laws can be conducted in several ways. The first way would be adopting legal solutions without adapting them, or introducing minor or major adjustments. The second way would be adopting the idea and the principle of a legal solution, that is, accepting the legal institute and not mere copying of norms (legal solutions). Therefore, within the global influence and under the influence of big countries' laws, developing countries not only „copy" legal norms, but they also „transplant"/„adopt" legal approaches, that is, cultural standards or values.[34] This way of „transferring" the law can lead to problems for the implementation of law in the country that adopted it because the imported law might not be in accordance with that country's system of values and legal tradition, so the transfer itself can be inefficient or even lead to unwanted and unplanned effects. This is especially visible in adopting, for instance, the model of the organization of some civil service or crime prevention programs. The same programs, legal solutions, models of organization and operation can be efficient in one system, and inapplicable or even harmful in another one.

[34] D. Williams, *op.cit.*, 57-69.

The American jurist Stevens differentiates four mechanisms that affect the globalization of law.[35] The first mechanism refers to the behavior of individual subjects in private (commercial) business. A natural person as a company's representative or a legal entity concludes a contract with international companies and arranges for arbitration in the case of a dispute. The system supports private sector growth and it bypasses states and state bureaucracy. The second mechanism refers to the cases when one jurisdiction adopts a different law to an already existing set of legal questions. A nation state can completely adopt another state's (more often a supranational organization's) legal solutions and there is no possibility to negotiate about the content or the form of that law. The adoption of another country's or an international organization's law is conducted under summary procedure. An example of such practice is the adoption of EU law. The third mechanism is harmonization, when the law of a separate jurisdiction is adopted based on another law, to diminish the possibility of (legal) disputes that might arise between them. The fourth mechanism is establishing Supra-national Legal Frameworks that restrict the existing sovereign law mostly through international (regional) organizations, which regulate various legal questions of interest to member countries. The volume of questions solved in this way varies significantly and it ranges from business to social questions. These organizations overtake a part of sovereignty, which belongs to the states, that is, they restrict a part of their state sovereignty. A legal entity or natural person from the nation state has the possibility to complain or object directly to those international organizations (bodies) and in that way the nation state's sovereignty is restricted.[36]

In the modern world, first forms of the globalization of law, that is, of global approaches to legal solutions for some questions appeared within the United Nations and regional alliances of states enacting various conventions adopted by nation states and then ratified within their national legislative bodies. This is how international law was internalized and became a part of that country's national legal system.

A significant part of the globalization of law is the law that is created by the EU as one form of creating legal standards within EU, that is, the form of homogenization of European law. Apart from that, EU law is a form of imperialistic influence of powerful and rich European countries on developing countries, which are or would like to become a part of the Union.

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[35] F. Steeves, *Globalization and United States Law Practice,* Washington University Global Studies Law Review, 2014, vol. 13, 474.
[36] *Ibid.*

EU law, according to some (Chinese) authors, has confederal and federal elements. It increasingly assumes the tendencies of federal law, which reflects the tendency to form one universal government within the EU.[37] Small countries have no influence on the creation of this law. They can only adopt it within the given frameworks. With their EU accession (or the attempt to do so) nation states willingly renounce their national and legal sovereignty to a great extent. The highest instance for all legal disputes of citizens of EU member countries or EU candidate countries is no longer the highest court in the given nation state, but the EU court of law. The process of EU law adoption is present in Serbia, where a whole complex of laws and regulations of the EU are being adopted under summary procedure without public discussion or discussion with experts. The main role in this process belongs to the translators and members of parliament who vote without a real possibility to process such a great volume of regulations. This practice is present in all the Balkan countries on their way to EU accession.

From the political aspect and the aspect of the theory of law, the influence of American law on EU law is insufficiently researched. Starting from the hypothesis that the global influence of American law on European law really exists, which we consider a provable assumption, an interesting theoretical and practical question arises about dual influence of globalization, which simultaneously occurs within the legal jurisdiction of European countries. At the same time, two processes happen within the process of globalization of European law. On the one hand, there is the Europeanization/harmonization of national laws of EU countries and candidate countries (influenced by EU law), and on the other hand, there is the globalization of law in European countries influenced by the USA (that is, Americanization of European law, as some authors refer to the process).

One of the forms of globalization of law exists in the sphere of international business and that is the so-called corporate law. Its characteristic is that it is out of reach of nation states' immediate influence. Legal subjects, especially from small countries, have to accept business conditions of corporations, that is, adapt to them if they want to conclude legal business deals with them. In conclusion of such business contracts, the law applicable to the mutual relations is defined and this law is usually American. Apart from that, in case of a dispute, international arbitration is arranged and in this way the application of national law is avoided. Certain jurists consider that in the process of defining the law, there is a free market

[37] F. Snyde, L. Yi, *Transnational Law and the EU: Reflections from WISH in China,* European Law Journal, Vol. 19, No. 6, November 2013, 705–710.

competition and that in the area of international business, one can speak about the existence of an 'international market of legal solutions' for typical situations, which companies consider acceptable. Because of its flexibility and the legal possibilities it offers, American law is most commonly accepted in practice (unlike European law, which is rigid). This is why, it should be noted that there is no accordance between the territorial sovereignty of a country and its legal system, within the field of corporate business with the selected solutions from the field of international corporate business.[38] In this field, the course of globalization shifted dramatically towards the American legal models and it was a reflection of the strong negotiating position of large international organizations. This opens the problems of legal control of international legal subjects' business operations. The rights of the third party can be endangered if the contract directly or indirectly affects them although they (most often) do not participate in its drafting with the international corporation.[39] There are various ways to avoid the country itself as a business partner in the area of business.[40] In legal business of this kind, there are also questions of preventing money laundering and terrorism financing, because the countries cannot control the business efficiently, since the nation states do not have the influence on provisions regarding these kinds of business contracts.

One of the significant modalities brought by the globalization in the area of law is the introduction of the active legitimation of natural persons to start legal proceedings against their countries before international courts. As a consequence of lessened sovereignty of states, there arises the possibility for an individual to start legal proceedings against their own country before the European Court of Human Rights in Strasbourg[41], as an out-of-state court

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[38] H. Eidenmüller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations,* Indiana Journal of Global Legal Studies Vol. 18/2 (Summer 2011), 707-749.

[39] See more about this: *ibid.*, 748.

[40] Legal system on global level supports the growth of private sector. Contracts are concluded with international companies and the arbitrations are arranged in case of disputes. International companies have their own set of forms for the contracts. Frameworks, clauses, and contracts are then copied, applied to new situations in different countries with different.. parties, and copied again. Arbitration clauses replace local regulations etc. Robert Barry, a former U.S. ambassador to Bulgaria said: "We do not have government-to-government agreements .... Our task is to promote the growth of the private sector rather than to encourage the growth of new bureaucracies." F. Steeves, *op.cit.*, 476 (footnote).

[41] http://www.coe.org.rs/def/tdoc_sr/council_of_europe/coe_institutions/?conid=18, dostupan 28. 6. 2016.

(that is to say, a court that is not under the jurisdiction of a country), in case the possibilities for their protection from national courts have been exhausted. Apart from this, one of the forms of globalization with political rather than legal background is about the mechanism of a global approach in the protection of individuals' human rights in cases where the nation state has violated its citizen's rights. Individuals, nongovernmental organizations or other countries can start proceedings against the country for violating or harming human rights (Human rights mechanisms). It is suggested that the mechanism is highly cosmopolitan and goes beyond the borders of state sovereignty.[42] This form of globalization in the area of law strongly affects the limitation of national states' sovereignty. It is used in practice by the powerful countries against the small ones in order to reach their political and military goals under the excuse of protection of human rights. Nowadays, this is one of the mechanisms for starting 'humanitarian' military interventions against small countries and introduction of double standards of action which Serbian people have experienced in their recent history.

Some authors write about the so called globalistic, out of state law, which regulates actions of international companies, organizations, associations, and even individuals. This law is beyond the countries and territorial jurisdiction. It is a matter of legal norms published on the internet sites of those organizations and transnational corporations which regulate the subjects' behavior, their rights, obligations, business relations, and competences. The authors define these norms as soft law codes and guidelines, highlighting that in the sphere of transnational business this is the way to undermine the economical management of the country and to accomplish the so-called globalization of the law. This weakens countries' sovereignty and undermines the presumptions of a country's inviolateness as a final form of political and legal organization.[43] Various forms of businesses and activities provide profits for organizations, associations, companies, and individuals, and the taxes are not paid for the profit because they are not related to the legal jurisdiction of certain countries nor can they be controlled, since there are no locally authorized financial institutions. These can be membership fees, participation fees, donations for certain activities support, online trade, etc. Within these forms of business and money flows, there exists an underground economy and tax evasion, and opportunities for transferring all

[42] A. Brysk, A. Jimenez, *The Globalization of Law: Implications for the Fulfillment of Human Rights,* Journal of Human Rights, 2012, 11:4–16, 5.
[43] F. Steeves, *op.cit.*, 473.

kinds of 'dirty money' (gained by organized crime), as well as various modalities of terrorism financing.

7. CONCLUSION

Globalization is a process that undoubtedly exists and is reflected in the processes of deteritorization and denationalization of law. These processes have developed and can be observed as real legal categories. At first sight this is contradictory, as the law has always been related to a certain territory and certain country, which enforces it. There is no doubt that globalization questions fundamental postulation of the traditional understanding of the law and the traditional idea of a state. Terms like 'new international law', 'cosmopolitan law', and 'world law'[44] can already be seen in literature and they refer to the law concerned with legal entities on the global market, and on the other hand, to the law regarding natural persons in situations where their human rights are at stake, since they are moved from the national to an international and beyond national sovereignty level, that is, out-of-state level. Undoubtedly, under the influence of globalization neither the country, nor the law, nor the country's sovereignty are the concepts they used to be.

It is noteworthy to mention Kelemen's observation that the essence of globalization is the imposing of standards of developed countries to other countries (apart from developed countries, standards are also imposed by international organizations, which are under their influence).[45] The Serbian author Miša Stojadinović indicates that globalization has two sides. The first one is emancipator, while the second one is neoimperisalistic.[46] It seems that the globalization's essence cannot be fully described using only the terms 'dictatorship of profit' and 'neoimperialistic side of globalization'. Its essence cannot be explained by its allegedly 'emancipating side' behind which there are political and economical interests of powerful countries, wars, etc.

It seems that, regardless of the field in which it is present, globalization implies the process of the creation of one supreme authority, global government, world's system of values and safety, if we observe its neoliberal side and tendency to have a unique global market and currency on the one hand and the tendency to create denationalized citizens of the world and consumers with the same values (material, cultural, family, etc.) on the other hand. Some authors emphasize that the existing processes (mentioned in

[44] J. Ku, J. Yoof, *op.cit.*, 213.
[45] D. Kelemen, E. Sibbitt, *op.cit.*, 107-108.
[46] M. Stojadinović, *op.cit.*, 93.

their papers) are developing into a system of aglobal rule, that is, a global government.[47] In accordance with this, there are authors who point out that globalistic processes are forming the 'embryo of a future federal country', that is, a future global state whose creation, or at least the attempt of it, is an ongoing process.[48]

Under the influence of globalization process, any law has been and will always be merely a servant of the powerful who create (or at least they try to create) global processes in accordance with their interests.

One should bear in mind that the existing world's processes are very complicated and divergent. Brexit (referendum for Great Britain's exit from the EU) is probably one of the indicators of this complexity. This is why papers which compare former colonial law and globalistic law should be taken into consideration. For example, the American author Merry indicated numerous similarities between colonial and today's globalistic law in her paper. One of the conclusions of her research is that legal models and ideas which are transferred from one system to another can transform and they can cause unwanted, unexpected and unplanned effects.[49]

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[47] J. Ku, J. Yoof, *op.cit.*, 213.

[48] Regarding this see K. Mitrović, *Učenja dva velika svetska sistema prava o zakonitosti i njihovo približavanje,* Nauka, bezbednost, policija, br. 2, 2014, 137-151. See also literature that the Author lists in his paper.

[49] M. S. Engle, *From Law and Colonialism to Law and Globalization*, Law And Social Inquiry, 2003, Vol. 28, 569-590.

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WITHOUT FEAR OR FAVOR': ENSURING INDEPENDENCE AND ACCOUNTABILITY OF REGIONAL JUDICIARIES IN A GLOBALIZED SYSTEM**

Abstract

The dynamics associated with guaranteeing the judicial independence and accountability of judges sitting on the benches of national and international courts can be seen to be different in many aspects. The guarantee of these two concepts for judiciaries sitting on the courts of regional economic communities could be seen as forming a hybrid of the situation existing on national and international benches. With an increasing numbers of regional courts and the need to find ways of ensuring independence and accountability of their members, regional economic communities have adapted the judicial council model as one aspect of their commitment to these concepts. The present work contextualizes the adaptation of the model within three such regional communities: the Caribbean Community; the European Union; and the Economic Community of West African States. It argues that variations of the judicial council model are an important contribution to establishing some form of judicial independence for the regional bench while acknowledging that the political accountability of such bench tends to remain in the hands of the regional executive rather than of any regional parliamentary assembly.

Key words: *regional courts, judicial ial independence, judicial accountability, regional integration.*

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1. INTRODUCTION

Within the national context,[1] it is a hard and sensitive task to strike the proper balance between, on the one hand, the guarantee of the independence of national courts and, on the other, their domestic accountability (in the last resort, to democratically-elected politicians).[2] Moreover, the concerns of public interest in the impartial administration of justice, the appointment to and the composition of benches as well as the accountability of those who hold public judicial office are also recognizable global phenomena.[3]

Such considerations are no less important or sensitive when dealing with the same matters in respect of courts of regional economic communities. This work therefore attempts to provide a brief analysis of three variations of the judicial council model,[4] adopted by regional economic communities throughout the world, that seek to ensure the independence and accountability of the judges sitting on the bench of regional courts. The study proceeds along the lines of examination, first, of the nature of the independence and accountability of the international or regional judiciary and the unique problems it throws up in such situation when compared to the purely national one (section 2). It then progresses towards an exposition of the different types of the judicial council model that have been created in order to deal with the issues of judicial independence and accountability in respect of each of the regional courts discussed (section 3). The conclusion (section 4) attempts to draw some common threads from these experiences while highlighting the continued differences in approach to independence and accountability.

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[1] G.A. Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States,* Stanford University Press, Stanford (CA), 2012.

[2] A. Arnull, *The European Union and its Court of Justice,* 2nd ed., Oxford University Press, Oxford, 2006, at 24.

[3] A. Olowofoyeku, *Accountability versus Independence: The Impact of Judicial Immunity,* in: Independence, Accountability and the Judiciary, (eds. G. Canivet, M. Andenas & D. Fairgrieve), British Institute of International and Comparative Law, London, 2006, chap. 21, 357, at 357; S.H. Brice, *Judicial Independence and Accountability Symposium: Foreword*, Southern California Law Review, Vol. 72, 1998-1999, 311, at 311; and F. Contini & R. Mohr, *Reconciling independence and accountability in judicial systems*, Utrecht Law Review, Vol. 3, Issue 2, 2007, 23, at 23.

[4] N. Garoupa & T. Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence,* American Journal of Comparative Law, Vol. 57, 2009, 103.

2. INDEPENDENCE AND ACCOUNTABILITY OF THE INTERNATONAL AND REGIONAL JUDICIARY

Judicial independence, as a fundamental component of the rule of law, has been expressed in a range of human rights treaties covering not only the United Nations[5] but also regional organizations in Europe,[6] the Americas[7] and Africa.[8] Thus for the three regional courts considered in the present article, the principle of judicial independence is a constant.

Coupled with these international treaties has been the production of official documentation, through global[9] or regional[10] initiatives, dealing in

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[5] Universal Declaration of Human Rights 1948, Art. 10; and International Covenant on Civil and Political Rights 1966, Art. 14(1).

[6] European Convention on Human Rights and Fundamental Freedoms 1950 ("ECHR"), Art. 6(1); and EU Charter on Fundamental Rights, Art. 47.

[7] Inter-American Convention on Human Rights 1969, Art. 8(1).

[8] African Charter on Human and Peoples' Rights 1981, Art. 7.

[9] A number of recommendations have been adopted under the aegis of the UN in order to clarify the meaning and scope of the notion of judicial independence, e.g., the UN Basic Principles on the Independence of the Judiciary 1985: <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>; and the Office of the UN High Commissioner for Human Rights, by Resolution 1994/41 decided to appoint a Special Rapporteur on the Independence of Judges and Lawyers: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>. Other international documents include the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003: <http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>; and from the Organisation internationale de la francophonie, Déclaration de Bamako, adoptée le 3 novembre 2000 par les Ministres et chefs de délégation des États et gouvernements des pays ayant le français en partage: <http://www.francophonie.org/IMG/pdf/Declaration_Bamako_2000_modif_02122011.pdf>; and Déclaration de Paris, adoptée le 14 février 2008 à la IVe Conférence des ministres francophones de la Justice: <http://www.francophonie.org/IMG/pdf/Declaration_4e_conf_justice_Paris_2008.pdf> all accessed 6 June 2016.

[10] Such regional documents include from the Council of Europe, Recommendation No. R(94)12 on the Independence, Efficiency and Role of Judges 1993 (<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2>) and the European Charter on the statute for judges 1998 (<http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf>) both accessed 7 June 2016; Inter-American Commission on Human Rights, Report on Human Rights Guarantees for the Independence of Justice Operators: Towards strengthening of access to justice and the rule

more detail with the two judicial principles of independence and accountability: while most of these projects concern national judiciaries, some do look at the situation of the international judiciary. In fact, consideration of the applicability of independence and accountability to the increasing ranks of international judicial fora has already brought forth a number of academic studies in this area, clearly acknowledging the fact[11] that these two judicial principles "are important to their integrity, credibility and effectiveness."

However, judicial independence and accountability in the international context are not as clearly defined as in national legal orders:[12] "Obviously, no supranational executive or legislative branch exists from which a judicial branch could aspire to be independent." Further, Bell has argued[13] that "apparently common values, such as 'judicial independence' have significantly different meanings in different judicial cultures" and has further contended that such basic values are understood and implemented (by the relevant judiciary) in the light of historical and institutional settings. Consequently, judicial independence and accountability give rise to issues that an international or regional court has to address and set the context in which they have to operate, e.g., traditionally as in relation to interference or influence by states[14] or, more recently, as in relation to their position within an international or regional organization.[15]

Shelton[16] has examined the main contents of each of these basic principles of the judiciary within the international context and it is therefore proposed to adopt that approach as the framework for analysing applicability of judicial independence and accountability vis-à-vis the

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of law in the Americas, OEA/Ser.L/V/II, 5 December 2013; and the African Commission on Human and Peoples' Rights, Recommendation on the Respect and Strengthening of the Independence of the Judiciary: African Commission, 19th Session, 03/26-04/04/1996, Ouagadougou, Burkina Faso.

[11] D. Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals,* The Law & Practice of International Courts and Tribunals , Vol. 2, 2003, 27, at 27.

[12] S. Charnowitz, *Judicial Independence in the World Trade Organization*, in: International Organizations and International Dispute Settlement (eds. L. Boisson de Chazournes, C. Romano & R. Mackenzie), Brill Publishers, Leiden, 2002, chap. 11, 219, at 220.

[13] J. Bell, *Judicial Cultures and Judicial Independence*, Cambridge Yearbook of European Legal Studies, Vol. 4, 2001, 47, at 47.

[14] M.O. Hudson, *International Tribunals, Past and Future,* Carnegie Endowment for International Peace and Brookings Institution, Washington, DC, 1944, 20, at 25.

[15] Charnowitz, *op.cit.*, at 220.

[16] Shelton, *op. cit.*, at 27-62.

regional economic courts in the Caribbean, Europe and Africa and which form the focus of the present work.

On the one hand, independence of the international or regional judiciary – vital for a fair trial – "entails the exercise of judicial functions free from harassment and from any political pressure."[17] Regional economic treaties and related rules on regional courts usually contain provisions, inter alia, on: general statements on independence; selection and tenure of judges (including the possibility of re-election); adequate compensation for judges and sufficient financing for the tribunal; privileges and immunities; as well as confidentiality of judicial deliberations.[18]

On the other hand, accountability of the international or regional judiciary requires "rules and procedures to determine judicial conflicts of interest, discipline, disqualification or removal from office":[19] the relevant regional documents may therefore include a list of functions that are deemed incompatible with the judges' role as members of the court and whether the judges can be challenged and disqualified from sitting on a matter or from continuing as a judge on the bench.[20]

Moreover, the issues of judicial independence and accountability for members of regional courts are clearly complicated by the presence of at least several Member States whose governments, while formally committed to the aims of the Treaty, still retain discrete national interests in the playing out of their participation – within the community institutions – in policy formulation and decision-making in the relevant regional community.

It could be argued that the guarantee of judicial independence for regional court judges may be taken as allowing them to fashion (as a bench) the space for deployment of regional economic integration law. Their potentially activist approach to the creation and development of this law reinforces their own commitment, in contradistinction to that of the Member State governments as well as to that of some of the regional community institutions themselves, to the ultimate realization of the integration project. Such commitment is especially significant, e.g., when the Member States themselves fail to live up to their Treaty commitments and the regional court, as exemplified by the Court of Justice of the European Union (CJEU),

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[17] Shelton, *op. cit.*, at 27.

[18] C. Brown, *The Evolution and Application of Rules Concerning Independence of the 'International Judiciary'*, The Law & Practice of International Courts and Tribunals, Vol. 2, 2003, 63, at 65.

[19] Shelton, *op. cit.*, at 53.

[20] Brown, *op. cit.*, at 65.

intervenes directly as a spur to deepening or enhancing the dimension of integration.[21] Through teleological interpretation in particular, a regional court can therefore mould the community legal order – at least in the initial stages – justified on the basis that the court is no more than interpreting the Treaty provisions themselves.

Nevertheless, the issue of judicial activism, through expansive interpretation of a regional economic community treaty, is likely to raise concerns of judicial accountability when national or regional political bodies consider the action of the judges as having gone beyond what was permissible under the court's treaty-given powers.[22] In this scenario, critical consideration of such activism carries with it an implicit condemnation of the legitimacy of the judgements made. Regional judges, subtly aware of the strength of their own standing and the limitations occasioned by the circumstances in which they operate, may therefore act instead with restraint in interpreting the relevant community treaty. Accountability accordingly need not merely take the form of controlling judicial behaviour but the rules provided to render judges accountable can nevertheless themselves be manipulated by national and regional political bodies as a means of coercing the regional courts to follow a particular, perhaps more avowedly state-centric, line.

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[21] Case 2/74 Reyners v. Belgian State [1974] ECR 631; Case 33/74 Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299; Case 41/74 Van Duyn v. Home Office [1974] ECR 1337; and Case 43/75 Defrenne v. SABENA (No. 2) [1976] ECR 455; and Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon") [1979] ECR 649.

[22] See generally with respect to the CJEU, K. Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians in the European Community*, Yearbook of European Law, Vol. 12, 1991, 1-34. Even national courts may be reluctant to follow the ECJ's interpretations of EU law, e.g., as happened with the refusal of the French Conseil d'Etat to recognize the principle of direct effect until the 1990s (A.F. Tatham, *The Effect of European Community Directives in France: the Development of the Cohn-Bendit Jurisprudence*, International and Comparative Law Quarterly, Vol. 40, 1991, 907); and the Czech Constitutional Court deciding a CJEU ruling as ultra vires: R. Zbíral, *Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12: A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires,* Common Market Law Review, Vol. 49, 2012, 1475.

3. ENHCANCING THE INDEPENDENCE AND ACCOUNTABILITY OF REGIONAL COURTS

In most examples of regional courts, the judges are proposed by their governments and are ostensibly appointed by a body of the relevant regional economic community. Such body, however, is usually the one on which sit the heads of state or government of the member states of that community; that body is almost invariably the one that can remove a judge from the regional bench or allow for an individual member state to do so. This is the case in relation, e.g., to several regional courts in Africa[23] including the Court of Justice of the East African Community,[24] the Court of Justice of the West African Economic and Monetary Union[25] and Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa.[26] The opportunities can therefore appear open for the national or regional executives to interfere in the processes of appointment and dismissal of judges as well as the potential to affect the outcomes of the decision-making of individual judges through political or other pressure.

Consequently, in order to avoid any prospect of politicization of the operation of regional benches, the judicial council model has been developed by which the creators of such procedures attempt to render judicial appointments more transparent, taking them out of the hands (to some extent) of the national and/or regional executives and allowing third parties an active input. The judicial council thus acts as an intermediary entity, sitting between the judiciary and the politically-responsible administrators on

[23] See generally M. Kamto, *Les cours de justice des communautés et des organisations d'intégration économiques africains,* African Yearbook of International Law, Vol. 6, 1998, 107-150.

[24] The EAC Court of Justice was established under Art. 9 of the 1999 East African Community Treaty; its jurisdiction is dealt with in chapter 8 of that Treaty (Arts. 23-47).

[25] This Union is usually known by its French acronym "UEMOA" representing "l'Union économique et monétaire ouest-africaine": <http://www.worldtradelaw.net/document.php?id=fta/agreements/waemufta.pdf> accessed 8 June 2016. The UEMOA Court of Justice was re-established in Arts. 16 and 38 of the 2003 modified UEMOA Treaty (originally signed in 1994) and its jurisdiction is provided in Additional Protocol No. 1 relating to the UEMOA Supervisory Organs, Arts. 5-19.

[26] This Organization is usually represented by the French acronym "OHADA" meaning "l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires:" <http://www.ohada.org/fr/> accessed 3 June 2016. The OHADA Common Court of Justice and Arbitration was established under Art. 3 of the 1993 OHADA Treaty and its jurisdiction is set out in Arts. 6-7 and 14-20 of the same.

the executive and/or parliament. As Garoupa & Ginsburg have noted in their work:[27]

Judicial councils are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability. Judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline. The first model of judicial self-management arguably errs too far on the side of independence, while pure political control may make judges too accountable in the sense that they will consider the preferences of their political principals in the course of deciding specific cases. There are a wide variety of models of councils, in which the composition and competences reflect the concern about the judiciary in a specific context, balancing between demands for accountability and independence.

Further consideration of the maintenance of judicial independence, post appointment, has also led to the setting-up of a mechanism to ensure financial independence of the relevant regional court in one instance. This work now addresses three variations of this model in turn, namely those provided by the Caribbean Court of Justice, the Court of Justice of the European Union and the Court of Justice of the Economic Community of West African States.

3.1. Caribbean Court of Justice

The Caribbean Court of Justice (CCJ)[28] is the regional court of the Caribbean Community and Common Market (CARICOM)[29] which in 1973 succeeded previous projects for economic integration in the English-speaking

[27] Garoupa & Ginsburg, above n. 4, at 106.

[28] On the CCJ, see generally, H. Rawlins, *The Caribbean Court of Justice: The History and Analysis of the Debate,* CARICOM, Georgetown, 2000; and S. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations,* The Caribbean Law Publishing Company, Ltd., Kingston, 2005.

[29] Set up under the 1973 Treaty of Chaguaramas Establishing the Caribbean Community and Common Market: <http://www.archive.caricom.org/jsp/community/original_treaty-text.pdf> accessed 6 June 2016. It comprises 15 states and dependencies, mainly of the English-speaking Caribbean but also includes Suriname and Haiti. The Bahamas is a member of CARICOM but not of the CSME. For CARICOM, see: <http://www.caricom.org/> accessed 3 June 2016.

West Indies.[30] CARICOM's three main aims are economic integration, foreign policy co-ordination, and functional co-operation. The Revised Treaty in 2001[31] now includes within its interstices the CARICOM Single Market and Economy (CSME) which came into force in 2006 as well as the CCJ that was set up under the Treaty[32] and the 2001 Agreement Establishing the Caribbean Court of Justice (CCJ Agreement).[33]

The 2001 Agreement requires[34] that CCJ judges possess a high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society. In order to reinforce the Court's capacity to deal with issues related to integration, three of the judges are required to possess expertise in international law including international trade law.[35] Apart from these criteria, the candidates should be someone who has distinguished themselves either as a judge of five years' standing from a Contracting State, the Commonwealth or a state exercising civil law jurisprudence common to Contracting Parties,[36] or as a lawyer or legal academic of 15 years' standing in total, again with the same geographical/legal system qualifications.[37] This of course allows for a much broader pool of applicants from outside the Caribbean region to apply for posts on the CCJ bench.

The drafters of the 2001 Agreement attempted to maintain the balance between independence and accountability, and thus proposed the establishment of a judicial and legal services commission for the CCJ. This body was, however, not so much an institutional innovation but rather a

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30 In the wake of the demise of the West Indies Federation in 1962, the Caribbean Free Trade Association ("CARIFTA") was originally established in 1965 by the leaders of three English-speaking Caribbean countries – Antigua, British Guiana (later Guyana) and Barbados – under the Dickenson Bay Agreement.

31 The 2001 Revised Treaty of Chaguaramas Establishing the Caribbean Community: <http://www.archive.caricom.org/jsp/community/revised_treaty-text.pdf> accessed 4 June 2016.

32 2001 Revised Treaty, Art. 1.

33 The Caribbean Court of Justice was set up by the 2001 Agreement Establishing the Caribbean Court of Justice ("the 2001 Agreement"): <http://www.caribbean courtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf> accessed 3 June 2016.

34 2001 Agreement, Art. IV(11).

35 2001 Agreement, Art. IV(1).

36 2001 Agreement, Art. IV(10)(a). In view of the legal systems of the Contracting Parties, this currently means French civil law (Haiti, St. Lucia) or (Roman-) Dutch civil law (Suriname, Guyana).

37 2001 Agreement, Art. IV(10)(b).

continuation and evolution of a tradition that had already taken root in the Caribbean since late colonial times.[38] So successful had that model been, that Commonwealth Caribbean countries (including Jamaica, Trinidad and Tobago, Barbados, The Bahamas, etc.) had adopted it on independence[39] and it also found a place in respect of judicial appointments to the Eastern Caribbean Supreme Court (ECSC).[40]

The decision to establish a Regional Judicial and Legal Services Commission (RJLSC)[41] for the CCJ[42] was driven primarily by a desire to insulate the appointment process from political influence, a matter supported by the Bar Associations in the individual Caribbean states, and most particularly, by the Jamaican Bar Association which campaigned vigorously in the 1990s for the creation of a system which was less exposed to political influence.[43]

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[38] A.F. Tatham, *Appointing regional judges in the Caribbean: A possible model for emulation by the Court of Justice of the European Union?,* paper presented at international conference on "Global Perspectives on Europe", 5-7 December 2013, University of Flensburg, Flensburg, Germany. Copy on file with author.

[39] The establishment of such a body may in fact be regarded as part of a broader trend, e.g., much comparative academic interest was stimulated by British proposals for a judicial appointments commission (a model somewhat different to the judicial council one), for which see J. Bell, *European Perspectives on a Judicial Appointments Commission,* Cambridge Yearbook of European Legal Studies, Vol. 6, 2003-2004, 35; C. Guarnieri, *Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government,* Legal Studies, Vol. 24, 2004, 169; and K. Malleson, *Creating a Judicial Appointments Commission: Which Model Works Best?,* Public Law, 2003, 102. The Judicial Appointments Commission for England and Wales was established under the terms of the Constitutional Reform Act 2005, s. 61 and Schedule 12 and commenced its work in 2006 as an independent body that selects candidates for judicial office in courts and tribunals within its remit.

[40] The ECSC was established on the basis of powers conferred by the UK Parliament in section 6 of the West Indies Act 1967 (1967, c. 4) and the provisions contained in the West Indies Associated States Supreme Court Order 1967: S.I. 1967 No. 223. The ECSC's Judicial and Legal Services Commission was established under the provisions of this latter Order.

[41] See, generally, D.P. Bernard, *The Caribbean Court of Justice: A New Judicial Experience,* International Journal of Legal Information, Vol. 37, 2009, 219, at 234-236; and S.A. McDonald, T*he Caribbean Court of Justice: Enhancing the Law of International Organizations,* Fordham International Law Journal, Vol. 27, 2003-2004, 930, at 1005-1009.

[42] 2001 Agreement, Art. V.

[43] K. Malleson, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean,* International and Comparative Law Quarterly, Vol. 58, 2009, 671, at 679.

Such a highly sensitive issue must be seen against the background of a long history of government interference in the appointment of judges at the domestic level in many of the Caribbean countries, which aroused a legitimate and justifiable suspicion of the role of the executive in the appointment process.[44] In addition, with fewer judges than states, there were fears that competing states would politicize the CCJ judicial appointment process by applying governmental pressure and engaging in political horse-trading.[45] By handing over the CCJ judicial appointment process to an independent body, the RJLSC became the key to the depoliticization of the whole process.

The formal independence of the RJLSC was established in the 2001 Agreement which states that,[46] in the exercise of their functions: "The members of the Commission shall neither seek nor receive instructions from any body or person external to the Commission." In order to ensure its independence in practice – and concomitantly to reinforce the CCJ's insulation from the political executive – there are no government representatives on the RJLSC. In fact, during the debate about its membership, a consensus emerged amongst the CARICOM Heads of Government that the RJLSC should be neither a politically- nor a legally-dominated institution and that stakeholders from other sections of the community needed to be included.[47]

The Commission is accordingly composed of 11 persons nominated or chosen by institutions or persons with no political affiliation and who are drawn from a relatively broad range of interest groups, although admittedly the members do have an evident legal or judicial bent. Its membership comprises:[48] (a) the CCJ President as RJLSC Chairman; (b) two persons nominated jointly by the Organization of Commonwealth Caribbean Bar Association (OCCBA) and the Organization of Eastern Caribbean States (OECS) Bar Association; (c) one chairman of the JLSC of a Contracting Party;[49] (d) one chairman of a Public Services Commission of a Contracting

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[44] R. Antoine, *Waiting to Exhale,* Nova Law Review, Vol. 29(2), 2005, 148-149.

[45] Malleson, *op. cit.,* at 679; and M. Wood, *The Selection of Candidates for International Judicial Office: Recent Practice,* in: Law of the Sea, Environment and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (eds. T.M. Ndiaye & R. Wolfrum), Martinus Nijhoff, Leiden, 2007, 357-368.

[46] 2001 Agreement, Art. V(12).

[47] D. Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence,* The Caribbean Law Publishing Co., Ltd., Kingston, 2004, at 11.

[48] 2001 Agreement, Art. V(1).

[49] Selected in rotation in English alphabetical order for a period of three years.

Party;[50] (e) two persons from civil society nominated jointly by the CARCOM Secretary-General and the OECS Director-General,[51] following consultations with regional NGOs; (f) two distinguished jurists nominated jointly by the Dean of Faculty of Law of the University of the West Indies, the Deans of Faculties of Law of any of the Contracting Parties, together with the Chairman of the Caribbean Council of Legal Education; and (g) two persons nominated jointly by the bar or law associations of the Contracting Parties.

The composition of the RJLSC is therefore balanced among members coming from different backgrounds and institutions; it aims to ensure that the RJLSC cannot be controlled by any one interest group and can accordingly resist external pressure while guaranteeing a system of appointments free from patronage.[52]

The RJLSC appoints all CCJ judges[53] except the President who is appointed and removed by a qualified majority of three-quarters of the Contracting Parties, on the recommendation of the RJLSC.[54] In order to enhance the independence of the office, the President is appointed for a non-renewable term of seven years or until they reach the age of 72[55] while other CCJ judges have security of tenure until age 72.[56] It is important to note that the Contracting Parties have no power in and of themselves to either appoint or remove the President as this can only be done on the recommendation of the RJLSC.[57] Apart from the President, any other CCJ judge can be appointed or removed by the RJLSC by a majority of its members.[58]

The grounds for removal of any CCJ judge[59] are their inability to perform the functions of their office, whether arising from illness or any other cause or for misbehaviour. Again, whether it is the President or another CCJ judge that is to be removed, a tribunal is appointed consisting of a chairman and at least two other members from among current or former senior judges from any part of the Commonwealth or from a state exercising civil law jurisprudence common to the Contracting Parties.[60] The tribunal is

[50] Selected in rotation in reverse English alphabetical order for a period of three years.
[51] For a period of three years.
[52] Malleson, op. cit., at 679.
[53] 2001 Agreement, Art. IV(7).
[54] 2001 Agreement, Art. IV(6).
[55] 2001 Agreement, Art. IX(2).
[56] 2001 Agreement, Art. IX(3).
[57] 2001 Agreement, Arts. IV(6) and IX(5)(1).
[58] 2001 Agreement, Arts. IV(7) and IX(5)(2).
[59] 2001 Agreement, Art. IX(4).
[60] 2001 Agreement, Art. IX(6).

established by the entity which originally appointed the judge (the CARICOM Heads of Government for the President, the RJLSC for other CCJ judges)[61] and is required to examine the matter of removal – to the extent that is possible – according to the legal rules on holding commissions of inquiry in the CARICOM Member State where the examination is to be held.[62] The tribunal advises the CARICOM Heads of Government or the RJLSC, as the case may be, as to the removal of the particular judge.[63] All CCJ judges retain the right to resign their office at any time, with the President having to communicate such decision to the current Chairman of the Conference of CARICOM Heads of Government,[64] and other judges to the RJLSC.[65]

The first appointment procedures for the CCJ involved an open call for candidates with advertisements for the posts placed in the regional and international media as well as online. Such publicity attracted about 90 applications, from both the Caribbean region and the international community. Interviews followed (although, unlike some such procedures, they were not public[66]), and short lists were compiled from which the final six judges were selected, with no consideration being given to equitable geographical distribution; judges were chosen solely for their individual expertise. As provided for in the 2001 Agreement,[67] prior to the appointment, the RJLSC was able to consult associations representative of the legal profession as well as other bodies and individuals it considered appropriate in selecting a CCJ judge.

The absence of any form of lobbying for or against candidates has been considered a very positive feature of the system, encouraging good-quality candidates to come forward and reducing any danger of political interference.[68] Despite the relatively small and close-knit legal elites in the Caribbean, two of the judges appointed did not belong to any CARICOM Member State, again emphasizing the transparency and independence of the appointments procedure.[69] Overall, the RJLSC variation of the judicial

[61] 2001 Agreement, Art. IX(6)(a).
[62] 2001 Agreement, Art. IX(6)(b) and (7).
[63] 2001 Agreement, Art. IX(6)(b).
[64] 2001 Agreement, Art. IX(9(1).
[65] 2001 Agreement, Art. IX(9(2).
[66] Such as the interviews for South African judges conducted before the Judicial Services Commission: K. Malleson, *Assessing the Performance of the South African Judicial Service Commission,* South African Law Journal, Vol. 116, 1999, 36-49.
[67] 2001 Agreement, Art. IV(12).
[68] Malleson, *op. cit.,* at 681.
[69] Bernard, *op. cit.,* at 235.

council model provides a different approach for judicial appointments to a regional court as compared to the more traditional national executive nomination and election process, which has dominated until recently with respect to the CJEU and which we will presently examine.

One further point: the expenses associated with the CCJ (including maintenance of its seat) under the 2001 Agreement are borne by the Contracting Parties.[70] Based on past experiences of states' delays in honouring regional financial commitments and in order to guarantee the CCJ a measure of financial autonomy from governments, the CARICOM Member States created a Trust Fund with capital of US$100 million (raised through international financial markets by the Caribbean Development Bank). This sum was transferred to a Board of Trustees of reputable persons with the requisite skills who are responsible for its management and disbursement to the administrators of the CCJ. It was lent to the Member States at low rates of interest and is repayable over a period of 15-20 years.

3.2. Court of Justice of the European Union

The CJEU's approach[71] to judicial independence[72] has undergone some refinement and amendment in form and practice since its creation. While initially based on the rules concerning the International Court of Justice in The Hague,[73] certain features are novel or have evolved differently within the context of the Union's development and the pivotal role of the CJEU.

Article 253 of the TFEU ("Treaty on the Functioning of the European Union") – the wording of which has remained substantially unaltered since first employed in its original incarnation in the EEC Treaty of 1957 – requires judges and advocates-general of the Court of Justice to be "chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their

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[70] 2001 Agreement, Art. XXVIII.

[71] See generally, H. de Waele, *Not Quite the Bed that Procrustes Built? Dissecting the System for Selecting Judges at the Court of Justice of the European Union,* in: Selecting Europe's Judges: A Critical Appraisal of Appointment Processes to the European Courts (ed. M. Bobek), Oxford University Press, Oxford, 2015, chap. 2, 24-50.

[72] On this point, see S. Rozès, *Independence of Judges of the Court of Justice of the European Communities,* in: Judicial Independence: The Contemporary Debate (eds. S. Shetreet & J. Deschenes), Martinus Nijhoff, Dordrecht, 1985, chap. 46, 501-511.

[73] L. Neville Brown & T. Kennedy, *The Court of Justice of the European Communities*, 5th ed., Sweet & Maxwell, London, 2000, at 49.

respective countries or who are jurisconsults of recognised competence."[74] Similarly, under Article 254 TFEU, members of the General Court need to be "chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office."[75]

Perhaps the strongest element of accountability lies in the appointment of the judges, under Article 253 of the TFEU, which is made by "common accord of the governments of the Member states for a term of six years" and which further allows them to be reappointed for a non-defined number of occasions. The reappointment process is staggered:[76] every three years, a number of the judges are replaced in rotation, with 14 judges replaced each term. In this way, the process of appointment has both a national and a Union aspect. From a national perspective, since there are no common EU rules or institutional requirements on selecting judges, the Member States employ various procedures in this respect although they tend to reflect domestic judicial appointment processes and similar approaches are used for candidate selection for the Strasbourg Court and international courts.[77] Although the judges are nominated and, in effect, appointed by their own Member States, they represent, in the deliberations and rulings of the Court of Justice, not the interests of their respective home states but rather those of the legal systems themselves.[78]

The formal nature of the independence of the Court of Justice and the accountability of its members have been somewhat enhanced procedurally – through changes made by the Lisbon Treaty – with the establishment of a

[74] This term is wide enough to cover lawyers in private practice and academic lawyers, even where they are not eligible for judicial appointment in their own countries: Arnull, *op. cit.*, at 20.

[75] The Lisbon Treaty, in contrast to previous treaties, includes the adjective "high." Moreover, as amusingly acknowledged many years ago, the absence of a nationality requirement for judges could theoretically lead to a bench completely comprised of third-party nationals: the then President of the European Court of Justice, Lord Mackenzie-Stuart, stated in an interview that, so far as the Treaties were concerned, the Court could be made up 'entirely of Russians', The Times, 18 August 1988. See also Brown & Kennedy, *op. cit.*, at 48.

[76] Protocol on the Statute of the Court of Justice of the European Union, annexed to the TEU, the TFEU and the EAEC Treaty, Article 9(1), as amended by the Croatia Accession Treaty 2011, Article 9.

[77] De Waele, *op. cit.*, sections I.c) and II.

[78] N. March Hunnings, *The European Courts,* Cartermill, London, 1996, at 52.

panel[79] under Article 255 TFEU to produce an opinion on the suitability of candidates proposed by the member state governments for members of the Court of Justice and the General Court.[80] While the EU Council of Ministers is responsible for establishing the Panel[81] and its operating rules,[82] its decisions in both these matters are made following the initiative of the President of the Court of Justice.[83] Nevertheless, the Council evidently remains in the driving seat: in appointing the members of the Panel (i.e., Member States "select the selectors"[84]) and in determining its chair, national executives have not surrendered their powers to a proto-judicial commission. Such point is evidenced by the fact that – under Articles 253 and 254 TFEU – member state governments need only to consult the Panel before making the relevant appointments, thereby emphasizing its role as facilitator and not decision-maker.[85]

The Panel is independent and is made up of seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts, and lawyers of recognized competence, one of whom is proposed by the European Parliament (the one minor

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[79] The idea for such panel was originally proposed in O. Due *et al., Report by the Working Party on the Future of the European Communities' Court System, January 2000.* Available at: <http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf> accessed 4 June 2016.

[80] J.-M. Sauvé, *Le rôle du comité 255 dans le sélection du juge de l'Union*, in: The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law (eds. A. Rosas, E. Levits & Y. Bot), Asser Press and Springer Verlag, The Hague/Berlin/Heidelberg, 2013, at 99-119.

[81] Council Decision 2010/125/EU appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union: [2010] Official Journal of the European Union L50/20.

[82] Council Decision 2010/124/EU relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union ("Operating Rules"): [2010] Official Journal of the European Union L50/18.

[83] V. Skouris, *Recommendation Concerning the Composition of the Panel Provided For in Article 255 TFEU,* Brussels, 2 February 2010, 5932/10 JUR 57 INST 26 COUR 13: <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%205932%202010%20INIT&r=http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F10%2Fst05%2Fst05932.en10.pdf> accessed 3 June 2016.

[84] In selecting the selectors, the member states are not expressly bound by any specific rules on gender balance, geographic criteria, or other factors that should be taken into account. The process for selecting the potential selectors is thus completely opaque, although it would probably entail extensive lobbying with the CJEU President: De Waele, above n. 71, section I.

[85] De Waele, *op. cit.,* Introduction and section IV.

contribution to democratic accountability in the whole selection process). panel members are appointed for four years and may be reappointed once.[86] The Panel makes its assessment on the suitability of potential members of the EU judiciary on the basis of six considerations:[87] legal expertise, professional experience, ability to perform the duties of a judge, assurance of independence and impartiality, language skills, and aptitude for working as part of a team in an international environment in which several legal systems are represented. The General Secretariat of the Council of Ministers acts as the secretariat. Any proposal for a candidate is submitted to the Panel via the General Secretariat. The Panel can ask the relevant Government for additional information or other material. Except where the proposal relates to a reappointment, it hears the candidate (in private). The Panel has interpreted its rules to mean that, while in the case of a new appointment it must have a hearing, in the case of re-appointments it cannot have a hearing. That interpretation might appear controversial but appeared to be supported by the drafting history.[88]

At least five members must be present at any meeting and their deliberations take place in camera. The sitting panel members must give a collective reasoned opinion on the merits of each proposed candidate, setting out the principal grounds for its opinion.[89] Such opinion remains confidential and is never made public; it is forwarded to the Representatives of the Governments of Member States, and the rules further provide that, if the Presidency of the Council of Ministers so requests, the President of the Panel shall present it to the Representatives meeting within the Council. It should further be remembered that the nomination of a judge to the CJEU (either Court of Justice or General Court) still requires unanimous agreements of the EU member state governments. Thus even one adverse voice could, in theory, prevent nomination. The governments moreover are not bound to follow the Panel's advice in respect of any particular candidate, although the Panel might not serve much purpose if they did not do so.[90]

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[86] Article 255 TFEU Panel, Operating Rules, point 3.

[87] J.-M. Sauvé, *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union,* Brussels, 11 February 2011, 6509/11, COUR 3 JUR 57, at 8-11: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206509% 202011% 20INIT> accessed 8 June 2016.

[88] Lord Mance, *The Composition of the European Court of Justice,* talk given to the United Kingdom Association for European Law, 19 October 2011, para. 25, at 13-14: <https://www.supremecourt.uk/docs/speech_111019.pdf> accessed 9 June 2016.

[89] De Waele, *op. cit.,* Introduction.

[90] Lord Mance, *op. cit.,* para. 26, at 14.

3.3. ECOWAS Court of Justice

The Economic Community of West African States (ECOWAS)[91] was founded in 1975 in order to promote economic integration throughout the region.[92] The Court of Justice of ECOWAS ("ECCJ")[93] was created by a protocol signed in 1991[94] and was later included in Article 6 of the Revised Treaty of the Community in 1993.[95] Originally under the 1991 Protocol, the power to choose and appoint judges for the ECCJ resided exclusively in the hands of the Authority of Heads of State and Government of the Community ("ECOWAS Authority")[96] but since 2006 a judicial council has assumed most of the burden in the appointment, disciplinary and removal processes.

The 1991 Protocol provides for seven judges for the ECCJ.[97] Thus, like the CCJ and unlike the CJEU, the ECCJ has far fewer judges than Member States in the Community. This could, of course, cause friction between those states. However, ECCJ judges belong to a group of high-level positions within the ECOWAS institutions, known as "statutory appointees." The ECOWAS

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[91] Treaty of the Economic Community of West African States, 28 May 1975: (1975) 1010 United Nations Treaty Series 17; (1975) 14 International Legal Materials 1200. This founding charter was replaced in 1993.

[92] On the general background to regional courts in Africa, see S.T. Ebobrah, *Litigating Human Rights before Sub-regional Courts in Africa,* African Journal of International and Comparative Law, Vol. 17, 2009, 79; and J. Gathii, *The Under-appreciated Jurisprudence of Africa's Regional Trade Judiciaries,* Oregon Review of International Law, Vol. 12, 2010, 245. On the ECOWAS Court (ECCJ) in particular, see K.J. Alter, L.R. Helfer and J.R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice,* American Journal of International Law, Vol. 107/4, 2013, 737; and E. Ojomo, *Competing Competences in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts,* African Journal of Legal Studies, Vol. 7, 2014, 87.

[93] The website of the ECCJ may be found at: <http://courtecowas.org>.

[94] Protocol A/P.1/7/91 on the Community Court of Justice ("1991 Protocol"): <http://www.courtecowas.org/site2012/pdf_files/protocol.pdf>; and Supplementary Protocol A/SP1/01/05 Amending the Protocol (A/P.1/7/91) relating to the Community Court of Justice, adopted 19 January 2005 ("2005 Protocol"): <http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf> both accessed 31 May 2016. Other rules have since complemented and revised these two protocols.

[95] The Revised Treaty of the Economic Community of West African States, 24 July 1993 ("the 1993 Treaty"): <http://www.ecowas.int/wp-content/uploads/ 2015/01/Revised-treaty.pdf> accessed 31 May 2016.

[96] As established under Art. 5 of the 1975 Treaty, now Art. 7 of the 1993 Treaty.

[97] 1991 Protocol, Art. 3(2).

Authority appoints and prescribes the conditions of service[98] of these statutory appointees. In order to ensure fairness in the distribution of these positions (including ECCJ judgeships), the positions are filled[99] by a "transparent, equitable and predictable system of rotation" in line with the schedule prepared (and maintained) by the ECOWAS Commission for approval by the Authority. While only nationals from ECOWAS Member States may become ECCJ judges,[100] the Protocol provides that no two judges from the same state sit on the bench at the same time.[101] In addition, as with their counterparts for the CJEU, prospective ECCJ judges have to be independent, of high moral character and possess the qualification in their respective states for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.[102] Age too is a major criterion of appointment: no person below the age of 40 years or above the age of 60 years can be appointed as an ECCJ judge.[103]

The ECOWAS Authority initiates the whole appointment process by allocating vacant positions to Member States in line with the abovementioned schedule of rotation. Once this is done, most of the work is passed to the Judicial Council of the Community (JCC), which reports to the Authority through the ECOWAS Council of Ministers. The JCC was established in 2006[104] and is responsible for "the recruitment and discipline of judges of the Community Court of Justice." Its creation was aimed at guaranteeing a high professional calibre for the ECCJ judges and enhancing independence throughout their time on the bench. The JCC's composition and modalities of operation actually depend on whether it is appointing or disciplining a judge.

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[98] Like other statutory appointees, their conditions of service are prescribed by Regulation C/REG.16/12/07, which places the judges on the same salary scale as Commissioners of the ECOWAS Commission, heads of specialized institutions and the Financial Controller while the President of the Court enjoys equal status as the Vice President of the ECOWAS Commission: [2007-2008] ECOWAS Official Journal 52/48-49.

[99] Supplementary Protocol A/SP.1/06/06, Art. 18(4).

[100] 1991 Protocol, Art. 3(1).

[101] 1991 Protocol, Art. 3(2).

[102] 1991 Protocol, Art. 3(1).

[103] 1991 Protocol, Art. 3(7).

[104] Decision A/DEC.2/06/06 establishing the Judicial Council of the Community: [2006] ECOWAS Official Journal 49/41 ("Decision A/DEC.2/06/06").

On the one hand, for the purpose of recruitment of judges, the JCC is composed of the chief justices or presidents of the supreme courts[105] (or their representatives) of the ECOWAS Member States not represented on the seven-member ECCJ.[106] In this respect, the JCC has increased the influence of national judges in the selection of ECCJ judges.

The JCC establishes an ad hoc committee of eight members that sets in motion a competitive selection process, beginning with calls for applications in line with regulations governing statutory appointments. The ECOWAS Legal Affairs Directorate (part of the ECOWAS Commission)[107] then advertises the position in the Official Journal of the Community, as well as in the national official gazettes and newspapers widely circulated in those Member States to which the vacant positions have been allocated by the ECOWAS Authority. The advertisements must state the required qualifications and terms of the applicants and must be open to all eligible citizens of the states concerned.

The Directorate collects all the applications for the JCC ad hoc committee which latter, after the closing date for submissions, then compiles the list of applicants and shortlists three candidates from each of the Member States to which the vacant positions have been allocated. Thereafter, the ad hoc committee conducts selection interviews (taking into consideration all the stated criteria), at the end of which it recommends to the JCC one candidate per Member State for appointment as an ECCJ judge. Once approved by the JCC, these recommendations are passed through to the ECOWAS Authority by the ECOWAS Council of Ministers.[108]

The appointment by the Authority is made for a non-renewable four-year term[109]; however, where an ECCJ judge is appointed in place of another, whose tenure has still to expire, the new judge is appointed under the same conditions as their predecessor and must observe the four-year term limit of the former judge. New judges swear to the oath of office before the Chairman of the ECOWAS Authority before assuming the duties of the new office.

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[105] Chief justice would usually be used to describe the head of the supreme court in a common law jurisdiction, while president would be used for the same role in civil law jurisdictions.

[106] Decision A/DEC.2/06/06, Art. 2(1).

[107] Decision A/DEC.2/06/06, Art. 5(4).

[108] See, e.g., "West Africa: ECOWAS Court of Justice Gets Seven New Judges," 23 March 2014, website of AllAfrica Global Media: <http://allafrica.com/stories/201403241843.html> accessed 8 June 2016.

[109] Under 1993 Treaty, Art. 18(4)(a), as amended by Supplementary Protocol A/SP.1/06/06, Art. 18(3)(f).

On the other hand, for the purpose of disciplining an ECCJ judge, including removal from office,[110] the JCC is composed differently, namely: (a) the chief justices of the supreme courts of Member States which do not have judges on the ECCJ; and (b) one representative of the judges of the ECCJ elected by the judges among themselves for one year. In these cases, the JCC can examine cases of "gross misconduct, inability to exercise his functions [as a judge] or physical or mental disability"[111] and, where criminal acts committed by a judge are involved, make its recommendations to the ECOWAS Authority through the Council of Ministers. In this way, a council of chief judges from unrepresented Member States oversees the application of judicial disciplinary procedures. This makes it more difficult for governments to punish ECCJ judges for rulings that such national executives do not find conducive to their interests.

Lastly, in case of resignation, the ECCJ President will inform the President of the ECOWAS Commission who will report the situation to the JCC. A resignation takes immediate effect, except that the resigning judge is permitted under the Protocol to continue to hold office until the appointment and assumption of office of his/her successor.[112]

4. CONCLUSION

This brief study has sought to identify whether, in the way that regional economic communities operate, the guarantees of judicial independence of regional courts allow the relevant bench to reinforce its common commitment to the integration project while allowing for its ultimate accountability to regional institutions, either in the political form of the entity bringing together the heads of state and government of the relevant community, or in the form of a judicial council made up of representatives who are not part of the national executives in that community.

From the regional courts examined, issues of independence and accountability are subject to a fine balancing but this equilibrium in the EU (coupled with a paucity of express Treaty or EU secondary legal rules on these issues) occurs against a background of a common European constitutional culture, where regional judicial independence and

[110] Governed by the provisions of the 1991 Protocol, Decision A/DEC.2/06/06 and the Rules of Procedure of the JCC when read together.

[111] 1991 Protocol, Art. 4(7); and Decision A/DEC.2/06/06, Art. 4(2).

[112] 1991 Protocol, Art. 7(2).

accountability are part of the intertwining of the European and national constitutional orders.

CARICOM and the CCJ have laid down extensive provisions on independence and accountability – evidently following solutions influenced by common law countries (although the separate budgetary source is perhaps unique, at least as regards regional courts) – while ECOWAS follows to a greater or lesser extent the CJEU approach but absent the as extensively developed rule-of-law background which is so much a given in the overall EU method of integration. The recent innovation of a type of judicial council model for both the CJEU and ECCJ will no doubt help to address certain concerns about judicial independence, taking such appointments out of the exclusive hands of the member state governments, either due to individual state nominations (CJEU) or through the high-level regional executive body which brings the Member States together (ECCJ).

The issue of the (political) accountability of regional judges, the flip side to their independence, is addressed in some way by regional communities and the judicial councils detailed here. Yet trying to find the proper balance, between differing regional communities at different stages of their development, is clearly fraught with problems. In many ways this situation does, in fact, reflect the hybrid nature of regional courts as being somewhere between national and international tribunals. The variations of the judicial council model discussed here are clearly solutions that fit that particular regional economic community at its point in time of development, taking into account socio-economic and legal cultural factors. At one level, the civil law influence, in having a preponderance of judges on such judicial councils (either national judges as in the ECOWAS JCC or a combination of national and former CJEU judges on the CJEU Panel), may be contrasted somewhat with the more common law approach of the CARICOM RJLSC that rather has a preponderance of lawyers or lawyer/legal academic-nominated representatives sitting on it.[113]

For now, at least, the political accountability of the regional judiciaries in these three courts ultimately lies in the hands of the national executives of the Member States of each community, meeting in the community's highest executive body that brings together the domestic heads of state and government. For the future, though, these regional communities might need to look further for an approach that more evenly tries to balance judicial independence with judicial accountability.

[113] Garoupa & Ginsburg, *op. cit.*, at 106-113.

In this regard, it might be that the Council of Europe's approach might have some influence. When seeking to appoint judges to the bench of the European Court of Human Rights (ECtHR),[114] the relevant Member State selects three suitably qualified candidates – at least one man and one woman – through its own national procedures. According to the European Convention on Human Rights and Fundamental Freedoms 1950,[115] the candidates must all be "of high moral character" and must either be qualified to be a senior judge or be "jurisconsults of recognised competence" but judicial experience is not specified. It sends the list of three possible nominees and their curricula vitae to a Council of Europe Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights ("ECtHR"). The Advisory Panel's role is to advise whether their proposed candidates meet the Convention's criteria for selection (until this stage, the procedure is similar to that of judicial appointment to the CJEU). The Advisory Panel can hold confidential discussions with the Member State, and it gives the Parliamentary Assembly of the Council of Europe its opinion on the candidates, again confidentially. The Member State then submits its list of three candidates to the Parliamentary Assembly. Parliamentarians on its Committee on the Election of Judges interview the three candidates and rank them, before the whole Assembly vote on which one should be the new judge.

Introducing parliamentary scrutiny and voting might be seen as allowing more transparency and democratic accountability to the whole process of judicial appointments. Adding public interviews or hearings to the process of appointing regional judges might, however, put an unnecessary burden on those seeking appointment and critics would be wary of such a process politicizing the entire process, much of which has been said of the US Senate's interventions in the approval of justices to the US Supreme Court.[116] Moreover, while the EU and ECOWAS both possess parliamentary institutions, albeit with widely differing powers – the European Parliament participates in law-making usually on a par with the EU Council of Ministers, while the ECOWAS Parliament has consultative and advisory

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[114] A. Lang, *A new UK judge for the European Court of Human Rights,* House of Commons Library, Briefing Paper No. 7589, 7 June 2016, points 2.1-2.4, at 6-10: <file:///C:/Documents%20and%20Settings/00070313/Mis%20documentos/Downloads/CBP-7589.pdf> accessed 10 June 2016.

[115] ECHR 1950, Art. 22. See also ECHR 1950, Arts. 23 and 24.

[116] See generally: R. Davis, *Electing Justice: Fixing the Supreme Court Nomination Process,* Oxford University Press, Oxford, 2005.

capacities only – CARICOM's former platform of parliamentary representatives, the Assembly of Caribbean Community Parliamentarians ("ACCP"), only had three meetings before it became dormant[117] (it too was envisaged as merely a deliberative body).[118] Thus, a parliamentary input into the process of appointing regional judges in order to express, in formal terms, the principle of accountability, might not be a feasible option at this time. However, leaving (political) accountability ultimately in the hands of the heads of state and government might still be seen as too much of a compromise for judicial independence on the regional bench.

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[117] "After CARICOM's Lapse, An OECS MPs Assembly," Guyana Chronicle, 16 August 2012: <http://guyanachronicle.com/after-caricoms-lapse-an-oecs-mps-assembly/> accessed 9 June 2016.

[118] Communiqué issued at the Conclusion of the Tenth Meeting of the Conference of Heads of Government of the Caribbean Community, 3-7 July 1989, Grand Anse, Grenada: <http://caricom.org/media-center/communications/communiques/ communique-issued-at-the-conclusion-of-the-tenth-meeting-of-the-conference>. See also the Agreement for Establishing the ACCP: <http://www.commonlii.org/caribbean/other/ treaties/CaricomTSer/1994/1.pdf> both accessed 10 June 2016.

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PUBLIC MANAGEMENT REFORM IN THE GLOBALIZED WORLD

Abstract

Public management reform is a continuous process and represents, especially in the modern world, an important requirement for successful application of reform principles and objectives in a society. The indisputable importance of public management in the globalized world is reflected in the scope and number of tasks it performs in every society, financial means it uses and allocates by public policies, the number of people it hires directly or indirectly, as well as in developmental and strategic plans which will affect the future of human civilization. In the Republic of Serbia, public management reform implies adopting vast legislation, regulation and public policies, and their implementing, which should be the primary focus of current reform activities accompanied by further harmonization with EU legislation. Furthermore, modernization of our public management is required if the state is to finally become a true citizens' service. Using E-government the public sector across the world becomes more efficient and provides better quality service meeting transparency and responsibility standards. E-government is needed to establish and develop information society where everyone can produce, use and exchange information and knowledge thus allowing individuals, communities and peoples to reach their full potential in promoting sustainable development and improving the quality of life in a globalized world.

Key words: *public management reform, globalization, public services, corruption, E-government.*

1. INTRODUCTION: THE NATURE OF PUBLIC MANAGEMENT REFORM IN THE GLOBALIZED WORLD

The reform of public administration is frequently regarded as a means to an end rather than an end in itself due to the fact that 'public administration

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permeates all aspects of life penetrating deeply into economy and society'[1]. To be more precise, it is potentially a means to achieve multiple ends. These comprise reduction of public spending, improved service quality, more efficient performance and increased likelihood that the policies will be implemented more effectively. Together with these very important goals, public administration reform can help achieve other minor objectives such as giving stronger control over bureaucrats to politicians, removing bureaucratic barriers that prevent public servants from effective administration thus helping the government and its programs become more reliable and obliging to legislature and citizens. Last but not least, we should mention symbolic and legitimate benefits of the reform. For politicians these include a broad spectrum ranging from increased visibility to a chance to actually do something. To announce reform, criticize bureaucracy, promote new administrative techniques, promise improved service, restructure ministries and agencies – all these activities help politicians get attention and publicity. There are also legitimacy-related benefits for top managers who play a major role in shaping and implementing such initiatives. They enhance their reputation and gain popularity as people who advocate modernization and simplification of operations. [2]

If management reform really results in cheaper and more efficient government, better quality of service and more effective programs, and if it, at the same time, increases political control and frees the managers to decide autonomously, if it makes government more transparent and improves the image of managers and entire administration, it is little wonder that it was triumphantly announced. Things, however, are not that simple. There are many examples and good deal of evidence to show that administration reform can go off track.

Primarily, they may not produce the promised benefits. Furthermore, they can generate side effects that will deteriorate administrative processes (in some important segment). Even if the reform evidently succeeds in achieving one or more objectives mentioned above (e.g. savings or improved quality) there is little likelihood that it will achieve all of them. One objective might be achieved at the cost of others, which frequently happens in administrative reforms. Will 'the achievement of one or two particular ends

[1] Z. Jovanović, *Uticaj ombudsmana (zaštitnika građana) na delatnost javnih službi,* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 2, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2011, 396.

[2] P. Christopher, G. Bouckaert, *Public Management Reform, A Comparative Analysis,* Oxford University press 2002, 6.

always be paid for by a lowered performance in other respects'[3]? 'Rule over specialized decision-makers in a bureaucracy is maintained by selective crackdowns on one goal at a time, steering the equilibrium – without ever acknowledging that tightening up on one criterion implies slackening off on another'[4]. In any case, public management reform is only one way to achieve the desired goals. More precisely, each account of these reforms must take into account the fact that governance can be improved in different manners and that management reform is frequently undertaken together with other policy initiatives[5]. Comparing administrative reforms in different countries, a scholar observed some years ago: 'Administrative reform is a subset of all policy performance, not a separate set of technical efforts'[6].

Other ways of improving government performance include political reforms (such as electoral system or legislative performance changes) and essential changes of key policies (such as macroeconomic management policies, labour market reforms or fundamental changes in social policy) [7].

Many commentators have already observed that there is a delay which has a negative effect on the majority of public management reforms. The full benefit of major changes in the processes and structures in the public sector cannot be perceived until three, four, five or even more years after the reform was started.

In the beginning, new legislation will probably be needed. Then it will be necessary to analyze the current state, and to design and reorganize operating procedures, train staff how to work with them, define new roles and reward systems, establish new measurement systems, inform service users and other stakeholders, and, finally, work very hard to try and reduce the tensions these innovations have caused among the staff as well as the users.

Politicians, however, are not happy with such a timeline. Their focus is more short-term: on the next election, the next government reshuffle, or even on what is in today's news. Political attention moves very quickly from one issue to another, more quickly than a complete organizational change can be

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[3] *Ibid.*, 7.

[4] *Ibid.*

[5] See D. Kavran, *Javna uprava, reforma-trening-efikasnost*, Biblioteka "Reforma državne uprave", knj. 5, Beograd 2003, 21-24.

[6] P. Ingraham, *The reform agenda for national civil service systems: external stress and internal strains,* in: Civilservice systems in comparative perspective, (eds. H. Bekke, J. Perry, T. Toonen), Bloomington and Indiana, Indiana University Press 1997, 326.

[7] The example of New Zealand is worth a mention: it combined administration reform with fundamental changes in macroeconomic policies and, later, the electoral system.

accomplished. This is nothing new. It has always been so, but the gap between the politicians' need for 'something to show now' and the management reformer's need for more time, continuity and commitment has become wider[8]. This gap is a result of the general trend of intensification and acceleration of the political process in many western democracies.

2. WHAT IS MEANT BY PUBLIC MANAGEMENT REFORM IN THE GLOBALIZED WORLD?

We need to answer a logical question: what is actually meant by public management reform in today's globalized world? Taking into account all the questions related to this definition, one could say that there are several answers to it. Off the cuff, we can say that 'public management reform consists of deliberate changes to the structures and processes of public sector organizations with the objective of getting them (in some sense) to run better'.[9] Structural change may include merging or dividing public sector organizations (creating a smaller number of larger sectors to improve coordination, or a larger number of smaller departments to sharpen the focus and encourage specialization). By process change, we may imply the redesign of the procedure systems by which, for example, passports or licenses are issued, setting of standards of service quality for health-care or education or the introduction of new budgeting and other financial procedures to encourage public servants to pay more attention to cost and monitor the results produced by their expenditures. The administrative reform process very often implies changes to the systems of public servants' recruitment and employment, rewards and promotion, punishment and firing (which would be a different kind of process change).

The term 'reform' in English is one of many alternative synonyms (some of which belong to the business domain, such as 'transformation' and 'reinvention', others to public sector history domain, such as 'modernization' and 'improvement'). Like all these other terms, 'reform' is marked: it does not simply imply a change but a beneficial change, a decisive step forward from a less desirable old state to a more desirable future state. This term is deeply rooted in improvement policy and strategy. We should add that it does not imply a rapid change like the American term 'transformation' or, to a lower degree, 'reinvention'. Nor does it imply the great dynamism conveyed by the

[8] P. Christopher, G. Bouckaert, *op. cit.*, 8.

[9] T.A.J. Toonen, *Administrative Reform: Analytics,* in: Handbook of Public Administration, (eds. B. G. Peters, J. Pierre), Sage Publications, London 2005, 467-471.

term 'modernization' in continental Europe. [10] In short, the term 'reform' has evolved into a serious term, but with strong political connotation. It does not denote total innovation, but reshaping (or reforming) of something already existing. Such an explanation is quite appropriate since it seems that the results of many administrative reforms can be classified as more or less fundamental in their character: 'At the most basic level we find adaptation and fine-tuning of accepted practices. The second order extends to the adoption of techniques. The third is concerned with sets of ideas which comprise the overall goals, the framework guiding action'. [11]

In today's globalized world, some modern sociologists see continuous reform as a central characteristic of contemporary life, as opposed to earlier emphasis on tradition (which remained largely under researched): 'The reflexivity of modern social life consists in the fact that social practices are constantly re-examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character'. [12]

Thus, we can conclude that public administration processes and structures are permanently reexamined against the backdrop of new information about how things work. Yet, although we may sound too direct, this claim seems too straightforward, empirical and brutally functional. We share the view of many experts that the 'incoming information' in not necessarily always clear-cut, and neither is the way in which it is interpreted and used: 'Policy reforms are . . . symbolically mediated change processes which can be understood only if we uncover the action-motivating reasons that guide efforts to alleviate practical problems. Claims about policy reforms are products of frames of reference; that is, they are systematically related assumptions that provide standards for appraising knowledge claims'.[13] If we want to understand reform processes we must regard them as processes of debate where every participant brings something different – different objectives (including the achievement of symbolic goals) as well as different frameworks and standards for identifying and accepting relevant 'evidence'.

We can conclude that the public management reform must mean deliberate changes of structures and processes in organizations of public management in order to get them to work better. The changes are influenced by the actors on both sides of this 'output linkage' between the state and civil society, i.e. by politicians and civil servants on the one side and by private

[10] P. Christopher, G. Bouckaert, *op. cit.*, 16.
[11] *Ibid.*, 17.
[12] *Ibid.*
[13] *Ibid.*

actors (citizens) on the other. They are also influenced by those with an economic interest, such as various consultants and large corporations. [14]

Additionally, management reforms in any country will invariably be marked by local priorities and preoccupations of the politicians and local actors and stakeholders. These local frameworks will differ substantially. Consequently, successful application of one and the same model across the world (or even across the democracies of Western Europe, North America and Australia) is naturally impossible. Reforms take place at various levels and can be broader or narrower in terms of scope. Halligan has made a useful classification. He divided reforms into reforms of the first order – adaptation and adjustment of adopted practices, the second order – adaptation of new techniques, and the third order – changes in the sets of ideas pertaining to overall objectives and frameworks which guide action. [15] The vocabulary pertaining to change: reform, transformation, redesigning, reconstruction, modernization – assumes speed, nature and values of changes denoted or represented by these terms. When analyzing texts on management, it is necessary to pay attention to who the speaker is and who they are meant for. We also need to emphasize that frames of reference change with time and that meanings of words can change as well. This is particularly true when translating from one language to another. For instance, in Finnish there is no equivalent for 'public management', and even the French gestion publique has a different connotation. Furthermore, this linguistic connundrum is also present within the same language depending on the context in which the terms are used and on the groups of users.

3. ACTORS IN THE PUBLIC MANAGEMENT REFORM PROCESS

In the end of the 20th and the beginning of the 21st century 'public management functions in a complex environment characterized by constant changes, which makes it completely different from the relatively simple, stable and predictable social climate of the past to which bureaucratic

[14] It is interesting to observe that numerous corporate actors which dominated Washington lobbies almost entirely disappeared when a new relationship between the government and the citizens was establish after administrative changes described in D. Osborne, T. Gaebler, *Reinventing Government: How the entrepreneurial spirit is transforming the public sector*, Plume, London 1992, 3-4.
[15] *Ibid*, 18.

organizations where well adapted in their routine business activities'. [16] To broaden the scope of our analysis of public management reform process, we will complement the preceding discussion of why some reforms are proposed and what public management is with the question of who is involved in these activities. First of all, we must emphasize that practically all public officials are involved in reform processes, as in many countries there is no public sector which, to some extent, has not been affected by the reforms in the past three decades. Naturally, every citizen is also involved in public sector reform. Examples of this are publication of Citizens' charter in Belgium, France, Italy, Portugal and Great Britain, as well as the privatization of large public utilities with substantial number of users, such as airlines, telecommunications companies, and postal service in many countries, including Australia, France, the Netherlands, New Zealand and the UK. It should be pointed out that 'traditional political culture of French citizens was defined by the contrast between the public and the private sphere, where the public sector was seen as morally superior. Since the end of the World War II, French public management has successfully undertaken the task of modernizing the society. Partnership spreads to almost all areas of state intervention and the only debate pertains to technical or economic efficiency'.[17] In addition to industrial and commercial activities, which were traditionally marked by partnership, it now spreads to fields which are the foundation and characteristic of state governance. Changes in legislation pertaining to public sector have made it possible to form partnerships with private sector to build and manage public utilities, such as prisons and hospitals.

However, although we should remember that the waves of administrative reform spread in such a way to affect almost entire population, we shall focus on main reform actors, those individuals and groups which have the power, ideas and skills to initiate and implement reform processes. In many countries it was necessary to obtain consent and, more importantly, active support of leading politicians, especially presidents, prime ministers and ministers of finance.

In the European Commission, administrative reform also required support of high-ranking politicians, namely the Collegium of European

[16] Z. Jovanović, *Izazovi i trendovi u upravljanju ljudskim resursima u javnoj upravi*, u: XXI vek - vekusluga i Uslužnog prava (ur. M. Mićović), knj. 6, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2015, 275-276.

[17] M. Knežević, Z. Jovanović, B. Urdarević, *Uspostavljanje javno-privatnog partnerstva u javnim preduzećima,* Teme, G. XXXVI, br. 2, Niš 2012, 906-907.

Commissioners. Data shows that from the beginning through the better part of 1980s, the restructuring processes were very popular in Australia, Canada, New Zealand, Sweden, Great Britain and the USA. The European Commission launched the 'Sound and Efficient Management 2000' programme[18], which was immediately afterwards followed by 'Modernizing Administration and Personnel 2000'.[19] However, the numbers show that other countries undertook reforms at a much slower pace and with much narrower scope.

Apart from politicians in executive government, many high-ranking civil servants were, in most cases, key reform program actors. In some countries they were the primary driving force. This might sound strange, as there is the stereotype that senior civil servants are conservative like 'mandarins' and resist changes. The data, however, shows that these 'mandarins' were initiators of reform and its implementation in Finland, France and New Zealand. In the meantime, in the academic world new theories were proposed to explain the phenomenon. Dunleavy, for example, developed the 'bureau-shaping' model according to which high-ranking managers gain benefit from reorganizing their staff thus distancing themselves from some operational problems (through decentralization process) keeping for themselves the roles that are more challenging intellectually.[20] Naturally, medium and lower-level officials are perhaps not as enthusiastic about reforms as they entail job insecurity, additional education, increased workload, more pressure at work etc. Wright describes it in the following manner: 'Current evidence suggests that top bureaucrats are not at all allergic to reform programmes, which, on the whole, impact more acutely on the lower ranks and which often open up more exciting opportunities of policy-oriented managerialism'. [21]

Behind the politicians and their advisers, high-ranking officials, there is a number of 'outsiders' who played an important role in the reform process, at

[18] The resignation of the European Commission, Research paper 99/32, http://www.parliament.uk/documents/commons/lib/research/rp99/rp99-032. pdf, visited on April 15th 2016.

[19] Administrative reform within the European Commission, School of Management and Governance, Enscheda 2008, 29-35. http://essay.utwente.nl/58990/1/scriptie_D_ Marinovic.pdf, last accessed April 16th 2016.

[20] P. Christopher, G. Bouckaert, *op. cit.*, 19.

[21] *Ibid.*, 20.

least in some countries.[22] Three such groups deserve to be mentioned: consultants, independent analysts and academics. In the USA, Australia and Great Britain management consultants are highly involved. For example, in Great Britain, public sector reforms of the 1960s were implemented mainly as an internal matter, while nearly every reform of the 1980s and 1990s meant participation of at least one large consultancy: PricewaterhouseCoopers, Andersen, Ernst and Young, Deloitte and Touche, KPMG,etc. In the USA presidents Reagan, Bush and Clinton, different as they were, all used services of business companies (and in 1997 vice president Gore published a book entitled Businesslike government: lessons learned from America's best companies). In both countries, there was a large influence of generic management models derived from the theory and practice of the private sector. [23]

In some countries political thinkers and analysts had significant influence. Prime Minister Thatcher got her ideas from right-wing analysts based at the Adam Smith Institute[24] and the Center for Policy Studies and for Economic Affairs[25]. These ideas often included proposals for reform of specific institutions such as National Health Service, or the system of state schools. In a similar way, in the USA, presidents Reagan and Bush used advice from political analysts from Hoover Institution. In Germany, the Bertelsmann Foundation is regarded as a workshop producing reforms which reduced social, political and bureaucratic inefficiency and rigidity that blocked the country's democratic development. [26]

In the end, the academic world also had some influence. Very frequently certain professors made substantial contribution to the work of the mentioned thinkers and analysts. Others were engaged as consultants by individual governments, the European Commission or the OECD's Public Management Service, PUMA[27]. PUMA is one of the focal points of the international network connecting civil servants, consultants and academics (and politicians from time to time) interested in issues pertaining to public

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[22] D.H. Rosenbloom, R.S. Kravchuk, D.G. Rosenbloom, *Public Administration, Understanding management, politics, and law in the public sector,* McGraw - Hill Higher Education, New York 2002, 16.

[23] P. Christopher, G. Bouckaert, *op. cit.,* 20.

[24] See http://www.adamsmith.org/, last accessed on April 25th 2016.

[25] See http://en.wikipedia.org/wiki/Centre_for_Policy_Studies, last accessed on April 25th 2016.

[26] P. Christopher, G. Bouckaert, *op. cit.,* 20.

[27] See http://www.oecd.org/document/8/0,3746,en_2649_34141_2673544_1_1_1_1,00.html, last accessed on April 25th 2016.

management. This organization helped shape the international position on administrative reform. The World Bank, the IMF and the Commonwealth Institute[28] also spread the reform ideas internationally. Less influential, though not insignificant, were the academically oriented networks of the International Institute for Administrative Sciences (IIAS)[29] and the European Group for Public Administration (EGPA) [30]. In some countries, the important role was played by university centres, such as "Speyer Post Graduate School of Administration Sciences in Germany".[31] Finally, some professors have tried to exercise their influence by writing and publishing books, so that the academic literature on public management reform is substantial today.

4. PUBLIC MANAGEMENT REFORM IN THE REPUBLIC OF SERBIA

Public management reform is one of the major horizontal reform aspects in every country since it provides the framework for the implementation of the state's public policies. In the course of the public management reform in Serbia, initiated in 2004, the necessary legal framework for the actions of the state and local administration was provided. Numerous acts were adopted to determine the direction of further improvements together with a set of strategic documents relating to the reform. [32]

Public management reform, together with economic management and the rule of law was proclaimed by the EU in 2014 to be one of the pillars of EU Enlargement Strategy. Public management reform and European integrations are two interconnected and interdependent processes aiming to apply the 'good administration'[33] principles such as: reliability, predictability, accountability and transparency, technical and administrative competency,

[28] See http://www.comw.org/, last accessed on April 25th 2016.
[29] See http://www.iias-iisa.org/e/Pages/default.aspx, last accessed on April 25th 2016.
[30] See http://www.iias-iisa.org/egpa/e/Pages/default.aspx, last accessed on April 25th 2016.
[31] See http://www.dhv-speyer.de/ENGL/, last accessed on April 25th 2016
[32] National programme for intergration (NPI); National programme for adoption of the acquis (2013-2016); Public administration reform strategy with action plan for its implementation (2015-2017), Strategy on professional training of government officials in the Republic of Serbia; Regulatory reform strategy in the Republic of Serbia etc.
[33] Europien Principles for Public Administration, SIGMA Papers, no. 27. OECD Publishing, http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan006804.pdf, last accessed on June 20th 2016.

organizational skills, financial sustainability and citizen participation. According to the European Commission communication, 'public administration in most candidate countries is still weak, limited in administrative capacity, highly politicized and insufficiently transparent' and 'states should intensify the effort to improve their public administrations at all levels in compliance with their national strategies'.

Public sector reform 'was perhaps most expected to yield results in the fight against corruption. Breaking up of monopoly, privatization of state-owned property, clear definition of mandates and responsibilities, competitive market with predefined rules known to all, application of proven managerial methods in administration – all these are common measures contained in every public administration reform program'.[34] 'Bad business environment often opens the door for corruption whose aim might be to obtain a building license or to avoid random inspection or some other reason'.[35] The Republic of Serbia has attained 'a certain level of readiness to fight corruption'.[36] Some progress has been made since 2014, especially when it comes to applying existing legislation and adopting the Law on Protection of Whistleblowers.[37] However, corruption is still widespread and a strong political incentive is yet to produce sustainable results.

When the Public Administration Reform Strategy in the Republic of Serbia was adopted in 2014[38] together with the Action plan to implement it in the period 2015-2017, a comprehensive framework was established for reform activities across the public administration system. Considerable effort was made to provide the know-how and conditions required to carry out the reform systematically and strategically so that careful planning of human resources and appropriate reorganization would improve the quality and performance of public administration.

Modernization of public administration is a prerequisite for a country to become a true public service. It enables the state not only to adequately

[34] Z. Jovanović, *Sprečavanje i suzbijanje koruocije u upravi - put ka uslužnoj upravi*, u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 3, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2012, 379.

[35] Z. Jovanović, *Regulatorna reforma u Republici Srbiji - put ka uslužnoj upravi,* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj.4, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2013, 250.

[36] See Evropska komisija, Radni dokument komisije, Republika Srbija 2015, Izveštaj o napretku, http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/godinji_izvestaj_15_final.pdf, last accessed on July 10th 2016.

[37] Službeni glasnik RS, br. 128/14.

[38] Službeni glasnik RS, br. 9/14, 42/14 – ispravka.

support the increase of productivity in the private sector, which is the motor of economic development, but also to meet the high standards of future operating in the EU environment. It concerns different manner of providing public service, creating necessary space for new services while reducing public spending to sustainable level. It requires a change in the employee structure, adaptation of the existing human resources to the new needs and optimization of the network of current organizational structures. This entire process should be accompanied by better performance of public servants and higher standard of public services, as the final aim is improved and modernized public administration.[39]

In order to improve the quality of public services with optimal resource utilization and to boost competitiveness of its economy, the Government should define, direct and coordinate general reform vision and priority goals, for which it must have wide public support. Consequently, it is essential to establish, maintain and improve continual consultative process involving representatives of different parts of the society at different levels of governments, so that reform priorities would mirror the identified current and projected future needs of the citizens and industry. By establishing the dialogue with the stakeholders – citizens, civil society organizations and economic entities or by shaping public policies to meet the citizens' needs and improve service quality Serbia is trying to create a regulated system in compliance with good administration principle.

One of the crucial elements of public administration reform is adoption of the new Law on general administrative procedure in 2016 coming into force on January 1st 2017.[40] Although the current Law on general administrative procedure[41] in terms of its quality and applicability stood the test of time and managed to overcome the specificities and meet the needs of current circumstances, it is necessary to reform the administrative procedure in order to enhance protection of citizens' rights, improve business environment and relationship between the administrative bodies and Serbian citizens. This is supported by the current public administration reform in compliance with Public Administration Strategy and the Action plan implementing it, enacted by the Government in March 2015. The new Law on General Administrative Procedure changes the administration's relationship to citizens transforming

[39] See A. S. Trbović, D. Đukanović, B. Knežević, *Javna uprava i evropske integracije Srbije,* FEFA, Beograd 2010, 97-102.

[40] Zakon o opštem upravnom postupku, Službeni glasnik RS, br. 18/16.

[41] Zakon o opštem upravnom postupku, Službeni list SRJ, br. 33/97, 31/01 i Službeni glasnik RS, br. 30/10.

the administration into what modern European administrations already are – the service for the citizens and industry. At the same time, the citizens and businesses will be expected to act more responsibly and proactively. Harmonization with international standards, especially with the principles of European administrative space, will produce the administration which can competently and efficiently meet the demands of the citizens and industry.

5. PUBLIC MANAGEMENT REFORM AND E-GOVERNMENT IN THE GLOBALIZED WORLD

E-government is a new phenomenon in the public administration development resulting from advances in modern information and communication technology (ICT).[42] ICT has 'a significant influence on economy and politics, plays a decisive role in economy modernization and contributes to jobs creation in the new system of global economy'.[43] Contributing to transformation of the public sector, information and communication technologies can improve public services making them faster, more available and efficient. 'In an economic crisis, including the one experienced today, there is a constant pressure on all systems, including public administration bodies and organizations, to cut down the work-related costs, which is directly linked to rationalization. There is, also, a trend in all European legal systems, including ours, to reduce the number of employees in the public sector and increase the number of electronic services, as they are seen as a means of rationalization'. [44]

Although the challenges of sustainable development have changed in the past decade becoming more individual and independent, Government institutions and their functions are still shaped after the public administration models from the beginning of the 20th century in which the ministries and their leaders work separately, 'in a ghetto', while issues are resolved at the sector level, rather than collaboratively. At the same time, the citizens and companies increasingly demand a more open, transparent, accountable and

[42] S. H. Schelin, *E-Government: An Overview,* in: Public Information Technology: Policy and Management Issues (eds. G. D. Garson), Idea Group Publishing, London 2003, 120-121.

[43] Z. Jovanović, *Elektronska uprava u Srbiji,* u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope (ur. S. Bejatović), knj. 3, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2008, 13.

[44] Z. Jovanović, *Elektronsko pružanje javnih usluga i njihov uticaj na racionalizaciju javne uprave*, u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 5, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2014, 306.

effective administration, while new technologies, especially ICT, enable more efficient knowledge management, information flow and cooperation between all sectors on all government levels in local, national and international domain.[45]

It needs to be emphasized that 'in the past twenty years new forces, such as globalization, information technology and innovations made us change the way we see administration, the role of government and the work done by the public sector institutions'.[46] The UN survey on E-government in 2014 focuses more than previous surveys on the comprehensiveness of government and collaborative national administration as a key to solving complex challenges which require an integrative and collaborative approach.[47] In that context, it is necessary to identify several favorable factors which contribute to the integrated administration. Firstly, there is an essential need for new forms of collaborative leadership and team work which also entail reshaping traditional values, attitudes and behaviors in the public sector by establishing visible guidelines and principles. Secondly, it is necessary to establish new forms of institutional frameworks for more efficient coordination, cooperation and accountability at the level of entire administration, between administrations as well as with institutions and individuals outside administration who can help create value in the public sector. Thirdly, there is a need for innovative coordination processes and service delivery mechanisms as well as for increased citizen participation extending to all social groups including marginalized and vulnerable population. Fourthly, collaborative mechanisms for increased citizen participation in the decision making process should be introduced in such a way to focus on each citizen as a beneficiary through a decentralized administrative system that mobilizes citizens using the existing forms of mass communication.[48]

As the last factor, which frequently emphasizes all other factors, it is necessary to direct the power of new technologies and appropriate

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[45] A. T. Chatfield, O. Alhujran, *A Cros-Country Comparative Analysis of E-Government Service Delivery among Arab Countries*, 151-153, https://drive.google.com/file/d/0B5-bvYGt58QNcDRhbkF0WU1uYzQ/view? pref=2&pli=1, visited on June 26th 2016.

[46] Z. Jovanović, *Izazovi i trendovi u upravljanju ljudskim resursima u javnoj upravi*, u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj 6., Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2015, 276.

[47] United Nations E-Government Survey 2014, https://publicadministration.un.org /egovkb/portals/egovkb/documents/un/2014-survey/e-gov_complete_survey-2014.pdf, last accessed on June 25th 2016.

[48] *Ibid.*

information and communication administration strategies towards improved cooperation between sectors. Global scope of the Internet and application of ICT techniques in administration, accompanied by enlarged investment in telecommunication infrastructure and better human resource management can provide a fertile ground for transformation of public administration into an instrument of collaborative management that directly supports results of sustainable development. [49]

While digital differences were earlier seen as a matter of having access to relevant information and communication infrastructure, today it is seen as a matter of access to ICT. Different degrees of digital development stem from widely spread social and economic inequality based on social and economic disparities between countries, groups and individuals influencing their ability to use ICT to promote welfare and prosperity. Consequently, developmental differences affect in one way or the other all the people in developed and developing countries.

All in all, in spite of certain advances in providing a variety of E-services and online information, the efforts to efficiently reduce digital discrimination did not produce significant results. Although ICT accessibility has improved and is not just the question of 'going online', e-services have not adequately utilized human, economic and social resources, institutional structires and management networks, which is a prerequisite for future development. [50]

Recently, governments have increasingly focused on the link between the use of new technologies, education and social inclusion, especially of marginalized and vulnerable groups. By 2014, 64 per cent of government portals and websites managed to provide integrated links to archives and information sources (legal documents, strategies, budget) pertaining to some marginalized and vulnerable population groups, especially to people living in poverty, persons with disabilities, older persons, immigrants and young people.

One aspect of the different digital development is the discrepancy in e-government usage, which correlates with demographic and socio-economic

[49] J. C. Bertot, P. T. Jaeger, U. Gorham, N. G. Taylor and R. Lincoln, *Delivering e-government services andtransforming communities throughinnovative partnerships: Public libraries, government agencies, and community organizations,* 127-128, https://drive.google.com/file/d/0B5-bvYGt58QNMEVYSnlDYU5pODA/view? pref=2&pli=1, visited on June 27th 2016.

[50] R. F. Hodos, *Computeriyation of public administration to E-Governmnet: between goal and reality,* 119-121, https://drive.google.com/file/d/0B5-bvYGt58QNWnFMa2JHNG4tdVk/view?pref =2&pli=1, visited on June 27th 2016.

characteristics, such as income, education and age. Furthermore, as more government tasks are performed through online services, there is a concern that a significant number of the population will remain shut-off from health care, education and other government services as well as from job opportunities. This has particularly been observed in the most advanced e-government countries where 'digital by default' strategies have made many services only available online, as a result of cost savings as well as downsizing in public sector. [51] This clearly results in a boost in e-government usage, but there is still the need to provide these services in the traditional way for groups which cannot access the Internet.

6. CONCLUSION

New public administration systems in the globalized world can emerge only in an orderly state with the rule of law, where the branches of legislative, executive and judicial government are separated and balanced. There has always been the need to make public administration better and more suited to the demands of the society. Essentially, public administration is the backbone of the governance system, an important element of political and administrative system, which must be adapted to the changes in social environment. However, the interest that political structures show in this matter is surprising. Even the EU integration process, together with other regional and international integration processes, has proclaimed public administration and governance system reform to be one of its pillars.

In general, the approach of the political structures was such that they transferred the root of large and growing social problems from the world of politics into that of administration. In many countries the politicians identified public administration as part of the problem rather than the part of the solution. Consequently, many reform initiatives turned into fight against bureaucracy in order to eradicate its negative effects. From the multitude of demands to transform public service emerged the movement to introduce modern governance systems. This movement, characterized by promotion of the governance systems concept as well as by specific structural models, had significantly different practical and administrative implications in various countries. These include the need for stronger legal protection of citizens, development of new legal instruments related to administration functioning,

[51] M. Sorrentinoa, M. D. Marcob, *Implementing e-government in hard times: When the past is wildly at variance with the future,* 332-335, https://drive.google.com/file/d/0B5-bvYGt58QNYlFOeEYzNzgzVzA/view?pref=2&pli=1, visited on June 27th 2016.

more openness and transparency of administration, information balance between citizens and administration, as well as political independence of the media shaping public opinion, sensibility of public administration to initiatives, wishes, and suggested solutions that citizens can offer for some of the public problems.

Essential reform of Serbian public administration was postponed for too long. Every government from 2001 emphasized how necessary this reform was. However, for a long time there was neither the vision nor an appropriate plan to build administrative institutions. Clear and consistent concept of a reform is a prerequisite for its implementation. Decision-makers should be allowed to decide on appropriate measures in new circumstances respecting stability and some basic principles. In order to provide continuity, the reform should be designed as a long-term one. It is necessary to reach a consensus – the government and the opposition must agree on some basic principles at least. However, there has to be collaboration between state, regional and local authorities which have to implement the reform.

Judging by the global examples of good practice, it can be concluded that effective e-government depends on strong political commitment, collaborative leadership and new institutional administrative framework which supports and applies the service delivery model focused on citizens. It also relies on adequate national policy and strategy of ICT use in e-government, strengthening of institutions and public servants' capacity building. Effective approaches and modalities and comparative advantage of integrated governance are the backbone of e-government's future development. Collaboration between different sectors, openness, transparency, accountability and citizens' participation in the public sector supported by ICT infrastructure and adequate human capital and online services are also foundations on which effective e-government can develop and provide sustainable development and the future we want.

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PART TWO
CONSTITUTIONAL LAW AND HUMAN RIGHTS
European Perspective and Local Practices

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DER VERTRAG VON LISSABON – EIN SUBSTITUT FÜR DIE GESCHEITERTE EUROPÄISCHE VERFASSUNG

Abstract

Die Europäische Union steht am Beginn des 21. Jahrhunderts vor großen Herausforderungen. Der Prozess der europäischen Integration wirft die Frage nach der "europäischen Kompatibilität" des Föderalismus bzw. der Bildung einer "Europäischen Föderation" auf. Hingewiesen wird auf die Tatsache, dass der Föderalismus eine bedeutende Rolle in der europäischen Entwicklung und Integration spielt, als politisches Unterfangen, das seinesgleichen sucht. Bis dato sind einige Föderalismusmodelle bekannt, jedoch machen die weitere europäische Entwicklung und Integration Innovationen erforderlich, sodass diese nicht in bereits bestehende oder im Voraus bestimmte Modelle eingeordnet werden kann, sondern es ist vielmehr notwendig, eine Synthese zwischen Einheit und Verschiedenartigkeit zu schaffen; von daher wird in den vergangenen Jahren ein "intensives Forschen nach einem neuen Europäischen Föderalismus betrieben", bzw. man debattiert über die Zukunft der EU. Die EU hat eine große Reform ihrer inneren Organisation durchgeführt, allerdings sollte die Wirkung der bisherigen Integration auf ihre föderale Einheit in Zusammenhang gebracht und, basierend auf den Grundsätzen der Einheit der Rechtsordnung, der Einheit der institutionellen Strukturen und der Solidarität der Mitgliedstaaten beleuchtet werden.

Schlüsselwörter: *Der Vertrag von Lissabon, Europäische Verfassung, Europäische Union, Ratifikation, Referendum, Föderalismus, European Federation, Subsidiaritätsprinzip, Charta der Grundrechte.*

1. EINFÜHRUNG

Nach der Nicht-Annahme des Verfassungsvertrages blieb der Vertrag von Nizza in Kraft, der nicht an die Trends der Entwicklung der

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Europäischen Union[1] und die Bedürfnisse ihrer Bürger angepasst ist. Um ihre Potentiale voll ausschöpfen zu können, muss sich die Union notwendigerweise modernisieren und reformieren, insbesondere wegen der gestiegenen Anzahl an Mitgliedern, der Erweiterung der Zuständigkeiten der Union auf neue Bereiche und des Auftretens neuer Probleme, wie etwa klimatische Veränderungen, internationaler Terrorismus und ähnliches, Probleme in der Funktion des bestehenden Systems, Effizienz der Institutionen, sog. "Stimmgewichtung" (einzelne Länder haben mehr Gewicht bei der Beschlussfassung) und anderes. Änderungen in der Europäischen Union sind desgleichen auch aus folgenden Gründen notwendig: Die Europäische Gemeinschaft hatte im Jahr 1990 – 12 Mitgliedstaaten, während die Europäische Union im Jahr 2008 - 27 Mitgliedstaaten zählte, die Europäische Gemeinschaft basierte auf einer Säule, die Europäische Union hingegen auf drei, die Europäische Gemeinschaft hatte keine Charta (grundlegender) Menschenrechte, die Europäische Union aber hat solch eine Charta, die Europäische Gemeinschaft war eine internationale Organisation, die Die Europäische Union sieht aber auch eine zwischenstaatliche Zusammenarbeit vor. Darüber hinaus sind Veränderungen auch wegen des Misserfolgs des Verfassungsvertrages nötig, und auch wegen der Unterzeichnung des Reformvertrages.

2. DER ZWECK DER VERABSCHIEDUNG DES VERTRAGES VON LISSABON

Grundlegender Zweck der Verabschiedung des Reformvertrages, der in Lissabon unterzeichnet wurde, ist vor allem die Notwendigkeit nach einer Erhöhung der Effizienz und Modernisierung der Institutionen, wie auch nach einer Änderung ihrer Funktionsweise, zumal es erforderlich war, neue Regelungen für eine erweiterte europäische Familie mit (in diesem moment) 27 Mitgliedern zu erlassen. Hier ist allerdings zu unterstreichen, dass der Vertrag von Lissabon weder das institutionelle Bild der Union verändert, noch die bestehenden Institutionen abschafft. Im Gegenteil, er erlässt für jede Institution bestimmte Änderungen und Zusätze in ihrer Arbeitsweise. Dies deshalb, da man bestrebt war, diese Institutionen näher an den Bürger zu bringen, sodass diese Änderungen beim Europäischen Parlament, bei Europäischen Rat, beim Rat, der Europäischen Kommission, der Rolle

[1] D. Bataveljić, *Ustavna pitanja procesa Evropskih integracija*, u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope (ur. S. Bejatović), knj. 3, Kragujevac 2008, 381-384.

nationaler Parlamente, wie auch bei anderen Institutionen stattgefunden haben.

Die drei grundlegenden Ziele der Unterzeichnung des Vertrages waren:

- Mehr Effizienz bei der Beschlussfassung;
- Mehr Demokratie durch eine stärkere Rolle des Europaparlaments und der nationalen Parlamente der Mitgliedstaaten;
- Erhöhung der Verbundenheit (Kohärenz) vom Aspekt des Äußeren (Neudefinition der Außenpolitik).

Der Vertrag von Lissabon (auch bekannt als Reformvertrag) ist ein völkerrechtlicher Vertrag, der am 13.12.2007 in Lissabon unterzeichnet wurde, und zwar als Resultat mehrjähriger Verhandlungen, primär über institutionelle Fragen, der politische, wirtschaftliche und soziale Veränderungen mit sich bringen sollte. Für die Zukunft Europas ist der Vertrag von großer Bedeutung, und als solcher hebt er die bestehenden Verträge über die Europäische Gemeinschaft und die Europäische Uni-on nicht auf, sondern vervollständigt diese. Der offizielle Titel des Vertrages lautet "Vertrag von Lissabon zur Änderung des Vertrags über die Europäische Union und des Vertrags zur Gründung der Europäischen Gemeinschaft" (Dokument 2007/C 306/01)[2]. Sogleich nach Unterzeichnung dieses Vertrages hat der portugiesische Premierminister und Vorsitzende des Europäischen Rates José Sócrates mit Begeisterung verkündet, dass es der Führungsspitze der Europäischen Union endlich gelungen sei, einen neuen Vertrag auszuhandeln, mit welchem die Europäische Union "aus der institutionellen Krise herausgekommen ist, und nun können wir mit Zuversicht in die Zukunft blicken". Im Anschluss an seine Aussage verkündete der Präsident der Europäischen Kommission, José Manuel Barroso, dass dies "ein historisches Abkommen" sei, "das der Europäischen Union die Fähigkeit für ein Handeln im 21. Jahrhundert gibt".

Mit Verabschiedung des Vertrages von Lissabon haben die Befürworter des europäischen Föderalismus[3], d.h. die Strömungen, wonach die Europäische Union eine "europäische Föderation"[4] werden soll, mit Genugtuung festgestellt, dass "endlich auch die lange Krise in der Europäischen Union, die 2005 nach der Ablehnung des Vorschlags einer Verfassung in den Referenda in Frankreich und in den Niederlanden

[2] D. Stanković, *Ekonomska i monetarna Unija,* Beograd, 1994.

[3] D. Bataveljić, A. Vojvodić, *Evropski federalizam na početku XXI veka,* Biblioteka Educatio, Zadužbina Andrejević, Beograd, 2009, 87.

[4] D. Bataveljić, *Jugoslovenski i nemački federalizam na putu ka evropskom federalizmu,* Institut za pravne i društvene nauke, Pravni fakultet, Kragujevac, 2005, 15.

entstanden war, gelöst ist", als die Bürger dieser EU-Länder auf diese Weise ihre Angst vor einer "verfrühten" Aufnahme neuer Mitglieder, insbesondere der Türkei, zum Ausdruck brachten. Man muss jedoch betonen, dass dieser Vertrag erst nach Ratifizierung in den Mitgliedstaaten der Europäischen Union in Kraft treten wird.

3. DIE RATIFIZIERUNG DES VERTRAGRES VON LISSABON

Es war vorgesehen, dass der Prozess der Ratifizierung dieses Vertrages bis zum 01. Januar 2009 abgeschlossen wein würde; hernach hätte er in Kraft treten und die Europäische Verfassung ersetzen sollen, die in den Referenda in Frankreich und in den Niederlanden im Jahr 2005 abgelehnt worden war. Aber auch dieser Vertrag wurde im Referendum in Irland am 12. Juni 2008 abgelehnt[5]. Der tschechische Präsident Václav Klaus verlautbarte danach, dass die Ablehnung des Lissaboner Vertrages in diesem Referendum bedeute, dass es keinen Sinn mache, mit einer Ratifizierung des Textes fortzufahren.

Nach der negativen Erfahrung des französischen und niederländischen Referendums sind alle EU-Länder (ausgenommen Irland) geneigt, den "Lissaboner Vertrag" ohne Referendum in ihren Parlamenten zu ratifizieren. Dadurch werden aber schon wieder die EU-Bürger umgangen, in deren Namen all dies angeblich geschieht. Der neue Grundlagenvertrag der EU enthält keine "staatlichen Merkmale", wie dies etwa die europäische Flagge und die Hymne sind, die aber in der Europäischen Verfassung vorgesehen waren, gerade deshalb, damit der "Lissaboner Vertrag" ohne Merkmale dieser Art in allen EU-Ländern angenommen werden kann. Alls übrige ist mehr oder weniger ähnlich...

Ein Referendum ist zweifelsohne eine wichtige politische Institution jeder demokratischen Gesellschaft und ein Merkmal der Demokratie, und zwar sowohl auf innerer, als auch auf internationaler Ebene. Trotz seiner demokratischen Rolle kann es aber auch bestimmte negative Eigenschaften haben. So haben beispielsweise die Bürger Irlands ihr demokratisches Stimmrecht bei einem Referendum in Zusammenhang mit der Ratifizierung des Lissaboner Vertrages genutzt, der leider gescheitert ist. Das hat hingegen auf der äußeren Ebene eine Sperre der übrigen 26 Länder hervorgerufen, was bedeutet, dass die Mehrheit von 1% der Bevölkerung die übrigen 99%

[5] K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland,* Band I, Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung, 2. Auflage, München, 1984.

blockieren kann. Aus diesem Grund muss Europa geeignete Maßnahmen ergreifen, und sich vor allem in Richtung Russland und China öffnen; um Initiativen gegenüber diesen Großmächten ergreifen zu können, muss eine Reform der Vereinten Nationen erfolgen, wobei ein kultureller Dialog, Verständnis und Zusammenarbeit mit anderen Ländern Asiens und Lateinamerikas unerlässlich sind.

Die ersten 11 Länder, die den Lissaboner Vertrag ratifiziert haben, sind folgende: Ungarn (17. Dezember 2007), Malta und Slowenien (29. Januar 2008), Rumänien (4. Februar 2008), Frankreich (14. Februar 2008), und Belgien (6. März 2008). In Großbritannien wurde eine verbitterte Debatte im Parlament geführt, aber am 11. März 2008 wurde der neue EU-Vertrag dennoch mit 346 Dafür-Stimmen und 206 Dagegen-Stimmen angenommen. Bulgarien hat den "Lissaboner Vertrag" am 21. März, und Österreich am 9. April 2008 ratifiziert, letzteres ebenfalls nach vehementen Diskussionen über die Neutralität dieses Landes. Als letzte aus der Reihe der 11 Länder haben die Slowakei und Polen (10. April 2008) das Lissaboner Abkommen ratifiziert.

4. NEUERUNGEN IM REFORMVERTRAG VON LISSABON

Es erhebt sich die Frage, was am Lissaboner Vertrag neu ist?

Der "Europäische Reformvertrag" ist ein Dokument, das "unter Zwang" den "Verfassungsvertrag für Europa" ersetzt hat und das größtenteils eine "bereinigte" Version des aufgegebenen Entwurfs der Verfassung Europas darstellt, deren Verabschiedung die Franzosen und Niederländer bei ihren Referenda 2005 abgelehnt hatten. Das ist "eine Art Surrogat " für die gescheiterte Verfassung der Europäischen Union. Sofern er in allen Ländern ratifiziert wird, wird der "Lissaboner Vertrag" den Vertrag von Nizza ersetzen, wonach die EU bis auf weiteres funktioniert. Der neue "Reformvertrag" sollte der Europäischen Union ein effizienteres Handeln und eine weitere Demokratisierung, wie auch ihre neuerliche Erweiterung ermöglichen.

Wichtiger als all das (vielleicht auch das Wichtigste) im neuen Vertrag der Europäischen Union ist aber, dass hierdurch ermöglicht wird, dass in Zukunft Beschlüsse in der EU mehrheitlich in 50 neuen Bereichen gefasst werden, einschließlich in den Bereichen Justiz und polizeiliche Zusammenarbeit, Bildung, aber auch in der Wirtschaft. Das Prinzip der Beschlussfassung durch Konsens gilt jedoch weiterhin in den Bereichen der Außenpolitik, Verteidigung, zum Teil auch in sozialen Fragen, Steuern und Kultur.

Die wichtigsten Neuerungen des Vertrags von Lissabon bestehen demnach in folgendem:

- In 50 Artikeln werden fest verankerte Rechte der Mitglieder aufgezählt, zu welchen auch die Redefreiheit und Religionsfreiheit gehören;
- Die Position des Präsidenten wird eingeführt, und die Funktion des Diplomatiechefs wird gestärkt;
- Das Europäische Parlament bekommt einen stärkeren Einfluss auf die Gesetze der EU.
- Die Union erhält ihren Präsidenten "aus Fleisch und Blut", anstatt des Vorsitzenden nach Rotationsprinzip – auf diesen Platz haben jedes halbe Jahr einzelne EU-Staaten gewechselt. Den EU-Präsidenten wählen die Premierminister und Staatspräsidenten der Mitgliedstaaten auf 30 Monate.
- Die EU erhält auch ihren "Außenminister" (Hoher Repräsentant für Außenangelegenheiten und Sicherheit). Dieser Hohe Repräsentant ist zugleich auch der Vizepräsident der Europäischen Kommission sein.
- Auch die Zahl der Abgeordneten im Europaparlament wird verringert, und zwar von aktuell 785 auf gesamt 751, d.h. 750 Abgeordnete zuzüglich Präsident dieses Parlaments (letzteren hat Italien "ausgefochten", um gleich viele wie Großbritannien zu haben – 73, hingegen wurde aber deshalb das Stimmrecht des Präsidenten des Parlaments aberkannt) bzw. von 6 auf maximal 96 für jedes Land.
- Die Regel der "zweifachen Mehrheit" wird für Abstimmungen im Ministerrat eingeführt: ein Beschluss kann nur gefasst werden, wenn für diesen 55% der Vertreter der Mitgliedstaaten stimmen, die zugleich 65% der Gesamtbevölkerung der EU ausmachen.
- Zu den wichtigsten Änderungen zählen auch größere Zuständigkeiten für die nationalen Parlamente.
- Die Europäische Union erhält den Status einer juristischen Person, wodurch ihr die Möglichkeit des Abschlusses von Völkerrechtsverträgen oder auch die Mitgliedschaft in internationalen Organisationen zukommt.
- Es wird eine "Austrittsklausel" eingeführt, die es den EU-Mitgliedern erlaubt, aus dieser Organisation auszutreten.

Das Ergebnis all dessen wird die Stärkung der Rechte der europäische Bürger in essentiellen Bereichen sein, wie etwa in den Bereichen der Menschenwürde, Grundfreiheiten, Gleichheit, Solidarität, Bürgertum und Gerechtigkeit. Darüber hinaus sieht der Lissaboner Vertrag strengere Bedingungen für eine Aufnahme in der Europäischen Union vor. Auf Insistieren von Jan Peter Balkenende, dem holländischen Premier, wurden in diesen Vertrag die Kopenhagener Kriterien aufgenommen, welche die

Bedingungen für alle zukünftigen Mitglieder diktieren[6]. Nach den Worten von Professor Jovan Teokarević von der Fakultät für Politikwissenschaften werden "zum ersten mal die Kopenhagener Kriterien offiziell eingeführt, die schon 1993 formuliert wurden. Die Rede ist von zwei Passagen, die drei Blöcke an Kriterien aufzählen, die nicht leicht durchführbar sind.

Mit diesem Dokument wird der Union weiters der Status einer juristischen Person in internationalen Organisationen zuerkannt, eine einheitliche Außenpolitik und eine raschere Beschlussfassung, die Symbole der EU werden fallen gelassen (Hymne und Flagge), die nationalen Parlamente aber erhalten mehr Rechte, um die Arbeit des Europäischen Parlaments zu überwachen. Fragen der Energetik und des Kampfs gegen Klimaveränderungen werden auf dem Niveau der Union harmonisiert. Das Abkommen führt viele neue und bearbeitet alte Mechanismen, vor allem in wirtschaftlicher Sphäre, was dazu beitragen wird, dass letztere wesentlich schneller und effizienter funktionieren wird, in einer Ära, in der wir mit wirtschaftlichen Herausforderungen wie China oder Russland konfrontiert sind; die negative Seite dieses Abkommens ist hingegen, dass die sechsmonatige, rotierende Präsidentschaft beseitigt wird und ein Präsident eingesetzt werden soll, wobei zwei Mandate von jeweils zweieinhalb Jahren möglich sind. Die Präsidentschaft war die Chance, dass auch kleine Länder ihre Interessen in der Union vorantreiben, und dass man auch deren Stimme hört, was es nicht mehr geben wird.

Im Europäischen Parlament begrüßte man auch, dass die Charta der Grundrechte in allen EU-Ländern (mit Ausnahme von Großbritannien und Polen) rechtlich bindend werden wird, da hierdurch die Rechte der Bürger gestärkt und die Rechtssicherheit in der EU gewährleistet wird. Im Europäischen Parlament wurde zudem die klare Aufgliederung von Zuständigkeiten zwischen der EU und den Mitgliedstaaten gelobt, i.e. dass man auch im neune Vertrag für "hinreichend Garantien" gesorgt hat, damit die EU nicht zu einem "zentralistischen, übermächtigen Super-Staat" und demnach in der EU auch weiterhin die "Prinzipien der übertragenen Zuständigkeiten" bzw. der Subsidiarität gelten, wobei die nationale Identität der Mitglieder garantiert wird. Gelobt wurde darüber hinaus auch, dass Entscheidungen im Ministerrat der EU hauptsächlich im Wege einer Mehrheitsabstimmung gefasst werden sollen und es seltener zu einer Sperre

[6] D. Bataveljić, *Proširenje Evropske unije i mesto Srbije u evropskim integracijama,* u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope (ur. S. Bejatović), knj. 5, Pravni fakultet, Institut za pravne i društvene nauke, Kragujevac, 2010, 498-500.

durch den Gebrauch des Vetos bzw. zur Einstimmigkeit kommen wird, d.h. jenem Prinzip, das bis dato für alle Entscheidungen der EU gegolten hat.

5. DIE BEDEUTENDSTEN REFORMEN, DIE IM VERTRAG VON LISSABON VERANKERT SIND

Im Wege des Lissaboner Vertrags wurden zahlreiche Reformen durchgeführt (von daher auch die Bezeichnung als Reformvertrag). Vor allem wird durch die Verankerung eines neuen Artikels betont, dass "die Union auf Achtung der Menschenwürde, Freiheit, Demokratie, Gleichheit, Rechtsstaatlichkeit und die Wahrung der Menschenrechte einschließlich der Rechte der Personen, die nationalen Minderheiten angehören, gründet. Diese Werte sind allen Mitgliedstaaten in einer Gesellschaft gemeinsam, die sich durch Pluralismus, Nichtdiskriminierung, Toleranz, Gerechtigkeit, Solidarität und die Gleichheit von Frauen und Männern auszeichnet".

Zu den bedeutendsten Änderungen (Reformen) und Zusätzen zählen:

- Größere Zuständigkeiten für die Europäische Kommission, das Europäische Parlament und den Europäischen Gerichtshof,
- Beseitigung des Vetorechts der Mitgliedstaaten in vielen Bereichen;
- Verlautbarung der Europäischen Charta der Grundrechte als rechtlich verbindliches Dokument der EU (bis jetzt hatte sie nur den Charakter einer politischen Deklaration);
- Änderung des Vertrages über die Europäische Union (Änderungen beziehen sich auf die Institutionen, eine verstärkte Zusammenarbeit, Außen- und Sicherheitspolitik und Verteidigungspolitik);
- Ergänzung des Vertrages zur Gründung der Europäischen Gemeinschaft (Zuständigkeiten und Interventionsbereiche für die Europäische Union werden präzisiert)
- Erhalt eines neuen Namens – "Vertrag über die Arbeitsweise der Europäischen Union".

Besonders betont werden muss, dass es den Mitgliedstaaten weiterhin frei steht, Völkerrechtsverträge abzuschließen, unter der Bedingung, dass diese Verträge mit den von Seiten der EU unterzeichneten Verträgen kompatibel sind oder in der Zuständigkeit der EU sind. Der Lissaboner Vertrag hat darüber hinaus die Struktur der Säulen, auf welchen die große europäische Familie basiert, vereinfacht, wobei die gemeinsame Außen- und Sicherheitspolitik ihren abgesonderten und besonderen Status behalten hat. Auf dem Gebiet der Außen- und Sicherheitspolitik ist die Verabschiedung

von Gesetzgebungsakten ausgeschlossen, sodass der Europäische Gerichtshof in diesem Bereich in der Regel keine Zuständigkeit hat[7].

Der Lissaboner Vertrag statuiert in Artikel eins, im Abschnitt, der sich auf die Änderungen des Vertrages der Europäischen Union bezieht, große Änderungen der EU-Institutionen. In den Bestimmungen über die Institutionen heißt es, dass die Union einen einheitlichen institutionellen Rahmen festgelegt hat, mit dem Ziel der Förderung ihrer Werte, der Erreichung ihrer Ziele, der Ziele ihrer Bürger und Mitgliedstaaten, wie auch für die Sicherstellung von Kohärenz, Effizienz und Kontinuität ihrer Politik und Handlungen. Aus diesem Grund sind als Institutionen der Union vorgesehen: 1) Europäisches Parlament; 2) Europäischer Rat; 3) Rat der Europäischen Union; 4) Europäische Kommission; 5) Gerichtshof der Europäischen Union; 6) Europäische Zentralbank; 7) Rechnungshof.

Die Garantie der Achtung von Menschenrechten, demokratischer Grundsätze, von Solidarität und Sicherheit stellt eine neue Qualität des Lissaboner Vertrages dar, der abgesehen von den Änderungen technischen und funktionaler Natur auch Änderungen und Ergänzungen in den Bereichen grundlegender Prinzipien und der Grundlagen der Union bringt[8]. In der Charta der Grundrechte[9] unternimmt die Europäische Union zum ersten mal eine Katalogisierung dieser Rechte in sechs Hauptbereichen; diese sind: 1) Würde; 2) Freiheiten; 3) Gleichheit; 4) Solidarität; 5) Bürgerrechte; 6) Gerechtigkeit/justizielle Rechte. Ein neues Recht der Bürger der Europäischen Union ist deren Möglichkeit, eine Gesetzesinitiative einzubringen, d.h. eine Petition mit mindestens einer Million Unterschriften der Bürger aus einer großen Anzahl an Mitgliedstaaten, die an die Europäische Kommission gerichtet werden kann, mit einem Antrag auf Einbringung einer Gesetzesinitiative in einem Bereich, in Bezug auf welchen die Bürger der Ansicht sind, er werde zur Vollziehung des Lissaboner

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[7] D. Bataveljić, *Sprovođenje Lisabonskog ugovora i rezultati njegove primene,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. B. Vlašković), knj. 1, Institut za pravne i društvene nauke, Pravni fakultet, Kragujevac, 2013, 72-75.

[8] D. Bataveljić, *Security of Western Balkan Countries, a Condition for Joining the European Union,* in: 4th International Conference on European Studies Social, Economic and Political Transition of the Balkans, Tirana, Epoka University, 2013, 265, http://www.academia.edu/6099315/4th_International_Conference_on_European_Studies_CONFERENCE_PROCEEDINGS_ICES_2013_Epoka_University_Tirana_Albania, http://dspace.epoka.edu.al/handle/1/920.

[9] Ustavna povelja Državne zajednice Srbija i Crna Gora iz 2003. godine [Verfassungscharta der Staatengemeinschaft Serbien und Montenegro aus dem Jahr 2003].

Vertrages beitragen ("Europäische Bürgerinitiative" - Artikel 11). Mit dieser Charta wird der umfassendste und modernste Katalog an Freiheiten und Rechten in der Welt verankert, sodass man insofern zu Recht behauptet, die Charta der Grundrechte sei die "Seele" des neuen europäischen Vertrages, da in ihr die Werte und Ziele zur Wahrung und Modernisierung des europäischen sozialen Modells enthalten sind.

Weiters wird der Europäische Rat[10] als besondere Institution statuiert, der sich aus den Staats- oder Regierungschefs der Mitglieder und aus ihrem Präsidenten und Präsidenten der Europäischen Kommission zusammensetzt und vom Rat zu unterscheiden ist. Den Vorsitz im Europäischen Rat führt und seine Arbeit koordiniert ein Präsident, dessen Mandat 30 Monate bzw. zweieinhalb Jahre beträgt, mit der Möglichkeit noch einer Wiederwahl. Er vertritt die EU in internationalen Beziehungen und wird mit qualifizierter Mehrheit der Mitglieder des Europäischen Rates gewählt, der Beschlüsse im Prinzip einstimmig fasst, ausgenommen in jenen Fällen, in denen die Verträge etwas anderes bestimmen. Das bedeutet, der Europäische Rat wird nicht länger eine sog. Quasi-Institution sein, sondern er wird zu einer regulären Institution der Europäischen Union.

Der Rat (Rat Europas, Rat der Europäischen Union oder Ministerrat) übt, gemeinsam mit dem Europäischen Parlament, gesetzgebende Funktion aus, wie auch Befugnisse aus dem Budgetbereich aus, er bekräftigt die Politik und koordiniert Aktivitäten; er setzt sich aus je einem Vertreter jedes Mitgliedstaates auf Ministerniveau zusammen. Hier muss betont werden, dass die Methode der Abstimmung im Rat geändert wurde – die Regel der sog. "zweifachen Mehrheit". Der Rat fasst nämlich Beschlüsse mit einer qualifizierten Mehrheit, ausgenommen in jenen Fällen, für welche die Verträge etwas anderes vorsehen. Im Zusammenhang mit dem Europäischen Parlament, das sich aus den Vertretern der Unionsbürger zusammensetzt (dessen Anzahl 750 Abgeordnete nicht übersteigt + Parlamentspräsident)[11], ist zu sagen, dass auch hier bestimmte Änderungen im Hinblick auf die Erweiterung seiner Befugnisse in der gesetzgebenden Sphäre, im Prozess der Budgeterstellung der Europäischen Union und bei der Ratifizierung internationaler Verträge vorgenommen wurden. Das Europäische Parlament übt, gemeinsam mit dem Rat, die bedeutende Funktion des Gesetzgebungs- und Budgetorgans aus. Es führt die politische

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[10] D. Vernet, *Europäisches Deutschland oder deutsches Europa?,* in: Europa hat Zukunft – Der Weg ins 21. Jahrhundert, Verlag für internationale Politik GMBH, Bonn, 1998.

[11] B. Vlajić, *Neposredna demokratija u nemačkom ustavu od 1919. godine,* Srpski knjaževski glasnik, Beograd, 1922.

Kontrolle und Aufsicht gegenüber der europäischen Exekutive durch, gibt Stellungnahmen im Einklang mit den in den Verträgen vorgesehenen Bedingungen ab und wählt den Präsidenten der Europäischen Kommission auf Vorschlag des Rates. Das heißt, das Europäische Parlament erhält gesetzgeberische Befugnisse, die in jenen Befugnissen vergleichbar sind, die der Rat inne hat. Damit stärkt der Lissaboner Vertrag die Kompetenzen und Mitbestimmungsrechte dieses Parlaments als einer europäischen Institution, welche die Bürger direkt wählen, was alles in allem einen bedeutenden Schritt auf dem Weg zur parlamentarischen Demokratie auf europäischem Niveau darstellt.

Der Hohe Vertreter der Union für die Außen- und Sicherheitspolitik stellt eine Verbindung zweier bisheriger Funktionen dar, nämlich: der Funktion des Hohen Vertreters für gemeinsame Außen- und Sicherheitspolitik und des Kommissars für auswärtige Beziehungen. Ernannt wird er vom Europäischen Rat mit Zustimmung des Präsidenten der Europäischen Kommission, und auf dieselbe Weise kann sein Mandat auch beendet werden. Dieser Hohe Vertreter hat gewichtige Befugnisse, und zwar im Hinblick auf die Führung der gemeinsamen Außen- und Sicherheitspolitik der Union, in der Vollziehung der Außenpolitik, welche die Staaten innerhalb des Rates vereinbaren. Er führt den Vorsitz im Rat für Außenangelegenheiten, er ist einer der Vizepräsidenten der Europäischen Kommission, zuständig für auswärtige Angelegenheiten und sorgt für eine Kohärenz in den Außenaktivitäten der Europäischen Union.

Im Kontext der Reformen[12] und Änderungen, die im Lissaboner Vertrag vorgesehen sind, ist im besonderen darauf hinzuweisen, dass die Einbindung nationaler Parlamente, d.h. der Parlamente der EU-Mitgliedstaaten, verstärkt wurde, wodurch das Subsidiaritätsprinzip bekräftigt wird (neu definiert wurde der Ansatz des Subsidiaritätsprinzips). Die nationalen Parlamente sollen nämlich direkt Vorschläge über europäische Bestimmungen erhalten, sodass sie hernach entscheiden können, ob der Vorschlag im Einklang mit dem Subsidiaritätsprinzip ist, oder nicht. Jedes nationale Parlament hat die Befugnis, zu signalisieren, dass bzw. wenn es der Ansicht ist, dass in einer beliebigen Aktivität der Europäischen Union das genannte Prinzip nicht beachtet wird. Darüber hinaus organisieren die nationalen Parlamente gemeinsam mit dem Europäischen Parlament die politische Aufsicht gegenüber dem

[12] D. Bataveljić, *Federalizacija Evrope i mogućnosti za reformu Evropske unije*, u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope (ur. S. Bejatović), knj. 4, Pravni fakultet, Institut za pravne i društvene nauke, Kragujevac, 509-510.

Europäischen Polizeiamt (EUROPOL) und der Europäischen Einheit für justizielle Zusammenarbeit (EUROJUST). Sie beteiligen sich außerdem an der Bewertung der Politik der Europäischen Union in Bezug auf das Ausmaß an Freiheiten, Rechten und Sicherheit (Artikel 12).

6. DIE GEWINNER DES VERTRAGES VON LISSABON

Als Gewinner des neuen europäischen Vertrages sind auch die nationalen Staaten zu nennen, i.e. die Mitgliedstaaten der Europäischen Union, da in diesem Vertrag im Vergleich zu früher die Zuständigkeiten sehr klar zwischen europäischem und nationalem Niveau aufgeteilt werden. Zum ersten mal werden nämlich ausschließliche Kompetenzen der Europäischen Union genannt, gemeinsame Kompetenzen der Europäischen Union und der nationalen Staaten, wie auch die politischen Bereiche, in welchen die Europäische Union ergänzende Maßnahmen ergreifen kann. Gemäß dem Vertrag über die Arbeitsweise der Europäischen Union (Artikel 2) "bleiben alle Zuständigkeiten, die nicht auf die Europäischen Union übertragen wurden, bei den Mitgliedstaaten", wobei die Union hier die Gleichheit der Mitgliedstaaten und deren nationale Identität zu wahren hat. Neben dieser deutlichen Abgrenzung der Zuständigkeiten (Kompetenzen) sind die Mitgliedstaaten die Gewinner, sowohl wegen der Stärkung des Rates, als auch wegen der Einführung des Europäischen Rates als neue Institutionen mit einem gewählten Präsidenten (Artikel 15).

Dies bestätigt nur die Tatsache, dass im Wege des Vertrages von Lissabon die Einbringung bestimmter demokratischer Grundsätze ermöglicht wurde, die jedem Bürger das Recht geben, am demokratischen Leben der Union teilzuhaben, und zwar dergestalt, dass Beschlüsse öffentlich gefasst und auf möglichst bürgernahem Niveau (Artikel 10), wohingegen die politischen Parteien zur Bildung eines europäischen politischen Bewusstseins beitragen und den Willen der Union kundtun. Mindestens 1.000.000 Unionsbürger aus einer größeren Zahl an Mitgliedstaaten können eine Initiative einbringen, mit welcher von der Europäischen Kommission gefordert wird, im Rahmen ihrer Zuständigkeiten einen Vorschlag über eine Frage abzufassen, von welcher die Bürger der Meinung sind, dass sie notwendigerweise durch einen Rechtsakt der Union mit dem Ziel der Anwendung des Vertrages geregelt werden soll.

Die Verträge von Nizza und Amsterdam erkennen formal die Wichtigkeit politischer Parteien an, zumal sie auf europäischem Niveau bedeutend sind, als eine Art des Ausdrucks des politischen Willens der Bürger und als Faktor der Integration und Formung eines europäischen

politischen Bewusststeins. Die Entwicklung und Konsolidierung des Parteiföderalismus tragen ihrerseits zur Steigerung des Einflusses von Interessensgruppen und zu einer progressiven Bildung dieses Bewusstseins bei.

An dieser Stelle muss auch die Tatsache betont werden, dass der Lissaboner Vertrag die Rolle der Kommunen (Gemeinden) und Regionen in Europa wesentlich stärkt, da zum ersten mal das Recht auf kommunale Selbstverwaltung (Artikel 4) zugestanden wird, und die Wahrung der kulturellen Identität der Regionen in der Europäischen Union gehört desgleichen zu den grundlegenden Ziele des genannten Vertrages. So ist es für die Kommunen und Regionen (Provinzen) eine ausgesprochen wichtige Pflicht, für jede Maßnahme der Europäischen Union eine Bewertung ihrer Folgen zu erstellen. In solch einer Bewertung müssen alle finanziellen und administrativen Folgen eines europäischen Gesetzes für das kommunale und regionale Niveau aufgezeigt werden.

7. ZUSAMMENFASSUNG

Die Erlassung der Europäischen Verfassung wurde als großer Erfolg erachtet, bedenkt man, dass nach allgemein gehaltenen Geschichten über die Zukunft Europas ein Konsens von 193 Artikeln erreicht wurde, um eine Verfassung zu erstellen. Im Ziel der Förderung der europäischen Integration und Wahrung der Identität wurden in der Zwischenzeit zahlreiche internationale Workshops mit unterschiedlichen thematischen Einheiten organisiert.

In den abschließenden Bemerkungen werden wir nun lediglich wiederholen, dass man nach dem Scheitern der Ratifizierung der Europäischen Verfassung vom Lissaboner Vertrag viel erwartet. In einigen Diskussionen gewinnt man durch einzelne Autoren den Eindruck, dieser Vertrag würde zu einem Verlust führen, sei es an nationaler Souveränität, sei es an regionaler Identität, oder gar an demokratischer Teilhabe. In Wahrheit ist gerade das Gegenteil der Fall, da dieser neue europäische Vertrag viele Gewinner hat, berücksichtigt man, dass er durch seine Reformen eine weitere Dezentralisierung des Beschlussfassungsverfahrens vorsieht, mit dem vorrangigen Ziel, dass letzteres möglichst bürgernah gestaltet wird, mit einer Einbeziehung der örtlichen und regionalen Dimension. Zum ersten mal wurde ein ausgeglichenes Regierungssystem verankert, vom kommunalen bis zum europäischen Niveau. Hierbei wird die grundlegende Natur der Europäischen Union nicht verändert, und es wird auch keinerlei "Super-

Staat" erschaffen, da der Vertrag lediglich eine Ergänzung zu den bereits bestehenden Verträgen ist.

Desgleichen erwartet man, dass dieser Vertrag viele Gewinner haben wird, zu denen vor allem die Bürger gehören, die direkt an der Gestaltung der Politik im Wege der Europäischen Bürgerinitiative teilhaben können. Die Charta der europäischen Bürgerrechte statuiert neben den klassischen liberalen Rechten auch bestimmte soziale und ökonomische Rechte der Bürger Europas. Als Gewinner sind auch die nationalen Parlamente zu nennen, die mehr Möglichkeiten für eine Mitwirkung erhalten haben, und allein dadurch hat eine Stärkung der Kompetenzen des Europäischen Parlaments stattgefunden. Und schließlich soll das Handeln der Europäischen Union gegenüber der äußern Welt einheitlicher und kohärenter werden, und die Freiheit und innere Sicherheit werden in ganz Europa gleichermaßen gestärkt werden können.

Dragan Bataveljic*

Summary

The Lisbon Treaty – A Substitute for the Failed European Constitution

The European Union is facing major challenges at the beginning of the 21st century. The process of European integration raises the question of "European compatibility" of federalism or the development of a "European federation". Attention is drawn to the fact that federalism plays a significant role in European development and integration. To date, some models of federalism are known, but further development and integration of Europe require innovation, so that it can not be classified in already existing or predetermined models, but rather it is necessary to create a synthesis between unity and diversity; this is the reason why in recent years there has been "intensive research into a new European federalism" or debates about the future of the EU. The EU has undertaken a major reform of its internal organization, but the impact of past integration should be linked to its federal unity and, based on the principles of unity of law, the unity of institutional structures and the solidarity of the Member States.

Keywords: *The Lisbon Treaty, European constitution, European Union, ratification, referendum, federalism, European federation, principle of subsidiarity, Charter of Fundamental Rights.*

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Ustavna povelja Državne zajednice Srbija i Crna Gora iz 2003. godine.

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ВОЗДЕЙСТВИЕ РЕШЕНИЙ КОНСТИТУЦИОННОГО СУДА БОСНИИ И ГЕРЦЕГОВИНЫ НА УРАВНИВАНИЕ СТАНДАРТА КОНВЕНЦИОННОГО И ВНУТРИГОСУДАРСТВЕННОГО ПРАВА НА ПРАКТИКЕ СУДОВ БОСНИИ И ГЕРЦЕГОВИНЫ

Аннотация

Европейская конвенция о защите прав человека и основных свобод предусматривает, что основная нагрузка по защите прав человека и основных свобод лежит на органах стран, подписавших конвенцию, в то время как Европейскому суду отведена лишь второстепенная роль. Таким образом, бремя нахождения точки зрения о содержательном толковании ценностей и идеалов Конвенции передано органам стран-подписантов договора. Тем не менее, подобное толкование должно быть в первую очередь согласовано с общим духом Конвенции, которая является инструментом, созданным для достижения и продвижения идеалов и ценностей демократического общества, и оно быть понятным и приемлемым как для стран-подписантов договора, так и для самого Европейского суда по правам человека.

В данной работе анализируется наиболее современная практика Конституционного суда Боснии и Герцеговины, и влияние его юриспруденции на уравнивание практики судов в Боснии и Герцеговине, особенно путем т. н. эволюционного толкования содержания ценностей и принципов во внедрении стандартов Конвенции в области защиты прав и свобод человека. Из юрисдикций Конституционного Суда, утвержденных Конституцией Боснии и Герцеговины, следует, что этот суд обязан толковать и применять Европейскую конвенцию о защите прав человека и основных свобод вместе с дополнительными протоколами по всем переданным ему делам. Следовательно, речь идет о толковании и применении положений Конвенции и дополнительных протоколов в целом, а не только определенных положений статей, регулирующих осуществление и защиту индивидуальных прав человека и основных свобод.

Ключевые слова: *Конституция Боснии и Герцеговины, Европейская конвенция о защите прав человека и основных свобод, Европейский суд по правам человека, стандарты конвенции.*

1. ВВЕДЕНИЕ

Европейская конвенция о защите прав человека и основных свобод[1] применяется в Боснии и Герцеговине напрямую, т.е. непосредственно. Это позволяет сторонам в правовой системе БиГ подать Конституционному суду Боснии и Герцеговины[2] апелляцию для защиты своих индивидуальных прав, ссылаясь непосредственно на нарушение Европейской конвенции. Аналогичное правило применяется в судебных разбирательствах в общих судах.

Конституционное положение Европейской конвенции, вместе с вспомогательным характером надзорной системы Конвенции, является одним из важнейших показателей, определяющих взаимоотношения между Конституционным и Европейским судами по правам человека[3]. Статья 39 Европейской конвенции регулирует обязанность Европейского суда по участию в защите прав человека и основных свобод. Однако эту статью всегда необходимо связывать и толковать совместно со статьей 1 Конвенции, которая предписывает, что Верховные Договаривающиеся Стороны обеспечивают каждому, находящемуся под их юрисдикцией, права и свободы, определенные в разделе I настоящей Конвенции[4].

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[1] Далее по тексу: Европейская конвенция,

[2] Далее по тексу: Конституционный суд.

[3] Далее по тексту: Европейский суд.

[4] Речь идет о/об: праве на жизнь (статья 2); запрещении пыток (статья 3); запрещении рабства и принудительного труда (статья 4); праве на свободу и личную неприкосновенность (статья 5); праве на справедливое судебное разбирательство (статья 6); наказании исключительно на основании закона (статья 7); праве на уважение частной и семейной жизни (статья 8); свободе мысли, совести и религии (статья 9); свободе выражения мнения (статья 10); свободе собраний и

Во многих национальных конституционных судах (среди которых и Конституционный суд), преобладает мнение, что цель Конвенции и ее надзорной системы связана не только с защитой прав человека и основных свобод, но и с созданием, толкованием и применением минимальных стандартов в области прав человека на юридической площадке стран-подписантов договора. В этом смысле Конвенцию все чаще называют "инструментом европейского общественного порядка". Конституционный суд соблюдает как решения Европейского суда, принятые в т. н. БиГ разбирательствах, так и решения, принятые в разбирательствах по защите прав человека и основных свобод на территории какой-либо из стран-подписантов договора.

Сама Конвенция (пункт 1 статьи 35) предусматривает, что Европейский суд "может принимать дело к рассмотрению только после того, как были исчерпаны все внутренние средства правовой защиты". Как предусматривает Конституция БиГ, Конституционный суд является компетентным для принятия решений и апелляций против определенных судебных решений, и считается, что все внутренние средства правовой защиты исчерпаны только после того, как решение о (не)нарушении прав человека и основных свобод принято Конституционным судом. Решая конкретный спор о нарушении прав человека Конституционный суд может, как правило, рассматривать окончательные решения суда и применяемое право, на основании которого они приняты, в целях определения того, были ли нарушены предусмотренные Конвенцией права человека и основные свободы.

Здесь можно отметить, что, в любом случае, Конституционный суд путем своих решений влияет на конституционную юрисдикцию Боснии и Герцеговины, юрисдикцию ее субъектов и Округа Брчко, как в его решениях в компетенции абстрактного контроля конституционности закона, так и в области решения конкретных разбирательств по поводу апелляций, поданных ввиду нарушения прав человека и основных свобод, гарантированных Конституцией БиГ и Конвенцией. Не вдаваясь в подробности, ниже приведено несколько

объединений (статья 11); праве на вступление в брак (статья 12); праве на эффективное средство правовой защиты (статья 13); запрещении дискриминации (статья 14); отступлении от соблюдения обязательств в чрезвычайных ситуациях (статья 15); ограничении на политическую деятельность иностранцев (статья 16); запрещении злоупотреблений правами (статья 17) и пределах использования ограничений в отношении прав (статья 18).

последних решений Конституционного суда, в которых очевидно подобное влияние Конституционного суда.

2. ПРАВО НА СВОБОДУ И ЛИЧНУЮ НЕПРИКОСНОВЕННОСТЪ

(статья II/3d Конституции Боснии и Герцеговины и статья 5 Европейской конвенции)

В ряде своих решений Конституционный суд подчеркнул, что право на свободу является одним из самых важных прав человека, что статья 5 Европейской конвенции предоставляет защиту, и что никто не может быть произвольно лишен свободы. Произвольное лишение свободы, прежде всего, оценивается в отношении соблюдения процессуальных требований закона, который применяется в конкретном случае и который должен соответствовать стандартам Европейской конвенции.

Положение статьи 5 Европейской конвенции требует задержания лица в соответствии со статьей 5 параграф 1 пп. c) Европейской конвенции, т.е. чтобы лишение свободы было "законным" в рамках указанной статьи, и включает в себя как процессуальную, так и материальную защиту таких лиц. Европейский суд пришел к выводу, что соблюдение статьи 5 Европейской конвенции требует рассмотрения судебными органами всех вопросов, связанных с содержанием лица под стражей, и что решение о задержании должно быть принято, принимая во внимание объективные критерии, предусмотренные законом. При этом существование обоснованных сомнений в том, что лицо, содержащееся под стражей, совершило уголовное преступление, в котором оно обвиняется - conditio sine qua non («необходимое условие») для определения или продления задержания. Однако по истечении определенного времени, этого становится недостаточным, и необходимо определить, существуют ли соответствующие и достаточные основания для задержания.[5] Далее, в соответствии с позицией Европейского суда, обоснованность задержания зависит также от обстоятельств в конкретном случае, которые должны указывать на существование общего (общественного)

[5] См. Европейский суд, Trzaska v. Poland, постановление от 11 июля 2000 г., жалоба № 25792/94, § 63.

интереса, который настолько важен и значителен, что, несмотря на презумпцию невиновности, перевешивает принцип соблюдения права на свободу.

В связи с вышеизложенным, согласно практике Европейского суда, обоснованность подозрения, на котором должен основываться арест, является важным элементом защиты от произвольного ареста и лишения свободы, предусмотренного статьей 5 пункт 1 подпункт с) Европейской конвенции. Обоснованное подозрение в том, что совершено уголовное дело требует „наличия фактов или информации, которые убедили бы объективного наблюдателя в том, что лицо могло бы совершить данное преступление“[6]. При этом, Конституционный суд отмечает, что в момент заключения под стражу необязательно должно быть утверждено, что уголовное дело совершено на самом деле, и характер этого дела не обязательно должен быть определен. Также в соответствии со статьей 5 пункт 1 Европейской конвенции, законность содержания под стражей определяется на основании национального законодательства, т. е., задержание должно иметь правовые основания в национальном законе, принимая во внимание то, что лишение свободы должно соответствовать назначению статьи 5 Европейской конвенции, т. е. лицо, о котором идет речь, должно быть защищено от произвольного задержания. [7].

Во время рассмотрения законности продления содержания под стражей апеллянтам нельзя ограничиваться рассмотрением оснований для содержания под стражей, предусмотренных статьей 5 пункт 1 подпункт с) Европейской конвенции. Благодаря практике Европейского суда, которую постоянно поддерживает Конституционный суд, в качестве причин для определения, т. е., продления содержания под стражей, принято следующее: а) „риск скрытия доказательств“[8], б) "серьезность преступления“[9], в) „риск

[6] См. Европейский суд, Fox, Campbell and Hartley v. the United Kingdom, постановление от 30 августа 1990 г., серия А, № 180, параграф 32 и O'Hara v. the United Kingdom, постановление от 16 октября 2001 г., Сборник судебных решений и определений 2001-X, параграф 34.

[7] См. Конституционный суд, Решение о допустимости и по существу дела № АР 5842/10 от 20 апреля 2011 года, доступно на веб-страничке Конституционного суда www.ustavnisud.ba.

[8] См. постановление по делу Wemhoff v. Federal Republic of Germany от 27 июня 1968 г..

[9] См. постановление по делу Kemmache v. France от 27 ноября 1991 г.

оказания влияния на свидетелей“[10], г) „опасность наличия сговора (соглашения)“[11], д) „риск оказания давления на свидетелей" [12] и е) „охрана общественного порядка“[13].

В деле Конституционного суда № АР 482/15 от 16 сентября 2015 г., Конституционный суд отмечает, что апеллянту определено и продлено содержание под стражей на основании существования обоснованных подозрений в совершении уголовного преступления - военное преступление в отношении гражданских лиц из статьи 142 Уголовного закона СФРЮ[14]. В качестве общего условия для определения и продления содержания под стражей, а также ввиду существования факта из статьи 132 параграф 1 п. а) и б) Уголовно-процессуального кодекса БиГ[15], т. е. а) если апеллянт скрывается или если существуют другие обстоятельства, указывающие на опасность побега, соответственно б) когда определенные обстоятельства указывают на то, что обвиняемый будет препятствовать уголовному процессу посредством влияния на свидетелей и соучастников (в качестве особого условия для определения и продления содержания под стражей). В конкретном случае, помимо прочего, апеллянт посчитал, что Суд БиГ определил и продлил содержание под стражей по причинам, предусмотренным статьей 132 параграф 1 п. а) и б) Уголовно-процессуального кодекса БиГ, однако не представил при этом веские доказательства, а из приведенных доказательств невозможно сделать подобные заключения, так как они предположительно основываются лишь на показаниях потерпевшей стороны, т. е. суд не указал конкретные факты или обстоятельства, которые указывают на возможное оказание влияния на свидетелей или соучастников.

Конституционный суд отмечает, что на основании обжалованного решения согласно которому апеллянту продлено содержание под стражей по предложению Прокуратуры БиГ следует, что Суд БиГ принял решение о продлении ареста после проведения слушания, на котором заслушали апеллянта, и предъявлены другие доказательства.

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[10] См. постановление по делу Ringeisen v. Austria от 16 июля 1971 г.

[11] См. постановление по делу B. v. Austria от 28 марта 1990 г..

[12] См. постановление по делу Letellier v . France от 26 июня 1991 г.

[13] Ibid.

[14] Служебная газета СФРЮ, № 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 и 45/90.

[15] Служебный вестник БиГ, №. 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08 и 12/09.

Суд БиГ рассмотрел существование обоснованного сомнения как общего условия для определения содержания под стражей во время принятия обжалованных решений. Также конституционный суд БиГ замечает, что решение о продлении ареста апеллянта содержит пояснение из которого следует, что суд оценил существующие доказательства и другие обстоятельства, которые, по мнению суда, оправдывают решение о содержании под стражей. Суд БиГ в своих решениях отметил, какие доказательства рассматривались при утверждении существования обоснованных подозрений (эти доказательства рассматривались и оценивались отдельно и взаимосвязано), и представил ясные и четкие пояснения в пользу их подтверждения. Конституционный суд считает, что в обжалованных решениях Суд БиГ предоставил очень четкое пояснение о том, на основании каких доказательств он утвердил, что существует обоснованное подозрение в совершении уголовного дела, в котором обвиняется апеллянт, и которое Конституционный суд не считает произвольным. Кроме того, Конституционный суд считает, что решение Суда БиГ не противоречит положениям Уголовно-процессуального кодекса БиГ и Европейской конвенции и содержит причины, связанные с наличием общего условия для определения содержания под стражей, согласно статье 132 пункт 1 настоящего закона.

Кроме того, Конституционный суд отмечает, что Суд БиГ, помимо наличия обоснованного сомнения в качестве общих предположений для предписания задержания апеллянту, выполнил также второе кумулятивное условие, а именно: в конкретном случае существуют также особые причины для содержания под стражей из статьи 132 параграф 1 пункты а) и б). В связи с этим Конституционный суд отмечает, что Суд БиГ установил в конкретном случае существует опасность совершения побега апеллянта - представляя подробные причины для такого заключения. Далее, Суд БиГ установил, что апеллянт, кроме гражданства Боснии и Герцеговины, имеет также гражданство Республики Хорватии которая, в соответствии со своим действующим законодательством не выдает своих граждан и оценил, что само по себе это обстоятельство не должно послужить достаточной причиной для продления содержания под стражей на этом основании. Однако Конституционный суд отмечает, что Суд БиГ в связи с этим предоставил также другие причины и отдельно оценил информацию, что апеллянт проживает на территории муниципалитета г. Славонский Брод (Республика Хорватия), в котором у него имеется семейный дом,

где он живет с супругой и двое детей, зарегистрированный бизнес, т. е. компания по оказанию определенных услуг, и что он исключительно в служебных целях приезжает в БиГ, где у него имеется фиктивный вид на жительство, так как объект, в котором он был зарегистрирован ранее, на данный момент - опустошен и заброшен. Принимая во внимание все вышеизложенное, Конституционный суд, в отличии от показаний апелляции, не находит ничего указывающего на то, что продление апеллянту содержания под стражей определено произвольно.

Далее, Конституционный суд отмечает, что Суд БиГ в конкретном случае утвердил существование опасности сговора в качестве основы для содержания под стражей из статьи 132 пункт б), так как существуют особые обстоятельства указывающие, что апеллянт будет препятствовать уголовному процессу посредством воздействия на свидетелей. Кроме того, Суд БиГ подробно пояснил причины, по которым он считает, что существует обоснованная опасность препятствия уголовному процессу, и существуют особые причины в конкретном уголовном деле. В соответствии с мнением Конституционного суда, Суд БиГ аргументированно сформулировал причины, из которых следует, что существуют особые обстоятельства, указывающие на то, что, в случае если апеллянт будет находится на свободе, он может повлиять на уголовный процесс посредством воздействия на свидетелей. В подобном заключении Суда БиГ, принимая во внимание факты по конкретному делу, Конституционный суд не находит никакого произвола. В связи с вышеизложенным, Суд БиГ заключил, что на данном этапе процесса необходимо обеспечить необходимые условия для дальнейшего беспрепятственного и эффективного проведения расследования, и считает, что все указанные обстоятельства в своей совокупности оправдывают задержание апеллянта под стражей на основании пп. б) п. 1 статьи 132 Уголовно-процессуального кодекса БиГ. При этом Конституционный суд отмечает, что во время принятия решения о продлении задержания в рамках определенных положений Уголовно-процессуального кодекса БиГ, Суд БиГ рассмотрел также возможность применения других мер и представил причины, по которым они являются неприменимыми в конкретных обстоятельствах данного случая. Принимая во внимание вышеуказанное, Конституционный суд не утвердил фактов, которые бы оправдали утверждение апеллянта, что лишение свободы в конкретном случае противоречит какому-либо правилу из статьи 5 Европейской конвенции.

3. СВОБОДА МЫСЛИ, СОВЕСТИ И РЕЛИГИИ И ЗАПРЕТ ДИСКРИМИНАЦИИ

Свободы, гарантированные статьей 9 Европейской конвенции, являются одной из основ „демократического общества". Эти свободы, в своем религиозном измерении, являются одним из важнейших элементов, которые являются составляющей целостности личности верующих и концепции их жизни, но также имеет драгоценное значение для атеистов, агностиков, скептиков и незаинтересованных. Плюрализм, который неразрывно связан с демократическим обществом, и которого добивались веками, зависит от этой свободы. Помимо всего прочего, эта свобода влечет за собой также свободу исповедать или не исповедать религию, свободу практиковать или не практиковать религию[16].

Несмотря на то, что свобода религии в первую очередь является личным вопросом, она также подразумевает свободу исповедования религии, в одиночку и в частном порядке или совместно с другими, публично, и в кругу людей аналогичной веры. В статье 9 Европейской конвенции изложены различные формы, которые могут иметь проявление той или иной религии, или убеждений, например: молитва, проповедь, обычаи и обряды[17].

Статья 9 Европейской конвенции не защищает каждое действие, мотивированное или вдохновленное религией или убеждениями[18]. В демократических обществах, в которых сосуществует несколько религий в пределах одной популяции, может возникнуть необходимость во введении ограничений на свободу исповедования религии или убеждений в целях согласования интересов разных групп и обеспечения уважения убеждений каждого лица[19]. Это следует как из

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[16] См. Европейский суд, Kokkinakis v. Greece, 25 мая 1993 г., Серия А № 260-А, стр. 17, параграф 3 и Buscarini and Others v. San Marino [GC], № 24645/94, параграф 34, ECHR 1999-I.

[17] Mutatis mutandis, См. Европейский суд, Leyla Sahin v. Turkey [GC], № 44774/98, ECHR 2005-XI и Cha'are Shalom Ve Tsedek v . France [GC], № 27417/95, параграф 73, ECHR 2000-VII.

[18] См. Европейский суд, Kalaç v. Turkey, постановление от 1 июля 1997 г., стр. 1209, параграф 27; Arrowsmith v. the United Kingdom, № 7050/75, Решение комиссии от 12 октября 1978 г., Сборник судебных решений и определений (DR) 19, стр. 5 и C. v. the United Kingdom, № 10358/83, Решение Комиссии от 15 декабря 1983 г., DR 37, стр. 142.

[19] Kokkinakis v. Greece, параграф 33.

пункта 2 статьи 9, так и из действующей обязанности государства согласно ст. 1 Европейской конвенции, которая гарантирует каждому лицу, находящемуся в ее юрисдикции, обеспечение прав и свобод, гарантированных Европейской конвенцией.

Так как выражение свободы религии со стороны одного человека может повлиять на другого, авторы Конвенции определили этот аспект свободы религии способом, предусмотренным в статье 9 пункт 2. Данный пункт 2 предусматривает, что какое-либо ограничение выражения религии или убеждений должно быть предусмотрено законом и необходимо демократическому обществу в целях достижения одной или нескольких определенных законных целей. Государственная обязанность по сохранению нейтралитета и беспристрастности несовместима с полномочиями государства по оценке законности религиозных убеждений или способов, которыми они выражаются[20]. Даже в случаях, когда определенное религиозное убеждение достигает необходимого уровня достоверности и важности, это не означает, что каждый акт, который в некотором роде вдохновлен, мотивирован или находится под влиянием религии является „проявлением" верования. Для того чтобы акт считался „проявлением" веры, как это предусматривает статья 9, этот определенный акт должен быть узко связан с религией или убеждением.

Принимая во внимание важность свободы религии в демократическом обществе, Европейский суд считает, что когда отдельное лицо жалуется на вмешательство в право на свободу религии на рабочем месте, при рассмотрении вопроса было ли ограничение пропорционально или нет, лучше было бы принять во внимание общий баланс, чем применять мнение, что существование возможности поменять работу сводит на нет какое-либо вмешательство в право. По своей установившейся практике Европейский суд оставляет странам-подписантам договора достаточно пространства для свободной оценки при принятии решения о том, в какой степени вмешательство считается разумным. Это усмотрение идет рука об руку с европейским надзором, который включает в себя принятие законов и решений о применении закона. Задача Суда состоит в том, чтобы определить,

[20] См. Европейский суд, Manoussaki and Others v. Grecia, судебное решение от 26 сентября 1996 г., Сборник отчетов 1996-IV, стр. 1365, § 47; Hasan and Chaush v. Bulgaria [GC], № 30985/96, § 78, ECHR 2000-XI и Refah Partisi (Партия благоденствия) and Others v. Turkey [GC], № 41340/98, 41342/98, 41343/98 i 41344/98, § 1, ECHR 2003-II.

были ли меры, принятые на национальном уровне, оправданными и соразмерными[21]. Учитывая взаимосвязь между религиозным и гражданским правами, Европейский Суд напомнил, что свобода вероисповедания, включая свободу исповедовать свою религию, в первую очередь является индивидуальным вопросом, и подчеркнул, что сфера индивидуального сознания существенно отличается от сферы „частного права" или гражданского права, которая касается организации и функционирования общества в целом.

Статья 9 Европейской конвенции структурирована таким образом, что первый пункт определяет защищенные свободы, а второй содержит т.н. ограничительную оговорку, или, другими словами, предписывает обстоятельства, при которых государственный орган может ограничить осуществление гарантированных свобод. В частности, в статье 9 пункт 1 Европейской конвенции перечислены формы, в которых может проявляться религия, например: обряд, проповедь и исполнение религиозных обязанностей и ритуалов. Однако эта статья не защищает каждое действие или акт, мотивированный или вдохновленный религией или убеждениями[22]. Ограничение, предусмотренное статьей 9 пункт 2 Европейской конвенции, предоставляет государствам возможность принимать решения, исключительно касаемые рамок осуществления этих прав и свобод, и то в тех случаях, когда вмешательство государства не противоречит закону, или, другими словами, когда оно предусмотрено законом или требуется демократическому обществу в целях защиты основных ценностей каждого государства, например: общественной безопасности, охраны общественного порядка, здоровья или нравственности, или в целях защиты прав и свобод других лиц. Таким образом, государство имеет право ограничить осуществление этих прав в общественных интересах, но не приостанавливать их.

Применяя эти принципы к конкретной ситуации в Решении № АР 482/15 от 16 сентября 2015 года Конституционный суд в первую очередь определил, попадают ли утверждения апеллянта в сферу права на свободу исповедования религии согласно статьи 9 Европейской конвенции. Конституционный Суд отмечает, что для рассмотрения утверждений апеллянта о нарушении права на публичное исповедование религии, предварительно необходимо определить, входит ли ношение хиджаба - платка в рамки статьи 9 Европейской

[21] Leyla Sahin v. Turkey, параграф 110.
[22] Kalaç v. Turkey, параграф 27.

конвенции, и затем, если эта статья применима, рассмотреть вопрос о целесообразности вмешательства, о котором идет речь, а также определить, является ли оно нарушением свобод, гарантированных данной статьей. Конституционный Суд также отмечает, что в данном конкретном случае заявительница указала, что она решила начать практиковать свою религию и исполнять религиозные обязанности в 2001 году, и это включало также ношение хиджаба - платка. Таким образом, Конституционный суд считает, что ношение заявительницей хиджаба - платка представляет собой проявление ее религиозных убеждений, и как таковое попадает под защиту согласно статьи 9 Европейской конвенции.

Поскольку Конституционный Суд пришел к выводу, что заявительница пользуется защитой в соответствии со статьей 9 Европейской конвенции, Конституционный Суд указывает на то, что следующие вопросы, на которые необходимо предоставить ответы, это: привели ли оспариваемые решения к вмешательству в указанное право заявительницы, и если привели, то существует ли законная цель, т.е. „соответствует ли это закону" и „требуется ли это в демократическом обществе"?

В связи с этим Конституционный суд отмечает, что представленная документация показывает, что 25 января 2012 года заявительница подала жалобу против Министерства обороны БиГ „в целях определения и устранения дискриминации", в котором она подчеркнула, что ей „отказан доступ к рабочему месту таким образом, что ей был предотвращен доступ к выполнению заданий, по которым у нее заключен трудовой договор". В связи с этим, Конституционный суд БиГ отмечает, что во время принятия решения по этой части жалобы заявительницы, Суд БиГ указал на положения статьи 20 Закона о службе в вооруженных силах БиГ[23], которые предусматривают, что военнослужащие во время службы должны носить форму в соответствии с правилами, принятыми министром обороны. Далее Суд БиГ установил что, учитывая тот факт, что министр обороны еще не принял правило о форме, по причинам беспрепятственного функционирования вооруженных сил были приняты СРП[24], которые

[23] Служебный гласник Боснии и Герцеговины, №. 88/05, 53/07, 59/09, 74/10 и 42/12.

[24] Стандартные рабочие процедуры (временные) ношения одинаковых форм вооруженных сил БиГ, которые одобрены Объединенным штабом вооруженных сил БиГ 30 мая 2008 года.

предусматривают ношение одинаковых форм и знаков различия в вооруженных силах БиГ.

Конституционный суд заметил, что, вопреки утверждениям заявительницы, СРП, которые являются временными мерами, не предусматривают ношение хиджаба - платка на каком-либо основании. Из ознакомления с СРП, представленными Министерством обороны, следует обратное. Более того, этими правилами предусмотрено, что членам вооруженных сил БиХ разрешено носить религиозные реликвии или не носить предусмотренные части формы только во время нахождения в религиозных объектах или во время молитвы, на что Суд и указал в своем решении. Также, Конституционный суд отмечает, что Суд БиГ утвердил, что заявительница не подвергалась дискриминации из-за перехода на рабочее место в другой барак, так как Суд БиГ оценил, что самим подписанием договора о военной службе заявительница была осведомлена о том, что в соответствии с потребностями службы она может быть перемещена на другую должность.

При этом Конституционный суд указывает также на новейшую практику Европейского суда, в которой этот суд рассматривал подобный фактический и юридический вопрос[25]. Европейский суд рассмотрел несколько прошений по этому делу, где заявители жаловались на ограничения, установленные их работодателями. А именно: в этом деле заявительницы Эвейда и Чаплин жаловались на ограничения, установленные их работодателями, а речь шла о вопросе видного ношения креста на шее. Заявительница Эвейда - коптская христианка, практикующая религию, и от 1999 года она работала на регистрации пассажиров в компании British Airways Plc, частная компания. Указанная компания от своих работников, которые вступают в контакт с общественностью, требовала ношение формы. Правила ношения одежды предусматривают, что любой аксессуар или предмет одежды, который работник должен носить по обязательным религиозным причинам должен быть скрыт под формой. После 20 мая 2006 года заявительница Эвейда решила открыто носить крест на работе. Когда она в тот день пришла на работу, менеджер попросил ее снять крест и цепочку или спрятать их под галстуком. 20 сентября 2006 года, после того, когда она не согласилась снять или спрятать крест, она отправлена домой без зарплаты до момента, пока она не решит

[25] См. Европейский суд, Eweida et al.v. the United Kingdom, судебное решение от 15 января 2013 года.

соблюдать свои договорные обязательства и правила ношения одежды. После этого, 23 октября 2006 года, ей предложено выполнение административных обязанностей, которые не подразумевали контакт с общественностью, т.е. это значило, что она не обязана носить форму, но она отклонила данное предложение. Работодатель заявительницы затем принял новые правила ношения одежды, которые, начиная с 1 февраля 2007 года, разрешали ношение религиозных и гуманитарных символов, как например крест и звезда Давида. Заявительницу Эвейду вернули на работу 3 февраля 2007 года с разрешением носить крест, согласно новым правилам. Однако British Airways отклонил просьбу заявительницы Эвейды возместить заработную плату за период, когда она не выходила на работу. В этом случае Европейский суд при принятии решения применил принцип пропорциональности между нарушением прав заявительницы Эвейды и защитой интересов работодателя, и в этом контексте в деле Эвейды принял решение, что были нарушены права заявительницы на свободу религии из статьи 9 Европейской конвенции, а в отличие от этого дела, в деле Чаплин преимущество дано работодателю, и Суд заключил, что в этом конкретном случае не было нарушено право на свободу религии согласно статьи 9 Европейской конвенции.

Связывая указанное решение Европейского суда с конкретным случаем, Конституционный суд прежде всего замечает, что в одном деле работодателем является частная компания, в которой заявительница не была возвращена на работу до момента изменения правил, которые позволили бы носить крест (хотя подобная возможность существовала), и что по ее возвращении заработок, потерянный за время ее отсутствия, не возмещен. С другой стороны, Конституционный суд подчеркивает, что в другом конкретном случае работодателем является Министерство обороны, которое, принимая во внимание его юрисдикцию, основывается на строго определенных правилах. Далее, заявительница была перераспределена на новое рабочее место и ей возмещен заработок, потерянный за время ее отсутствия. Кроме того, ввиду отсутствия правового акта, на основании которого заявительнице отказано в возмещении заработной платы и соответствующих взносов, Суд установил, что таким образом создано ее прошение к Министерству обороны о выплате. Кроме того, так как Суд БиГ установил, что не существуют акты, на основании которых заявительница удалена с работы, она была перераспределена на новое рабочее место согласно договору о принятии на службу, подписанному с Министерством обороны. Конституционный суд считает, что

принятие указанных решений Суда БиГ не нарушило право заявительницы на свободу проявления религии согласно положениям статьи II/3g) Конституции Боснии и Герцеговины и статьи 9 Европейской конвенции.

В конкретном случае заявительница считает, что она подверглась дискриминации из-за того, что она начала носить хиджаб - платок, и то что из-за этого она была лишена права на работу, а одновременно этим, согласно утверждениям заявительницы, в этом праве не отказано ее другим коллегам, которые „могут красить свои волосы, отращивать и красить ногти, и прочее". В связи с этим Конституционный суд, прежде всего, отмечает, что в конкретном случае речь идет о правилах и обязанностях, вытекающих из трудовых отношений, где, в случае возникновения определенных нарушений, и работник, и работодатель имеют возможность применения определенных средств правовой защиты, с помощью которых эти нарушения можно устранить. Объединяя в одном контексте утверждения заявительницы, что по причине дискриминации ей отказано в праве на работу [а другим - нет] и постановление Суда БиГ о том, что акт, согласно которому ее временно отстранили от работы - не существует (что не опровергает ни сама заявительница), а также тот факт, что Суд БиГ обязал Министерство обороны выплатить заявительнице возмещение за период ее отсутствия, Конституционный суд считает утверждения заявительницы о том, что ей „отказано в праве на работу" - полностью необоснованными. Следовательно, Конституционный суд считает, что утверждения заявительницы о нарушении права на запрещение дискриминации из статьи II/4 Конституции Боснии и Герцеговины и статьи 14 Европейской конвенции в связи с правом на свободу проявления религии - не обоснованы.

4. ОБЩИЙ ЗАПРЕТ ДИСКРИМИНАЦИИ

В решении № U 9/12 от 30 января 2013 года Конституционный суд заключил, что положение статьи 18d пункт 4 Закона об изменениях и дополнениях Закона об основах социальной защиты, защите гражданских жертв войны и защите семей с детьми[26] противоречит положению II/2 Конституции Боснии и Герцеговины, в сочетании со статьей 1 Протокола № 12 к Европейской конвенции, так как указывает

[26] Служебная газета Федерации БиГ, № 14/09.

на различное отношение к людям с инвалидностью, а для этого не существует разумного и объективного оправдания.

Конституционный суд напоминает, что статья 1 Протокола № 12 к Европейской конвенции содержит общий принцип запрета дискриминации и гарантирует предоставление всех прав, предусмотренных законом, без дискриминации по какому-либо признаку, как: пол, раса, цвет кожи, язык, религия, политические или иные убеждения, национальное или социальное происхождение, принадлежность к национальным меньшинствам, имущественное положение, рождение или любой другой признак. Далее, положения Протокола № 12 к Европейской конвенции подразумевают, что общественные органы не могут никого дискриминировать по какому-либо признаку, поэтому основной принцип запрета дискриминации распространяется и на национальные законы, а не только на права, гарантированные Европейской конвенцией, как это предусматривает статья 14 Европейской конвенции, на которую ссылается заявитель.

Конституционный суд в своем решении № U 7/11 от 30 марта 2012 г., установил, что на сегодняшний день отсутствует существенная практика в Европейском суде и в Конституционном суде, касательно толкования положений Протокола № 12 к Европейской конвенции. Поэтому в данном постановлении подчеркнуто следующее: „[…] что для Конституционного суда толкование, которое Европейский суд предоставил в решении, принятом по делу Сейдич и Финци против Боснии и Герцеговины, является значительным“[27]. В этом решении Европейски суд указал следующее: „Смысл дискриминации непрерывно толкуется в практике Суда в рамках рассмотрения статьи 14 Европейской конвенции. По сути, эта практика ясно показала, что дискриминация означает различное обращение с лицами в одной и той же ситуации, без объективного и разумного для этого оправдания[28]. Источники используют один и тот же термин дискриминации и в случае статьи 1 Протокола № 12. Несмотря на различия в этих двух положениях, значение этого термина в статье 1 Протокола 12 приближается значению термина из статьи 14[29]. Таким образом, Суд не видит причин отклоняться от установленной интерпретации дискриминации, как это описано в тексте, когда тот же термин,

[27] См. Европейский суд, Sejdić and Finci v. Bosnia and Herzegovina, постановление от 22 декабря 2009 г., заявки № 27996/06 и 34836/06.

[28] См. параграфы 42-44 и источники, которые их цитируют.

[29] Пояснительный доклад к Протоколу № 12.

используется в контексте статьи 1 Протокола № 12". В вышеупомянутом случае Европейский суд пришел к выводу, что имело место нарушение статьи 1 Протокола № 12 к Европейской конвенции, почти полностью ссылаясь на свои выводы в том же решении относительно нарушения статьи 14 Европейской конвенции в сочетании со статьей 3 Протокола № 1 к Европейской конвенции[30].

С учетом вышеизложенного, Конституционный суд напоминает, что, по мнению Европейского суда, дискриминация существует, если с лицом или группой лиц в похожей ситуации обходятся по-разному, в зависимости от пола, расы, цвета кожи, языка, религии (...), с аспекта соблюдения прав, предусмотренных Европейской конвенцией, без наличия объективного и разумного оправдания для такого обращения или использования средств по сравнению с желаемой целью, которые которые несопоставимы[31]. При этом не важно, является ли дискриминация результатом различного правового обращения или применения закона.

В соответствии с практикой Конституционного суда и Европейского суда, какой-либо акт или предписание являются дискриминационными, если они создают различие между отдельными лицами или группами лиц, находящихся в аналогичной ситуации, а также в случае если для подобного различия отсутствует объективное и разумное обоснование, т.е. если отсутствовала разумная соразмерность между используемыми средствами и поставленными целями, которые пытаются достигнуть. Однако, по мнению Европейского Суда, национальные власти при принятии решения имеют определенную свободу для оценки того, в какой мере различия в подобных ситуациях оправдывают такое различное обращение согласно закону. Объем этого усмотрения или оценки варьирует в зависимости от обстоятельств и фона этого дела[32].

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[30] См. Конституционный суд, Решение о допустимости и по существу дела № U 7/11 от 30 марта 2012 г., пункт 21, опубликовано в Служебном гласнике Боснии и Герцеговины, № 36/12.

[31] См. Европейский суд, Belgian Linguistic case, судебное решение от 9 февраля 1967 г., Серия А, № 6, параграф 10.

[32] См. Европейский суд, Rasmunssen в. Denmark, судебное решение от 28 ноября 1984 г., Серия А, № 87, параграф 40. Например, Европейский суд предоставил значительную свободу оценки в разработке и реализации решений в области налоговой политики (см. Европейский суд, Company „National and Provincial Building Society"et al. v. the United Kingdom, постановление суда от 3 октября 1997 г., Сборник отчетов 1997-VII, параграф 80).

В конкретном случае, заявитель считает, что спорным положением дискриминированы лица с инвалидностью, которая наступила после 65 лет. Заявитель указывает на то, указанные лица посредством спорного положения поставлены в неравноправное положение, хотя они должны быть защищены, так как на возникновение инвалидности невозможно повлиять. Он также указывает на то, что речь идет о лицах, нуждающихся в помощи.

Конституционный суд указывает на то, что международное право признает три основания для обеспечения адекватного уровня жизни: собственность, труд и социальное страхование. С точки зрения международной правовой защиты, лица с инвалидностью имеют все основные (общие) права и свободы человека, также как и все другие люди. Однако на основании своих объективных ограниченных возможностей у них также имеются некоторые дополнительные права. Эти права не отражают фаворитизм этих лиц (дискриминацию всех других). Они являются необходимым условием для обеспечения настоящего равноправия с другими людьми таким-же образом, как это обеспечивается другим уязвимым категориям людей, как например: дети, пожилые люди, меньшинства, итд.

Конституционный Суд отмечает, не предоставляя при этом какое-либо определение инвалидности, что термин „инвалид" - это общее название для лица, которое вследствие врожденного или приобретенного физического увечья (по причине болезни, травмы, ранения, и т.д.) является частично или полностью нетрудоспособным, а в некоторых случаях не может без посторонней помощи заботится о себе. В зависимости от происхождения инвалидность, как правило, делится на: инвалидов войны, инвалидов мирного времени и инвалидов труда, при условии, что возможно дальнейшее деление (например, инвалиды войны, военнослужащие, а также уволенные с военной службы лица, которые стали инвалидами во время прохождения военной службы, т.е. не во время военных действий и другие).

Однако Конституционный суд отмечает, что вопросы, касающиеся социальной политики и лиц с инвалидностью находятся в юрисдикции субъектов и кантонов. В результате этого в этой области имеются различные правовые решения.

В целях улучшения ситуации в области инвалидности, Конституционный суд отмечает, что Совет министров Боснии и Герцеговины 8 мая 2008 г. принял Политики в области инвалидности в

Боснии и Герцеговине[33]. В упомянутом документе отмечено, что цель этих политик Боснии и Герцеговины, ее субъектов Федерации Боснии и Герцеговины и Республики Сербской и Округа Брчко - обеспечение лицам с инвалидностью наилучших возможных качеств жизненного потенциала, уважение и достоинство, независимость, продуктивность и аналогичное участие в обществе в наиболее продуктивной и максимально доступной среде. После утверждения упомянутой политики оба субъекта разработали стратегии в области инвалидности, а именно: „Стратегия по продвижению общественного положения лиц с инвалидностью в Республики Сербской 2010-2015" и „Стратегия по стабилизации возможностей для лиц с инвалидностью в Федерации Боснии и Герцеговине 2011-2015".

Конституционный суд напоминает, что спорное положение предусматривает, что лица с инвалидностью, которая возникла после 65 лет, в случаях, когда утверждена необходимость в использовании прав на получение льгот и помощи от другого лица - это право осуществляется в соответствии с правилами кантона. По мнению Конституционного суда бесспорно следует, что упомянутое положение делает различие между лицами с инвалидностью по признаку возраста. В частности, на основании данного положения возникает различие между лицами с инвалидностью, которая возникла после 65 лет - по отношению к тем, чья инвалидность возникла до 65 лет. Поэтому по мнению Конституционного суда, спорное положение как таковое воздействует на возникновение различия между лицами с инвалидностью, основываясь на том, в каком возрасте возникла инвалидность.

Далее Конституционный суд должен рассмотреть существует ли разумное и объективное оправдание для такого различного обхождения. А именно, Конституционному суду задается вопрос, почему лица, которые стали инвалидами после 65 лет, должны осуществлять свои права в соответствии с положениями кантонов, а лица, чья инвалидность возникла до 65 лет, осуществляют эти права в соответствии с федеральными положениями. Конституционный суд подчеркивает, что орган принявший закон не предоставил Конституционному суду ответ, из которого можно было бы ясно заключить, что являлось фактором для принятия такого положения.

Конституционный суд подчеркивает, что вопрос социальной политики согласно статье III.2 Конституции Федерации БиГ

[33] Опубликовано в Служебном вестнике БиГ, № 76/08.

подчиняется юрисдикции федеральной власти и кантонов. При этом Конституционный суд отмечает, не растолковывая положения Конституции БиГ, что распределение юрисдикции между кантонами и федеральной властью указывает на то, что федеральная власть и кантоны совместно договариваются о способе проведения социальной политики, который не должен ущемлять пользователей правами. Как отмечает Конституционный суд, данная политика должна приводить к выравниванию и повышению прав лиц с инвалидностью, а не к различному обхождению и уменьшению их прав. Более того, приоритетом должно быть исполнение большей части международных обязанностей, которые страна Босния и Герцеговина, и соответственно ее субъекты, приняли на себя в области осуществления прав лиц с инвалидностью, которые являются наиболее уязвимой группой населения.

По мнению Конституционного суда, распределение юрисдикции не может быть разумным и объективным оправданием для таких различий в отношении лиц с инвалидностью по признаку возраста. Конституционный суд отмечает, что спорное положение само по себе бесспорно создает подобную разницу между лицами с инвалидностью на основании возраста. По мнению Конституционного суда, это уже является достаточным основанием для заключения, что спорное положение является дискриминационным, не вдаваясь в подробности самих условий и сумм, которые бы эти пользователи осуществили в соответствии с кантональными предписаниями, на которые указывает спорное положение.

Конституционный суд подчеркивает, что лица с инвалидностью имеют право на полное и одинаковое участие в обществе и улучшение качества своей жизни. С другой стороны обязанностью страны является обеспечение возможности этим лицам в достижении наилучшего жизненного потенциала, уважения и достоинства, продуктивности и одинакового участия в обществе, в самой продуктивной и наиболее доступной среде. Это значит, что целью каждого общества должно стать упрощение жизни для этой категории населения, а не их маргинализация. По мнению Конституционного суда, страна должна стремиться к тому, чтобы социальная политика не делала различий между лицами с инвалидностью, когда речь идет об осуществлении их прав, или же сведение данных различий к минимуму. Принимая во внимание вышеизложенное, Конституционный суд считает, что спорное положение не удовлетворяет этих запросов. Более того, спорное положение само по себе является дискриминационным, так

как разделяет лица с инвалидностью по признаку возраста. При этом законодатель не предоставил разумного и объективного оправдания для таких разделений.

5. ПРИНЦИП НЕЗАВИСИМОСТИ ПРАВОСУДИЯ И ОБЩИЙ ЗАПРЕТ ДИСКРИМИНАЦИИ

В решении номер U 7/12 от 30 января 2013 г. Конституционный суд заключил, что Закон о заработной плате и других компенсациях в судебных и прокурорских учреждениях на уровне Боснии и Герцеговины[34] не соответствует положениям статьи I/2 Конституции Боснии и Герцеговины, так как нарушает принцип независимости правосудия как основной гарантии верховенства закона. К тому же, этот закон не соответствует положениям статьи II/4 Конституции Боснии и Герцеговины, в сочетании со статьей 14 Европейской конвенции, статьей 1 Протокола номер 12 к Европейской конвенции и статьей 26 Международного пакта о гражданских и политических правах.

Исходной точкой для этого решения является позиция Конституционного суда о том, что судебная система играет важную роль в защите прав человека и основных свобод, в чем ключевую роль играет принцип независимости судов. Этот принцип гарантирован также статьей 6 Европейской конвенции, в которой говорится, что каждое решение должно приниматься независимым и беспристрастным судом, созданным на основании закона. С этим связано и требование Европейского суда, чтобы суд был независимым как от исполнительной власти, так и от сторон[35]. Также Конституционный суд отмечает, что Основные принципы Организации Объединенных Наций по вопросу независимости судебных органов от 1985 г. предусматривают, что страна гарантирует независимость судебной системы, что должно быть гарантировано конституцией или законом страны. Соблюдение независимости судебной системы является обязанностью государственных и прочих учреждений.

Вопрос о независимости судебной системы также был предметом мнения Европейской комиссии „За демократию через право“

[34] Служебный гласник БиГ, № 90/05 и 32/07.

[35] См. Европейский суд, Ringeisen v. Austria, судебное решение от 16 июля 1971 г., параграф 95.

(Венецианская комиссия) о правовой безопасности и независимости судебной системы в Боснии и Герцеговине от 15 и 16 июня 2012 года[36]. Мнение подготовлено по запросу Европейской комиссии в контексте Структурного диалога о работе судебной системы между Европейским союзом и Боснией и Герцеговиной. В этом Мнении подчеркнуто, что Венецианская комиссия в своем отчете о верховенстве закона, указала, что принцип правовой безопасности играет главную роль в поддержании доверия к судебной системе и верховенству закона. Существование правовой безопасности (или ее отсутствие) имеет огромное экономическое влияние, и ее должны продвигать все формы государственной власти. Она призывает законодателя обеспечить качественные законы и другие правовые документы. Венецианская комиссия отмечает, что правовая безопасность требует от исполнительной власти соблюдения этой безопасности при применении этих правовых инструментов и принятии решений, будь то в целом или в конкретных вопросах. Кроме того, судебные органы должны придерживаться этого принципа при применении правовых инструментов в конкретных случаях и при толковании положений закона.

Мнение указывает, что существуют две основные формы независимости правосудия: институциональная и индивидуальная. Институциональная независимость правосудия относится к вопросу способности правосудия действовать без давления остальных органов власти - исполнительной и законодательной. Институциональная независимость судебной системы обращает основное внимание на независимость судебной системы от остальных ветвей государственной власти (внешняя институциональная независимость). Необходимо также обратить внимание на отношения между судами внутри одной системы правосудия (внутренняя институциональная независимость). Институциональную независимость можно оценить с помощью четырех критериев. Одним из этих критериев является требование, что судебная система должна быть независимой также и в финансовых вопросах. В связи с этим подчеркнуто, что правосудие должно получать достаточно средств для правильного исполнения своих функций и иметь роль в принятии решений о том, как эти средства будут распределяться. Индивидуальная независимость относится к независимости, которую имеют судьи в качестве индивидуальных лиц при исполнении своих профессиональных обязанностей. Эти условия

[36] Далее по тексту: Мнение.

являются неотъемлемой частью основного демократического принципа разделения властей: судьи не должны подвергаться политическому влиянию, а правосудие всегда должно быть беспристрастным. Также было подчеркнуто, что индивидуальная автономия имеет несколько аспектов, и один из них - это безопасность мандата и финансовая безопасность.

Из вышеуказанного следует, что важным предварительным условием для независимости правосудия является финансовая независимость судебной системы вообще, а также финансовая безопасность судей в частности. В связи с этим, ссылаясь на Рекомендацию Совета Министров Совета Европы государствам-членам относительно судей: независимость, эффективность и подотчетность, от 17 ноября 2010 г., в пункте 11 указано, что внешняя независимость судей не является преимуществом или привилегией судей из-за их личных интересов, а из-за интересов верховенства закона и лиц, ищущих и ожидающих беспристрастного правосудия. Беспристрастность и независимость судей являются ключевыми для обеспечения равенства перед судом. В пункте 33 Рекомендации указано, что каждая страна должна предоставить определенные средства, объекты и оборудование, с целью обеспечить условия для действий и работы в соответствии со стандартами, предусмотренными статьей 6 Европейской конвенции.

Таким образом Конституционный Суд отмечает, что нельзя отрицать тот факт, что финансовая независимость судебной системы является важной предпосылкой для независимости судебной системы в целом. Конституционный Суд отмечает, что судебные органы финансируются из бюджета, который определяют две другие ветви власти, законодательная и исполнительная, но без участия судебной власти. С другой стороны, нехватка ресурсов и ограничение финансирования судебной системы может поставить под угрозу принцип независимости судебной системы. Это подчеркивается также в «Великой хартии вольностей», где пункт 4 предусматривает, что независимость судей гарантируется также через их финансирование. Кроме того, Конституционный Суд отмечает, что Основные принципы Организации Объединенных Наций по вопросу о независимости правосудия (ООН 1985) устанавливает обязанность каждого государства предоставить необходимые средства для обеспечения надлежащего функционирования судебной системы.

Конституционный суд считает, что в части введения Европейской хартии о законе о статусе судей, на которую также ссылается заявитель,

указано, что целью принятия упомянутой хартии было продвижение судебной независимости, для обеспечения высокого уровня верховности права и для достижения более эффективной защиты индивидуальных свобод в демократических странах. В этой хартии указано следующее: „Сознавая необходимость того, что положения, направленные на обеспечение наибольших гарантий компетентности, независимости и беспристрастности судей, должны быть изложены в официальном документе, предназначенном для всех европейских государств; Стремясь к тому, чтобы законы о статусе судей различных европейских стран учитывали эти положения в целях обеспечения наивысшего уровня гарантий в конкретных формулировках". Значит, несомненно, цель Хартии - это улучшить статус судей путем обеспечения высокого уровня компетентности, независимости и беспристрастности судей. Из общих принципов Европейской хартии следует, что ее положения не могут служить оправданием для поправки национальных законов с намерением сократить уровень уже достигнутых гарантий в этих странах.

Рассматривая запрос по делу, в контексте всего вышеизложенного, Конституционный суд отмечает, что законодательная власть оспариваемым законом лишила судей, прокуроров и остальных сотрудников Суда БиГ права на компенсацию расходов на проезд, питание и раздельное проживание. При этом, Конституционный суд подчеркивает, что материальным основанием является также сохранение независимости правосудия, на что указывают многочисленные международные документы. По мнению Конституционного суда, лишением прав судей, прокуроров и прочих сотрудников суда на упомянутые компенсации, в ситуации несуществования самостоятельных судебных и прокуратурных бюджетов, законодательная власть воздействует на структуру материальной основы и льгот, а этим и на роль правосудия, которую оно имеет в каждом демократическом обществе. Конституционный суд также подчеркивает, что принцип независимости правосудия является фундаментом для развития каждой страны, и что демократическое общество и верховенство права не могут существовать без независимого правосудия. Модернизация и эффективность правосудия должны быть приоритетом каждой демократической страны. Невозможность предоставить компенсации, о которых идет речь, представляет очевидную регрессию в гарантии, что отдельные судьи и прокуроры останутся независимыми, а это означает, что роль правосудия, служащего гражданам, будет слабеть, в то время когда ее необходимо

усиливать. Поэтому, очень важно не допускать никакого вида маргинализации правосудия.

Конституционный суд обращает особое внимание на необходимость обеспечить носителям судебных функций компенсацию за отдельное проживание, чтобы удовлетворить соответствующему принципу территорииального и национального присутствия судей и прокуроров в судебных учреждениях. А именно, по мнению Конституционного суда, принимая во внимание общественно-политический строй Боснии и Герцеговины, как и военные действия, которые, в числе прочего, в последствии вызвали изменения в структуре населения в Боснии и Герцеговине и внутренние миграции - существует необходимость обеспечения в судебных органах, учреждениях, соответствующего территориального присутствия конститутивных народов и Остальных. Таким образом, предоставление указанной компенсации приводит к обеспечению определенного территориального присутствия конститутивных народов и Остальных в правосудии, что, по мнению Конституционного суда, увеличивает доверие и репутацию правосудия в глазах общества, т. е. граждан Боснии и Герцеговины. По мнению Конституционного суда, все вышеуказанное соответствует положению статьи 43 параграф 2 Закона о высоком судебном и прокуратурном совете Боснии и Герцеговины[37], которое предусматривает критерии для назначений судей и прокуроров. Это положение предусмотрено так, что Совет применяет соответствующие конституционные положения, которыми определяются одинаковые права и присутствие конститутивных народов и Остальных.

Конституционный суд отмечает, что судьи, прокуроры и определенные группы экспертных сотрудников в судебных учреждениях на уровне Боснии и Герцеговины по оспариваемому закону не получают одинаковые льготы в качестве выбранных должностных лиц, государственных служащих, работников и других сотрудников в органах законодательной и исполнительной власти в Боснии и Герцеговине. Вопрос этих льгот в остальных учреждениях Боснии и Герцеговины предусмотрен Законом о заработных платах и льготах в учреждениях Боснии и Герцеговины[38]. Конституционный суд снова напоминает о Великой хартии вольностей, которая обязывает

[37] Служебный гласник БиГ, № 25/04, 93/05, 32/07, 48/07 и 15/08.
[38] Служебный гласник БиГ, № 50/08, 35/09, 75/09, 32/12, 42/12 и 50/12.

страну на обеспечение человеческих, материальных и финансовых ресурсов для обеспечения независимости правосудия.

В спорном законе Конституционный суд не находит оправдания для различного обхождения относительно структуры доходов пользователей государственного бюджета, принимая в особое внимание тот факт, что правосудие является особой категорией пользователей бюджета, как и то, что спорный закон принят семь лет назад, и с тех пор никогда не был изменен и дополнен в соответствии с экономической и финансовой ситуацией в стране. Поэтому Конституционный суд считает, что не существует разумное соотношение между полученными средствами и целью, которой пытались достичь принятием этого оспариваемого закона. Более того, можно заключить, что не предусматривание этих льгот в спорном законе представляет дискриминацию этих бюджетных пользователей, так как нарушает конституционный принцип из положения статьи II/4 Конституции Боснии и Герцеговины. Тем самым, Конституционный суд уважает дискреционное право законодателей регулировать определенные области так, как он посчитает наиболее целесообразным. Поэтому, в решении U 12/09 Конституционный суд указал, что он уважает особенность конституционного порядка Боснии и Герцеговины, но что совместные конституционные стандарты комплексных стран - в особеннонсти на уровне Европы - должны приниматься во внимание, а отклонения допустимы только когда существует достаточно на это причин[39]. Однако, Конституционный суд опять отмечает, что доходы держателей судебных должностей должны быть соответствующего уровня в целях обеспечения эффективности и независимост и правосудия.

6. ПРАВО НА НАИМЕНОВАНИЕ ЯЗЫКА

В решении номер U 7/15 от 26 мая 2016 г. Конституционный суд заключил, что первое предложение статьи 7 параграф 1 Конституции Республики Сербской, в части „язык боснийского народа“ - нейтральное положение, которое не определяет название языка, а содержит право конститутивного боснийского народа, как и всех других конститутивных народов и Остальных, которые так не декларируются, называть язык, на котором они говорят - по их желанию, что соответствует Конституции Боснии и Герцеговины.

[39] См. Конституционный суд, Решение № U 12/09 от 28 мая 2010 г., пункт 34.

Любое иное обращение на практике привело бы к нарушению как Конституции Боснии и Герцеговины, так и Конституции Республики Сербской.

В начале своего изложения Конституционный суд дал общее мнение о языке, соответственно, почему право на название языка является конституционным вопросом в конкретном случае. Во время рассмотрения запроса Конституционный суд рассматривал исключительно конституционные аспекты права на название языка. Конституционный суд не рассматривал экспертные вопросы и возможные (экспертные) дилемы, связанные со служебными языками, которые используются в Боснии и Герцеговине (например, идет ли речь об одном или трех языках, в какой мере они похожи или различны, и т.д.), так как это вопросы, которые должна решить наука (лингвистика), а не Конституционный суд.

Так как существуют разные языки и разные народы/нации, которые говорят на этих языках, самостоятельно возникает идея о языке как о конститутивном элементе этнической/национальной принадлежности. Язык и письмо являются одними из важнейших характеристик конститутивных народов, которые формируют их личность. Поскольку язык, помимо прочего, представляет свободу выражения своей национальности и культуры, свободу использовать свой язык и равенство языков народов - он является одним из гарантированных прав. Как для конститутивных народов, так и для меньшинств, эта свобода означает право свободного использования своего языка и в частной жизни, в обращениях к государственным органам, в печати как и во всех других формах общественного употребления языка. Поэтому, каждый вопрос, затрагивающий эту сферу, очевидно представляет витально важный вопрос для каждого конститутивного народа.

В решении о допустимости и по существу дела № 10/05[40] Конституционный суд предоставил понятие витального интереса конститутивного народа. Конституционный суд представил несколько факторов, которые формируют понимание вышеупомянотого понятия. Во первых, понятие „витального интереса" - это функциональная категория и ее нельзя рассматривать отдельно от понятия конститутивности народов, чьи витальные интересы защищают статьи IV/3e) и f) Конституции Боснии и Герцеговины.

[40] См. Конституционный суд, Решение № U 10/05 от 22 июля 2005 г., опубликовано в Служебном гласнике БиГ, № 64/05.

Далее, Конституционный суд в своем решении подчеркнул, что: „В последнем предложении преамбулы Конституции Боснии и Герцеговины, босняки, хорваты и сербы определяются конститутивными народами (наряду с другими) и гражданами Боснии и Герцеговины". Конституционный суд в своем третьем частичном решении U 5/98[41] пришел к выводу, что „независимо от того, насколько неопределенным является язык Преамбулы Конституции БиГ из-за недостатка определения статуса босняков, хорватов и сербов в качестве конститутивных народов, она ясно определяет всех их как конститутивные народы, т. е., в качестве народов. Концепция конститутивности народов, как далее указано, это не абстрактное понятие. Оно включает в себя определенные принципы, без которых общество, с различиями, защищаемыми конституцией, не смогло бы эффективно функционировать"[42]. В дальнейшем анализе значения „витального интереса" Конституционный суд в вышеупомянутом решении подчеркнул, что значение „витального интереса" частично сформировано статьей I/2 Конституции Боснии и Герцеговины, которая отмечает, что Босния и Герцеговина - демократическая страна, т. е., „что демократические органы власти и справедливые процедуры лучше всего создают мирные отношения в плюралистическом обществе" (абзац 3 Преамбулы). В связи с этим, интерес конститутивных народов - как можно больше участвовать в системе власти и действиях общественных органов власти - можно считать витальным интересом. Также было отмечено, что: „Витальный интерес, как уже упомянуто в этом решении, включает защиту разных прав и свобод, которые предоставляют значительную помощь в обеспечении того, чтобы конститутивные народы могли выносить свои интересы в рамках колективного равенства и участия в функционировании государства. Кроме того, что это является конституционным правом[43], свобода использования своего языка в участии и подходе к

[41] Решение от 7 января 2000 г., опубликовано в Служебном гласнике БиГ, № 23/00, параграф 52.

[42] Решение Конституционного суда, № U 2/04, пункт 33.

[43] См. статья II/4 Конституции Боснии и Герцеговины в сочетании со ст. I/4, II/3м) и II/5 Конституции Боснии и Герцеговины, Европейскую хартию по региональным языкам и языкам меньшинств и Четвертое частичное решение суда, № U 5/98 от 18 и 19 августа 2000 года, опубликованное в Служебном гласнике БиГ, № 36/00, пункт 34.

образованию, информациях и идеях на этом языке - тоже подпадает под сферу витального интереса“[44].

Конституционный суд также напоминает о мнении в вышеупомянутом решении номер U 5/98, в котором подчеркнуто: „Поскольку каждое положение конституций субъектов должно соответствовать Конституции БиГ, включая Преамбулу этой конституции, положения Преамбулы предоставляют правовое основание для пересмотрения всех нормативных актов, объема прав и обязанностей или ролей политических учреждений. Таким образом, положения Преамбулы - не только описные, им придается нормативная сила, и они представляют достаточный стандарт для судебного контроля Конституционного суда“ (параграф 26).

Прежде всего, Конституционный суд подчеркивает, что Конституция Боснии и Герцеговины неясно регулирует употребление служебных языков в Боснии и Герцеговине. Однако, Преамбула Конституции Боснии и Герцеговины предусматривает принцип конститутивности народов, содержащий ряд отдельных коллективных прав конститутивных народов (в сообществе с Остальными) и граждан Боснии и Герцеговины. Как уже упомянуто в предыдущих пунктах этого решения, язык является одной из важнейших характеристик конститутивного народа и составляет его личность. Это конституционное право следует из соблюдения принципа человеческого достоинства из первого предложения Преамбулы Конституции Боснии и Герцеговины. Было бы иллюзорно говорить о соблюдении человеческого достоинства из первого предложения Преамбулы Конституции Боснии и Герцеговины, если не соблюдать право и волю конститутивных народов и Остальных на свободное употребление своего языка.

Конституционный суд далее отмечает, что вопрос употребления служебных языков в Федерации Боснии и Герцеговине регулируется статьей 6 Конституции Боснии и Герцеговины таким образом, что в пункте (1) упомянутой статьи указано: „Служебные языки в Федерации Боснии и Герцеговине: боснийский язык, хорватский язык и сербский язык", в то время как в пункте (2) предусмотрено: "Остальные языки можно использовать в качестве средства коммуникации и образования“. Служебными языками, в соответствии с первоначальными положениями Конституции Федерации БиГ были боснийский и хорватский языки. Однако исполнением решения о

[44] Решение Конституционного суда, № U 8/04, п. 38-41.

конститутивности трех народов в Федерации Боснии и Герцеговине, Поправка XXIX предусматривает, что сербский язык также является официальным языком.

Вопрос служебных языков в Республике Сербской регулируется статьей 7 п. 1 Конституции Республики Сербской, который предусматривает следующее: „Служебными языками Республики Сербской считаются: язык сербского народа, язык босняцкого народа и язык хорватского народа." Пункт 2 упомянутой статьи предусматривает, что „на территориях, где живут другие языковые группы - в употреблении находятся их языки и письмо, как предусмотрено законом".

Конституционный суд прежде всего желает отметить, что оспоренное положение статьи 7 п. 1 Конституции Республики Сербской принято 19 апреля 2002 г., когда высокий представитель принял решение об изменениях и дополнениях Конституции Республики Сербской (Поправка LXXI), в целях исполнения четырех частичных решений Конституционного суда номер U 5/98 (решение о конститутивности). Конституционный суд отмечает, что до принятия упомянутой поправки в Республики Сербской в служебном употреблении стоял только "сербский язык с „экавским и иекавским диалектом". Следовательно, причиной принятия упомянутой поправки к Конституции Республики Сербской было согласование конституции субъекта с Конституцией Боснии и Герцеговины после принятия Решения Конституционного суда номер U 5/98.

Конституционный суд замечает, что в первом предложении статьи 7 п. 1 Конституции Республики Сербской представлено определение служебных языков Республики Сербской, и следовательно, указано, что служебные языки в Республике Сербской „язык сербского народа, язык босняцкого народа и язык хорватского народа". Конституционный суд считает, что таким образом предоставлено описное - нейтральное определение служебных языков, которые используются в Республике Сербской, а не название языков конститутивных народов. А именно, как следует из самого определения „язык босняцкого народа" - это язык, используемый босняками (без конституционного названия этого языка). Значит, в отличие от Конституции Федерации Боснии и Герцеговины и Правил Конституционного суда, где ясно дано название языков, которые служебно используются в Федерации Боснии и Герцеговине и во время коммуникации с Конституционным судом, Конституция Республики Сербской не называет, т. е., не дает наименование языку, а вместо этого связывает его с конститутивным

народом указывая, что в Республике Сербской, помимо всего прочего, в употреблении находится также „язык босняцкого народа“. Таким образом, босняцкому народу не навязывается название языка, а отмечается, что у босняцкого народа есть право использовать свой язык в качестве служебного. Это означает, что в Республике Сербской, кроме „языка сербского народа“ и „языка хорватского народа“, в служебном употреблении находится также язык „босняцкого народа“.

Конституционный суд отмечает, что Венецианская комиссия во мнении, предоставленном по поводу реализации Решения Конституционного суда номер U 5/98 и принятых поправок к Конституции Республики Сербской[45], помимо прочего, подчеркнула, что: „чувствительным вопросом официальных языков занимается статья 7 Официальные языки в Республике Сербской - это язык сербского народа, язык босняцкого народа и язык хорватского народа. Эта неопределенная формулировка посторена таким образом с целью избежания излишних дебат по поводу правильного названия языка“.

Такой подход ко всем народам, в том числе к конститутивному босняцкому народу, который дает право самим определять название своего языка, по мнению Конституционного суда соответствует принципу конститутивности народов. Значит, спорное положение не дает названия служебным языкам (не дает наименование), т. е., не содержит название языка, которое бы противоречило названию языка, на котором говорят босняки в Республике Сербской. Если оспоренное положение анализировать в более абстрактном смысле без рассмотрения конкретных случаев, т. е., действий общественной власти в Республике Сербской, то это не предотвращает босняков называть свой язык по своему желанию. Конституционный суд заключает, что первое предложение статьи 7 параграф 1 Конституции Республики Сербской, в части "язык босняцкого народа" в качестве нейтрального положения - не дает название языку и соответствует принципу конститутивности народа.

Однако, Конституционный суд отмечает, что, в отличие от большинства утверждений из ответа на запрос, язык является собственностью народа, использующего его, и поэтому его название должно отражать желание большинства людей, говорящих на нем. Конституционный принцип о свободе употребления языка и свободе назвать свой язык по собственному желанию следует из принципа человеческого достоинства из первого предложения Преамбулы к

[45] Принято на 52. пленарном заседании 18 и 19 октября 2002 г.

Конституции Боснии и Герцеговины, и представляет выражение принадлежности к народу, особое выражение национальной культуры.

Конституция Боснии и Герцеговины нигде не предусматривает, что названия языков, на котором говорят конституционные народы, должно быть связано с названием конституционного народа. Конституция Боснии и Герцеговины дает право конституционным народам и остальным называть язык, на котором они говорят - по их желанию. Это положение не дает право общественным властям в Республике Сербской в определенных случаях определять название языка, на котором говорят босняки - противно их конституционному праву называть язык на котором они говорят по собственному желанию. Название языка нельзя обусловливать языковыми правилами, так как конституционное право на название языка отделяется от содержания языка, стандарта языка, и т.д. Оспоренное положение не предотвращает босняков или кого-либо другого называть язык, на котором они говорят, так, как они хотять. Поэтому, такая концепция оспоренного положения следует мнению, что Конституция Боснии и Герцеговины дает право всем конститутивным народам, и боснякам и другим людям, которые так не декларируются - называть этот язык так - по собственному желанию.

Конституционный суд далее должен был ответить на вопрос, нарушает ли это оспоренное положение право босняков или других народов, считающих "боснийский язык" своим родным языком, на образование и школьное обучение на родном языке из-за того, что положение не содержит название „боснийский язык“. Соответственно, нарушается ли таким образом принцип запрещения дискриминации граждан из группы „Остальные“, которые принадлежат к боснийскому сообществу - в связи с правом на образование на родном языке.

Право на образование, которое гарантированно первым предложением статьи 2 Протокола номер 1 к Европейской конвенции, само по себе требует, чтобы его формировала страна, но этим не должна нарушаться сущность этого права, и это не должно противоречить другим правам, предусмотренным Европейской конвенцией или ее протоколами. По отношению ко второму предложению, Европейский суд в своем судебном решении Кэмпбелл и Козенс против Соединенного Королевства пояснил слова „философские убеждения“ в смысле второго предложения статьи 2. А именно, в своем обычном значении слово „убеждения“ само по себе не является синонимом слов „мнения“ и „идеи“ - как они употреблены в статье 10 Европейской конвенции, которая гарантирует свободу

выражения мнения. Она больше похожа понятию „верование“ (в французской версии текста - convictios), которое появляется в статье 9, которая гарантирует свободу мысли, совести и религии и обозначает взгляды, которые в определенной степени могут быть достоверными, серьезными, последовательными и важными[46].

Также, Европейский суд указал, что „слово `философский´ невозможно полностью определить“, и что „необходимо вложить немного труда для достижения точного значения этого слова“. Европейский суд отметил, что, принимая во внимание Европейскую конвенцию в целом, включая также статью 17, выражение "философские убеждения", по мнению суда, означает „те убеждения, которые уважаются в демократическом обществе,[47] и которые соответствуют человеческому достоинству“. Кроме того, „эти убеждения не должны противоречить правам ребенка на образование, чему и посвещена целая статья 2, в которой доминирует первое предложение“[48].

Далее, по практике Европейского суда, статья 2 включает в себя все функции страны, которые касаются образования и обучения, и не допускает возможности делать различия между религиозным обучением и другими предметами. Она предусматривает, что страна должна уважать и религиозные и философские убеждения родителей в течение целой программы государственного образования.

Конституционный суд отмечает пункт, указанный в Решении номер U 26/13, которое принято в процессе оценки конституционности Закона об основном образовании и воспитании Республики Сербской, Закона о среднем образовании и воспитании Республики Сербской, как и конституционности законов об основном и среднем образовании всех десяти кантонов в Федерации БиГ. В указанном решении Конституционный суд подчеркнул, что: „Все принципы и стандарты, предусмотренные Европейской конвенцией касательно дискриминации и права на образование - поддерживаются Конституционным судом. Далее, Конституционный суд считает, что в такой сложной стране, как Босния и Герцеговина, должна существовать

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[46] См. Европейский суд, Campbell and Cosans v. the United Kingdom, судебное решение от 25 февраля 1982 г., Серия А, № 48, стр. 16, параграф 3.

[47] См. Европейский суд, Young, James and Webster v. the United Kingdom, судебное решение от 13 августа 1981 г., Серия А, № 44, параграф 63.

[48] См. Европейский суд, Campbell and Cosans v. the United Kingdom, судебное решение от 25 февраля 1982 г, Серия А, № 48, стр. 16, параграф 36.

система образования, которая не будет противоречить указанным принципам. Значит, необходимо, чтобы система образования предоставила и родителям и детям право на образование, которое будет соответствовать их религиозным и философским убеждениям и которые заслуживают уважения в демократическом обществе, обществе без дискриминации по какому-либо признаку. Это единственный вид образования - в духе демократии, к чему и стремиться Босния и Герцеговина, а все остальное было бы иллюзорным"[49].

Конституционный суд отмечает, что в предыдущих пунктах этого решения он оценил оспоренное положение абстрактно, и напомнил, что положение следует мнению, что Конституция Боснии и Герцеговины дает право всем конститутивным народам, как и другим людям, которые так не декларируются - называть язык, на котором они говорят - по собственному желанию. Конституционный суд не может рассматривать все случаи, в которых общественная власть в Республике Сербской толкует оспоренное положение и применяет его в практике. Каждый отдельный случай может быть предметом отдельного дела, а в итоге и дел, возбужденных на основании статьи VI/3b) Конституции Боснии и Герцеговины. Оспоренное положение не дает право общественным властям в Республике Сербской определять название языка в определенных ситуациях, конкретно, языка, на котором говорят босняки, вопреки их конституционному праву называть язык, на котором они говорят - по собственному желанию. Во время принятия решений в таких случаях, все компетентные органы (суды и руководящие органы) должны принимать во внимание мнение Конституционного суда, что все конститутивные народы, как и другие, которые так не декларируются, имеют конституционное право называть язык, на котором они говорят, так, как они хотят, и что только такое толкование и применение на практике - соответствует Конституции Боснии и Герцеговины.

[49] См. Конституционный суд, Решение о допустимости и по существу дела № U 26/13 от 26 марта 2015 г., опубликованная в Служебном гласнике БиГ, № 33/15, параграф 39.

7. КОМПЕТЕНЦИИ И ОТНОШЕНИЯ МЕЖДУ УЧРЕЖДЕНИЯМИ БОСНИИ И ГЕРЦЕГОВИНЫ И СУБЪЕКТАМИ

В деле U 11/15 от 6 апреля 2016 г. Конституционный суд оценил, что Закон об обязательном страховании в дорожном движении не противоречит положениям статей I/2, I/4, III/3b) и III/5a) Конституции Боснии и Герцеговины. Конституционный суд считает бесспорным, что Закон о страховом агентстве в БиГ представляет „решение учреждений Боснии и Герцеговины" при толковании статьи III/3b) Конституции Боснии и Герцеговины, и что этим законом, т. е., статьей 6 этого закона определена процедура, которую должны соблюдать субъекты и округ Брчко во время принятия законов из области страхования. Конституционный суд отмечает, что этот суд поддерживает обязанность соблюдения процедур, предусмотренных государственным законом, и считает обязанностью каждого субъекта и округа Брчко Боснии и Герцеговины соблюдать эти процедуры, как конкретные процедуры, предусмотренные положением статьи 6 Закона о страховом агентстве в БиГ, так как этим способствуется соблюдение принципа верховенства закона, правовой определенности и равенства всех сторон.

8. ВМЕСТО ЗАКЛЮЧЕНИЯ

Босния и Герцеговина - это страна, которая в своей Конституции определилась за уважение и соблюдение прав человека и основных свобод. Уже в преамбуле Конституции БиГ ссылается на Универсальную декларацию о правах человека, Международный пакт о гражданских и политических правах, соответственно, об экономических, социальных и культурных правах и на Декларацию о правах лиц, которые принадлежат национальным или этническим, религиозным и языковым меньшинствам. Основную часть Конституции БиГ составляют 15 международных соглашений о правах человека, перечисленных в Приложении I к Конституции БиГ, а пользование правами и свободами из указанных международных соглашений обеспечено всем лицам в Боснии и Герцеговине, без дискриминации, как предусмотрено статьей II/4 Конституции БиГ.

Принцип верховенства права, указанный в статье I/2 Конституции БиГ, означает, что страна Босния и Герцеговина функционирует в соответсвии с существующими законами, а прежде всего, в соответствии

с Конституцией БиГ. Эта обязанность также относится к законодательной, исполнительной и судебнной власти Боснии и Герцеговины. Кроме того, внутренний строй Боснии и Герцеговины основывается на принципе разделения власти, что является важным для концепции верховенства права, с акцентом на независимость судов, перед которыми осуществляется принцип контроля власти путем права.

Верховенство права основывается на двух важных характеристиках, а это равенство всех перед законом и разделение власти. Независимость правосудия - это фундамент разделения власти, а правосудие - одна из трех граней власти в демократической стране. Оно занимает особое место и играет значительную роль в каждом демократическом обществе. Правосудие не только находится в равном положении как и другие две грани власти (исполнительная и законодательная), но и является особой гранью, потому что контролирует решения других двух граней власти. Далее, независимость правосудия является фундаментом гарантии верховенства права, демократии и соблюдения прав человека. Осуществленный уровень независимости судебной системы представляет ключевой показатель достигнутого уровня верховенства права в демократическом обществе.

Принцип независимости правосудия, не смотря на то, что это не указано четко в Конституции БиГ, представляет общий принцип, который необходимо соблюдать, так как он неотъемлем от принципа верховенства права, указанного в статье I/2 Конституции БиГ. Однако, принцип верховенства права и независимость судебной власти как его неотъемлемой части, в особенности принцип разделения власти, не значит, что законодатель не может законами и правилами регулировать вопросы, которые важны для функционирования государственных учреждений, даже если речь идет о судах, но только таким образом, чтобы это было предусмотрено и соответствовало Конституции БиГ.

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Summary

Decisions of the Constitutional Court of Bosnia and Herzegovina - Their Influence on Standardisation of Convention and National Law in the Court Practice in Bosnia and Herzegovina

The European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the primary burden in protection of human rights and fundamental freedoms lays on the authorities of the Contracting States, and the role of the European Court is only subsidiary. Hence, the burden of establishing standpoint on major interpretation of the values and ideas of this convention are transferred to the authorities of the Contracting States. However, the interpretation must be such that, primarily it complies with the general spirit of the Convention created as an instrument to accomplish and promote ideals and values of democratic society comprehensible and acceptable to the Contracting States and the European Court of Human Rights.
This paper analyses the latest practice of the Constitutional Court of Bosnia and Herzegovina and the effect of its jurisprudence on the standardisation of courts' practice in Bosnia and Herzegovina especially through so called evolutive interpretation of values and principles in the implementation of Convention standards in protection of human rights and freedoms. Through the jurisdiction of the Constitutional Court of Bosnia and Herzegovina, established by the Constitution of Bosnia and Herzegovina follows that this court has the authority to interpret and apply European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols to all cases brought before it. It means that it covers interpretation and implementation of the Conventions and Protocols as a whole rather than individual articles that regulate attainment and protection of individual human rights and fundamental freedoms.

Key words: *Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina, the European Convention for the Protection of Human Rights*

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and Fundamental Freedoms, The European Court of Human Rights, the Convention standards.

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PART THREE
GLOBALISATION AND CRIMINAL LAW
Influences of Globalization Process on Criminal Law

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CONTEMPORARY TERRORISM AS A GLOBAL SECURITY CHALLENGE AND THE ROLE OF CRIMINAL LAW

Abstract

For decades, terrorism has been an area of significant interest of academics from different fields of research. However, until the end of the twentieth century, the terrorism wasn't observed as a global threat. The terrorist attacks of the early 21st century in modern sociological and criminological literature are referred to as a milestone in the development of the phenomenon of terrorist crime. The post-modern or contemporary terrorism, by its essence, scale and phenomenology, significantly differs from classical and modern forms of this criminal phenomenon. The authors discuss conceptual definitions of terrorism and identify key elements for defining this phenomenon. The authors also indicate the specific characteristics of the contemporary (post-modern) terrorism, and then analyze the role of criminal legislation, focusing on the Serbian criminal legislation and the most important acts of international law in this area. The main question is whether the Serbian legal framework contains adequate legal instruments for fighting contemporary terrorism.

***Key words**: Terrorism, Post-modern terrorism, Criminal Law, Counterterrorism, Global security challenge.*

1. INTRODUCTION

Terrorism is considered a global phenomenon, with the renewed contents, the role and objectives in relation to previous period. The consequences that terrorism produce on national, regional and global levels are immense, both in the sphere of politics and security, as well as in the economy, tourism and other important areas of social life. The means and

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methods used by contemporary terrorist organizations, high level of their organization and changes in the operational structure, transnational character and objectives, links with powerful financial centers and organized crime (which is in the unique coexistence with terrorism), high level of interconnectedness and coordination, potential threat of unconventional weapons (biological, chemical, nuclear and radioactive), the use of cyberspace for communication, transmission of messages and planning and implementation of actions and other characteristics of these organizations, as well as the changed social reaction manifested in so called international war against terrorism, are clear indications that there have been some changes in the terrorist phenomenon in relation to the recent past, and that the stage of modern terrorism is so far the most dangerous stage of development of this type of crime.

Severe consequences of terrorist attacks in Belgium and France, in 2015 and 2016, migrant crisis and a series of smaller attacks in Germany, and also fierce terrorist strikes in the Middle East, especially in Iraq, cautioned the world public that terrorism continues to spread around the planet, and that an adequate response of national states and the international community still lacks. Terrorists take advantage of contemporary information technologies and global networking, where the Internet proves to be an excellent platform of informational and propaganda warfare. Thanks to a global distribution, availability and lack of censorship, Internet has become the most attractive media for post-modern terrorists. The role of traditional media is second rate compared to the Internet, which offers a whole field of possibilities for the free dissemination of ideology and psychological pressure on target audience.

Today, when the victims of terrorist attacks are randomly selected, innocent citizens are victimized without any personal contribution, simply due to the fact they were at a certain place at a certain time. This leads us to the conclusion that, in addition to endangering national security because of its predominantly political goals, terrorism becomes an extremely serious factor of endangering human security.[1] Authors believe that postmodern

[1]About the concept of human security: M. Milosevic, B. Banovic, *White collar crime and Human Security,* in: Twenty Years of Human Security - Theoretical Foundations and Practical Applications (eds. I. Đorđević et al.), Belgrade: Faculty of Security Studies, Paris: Institut Francais de Gedopolitique, 2015, 199-211.

terrorism is a specific phenomenon that can be viewed as a separate phase in the development of terrorist crime.[2]

Having this in mind, we shall concentrate to the analyses of different theoretical approaches to the concept of terrorism in the criminological literature and then discuss the basic characteristics of postmodern terrorism as a separate phase in the development of this criminal phenomenon. After that, we will focus to the most important documents of international law in the subject matter and analysis of domestic criminal legislation in Serbia.

2. THE CONCEPT OF TERRORISM AND THE CHARACTERISTICS OF POST-MODERN TERRORISM

Schmid and Yongman analyzed 109 definitions of terrorism and identified 22 elements that are most often mentioned in these definitions.[3] These elements are: the use of violence; political violence; causing fear or terror, threats, psychological impact and the expected reaction; distinction victims and wider targets; targeted, planned and organized the operation, methods of struggle, strategy, and tactics; violation of accepted rules; the absence of humanitarian reasons; blackmail, coercion and inducement to obedience; desire for publicity; stubbornness, impersonality, randomness, non-discrimination; victims are civilians, noncombatants, people with no connection to the matter; intimidation; innocent victims; executive, group, movement or organization; symbolic nature; the unpredictability of violence; secrecy and clandestinely repeating the campaign of violence; criminal, criminal character; requirements placed third parties. Unlike the above-mentioned authors, who measured the incidence of repetition of certain terms in a variety of definitions of terrorism, trying to find a common set of elements, some other authors have identified several key elements for the definition of terrorism. Jessica Stern believes that the essential elements of the

[2] B. Ganor, *The Counter Terrorism puzzles Interdisciplinary Center of Herzliya and Transaction Publishers,* Herzlia, 15-17; R. Gunaratna, The new al-Qaida: Developments in the Post-9/11 evolution of al-Qaida, in: Post Modern Terrorism: Trends, Scenarios and Future Threats (ed. B. Ganor), ICT Herzlia, Herzliya, 2005, 65; B. Hoffman, Modern Terrorism Trends: reevaluation after 9/11, Interdisciplinary Center of Herzliya and Transaction Publishers, Herzlia, 35 etc.

[3] A. Schmid, J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature,* Transaction Books, New Brunswick, New Jersey, 1988, 5-6.

concept of terrorism are "focus on civilians and deliberate causing of fear among the population of target group".[4]

Back in 1988, the State Department conducted research and found that there were a 109 definitions of terrorism, and that, in them, 22 different elements are used to define the concept of terrorism.[5] Burke believes that there is still no valid definition of the term, despite numerous attempts.[6]

Contemporary communication theorists placed the phenomenon of terrorism in the framework of symbolic communication theory. Carber claims that "terrorism, like any symbolic act can be seen as any other media of communication. It consists of four basic components: transmitter (the terrorist), targeted recipient, message and feedback (reaction of target audience)".[7] Jenkins,[8] Weimann[9] and Winn,[10] consider that the essence of a terrorist act is in its theatricality, because it is not primarily aimed at the immediate victims of the attack, but the audience that through means of mass communication looks at the event. Tsafti and Weimann concluded in their study that the postmodern version of a terrorist crime may be defined as an attempt to convey message.[11]

Cassese, similarly, allocates the three elements of the definition of the concept of international terrorism: incriminated deed that the terrorist act was committed, the use of force or threat of use of force to cause fear among specific target groups and the political, religious or other ideological motivation that transcends the ends of one or more persons.[12] Shaw proposes a simple definition of terrorism: "the use of terror to achieve a political objective."[13] Tomaševska differs terrorist acts from similar forms of criminal behavior by means of which the author calls extra normal;[14] indirect mode to

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[4] Dz. Stern, *Extreme terrorists,* Alexandria press, Belgrade, 2004, 8.

[5] J. Record, *Boundng the Global War on Terrorism,* Strategic Studies Institute, Washington, 2003, 12.

[6] J. Burke, *Al Qaeda: The True Story of Radical Islam,* Penguin Books, London, 2004, 22.

[7] Y. Tsfati, G. Weimann, www. terrorism.com: Terror on the Internet, Haifa University, Tel Aviv, 2002, 317.

[8] B. Jenkins, *International Terrorism,* Crescent Publications, Los Angeles, 1975, 25- 35

[9] G. Weimann, *The Mediated Theater of Terror: Must Show Go On?* in: The News Media and Terrorism (ed. P. Bruck), Carlton University Press, Ottawa, 1986, 1-22.

[10] G. Weimann, C. Winn, *The Theatre of Terror, Longman Publication,* New York, 1994, 42-47.

[11] Message are conveyed through the use of systematic, orchestrated violence. Y. Tsfati, G. Weimann, op.cit., 318.

[12] A. Cassese, *International Law,* Oxford University Press, New York, 2005, 450.

[13] M. Shaw, *International Law,* Cambridge University Press, Cambridge, 2004, 1048-1053.

[14] K. Tomaševski, *Izazov terorizma,* Napredak, Aranđelovac, 1973, 22.

achieve the objectives, which is why the author also calls it "communications war"; its immorality; illegality, that is characteristic of the act which is prohibited by law; and focus on creating a sense of intimidation in public. Concise Oxford Dictionary of Politics provides a definition of terrorism, based on a modern approach to this phenomenon: "... the term around which there is no agreement among governments nor in academic analyzes, almost always used in a pejorative sense, most often to describe acts endangering life by politically motivated self-organized groups."[15]

Dimitrijević identifies four elements of the terrorist phenomenon "terrorist acts are usually violent; they are politically motivated, potential victims of such acts usually have nothing to do with politics; and, finally, the aim is to provoke feelings of fear and insecurity."[16] Laqueur states that the use of force or threat of use of force is the only common element of all terrorism definitions, but this element is not sufficient to properly determine the concept of terrorism. He defines terrorism as an illegitimate use of violence to cause panic in society and achieve a political goal, while targets of attack are innocent people.[17] Ignjatović notes that the most common definition of terrorism in the literature defines it as a "form of political crime which by unpredictable violence seek to achieve a change in society."[18] The author insists on the separation of the terms "terror" - which is tantamount to a form of government, such tyranny, and represents the use of violence by the subjects who possess political power; and "terrorism" as a "form of struggle of social groups that do not have the power to influence social trends or at least not in a way that is determined by the law."[19]

Schmid proposes two definitions of terrorism. The first is the so-called short legal definition as follows: "terrorism in peace is the equivalent of a war crime." The second is the definition of academic consensus- "terrorism is a method that causes fear, whit committing acts of violence by the (semi) secret individuals, groups or government entities from unusual, criminal or political reasons, where, as a contrast to the assassination, direct victims of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (random target) or selectively (symbolic targets) among the target population, and they serve as messengers. Threats

[15] I. Mc Lean, A. Mc Millan, *The Concise Oxford Dictionary of Politics,* Oxford University Press, 2003, 81.
[16] V. Dimitrijević, R. Stojanović, *Međunarodni odnosi*, Službeni list SRJ, Beograd, 1996, 340-341.
[17] W. Laqueur, *Postmodern Terrorism: New Rules for an Old Game,* Foreign Affairs, 1996, 87.
[18] Đ. Ignjatović, *Kriminologija,* osmo izmenjeno izdanje, Službeni Glasnik, Beograd, 2007, 283.
[19] *Ibid.*

and communication processes that are based on violence between terrorists and victims, are used to manipulate the main targets (the audience) turning them into a target of terror, a target of demand or an target of attention, depending on what the attackers are primarily looking to achieve. The task of the terrorists is to intimidate the public and the authorities of the State or international organization and compels them to make a particular decision or abstain from doing any act. Terrorism is, in this sense, a form of psychological warfare, which is possible only in democratic countries, where the public has a role in political decision-making.

With this in mind, and summarizing key elements outlined in the literature, we can define terrorism as a form of political crime that characterizes the deliberate use of violence against civilians or threat of its use, with the intention of intimidating the public and political decision-makers and their coercion to certain acts or maintenance, in order to achieve political or other social goals.[20]

However, the development of terrorism, as well as the start of the so-called international war against terrorism, has led to many changes in tactics, manner of execution, the reach, methods, resources, organization and objectives of the leading terrorist groups. Terrorism, at the end of the twentieth century, has become a global security challenge. In the literature we find interesting and precise division of the stages of development of a terrorism, which clearly outlines the contemporary, i.e. post-modern terrorism as a milestone in the genesis of these criminal phenomena. Ganor argues that there are three basic stages in the evolution of the phenomenon of terrorism: classical, modern and post-modern terrorism.[21] Classical terrorism is the oldest form of phenomena. Its characteristics are: personalize mint, that is, focus attacks on concrete, individual specific person who has a certain social power and influence the adoption of important political or similar decisions. This kind of terrorism can not be distinguished and of organization of and methodical, but is mostly a personal act of an individual. The aim of the terrorists was a classic exercise of the direct impact of a change in official policy, the system of government or representatives of the authorities. This form of terrorist crime was dominant until the first half of 20thcentury.

Modern terrorism occurs in the second half of the last century. Its target is the civilian population, and the aim is to exert pressure on the public, by producing an atmosphere of fear and insecurity among the population, in

[20] M. Milošević, *Teroristi: žrtve i zločinci-faktori kriminalne motivacije,* Univerzitet u Beogradu-Fakultet bezbednosti, Beograd, 2009, 35.
[21] B. Ganor, *op. cit.*, 17.

order to indirectly influence to political decisions or to achieve other objectives (obtaining autonomy or independence for certain regions, national liberation, etc.).[22] For the last stage in the evolution of the terrorist phenomenon, Ganor considers post-modern terrorism. The target is a broad population, resources and methods are drastic, and deadlier than ever, and the goal is a total change of political reality.

Gunaratna, similarly, argues that universal jihad ideology promoted by representatives of al-Qaeda, is an framework for gathering of many groups that are otherwise struggling to achieve local goals, thereby laying the foundations for the creation of a global terrorist network.[23] In order to spread their ideology, the leaders of al-Qaeda form training camps around the world and participate in armed conflicts and also provide substantial financial assistance to local Muslim organizations.[24]

According to the same authors, changes are observed in respect to the operational methods and the means, which have led to far greater efficiency of terrorist organizations. Their actions caused more deaths than previously, as a result of using the suicide attacks.[25] Hoffman argues that there has been a fundamental change in the functioning and organizational structure of Al-Qaeda and other significant terrorist organizations.[26] This structure is made up of several levels that consist of the members of different social and psychological characteristics. One of the main dangers which these changes carry is related to the potential use of non-conventional resources (nuclear, chemical and biological) by terrorists, which can pose a threat of global level and reach.

The characteristic of modern terrorism is the use of IT structure for action planning, coordination of terrorist networks, propaganda and recruitment of potential members. Maintenance of the global terror network would not be possible without the communication performance which the Internet allows. After the terrorist attacks in September 2001, the security of cyberspace and the protection of critical information infrastructures, particularly in Western countries, became one of the main issues. Accentuating these issues arise as a

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[22] B. Hoffman, *Modern Terrorism Trends: Reevaluation after 9/11,* Interdisciplinary Center of Herzlia and Transaction Publishers, Herzlia, 35-38.

[23] R. Gunaranta, *op.cit.*, 45.

[24] *Ibid.*, 45. The examples of this include al-Qaeda activities in the regions of Tajikistan, Kashmir, Bosnia, Chechnya, Dagestan, Mindao and Xsingjang.

[25] A. Merari, *The Profile of the Modern Terrorist,* in: Post Modern Terrorism (ed. B. Ganor), Interdisciplinary Center of Herzlia, Herzlia, 2005, 107- 110.

[26] *Ibid.*, 57-62.

result of information that the Internet represents the main source of information necessary for the planning and implementation of the attack.[27] Obviously, the use of global information network for terrorist activities is an important feature of the phenomenon of post-modern terrorism.[28] This is explained by the very nature of terrorist act, which operates through the transmission of messages and psychological symbolism. The aim of terrorists is to intimidate the public and thus indirectly coerce the state government. Terrorist organizations strive to establish dominance and control by the spread of fear, which is effectively highlighted by Hacker: "…. they want to fascinate …. they play for the audience and they want to attract the public attention".[29] This feature of terrorism comes to the fore in the modern era, because the aforementioned speed and volume of interactions through the internet social networks leads to the maximization of psychological effects towards policy decision makers in democratic countries. The effectiveness of the international fight against this and other security threats in cyber-space, however, is limited by the ambiguity of leading world powers on the issue of the legal status of cyber conflict.[30]

An important feature of postmodern terrorism lies in introducing the new channel of funding – contemporary terrorists are increasingly being supplied from the proceeds of organized crime, including money laundering, corruption and corporate crime.[31]

Based on the foregoing, we think that contemporary or postmodern terrorism, can be operationally defined as a phase in the development of a terrorist crime, characterized by: a. universal political and social goals of leading terrorist groups; b. the creation of regional and global terrorist networks and changed structure of terrorist organizations, primarily in terms of their greater resilience, adaptability and diffusion, links with organized

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[27] N. Putnik, *Sajber prostor i bezbednosni izazovi*, Univerzitet u Beogradu, Fakultet bezbednosti, Čigoja štampa, Beograd, 2008.

[28] B. Banović, V. Turanjanin, I. Ilić, *Visokotehnološki terorizam - permanentna pretnja današnjice,* u: Suprotstavljanje savremenom organizovanom kriminalu i terorizmu (ur. S. Mijalković *et. al.*), Beograd, Kriminalističko-policijska akademija (Edicija Asphaleia ; knj. 5), 2013, 325-338.

[29] J. F. Hacker, *Dialectical Interrelationships of Personal and Political Factors in Terrorism*, in: Perspectives on Terrorism (eds L. Freedman, A. Yonah), Scholarly Resources, Wilmington, Delaware, 1983, 19-32.

[30] M. Milošević, N. Putnik, *Problem pravne (ne)regulisanosti konflikata u kiber prostoru*, Treći program, br. 162, 2/2014.

[31] B. Banović, M. Milošević, *Povrede ljudskih prava od strane korporacija i mogućnosti krivičnopravne zaštite,* Teme, 3/2014, 1251 – 1273.

crime, financing through money laundering, corruption and related criminal activities; c. increased threat of use of non-conventional resources; d. the ability of carrying out serious activities in cyberspace; e. the emergence of a growing number of activists ready to carry out suicide attacks, but also those who are trained to perform complicated terrorist attacks on information systems. However, special attention should be paid to a phenomenon of suicide terrorism which especially contributed to the horrifying performance of contemporary terrorist attacks. That is the reason, we will shortly view its occurrence and basic features.

3. CONCEPT AND CHARACTERISTICS OF SUICIDE TERRORISM

Jihad ideology is not the only source of suicide terrorists' motivation. It should be admitted that greater number of suicide attacks were done by radical jihad organizations, and that the context in which jihad suicide-fighters work is unique. The examples of suicide terrorist attacks existed before 1980s, but, these cases were sporadic isolated incidents, they did not have systematic character nor were they part of a general strategy of some terrorist organization.[32]

The beginning of suicide terrorism era is 1983, the attack on the USA Embassy in Beirut. After this event, there occurred 300 suicide attacks, recorded around the world, in this period that lasted until 2003. The attacks occurred in the territories of Lebanon, Israel, Sri Lanka, India, Pakistan, Afghanistan, the Yemen, Turkey, Russia and the USA.

The growth of suicide attacks death rate number is striking. Pape cites the data, that there were 31 suicides terrorist attack acts, in the 1990s this number grew to 104, and that only in the period from 2000 until 2001, 53 attacks were recorded.[33]

This data are especially astounding, the author continues, if you bear in mind that the overall number of terrorist acts compared to the 1980s is in significant decrease. Results obtained by terrorist organizations applying suicide method, are not at all negligible. In this way Pape cites that suicide attacks were aimed at the USA and French governments to make decisions to withdraw troupes from Lebanon 1983, Israelis to do the same in 1985, and to

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[32] R. Pape, *The Strategic Logic of Suicide Terrorism,* American Political Science Review, Vol. 97, No. 3, Chicago, 2003, 25; C. Rapoport, David, *Assassination and Terrorism*. Toronto: CBC Merchandising, 1971.

[33] *Ibid.*

withdraw their forces from the area of Gaza and the Western Banks, in 1994 and 1995.

It is striking data that there were five suicide attacks monthly on average in Israel during 2002. Ganor cites the data that over fifty percent of all the victims in Israel in the period of 2000 - 2005 lost their lives as a consequence of suicide terrorism acts.[34]

However, it is an undisputed fact that suicide terrorism act became a part of certain terrorist organizations systematic politics. Ganor thinks that suicide attacks that occurred during the last two decades became the most dangerous modus operandi of contemporary terrorism.[35]

Contemporary authors almost without exception agree that sudden growth in number of suicide attacks around the world, which is most prominent in the last decade, is a result of tactic commitment of terrorist organizations, who realized that it "works" and that they can bring about greater advantages in a conflict with a technologically stronger opponent.[36] Suicide attacks present an extraordinary means for terrorist organizations and their gaining crime aims, but with great threat, given the potential modifications of this kind of terrorist acts, above all, in the course of suicide tactics combining and attacks with unconventional arms – chemical, radioactive, biological and nuclear.

Anyhow, before we chose sides to some motivation explanation which is in the background of a terrorists' decisions to start suicide campaigns, the question what suicide terrorism really is, should be considered, that is the definition of this concept should be given.

Suicide terrorism, as is cited in literature, can be defined in two ways. The first, narrower definition reduces suicide terrorism to situations in which an attacker directly takes his life during an action.

According to another, broader definition, the concept of a suicide attack includes every situation in which is clear that a terrorist loses his life during an action, that is, it does not include those situations in which he does not take his own life.

We believe that narrower definition of suicide terrorism should be accepted, not only because most of contemporary literature does so, but also, similarly to Pape, we believe that there is smaller number of terrorist acts,

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[34] B. Ganor, *The Rationality of the Islamic Radical Suicide attack phenomenon,* International Policy Institute for Counter-Terrorism (ICT), Herzlia, 2007, 4.

[35] *Ibid.*

[36] A. Pictures, *The role of suicide,* Terrorism and Political Violence, Routledge, Vol. 18, No. 1, 2006, 75.

which could be easily determined to certainly end with a death of an attacker. So, there is always a chance that an attacker will survive an attack, that is, his state of mind is different from the state of mind of a person who starts an action aware that during it he should take his own life. Such an attacker is, in fact, facing the imminent death, without such occurrence, an action would be unsuccessful. That is the reason why, it is believed that one should not unnecessarily broaden the concept of suicide terrorism to situations which do not have the same psychological structure. We will, therefore, only concentrate on analysis of offenders who take their own lives with the aim to accomplish an attack.

Another important issue is what the basic characteristics of suicide terrorism are. Pape explains that the essential feature of suicide attacks is that they are the most aggressive terrorism forms, which are used by organizations, even with a risk of losing support of a population who supports them otherwise.[37] Analyses of suicide terrorism in relevant studies, which did the survey of its phenomenology in the period from 1983 until today, show the existence of these specific characteristics and phenomena.[38]

First, the sense of time. Almost every suicide attack happened as a part of organized, coherent campaigns of violence, adjusted to cause certain consequences during important political moments. According to data which are cited in literature, of 188 attacks made in the period from 1980 until 2000, 95% were done as a part of certain terrorist campaign. Suicide attacks were not isolated incidents, and the time of their execution was not chosen incidentally.

Second of all, terrorist organizations chose democratic countries. This is not surprising; bearing in mind that enforcement is a basis of terrorist logic. In democratic countries, the public has much greater sequential influence in making decisions of politics subjects, than in nondemocratic countries in which there is no change of power, and no real control of it.

That is why democracies are more suitable targets for suicide terrorism that shocks, horrifies and enforces more than any other type of terrorism.

Hoffman cites these fundamental characteristics of suicide terrorism and he regards them as universal: the small cost – these attacks do not need to have high costs or great material means; their organization is not complicated; chances to discover accomplices and aspirators are minimal, because the attacker usually does not survive; media promotion is guaranteed, because there is no successful not even attempted suicide attack

[37] *Ibid.*, 7.

[38] B. Ganor, *Suicide terrorism,* ICT Herzlia, Tel Aviv, 2000, 8.

that did not receive great media attention in the whole world; terrorists suicide attackers are so-called "smart bombs", which enable extraordinary time programming of an attack with maximal efficiency; and, what is most important they ruin the confidence in the state government capabilities to protect its population.[39]

The same author concludes that the phenomenon of "suicide terrorists" and "isolated, sporadic and dramatic incident" turned into most dangerous and most used "weapon" of contemporary terrorist organizations: "…first of all you feel anxious while you ride on a bus; then you think it over whether to go to a shopping mall; then you think carefully and thoroughly whether you will sit in your favorite café, in the end, you start believing that no place is secure – in gaining this goal – suicide terrorists are their cheap, reliable and deathly weapon".[40]

However, suicide terrorism is featured with, above all, the great tactic and technical advantages compared to other kinds of terrorist attacks, which makes them powerful means in the hands of terrorist organizations. Moreover, although it is clear why terrorist organizations gladly turn to usage of suicide tactics, there is one question left, which is, according to our beliefs, presents even greater enigma.

Why does a certain person, the immediate doer of the act, decide to do such an act? The fact that such an act helps a lot to contribute to gaining goals of an organization. And for it, it presents a rational choice, this is what Pape and Hoffe write about, does not answer the question what motivates the concrete doer of an action to sacrifice him or herself for gaining these goals. We, are, preventively, interested in motivation of a immediate doer of a suicide act, together with a question if the doers of suicide acts are psychically disturbed persons, with a personality features predispositions for a suicide act, and also if they possess social characteristics that are usually present with suicide personalities, or they, again, the persons in question are the ones who become suicide because of specific factors, that do not play the main role in other suicides.

Merari, systematically gathered data on suicide attacks, from the one in Beirut, 1983, which is regarded as the beginning of a new era in terrorism, until the latest ones, he concluded that, contrary to the expectations given, with these terrorists there were no usual risk factors that are present with suicide attackers, as for example mood swings, schizophrenia, addictions, or

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[39] B. Hoffman, *The mind of the terrorist: Perspectives from social psychology*, Psychiatric Annals Vol. 29 (6): 1999, 337-340.
[40] *Ibid.*, 44.

prior attempts to commit suicide.[41] The author's conclusion is that clinical picture of these persons is not the same as the one, which is usual with other suicides.

What confirms this thesis can be found in Silke's beliefs, who cites that with suicide terrorists, as with other terrorists, there are no signs of serious psychopathic disturbances, so that, according to the results of numerous researches, it could be concluded that they are persons with average psychological constitution, at least in the prospect of a cultural context that they belong to.[42]

And Salib, similarly to the previously cited authors believes that "the primary aim of a suicide terrorism is not the very suicide, because it is, for the terrorist group, suicide is only means for gaining the aim," while the doers "see themselves as somebody who does this for the greater aim".[43] It is clear that psychopathological conditions, acute or chronic, are not present on the same level with classical suicides and suicide terrorists. Non-existence of usual risk factors for a suicide with suicide attacks proves that here is in question, in psychological sense, a phenomenon very different than a classical suicide.

The first wave of researching social characteristics of suicide terrorists started in the 1980s when the phenomenon of suicide terrorists appeared in the spotlight. The results of these researches were later, during 1990s, proved to be insufficiently reliable and accurate, bearing in mind the growth of attacks number and occurrence of attackers who did not match stereotypes profiles made the authors of this era. So, the data given by Merari and Post from 1990 were not kept in the later period. In their researches, they created a social profile of a suicide attacker, in which a typical suicide terrorist was presented as a relatively uneducated, unemployed and socially isolated male, single, in the early 20s or a bit younger.[44]

In contrast to this research, that reflected the period of more than two decades earlier, there are researches done in the contemporary period,

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[41] A. Merari, *op.cit.*, 34.

[42] A. Silke, *The Psychology of Suicide Terrorism,* in: Terrorists, Victims, and Society: Psychological Perspectives on Terrorism and its Conseqencies (ed. A. Silke), John Willey, London, 2003, 93-108.

[43] E. Salib, *Suicide terrorism: A case of folie a plusieurs?,* British Journal of Psychiatry, No. 182 (6), 2003, 475-476.

[44] J.M. Post, *Terrorist Psycho-Logic: Terrorist Behaviour As a Product of Psychological Forces,* in: Origines of Terrorism (ed. W. Reich), Cambridge University Press, New York, 1990, 25-40; A. Merari, *The Readiness To Kill and Die: Suicidal Terrorism in the Middle East,* in: Origines of Terrorism (ed. W. Reich), Cambridge University Press, New York, 1990, 42-53.

proving that there are attackers of suicide terrorist attacks can be found among uneducated, and highly educated persons, that there are married and single ones, socially isolated and socially integrated, from 13 to 47 of age. It is obvious, that potential suicide terrorists come from various social environments, and that they do not have the same, not even similar social – psychological profiles.[45]

Silke's research data show that social characteristics of "suicide terrorists" are heterogeneous, diffuse and not suitable or creating clear and definite typology.[46]

So, it can be concluded that social demographic factors, that relatively regularly appear with other suicide are not able to give an explanation of suicide terrorism phenomenon, because with suicide terrorists, social, economic and demographical regularity there could not be noticed, which could give base for their identification with other suicides.. Suicide attackers, according to all the data given, do not have a socio-psychological profile characteristic for suicides in general.

All the given conclusions are completely in accordance with contemporary psychology and criminology beliefs about the existence of defining personality traits and social features that predispose a distinctive person a certain person to any sort of terrorist activities. In other words, and the example of suicide terrorists, they prove contemporary criminology theses on terrorists in general. There is no, universal psychological or social profile of suicide terrorists.

Suicide tactics became some sort of trademark of certain terrorists' organizations. These are, usually, organizations whose ideology is radical Islamic Jihad, which created a wrong public opinion that suicide attacks are characteristic of terrorist group guided by this ideology.

Liberation tigers of Tamil Elam, whose members belong to Hindu faith, very frequently use suicide tactics in their activities. The same thing can be said about RKK?? (PKK – Kurdistan Workers Party), which is not above all Islamite, but separatist and leftist organization, and with Chechen terrorist. It is also, in earlier historical bases there existed similar phenomena that can be compared to terrorist suicides.

As Ganor notices correctly, term suicide terrorism can lead you to wrong trail, because in the eyes of members of this Islamite community that

[45] E. Sprinzak, *Rational Fanatics*, Foreign Policy, No. 120, 2000, 65-73.
[46] A. Silke, *op.cit.*, 108; A. Merari, *op.cit.*, 45-48.

supports Sahid, this person is not a suicide. Even more, Islam forbids suicide. So such an act is contrary to religious beliefs. [47]

The belief that this author, in our opinion, what is very important for understanding the source of Sahid's motivation. The explanation for this fact is exactly to self perception of Sahid, as in perception of their closest environment. Sahid, for himself and the environment, is not desperate person who would like to end his own life, but a martyr in "holy war" – jihad. This is why all these researches that were based on the idea that suicide terrorism can be explained with suicide dispositions of an immediate doer of this action proved to be inaccurate.

Sahid is, in the given community "hero" and "martyr", or, as it is said in Arabic Istishhad.[48] He is someone who brings honor to himself and his family, and certain, not little, social benefit.[49]

According to this, in order to be able to understand reasons because of which Sahid is interested in a suicide act, we have to perceive his behavior from the mentioned perspective. In this context, Sahid's behavior, which is, viewed shallowly, seems irrational and senseless, so it is a result of a deranged and not developed psyche; it is given different meanings and explanations.

For a Sahid, the decision to become part of a brigade of martyrs for jihad is a **rational existential decision.**[50] Rationality of such a choice is reflected in personal and social convenience which an organization follower who uses suicide terrorism regards that he gains by suicide act.

Firstly, personal uses for Sahid are these:[51]

Person who opts to suicide terrorist act becomes a jihad martyr, by which he gains great glory and honor among the members of his community. This is a very important reason for an individual who decides to do such an act. In the second chapter we determined that narcissistic personality structure, according to numerous authors, is often the reason for terrorist behavior. The chance to become "legend", "hero" is almost irresistible to a narcissistic

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[47] B. Ganor, *The Rationality of the Islamic Radical Suicide attack phenomenon*, International Policy Institute for Counter-Terrorism (ICT), Herzlia, 2007, 4-8. It is important to cite the opinion of Shaykh Atiyyalah Saqr, one of the Muslim religious leaders, who strongly opposes using the suicide tactics, highlighting the Mohammed's words, who said that nobody who commits suicide will go to Jannah. Moreover, the leader mentioned is a former leader of Al-Azhar Fatwa Commity.

[48] M. Sageman, *Understanding Terror Networks,* University of Pennsylvania Press, 2004, 83.

[49] B. Hoffman, *Inside Terrorism, op. cit*., 159-160.

[50] B. Ganor, *op. cit*., 9.

[51] *Ibid.*

personality who grows in such a community. Even so, this is a unique chance for a "little" man, an average member of community, frustrated by relative depriving and, sometimes, molested in childhood or in adult period, to change his social status and to gain respect for which he strives for, even for the price of his own life.

Sahid, according to the version of Muslim religious teachings, which are promoted by terrorist organizations, deserves getting to Jannah where he gets his award for his "great deed". In the green fields of Jannah, he is awaited by 72 gorgeous virgins, who are at his disposal. Sahid is convinced that he is in for everlasting hedonistic pleasure. Ganor also mentions an interesting aspect, in connection to direct leaving for Jannah, without going through purgatory, which is given to Sahid only. This is we believe, a very skillful psychological trap that terrorist organizations prepare for a potential doer. When they succeed in convincing him that he will not go through pains of purgatory, they give him the choice of alternatives among which the most rational seems suicide. Because, it is more rational to decide to turn oneself to short term suffering that suicide act gives him, then long and difficult suffering in purgatory. All of this information is given if the person is convinced in skillful transformed versions of Muslim teachings.

Then, Sahid is given the opportunity to do an altruistic deed for his family and friends. Apart from contributing greatly to jihad, he contributes, as motivators convince him, everlasting gift for even 70 relatives and friends.[52] He is then indoctrinated by an idea that his sacrifice, which, if benefits are remembered that occur directly after "pulling the trigger" is not at all irrational or frightening , will bring benefit to many, which is a very important motivating factor.

As we draw conclusions, terrorist organizations try to convince a young "martyr for jihad" that his sacrifice is not as frightening as it seems. Sufferings that he will survive on purpose are minimized when compared to the tortures that he will, as he is being convinced, he will survive (in purgatory). Viewed from this perspective, a person who was convinced by suggestions believes his act is a rational choice when compared to given alternatives. Here we can look back at neoanalitic, Yung's explanation of suicide. It is clear that terrorist propaganda targets it affecting the psyche of immature individuals, usually adolescents, who understands suicide in the service of terrorism as a chance to facilitate existential pains and making the fantasies of returning to the early childhood in which he would feel worry

[52] Durkhem wrote about altruism as a motive for committing suicide act. See E. Durkheim, *Suicide-a study in sociology*, Routledge, London, 2006, 175-200.

free and safe. However, personal commodities are not the only ones that are presented to Sahid. In the viewed cultural context, the role of family is very important. Family environment has great influence to many potential Sahids who are inspired by loyalty to the family and they have strong need to help their relatives. It should not be forgotten that areas of Palestine, Iraq and Chechnya, which are already known as areas of low socio-economical status, and there is also a great degree of deprivation of the population where Sahids are recruited from their number is very high. This is why, the social motives should not be neglected, as for a Sahid who wants to insure his family, as for his relatives, who have great influence on him and they can, if they are convinced in the version which is "served to them", they might believe that sacrifice of one of family members seems to be a rational choice, because both he and they get many gratifications.

4. THE DEFINITIONS OF TERRORISM IN THE ACTS OF INTERNATIONAL LAW

Counterterrorism strategies are frequently opposed with the principles of absolute protection of human rights and freedoms, because the efficiency of anti – terrorism measures can be partly limited due to the need of respecting norms on the protection of privacy, freedom of movement and other basic rights and freedoms guaranteed by constitution and international conventions. State repression and restriction of human freedom in the name of protecting national security or national interest, and the growing internationalization of criminal law, as well as deeper intrusion into the hitherto undisputed jurisdiction of the state, make decision makers equilibrate between the extremes of contemporary criminal law.[53]

Although the League of Nations discussed the issue of terrorism before the Second World War, this problem has erupted in the center of interest of the world public only after the tragic terrorist attacks in Munich in 1972, during the Olympic Games, when a group of eight Palestinian terrorists broke into the Olympic village and took nine Israeli athletes as hostage, who were later killed, along with five of the kidnappers, when German security

[53] M. Milošević, B. Banović, *Krivičnopravna zaštita od političkog kriminaliteta u Republici Srbiji*, u: Krivičnopravni instrumenti suprotstavljanja terorizmu i drugim krivičnim djelima nasilničkog karaktera, Zbornik radova, međunarodni naučni skup, Teslić, 22. i 23. april 2016. godine, Ministarstvo pravde Republike Srpske: Internacionalna asocijacija kriminalista, Beograd: Srpsko udruženje za krivičnopravnu teoriju i praksu, Banja Luka, 2016, 272-301.

forces tried to set them free. The first resolution on terrorism was adopted in 1972, and after three years of work to shed light on the causes of this phenomenon and addressing key issues related to it, the second (1976) and the third resolution (1977) were adopted. The next UN resolution on terrorism was adopted in 1984.[54] The forth resolution is more concerned with the so-called international terrorism, and represents a step forward compared to the previous three, which are primarily related to state terrorism. The resolution from 1989 is in the line with the previous one. However, the turning point in the perception of terrorism by the UN is the resolution from 1994 in which terrorist acts are final approached from a different perspective. Terrorism is described primarily as an act of violence of groups and individuals, and not as an act carried out by the state against its citizens or other countries, independently or with the help of certain organizations. Here, we came closer to defining terrorism as primarily an individual criminal act.

That same year, adopted the resolution in which the definition of terrorism in the modern sense.[55] This resolution defines terrorism as "criminal act thoughtfully and calculated to excite the state of fear in the public, among a group of persons or particular persons with a political objective, which can not be justified by political, philosophical, racial, ethnic, religious or any other nature on which may be challenged". The same definition was repeated and in Resolution 51/120 of 1996. This definition of terrorism, although it is not legally binding, represents the first institutional definition of terrorism given in the framework of the UN. UN adopted the Convention on the Suppression of the Financing of Terrorism, which, according to some authors,[56] implicitly defines terrorism.

In Article 2, paragraph 4, the Convention defines terrorism as any act committed with the aim to cause death or serious bodily harm to a civilian or other person not taking an active part in the hostilities in a situation of armed conflict, when the goal of such an act, by its nature or the context in which it is performed, is to intimidate a population or to compel a government or an international organization to act or abstain from doing any act.

The High Council of the UN Secretary-General also proposed an interesting definition of terrorism.[57] The High Council proposes that

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[54] UN Document A/RES/39/159 Inadmissibility of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States.

[55] UN Document A/RES/49/60: Measures to eliminate international terrorism.

[56] A. Cassese, *International Law,* Oxford University Press, New York, 2005, 450.

[57] Founded by UN Secretary-General, Kofi Annan.

terrorism should be defined as "any act committed with the intent to cause death or serious injury to civilians or persons taking no active part in the fight, with the aim of intimidating a population or compel a government or an international organization to act or abstain from doing any act".[58]

The European Union, as far as 2001, didn't seriously deal with the problem of terrorism in its official documents.[59] Also, the majority of EU member states till 2000 didn't have appropriate standards tin heir legislation that would be related to the prevention and suppression of terrorism. However, the EU Council Framework Decision on combating terrorism of 13 June 2002, amended on 28 November 2008, gives the definition of terrorism: "a terrorist act is a crime committed by a group or individual against one or more states, their institutions or people, in order to intimidate them, seriously altering or destroying the political, economic or social structures of the country ".[60]

The most significant act at the European soil in the subject matter is the Convention on the Prevention of Terrorism, adopted by the Council of Eurpoe in 2005, which was ratified in Serbia in 2009.[61] Annex of the Convention provides the obligation of States Parties to criminalize as terrorist all acts that are identified as such in the most important international conventions listed in the Annex. Those are all important conventions adopted since 1970 till the adoption of the European Convention (with the exception of the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, adopted by the General Assembly of the United Nations adopted in July 2007).[62]

5. TERRORISM IM SERBIAN CRIMINAL CODE

Till amendments from 2012, the crime of terrorism in the Serbian Criminal Code[63] (further: CC) was defined as the undertaking a generally dangerous acts, the use of generally dangerous means or a threat to use

[58] M. Milošević, *op. cit.,* 22-23.

[59] B. Banović, *Normativni okvir Evropske unije za borbu protiv terorizma,* Revija za bezbednost, god. 3, br. 9, 2009, 48-57.

[60] Z. Stojanović, N. Delić, *Krivično pravo-posebni deo,* Pravna knjiga, 382, 383.

[61] Law on Ratification of the Council of Europe Convention on the Prevention of Terrorism (Official Gazette of RS - International Treaties, No. 19/2009).

[62] Z. Stojanovic, N. Delic, *op. cit.,* 382, 383.

[63] The Criminal Code of the Republic of Serbia, Official Gazette of RS, No. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

nuclear, chemical or bacteriological weapons or other means which are generally dangerous, exercise kidnapping, hostage-taking or arbitrary deprivation of liberty, or execution of another an act of violence with intent to endanger the constitutional order and security of Serbia and with consequence manifested in the producing of uncertainty and fear among citizens.[64] After the amendments, the crime of terrorism is quite differently determined.

First, terrorism is placed among crimes against humanity and other values protected by international law. The legislator abolished the crime of international terrorism, which had been artificially separated from the criminal acts of terrorism (technically speaking, the offense of terrorism has been deleted by Article 312, and Article 391 CC, which related to international terrorism, was renamed and redefined). The difference between these two offenses was in a passive subject – the terrorism comprised acts against the Republic of Serbia while international terrorism was a crime in which foreign country or international organization was targeted. Combining these two crimes through a new incrimination of terrorism, the legislator has acted in accordance with the majority opinion of criminal law theorists.[65]

The new criminal law definition of terrorism complies with the most important international counterterrorism conventions. Articles of the CC starting from 391 to 393a deal with the crime of terrorism incriminate not merely the terrorist acts but also terrorist propaganda, recruiting and training, funding, and creating a terrorist group and joining terrorist organization, but also the incitement to terrorist activities. Incrimination of these actions posted a broad crime zone, which has increased the level of criminal law protection from terrorism. This is the result of commitment of the international community to seriously confront terrorist crime as one of the greatest security threats in the contemporary world, which is why legislator introduced certain derogations from general principles in criminal procedural law, too.[66] However, although Criminal law is an instrument in the fight against terrorism as a global security challenges, we should bear in mind the principle of legitimacy as the basis and the limit of criminal repression and the fact that other measures, particularly political and social

[64] Law on Amendments to the Criminal Code of the Republic of Serbia, Official Gazette of RS, No. 121/2012.

[65] Z. Stojanović, N. Delić, *op. cit.*, 382.

[66] B. Banović, *Zaštita podataka o ličnosti i specijalne istražne tehnike,* Pravni život, 9/2013, 759-776.

nature, are more important means of countering terrorism than the criminal law repression.[67]

Mentioned articles of the CC include the following incriminations: terrorism (Article 391), public incitement to commit a terrorist offense (Article 391a), the recruitment and training to carry out terrorist acts (Article 391B), the use of the deadly devices (Article 391v), destruction and damage to a nuclear facility (member 391g), the financing of terrorism (Article 393) and the terrorist conspiracy (Article 393a).

The subjective characteristics of this offense are stipulated in a different manner than in the former version. The crime can be conducted only with dolus (intent) which is manifested through intimidation of public, or coercing Serbia, a foreign state or an international organization to act or abstain from doing any act or to seriously threaten or damage the fundamental constitutional, political, economic or social structures of Serbia, foreign governments or international organizations. This is a criminal law concept of terrorism in conformity with its theoreticall determination, because "annimus terrorandi" is properly recognized in the legal definition. The act of commission has been set and there is an alternative when the offender to take one of the following: attacks on life, body or liberty of another person; kidnaps or taking of hostages; destroy the state or public facility, a transport system, infrastructure including information systems, fixed platform on the continental shelf, a public good or private property in a manner that may endanger the lives of people or cause significant damage to the economy; kidnaps aircraft, ships or other means of public transport or carriage of goods; produces, possesses, purchases, transports, supplies or uses nuclear, biological, chemical or other weapons, explosives, nuclear or radioactive material or device, including research and development of nuclear, biological or chemical weapons; discharges of dangerous substances, or causing fire, explosion or flood or takes other generally dangerous acts that may endanger the lives of people; disturb or suspend the supply of water, power or any other fundamental natural resource that can endanger human lives. Legislator stipulated the sentence of prison from five to fifteen years.

Paragraph 2 of Article 391 criminalizes the posing of a threat of terrorist acts and stipulates a penalty of six months to five years, which is clearly in line with the strict criminal policy towards terrorist crime. Aggravated form of terrorism exists when the death of one or more persons occurs because of the commitment of terrorist act or when the act caused great destruction.

[67] *Ibid.*

Speaking about subjective characteristic of this form, the perpetrator acts with the negligence in relation to the death (or deaths) that occurred. Aggravated form is punishable by a prison of at least ten years. The second aggravated form is prescribed in paragraph 4 and it exists when the perpetrator intentionally kills one or more persons in committing the terrorist offense. It is interesting that most severe form of terrorism (second aggravated form) is punishable by the severest penalty in our legislation - special minimum of twelve years, and possible imposition of an exception to the general maximum - penalty of thirty to forty years in prison, specific minimum of twelve years is higher than the one stipulated for the crimes of aggravated murder (specific minimum is ten years), genocide, war crimes and crimes against humanity (specific minimum five years).

The recruitment and training for terrorism and public incitement to commit terrorist acts, and also terrorist financing offenses have significantly expanded the crime zone of terrorism. This applies particularly to the offense stipulated in Article 391a, which exists when the perpetrator publicly state or propagate ideas that are directly or indirectly inciting criminal offense under Article 391. This offense, which is, by its essence, a terrorist propaganda, is punishable with a prison up to ten years. It seems that the implementation of this provision could lead to serious problems in court practice, because the crime is unusually wide, where a formulation "ideas that directly or indirectly encourage" leaves too much space for interpretation and discretionary assessment of the court. This issue is particularly sensitive because the constitutionally guaranteed freedom of expression is potentially compromised if this legal description is interpreted too extensively. We should bear in mind potential difficulties that could arise in proving the fact that an expressed idea indirectly propagated terrorism, because if the expressing of certain political attitudes can be interpreted as an terrorism propaganda, that would lead to unacceptable consequences towards fundamental human rights. The most important question here is how the courts will handle this "walk on the wire".

We also consider problematic the fact that the preparation is not explicitly criminalized as an criminal stage in the realization of a terrorist offense. The previous legal solution has enabled the punishment for preparatory work by the provisions of Article 320 CC (preparing acts against the constitutional order and security of Serbia). Although other related incriminations are defined so that the criminal reaction occurs at a very early stage (recruitment and training, public incitement, the threat of execution of work), lack of a more general and more flexible provision that would incriminate preparation of a terrorist offense, seems to be a shortcoming of the legislator.

6. CONCLUDING REMARKS

Despite the fact that the subjects of criminal policy at international and national level are taking a number of political, social and regulatory measures to combat terrorism, this criminal phenomenon continues to grow and renew its means and methods. The terrorist attacks in recent years, combined with the international (migrant) or internal (Turkey, for example) political and social crises, produce high level risk to almost all aspects of contemporary social life, making the citizens of endangered countries live in an atmosphere of uncertainty and concern for their lives and safety. The fight against terrorism, as a phenomenon characterized by global goals and radical extremist ideology, requires close and sincere cooperation between states, even those that are not in good political relations with each other, due to the fact that response to the global terrorism can be effective only if it is - global.

Characteristics of contemporary forms of terrorism indicate that the degree of danger to the international community that it carries is significantly higher than in the previous decades. The Republic of Serbia has responded to the changing contemporary security challenges of terrorism with amending of criminal legislation, through the redefinition of the criminal zone that made current legal solution compatible with international law and comparative trends. However, it is worth mentioning that the tightening of criminal repression, by itself, cannot bring results in the fight against terrorism, and also can lead to dubious norms and problems in practical implementation. It should be borne in mind that criminal law is not the key factor in the fight against terrorism, and that more serious results can be achieved with political and social measures, which would affect the factors of emergence and strengthening of terrorist crime. After all, the normative dimensions of the fight against terrorism are not exclusively in the field of Criminal law. The efficient prevention of terrorist attacks also depends on adequacy of regulations in the field of national and private security, defense and protection of critical infrastructure,[68] because they establish an effective system of detection, early warning and prompt response. The norms governing the system of protection and rescue in emergencies, which include

[68] M. Mandić, O. Dzigurski, M. Milosević, *Critical infrastructure security and social networks and social engineering, Accordance of education programs with the need of critical infrastructure protection,* in: National Critical Infrastructure Protection - Regional Perspective, Belgrade: Faculty of Security Studies, Belgrade and Institute for Corporative Security Studies, Ljubljana, 2013.

the consequences of terrorist attacks, are also an important aspect of regulating counterterrorism activities.

The fact that Serbia has a relatively good criminal law framework (apart from the mentioned shortcomings) is not, in itself, sufficient to conclude about the adequacy of counterterrorism legislation as a whole. Only the totality of adequate legal solutions deployed in different areas of legislation (criminal substantive and criminal procedural law, the protection of confidential information, cyber security, defense, internal affairs, intelligence and security subsystem and other actors in the sector of national security, private security, protection of critical infrastructure, etc.), can pose a serious normative framework against terrorism, where the substantive criminal law, in accordance with its traditional role, would be *ultima ratio*, while the provision of the law of national security should represent a pillar of counterterrorism.

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THE CONTEMPORARY PENAL POPULISM: THE GLOBAL TRENDS AND THE LOCAL CONSEQUENCES

Abstract

The penal populism as a special approach to shaping the social reaction to crime has a global character and has been present for a few decades already. The global social changes connected with the appearance and strenthening of the neoliberal socio-economic system, contributed to its appearance together with the role of the media, the changes of the appearing perception of the crime and the politization of crime. The basic characteristics refer to the establishment of new strategies of crime control, significant criminal-legal expansionism, more severe penal policy, the strengthening and expansion of the formal control, new penology. The most important consequence of the new criminal control practice is a great increase in the number of convicts with the prison penalty, which cannot be explained solely by the increase in crime. Since apart from the global character of the relevant social changes, the penal populism with its controversial consequences has not overtaken all the countries with the same intensity, a special attention is drawn by the countries which have kept the functional criminal-legal system out of the new punitiveness. The relevant research show that the level of punitiveness is in a significantly stronger correlation with economic policy, i.e. investments into the social policy, than with the real state of crime. The local reception of the global trends, both generally and in the criminal legislation system of Serbia, is characterized by inconsistence and neglect of the institutional and cultural incompatibility and the standardisation of thy hybrid law institutes which have a great difficulty of fitting into the national legal systems.

Key words: *penal policy, public perception of crime, crime emotionalisation, new penology, the crime populism.*

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1. INTRODUCTION

The penal populism marks the populistic approach[1] to the problem of the formal social crime control. The causes as well as the consequences of the penal populism are of the global character. The expansion and strenthening of the crime-populistic approach was marked in mid-eighties, whereas during the 90es the crime populism becomes recognizable on the global level, only to influence significantly almost all the segments of the social reaction to crime in the follwoing period. The penal populism is closely connected with the public perception of the high crime endagerdness and the visible fear of crime, parallel to the perception of the police as inefficient, and the courts as slow and unjustifibly mild. The populistic political option uses all that in order to achieve their political goals, competeing with their opponents concerning the severity of the response to crime.[2]

A few decades of priominent penal populism have significantly transformed the system of the social reaction to crime.[3] The globalistic character blurs to an extent the real scales of these proceses, so it seems as if

[1] The populism, generally, refers to the policy „familiar to the people", which in order to achieve their aims emotionally instrumentalizes the fears of the people, their discontent, the current and temporary conflicts, instists on instincts and simple solutions, and strives or claims it strives, to work in the interest of the broadest walks of life, i.e. people, as opposed to the remote, alienated and uninterested social elite. As a rule, the target group of populism are the layers of the society which feel neglected in the existing political and economic system. By the media campaigns, good organization and deft use of the legal instruments the existing fears and insecurities are strengthened, the calls for change are sent and simple solutions are offered for the socially complex situations, populists, no matter to which area the activity is pointed to, emphasizes „being close to people", different from the alienated economic, political and professional elites, insist on the simple „common sense approach" to the question in stead of the „unproductive" expert analysis. They criticize their opponents by the well-prepared and catchy expressions and slogans „which the simple people understand", they talk about what masses want to hear. Their highly affective statements deepen the existing conflicts and misunderstandings, they stir emotionally a great number of supporters and often achieve a high level of the national cohesion in respect of the ceratin matters. By gaining power and real influence, as a rule, they try to above all „put under control" the legal system and public media and decides for popular, but in the long run unsustainable and harmful measures (T. Meyer, *Populismus und Medien*, in: Populismus (Hrsg. F. Decker), Wiesbaden, 2006, 81-89).

[2] J. Pratt, *Penal Populism*, London-New York, 2007, 14.

[3] S. Soković, *Savremene globalne tenedencije u kontroli kriminaliteta (karakteristike, perspektive i osvrt na domaće prilike),* Crimen, (II), 2/2011, 212-226:

everything does not happen here and now, but in some other spaces and in an undefined time. Facing the consequences of the globalistic changes happens as a rule when a certain practice has stabilized and is kept alive parallely with the ambiguity surrounding its usefulness and theoretical-conceptual groundedness.[4] The consequences of the penal populism can be seen both in the ultimately dissonant contemporary penological-theoretical concepts, and in the increase in the prison population and putting under some kind of control, a great number of citizens, through alternative measures of non-imprisonment or the measures of preventive control, independent from the real state of crime.

2. THE GLOBAL CAUSES

2.1. The Global socio-economic and cutural changes

The development of the penal populism correlates with the broader socio-economic changes, above all with the global tendency of rejecting the model of the social wealth and the reduction of assests spent from the state budget. The prominent advantage of the market economy over the social policy makes the constant social insecurity, whereas new technologies simultaneously bring about the visible and everyday physical insecurity in all segments of life.[5] Modern society is becoming the society of risk[6], and the security becomes a fetish of modern age. The general social and physical insecurity becomes ontological, generates both the pesonal and emotional instability, alienation and identity crisis.[7] Furthermore, we cannot count on the safe system programs of state help because the direct state control in many services important for everyday life of citizens is missing or is extremely weak. The privatisation of public services or establishing of the public-private partnerships reduce the costs of the state, but do not reduce its responsibility. In the areas which are not under the direct control of the state the responsibility becomes significantly fragmented, no entity has the full competence, and thus not full responsibility.

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[4] E. Gidens, *Sociologija,* Beograd, 2007, 71.

[5] A. Giddens, *The consequences of Modernity*, London, 1990, 7; K. S. Williams, *Textbook on Criminology,* Oxford, 2008, 585.

[6] E. Gidens, *op. cit.*, 73.

[7] F. van Marie, Sh. Maruna, *„Ontological insecurity" and „terror management": Linking two free-floating anxieties,* Punishment & Society, 12/1, 2010, 17-26.

In the social sense, the result of adapting to the transformations of the modern society is making the so called control culture.[8] The crime loses the character of exquisitenss and becomes a normal phenomenon, the risk which is counted on in everyday life. It is expected that every citizen adapts his / her behaviour and thus to a great extent avoids the risk of the criminal victimization. The causes of the criminal behaviour are not sought after, rather it is strived for the control of crime with the least possible expenses. The system of the formal control of crime does not strive for the rehabilitation and re-integration of offenders, but is grounded on the risk management of the future criminal behaviour, above all through the control and locking up the offenders. The most important characteristics of the new model of social reaction to the crime are: the loss of the rehabilitation idea; the strenthening of the demand for more efficient application of law and strict punishment; „the return to the victim"; the politization of crime and the new populism; the importance of the public saftety; the come back of the belief in imprisoning the offenders; the transformation of the criminological attitudes towards crime into the understanding of crime a normal, routine, inseparable activity of the modern society which should be controlled, and not suppressed; the expansion of the prevention, safety and security idea; the strengthening of the role of the private sector in crime control and safaety maintenance; the acceptance of the idea about „the crisis of the character". Moreover, the emotionally burdened states of insecurity, the bitterness and anger supress the expert analysis of the state of crime and the rationally perceived humanity in the form of the formal reaction to crime.[9]

2.2. The Role of the Media

With the help of the informational technologies the mass media make it possible for the contemporary society to have an unimaginable level of interconnectedness and interactivity and as a fact create a special world information order, and re-shape a great number of information, based on which we function in everyday life. The weakening of the internal cohesion of the modern social communities influences the fact that the majority of necessary information is not acquired in the immediate communication, but by distant and abstract sources.

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[8] D. Garland, R. Sparks, *Criminology, Social Theory and the Challenge of our Times,* British Journal of Criminology, 40(2), 2000, 189-204.

[9] D. Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society,* British Journal of Criminology, 36(4), 1996, 445-71.

At the same time „the media imperialism is stronger and stronger"[10], the ownership over the media is more and more concentrated in the hands of big media congglomerates, and the media companies operate outside of the national state borders. The advantage in the media reporting is given to the contents which provide higher viewer ratings and bigger sale, because the income of the commercialized media depends on the commercials. The partcipation of the citizens in the public activities is weaker and weaker, and at the same time their understanding of the matters important for the public is being reduced. The consequence of that is „the entertainment culture"[11], simultaneous glamourisation and simplification of the contents of media reporting, the triumph of entertaining programmes and „famous" people at the expense of the controversial maters, debates and expert analyses. The crime becomes a great media topic, as it attracts the public. At the end of 90es the crime reporting took up over 20% of the media reporting, when compared to the modest 4% in the period from after-the-war till the 70es, and one should bear in mind the scope of qualitative and quantitative increase in the overall media space.[12] The reporting about the crime has as an aim to, not only inform, but to entertain. Instead of that the expert discussions of the competent individuals based on the valid data, and the crime is discussed in public in the style of sensational tabloid rethoric, in episodes, through highly personalized single cases.[13] The level of sensitivity of the public to the crime problems is raised by the special ineterest in violence, sexul felons, juvenile crime[14], recidivists and antisoacial behaviour, as the most obvious form of endangerement,[15] with the simultaneous sensationalistic compassion and moral identification with the victims.[16] The

[10] E. Gidens, *op. cit.,* 483.

[11] *Ibid,* 485.

[12] J. Ditton, J., Daffy, *Bias in the newspaper reporting of crime news,* British Journal of Criminology, 23(2), 1983, 159-165.

[13] Reiner, R, *Media Made Criminality: The representation of Crime in the Mass Media*, The Oxford Handbook of Criminology, Oxford, 1997, 199.

[14] S. Soković, *Maloletnički kriminalitet i recidivizam: pravilo i/ili izuzetak,* Revija za kriminologiju i krivično pravo, 51(3), 2013, 23-37.

[15] L. Mikieli, *Jedno nasilnije društvo? Društveno istorijska analiza interpersonalnih nasilja u Francuskoj od 1970. godine do danas, I deo,* Anali Pravnog fakulteta u Beogradu, 1/2008, 26-48; L. Mikieli, *Jedno nasilnije društvo? Društveno istorijska analiza interpersonalnih nasilja u Francuskoj od 1970. godine do danas, II deo,* Anali Pravnog fakulteta u Beogradu, 2/2008, 5-24; M. Filipović, *Evolucija nasilja: pokušaj racionalizacije ideoloških diskursa,* u: Istraživanja u specijalnoj pedagogiji (ur. D. Radovanović), Beograd, 2009, 195-211.

[16] J. Pratt, *op. cit.,* 71.

emphatic affective-emotional approach with the broader message about the deteoriation of moral values provides a great attention of the audience, but at the same time generates fear of crime and creates a picture about the violence and lawlessness which threatens to ecompass the whole society, about the crime epidemics, in front of which the inefficient police and the mild and complacent courts are powerless.

2.3. The Public Perception of Crime

In the society full of risk and insecurity the perception of the crime is the result of the presentation of the crime by the media and does not show the real state of affairs. The real crime is surpassed by the myths about the crime which is spread by the media,[17] a and the crime does not represent only the possibility to cause the damage of the property and individual injuries, but also the materialized confrimation of the deterioration of the social and moral norms, the desintegration of the civil order and the moral cohesion of the society. The emotional crime is subject to unobjective estimation, dramatisation and exaggeration, and thus the crtitical approach was replaced by the emotional impulses of anger and rage.[18] The Fear of crime[19] and the crime risk victimisation evasion[20] are in the contemporary society almost institutionalized, because they influence where we live and how we live („safe suburbs", „defendible space", the safety as the necessary factor of urban planning, the security alarms, interphones, video seurveilance, avoiding the risky locations, and similar). The citizens are expected to behave rationally and to avoid risks, and the crime prevention becomes more and more the responsibility of „the active citizen", and less of the state structures.[21] Thus an important part of general and permanent insecurity,

[17] Đ. Ignjatović, *Kriminologija,* Beograd, 2010, 139.

[18] S. Monterosso, *Punitive Criminal Justice and Policy in Contemporary Society*, Queensland University of Technology Law and Justice Journal, 9/2009, 13-25.

[19] It is well known that the application of the quantitative approach solely in studying fear from crime overrates the real state, because of which the implications of such research on the political decisions are utterly dubious. See: H. Kury, G. Woesner, A. Lichtblau and A. Neumaier, *Fear of Crime as Background o Penal Politics? Policing in Central and Eastern Europe,* in: Dilemmas of Contemporary Criminal Justice (eds. G. Mesko, M. Pagon, B. Dobovsek), Maribor, 2004, 126-133.

[20] It is important to note that the risk arises and is present in the social interaction, and that as such it is prone to the objective estimation, dramatization and exaggeration.

[21] D. Garland, *„Governality" and the problem of Crime: Foucault, Criminology, Sociology,* Theoretical Criminology, 1(2), 1997, 173-214; J. Loader, Fall of Platonic Guardians,

uncertainty and endangerment of citizens in the contemporary society of risks is connected to the state of criminality / crime and inadequate social reaction to crime.

2.4. The Crime Politization

The state of „the moral panic", significantly created and constantly fed by the enormously powerful media, demands an adeqaute response, i.e. ever more severe punishment, due to which there is a turn in the public policy priorities.

The security problem and „the ever growing crime" become the main subject of the political campaigns, from local to the presidential ones,[22] and the criminal-legal system of response to crime becomes the source of the internal politics.

The politicians „get even with" crime by advocating the reform of the penal legislation and much more sever punishment policy „which will stop the violence and lawlessness which threatens the society". The advocating of more severe punishment („three strikes and you are out") and punishing for the smallest violations of law („the zero tolerance" of crime) in the time of general insecurity gets the favourable view of the public, provides plitical support and satisfies the conservative nostalgia for the classical retributivism[23] expressed above all with the wealthy ones and thus very powerful groups of the society.When once reached, this desire of the public is insatiable, and the very practice of severe punishment starts a life of its own, and keeps being alive for a long time due to completely different reasons when comaired to the ones why it came about in the first place. [24]

Liberalism, Criminology and Political Responses to Crime in England and Wales, British Journal of Criminology, 46(4), 2000, 561-586.

[22] The placing of the question of control of crime in the center of the political campaign can have serious consequences for the outcome of the campaign as well as for the criminal legislaton. The decision of the not so popular governor of California in 1993 to revitalize his campaign by advocating more severe penal policy, resulted in the political support but also imposing the law which introduces the principle „three strikes and you are out", and in a specially restrictive form („two strikes"), not for the most serious crime, and without parole. J. Pratt, *op. cit.*, 90.

[23] C. Shearing, *Punishment and Changing Face of the Governance*, Punishment & Society, 3/2, 2001, 203-220.

[24] D. Garland, *Epilog: The New Iron Cage,* Punishment & Society, 3(1), 2001, 197-199; D. A Green, *Feeding Wolves: Punitivness and Culture*, European Journal of Criminology, 6(6), 2009, 517-436.

3. THE GLOBAL CHARACTERISTICS

3.1. The New Strategies of Crime Control

The populistic approach to crime problems supresses the strategies which essentially deal with the causes of crime (powerty, inequality, uneployment) and gives advatage to the measures and techniques which are relatively simply introduced and applied, and work as a means of calming down the citizens and create the impression decisive actions are taken against crime.[25] Although certain results cannot be denied, the success of these measures is short-term, directed only to certain segments of the society and often leads to dislocation of criminal activities to other areas. Contemporary states do not guarantee security to their citizens, the activities of the state policy are directed towards the control of insecurity and risk,[26] and in reality are most often visible through the realization of measures from the context of the strategies for the situation prevention, risk removal strategies and risk management strategies.[27]

The situational prevention shifts the focus of prevention from the perpetrator to the physical locations where the criminal acts are commited. It is directed to the „criminal situation" and endeavours to remove, neutralize or replace the outside, physical factors which contribute to carrying out the decision to commit a crime, or to preclude their group acting, which as such makes it easier to the motivated ciminal commiting of future crimes. The situational prevention does not influence the criminal affinities and motives of the perpetrator, but understands them as realistically given.[28]

The risk removal strategy is based on the approach that criminals should get what they deserve due to the fact that they commited a crime, without truning to other factors of individual crime etyology and stipulates the appliaction of the prison punishment, the control of the perpetrators by the use of electronic surveilance, the appliaction of medicament therapies in order to control the behaviour and similar measures. The treatment of the convicts entails the severity and discipline.

The strategy of risk management and risk reduction in its foundation represents a special way of prevention acting with the aim of making the citizens responsible to a greater extent for their own security and their own

[25] S. Soković, *Kazneni populizam: uzroci, odlike i posledice*, u: Kaznena politika: zakon i praksa (ur. S. Bejatović), Beograd, 2013, 185-232.
[26] E. Gidens, *op. cit.,* 231.
[27] S. Williams, *Textbook on Criminology*, Oxford, 2008, 595.
[28] S. P. Laub, *Crime prevention, Approaches, Practices and Evaluations*, 2004, 39.

assets. The surveilance of movement which often represents a breech to privacy and the application of different programmes with the aim of developping the patterns of behaviour recognizible from the point of view of security should reduce the risk of victimization. The control of the behaviour does not include the estimation of the moral-ethical aspect, every behaviour which corresponds to the safety standards is allowed.

3.2. The Criminal-legal expansionism

The contemporary criminal-legal model follows (or is preceeded by!) also the economic analysis of crime and the economic rationality, as well as the criminological control theories which consider the criminal act as a puproseful choice considering the circumastances (the theory of the rational choice, the theory of the routine activity). The intensive legislative activity leads to piling up of laws which should fulfill above all the political expectations, which are more declarative than reformative, and to a great extent represent the decisiveness and engagement of the government, and to a much lesser extent the way to solve the real problems.

In the context of the cultural control and the new model of the social reaction to crime the criminal-legal system should keep the security of the society because the reason for the criminal- legal resactions becomes more and more the danger, and less and less the committed crime.[29] The contemporary criminal law is globally characterized by the introduction of the new criminal acts and from the delator criminal activities and the criminal activities of threatening / endangerement, the prohibition of the risky activities without the contretisization of the risk,[30] the stipulation of the punishment for the finished criminal activity for the activities which actually represent the remote preparatory activities, the departing from some basic principles, the weakening of the principle ultima ratio, the multiplication of incriminations in the areas in which the existing ones are not applied (organzied crime, terrorism, corruption, the internatioanl criminal activities).[31] The overemphasized preventive orientation of the criminal legislation, which has mostly arisen as the consequence of the pressure by the media and politicians, strengthens actually the retributtional characteristics of

[29] Z. Stojanović, *Preventivna funkcija krivičnog prava,* Crimen (II), 2011/1, 3-26.

[30] M. Bock, *Über die Positive Spezialprävention in den Zeiten des Feindstrafrechts*, u: Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja, IV deo (ur. Đ. Ignjatović), Beograd, 9-32.

[31] C. Roxin, *Besitztdelikte*, u: Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja, II deo (ur. Đ. Ignjatović), Beograd, 2010, 9-25.

the criminal legislislation / law.[32] The criminal-legal prevention in the contemporary law becomes in a sense limited by nothing, as different from-the criminal-legal retribution which contains the self-limiting mechanism (proportionality as tthe repression measure). The self-limiting mechanism of criminal-legal prevention could only be sucess achieved in the supression of crime, but the standpoint that the aim justifies the means, allows for the significant measure of retribution.[33]

3.3. The Penal Policy

The populistic penal policy has a global character and arises as the product of the ineraction between the media „cultural entertainement" and the social-globalistic „control culture." Advocating the viewpoint that „the punishment is the best prevention", the politicians sverely criticize the mild penal policy of the courts and advocate more severe punishments of the offenders and the more comprehensive and consistent appliacation of the imprisonment punishment. The starting point about the mild penal policy of courts is based on the generalization of individual cases by the media, and not on the documented expert analysis of the relevant data. At the same time, the prosecution and courts are requested to raise the level of efficiency and the decision making „in the real time", all of which is followed by the political and media pressure in terms of the modernization and rationalization. The penal sanctions are made more severe, for a greater number of criminal acts it is threatened by the longer prison sentences, the longer sentences in prison become the obligatory choice of the court for the recidivists, and the possibilities for parole for recidivists are narrowed to a greater extent. The severe and swift punishment is followed by publicly pointing out to the offenders by using the strategy of „naming and shaming".[34] The basic message of the populist penal policy is that the political structures have gained control of the threatening endagerments and that they are capable of disciplining „those" who threaten. Foremost reliance on the punishment and sentencing leads also to the ideaology „we and they", i.e. we and they who endanger us as threating outcasts, strangers,

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[32] Z. Stojanović, *Krivičnopravni ekspanzionizam i zakonodavstvo Srbije*, u: Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja, IV deo (ur. Đ. Ignjatović), Beograd, 2010, 32-49.

[33] Z. Stojanović, *Preventivna funkcija krivičnog prava,* Crimen (II), 2011/1, 3-26.

[34] J. Pratt, *op. cit.,* 126; J. Yates, *„Naming and shaming": Antisocial Behaviour Policy in England and Wales;* u: Istraživanja u specijalnoj pedagogiji (ur. D. Radovanović), Beograd, 2009. 195-211.

and those from who we must be protected.[35] These opinions additionaly strengthen the existing economic and social marginalisations and secondary increase in the intensity of the social reaction to the breaking of the law.[36]

3.4. Alternative Measures and „the Prolonged Formal Control"

The populistic approach to punishment opens the phenomenon the „bifurcation strategies or the double track strategy" which, paradoxically, leads to the simultanoeus strengthening of mildness and severity in punishing and introduces the broader circle of citizens into the systems of the formal social control. The broader application of alternative measures for the not so severe crimes should reduce the prison population, reduce the costs of the imprisonment system, raise the efficiency of the social re-integration and reduce the come back rate[37]. However, the cancellation of the alternative measure by which the sentence is suspended under certain circumstances, very often leads the pplication of the longer punishment than the one which would have been stated right away without the application of the alternative which ultimately relativizes the bifurcal balancing and leads to the generally more repressive approach, both in respect of more serious crimes and in the case of less serious crimes.[38] The application of the non-institutional measures is followed by the so called „effect of spreading the net", i.e. the phenomenon that the alternative sanctions and measures take more citizens under some kind of social control, than it is the case without the application of the alternative programmes. The bipolarity in the contemporary penal politicy is the consequence of the conceptual dychotomy of the contemporary penal-theoretical standpoints, which include the non conservative retributiovism and the neoliberal pragmatism.[39]

The system of the formal social control expands more and more to other anti-social behaviour which is not penal-legal sanctioned.[40] A specific type of

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[35] D. Garland, *Criminology, Social Theory and the Challenge of our Times,* British Journal of Criminology, 40, 2000, 189-204.

[36] S. Hallsworth, *Rethinking the Punitive Turn: Economies of Excess and Criminology of the Other,* Punishment & Society, 2/2, 2000, 145-160.

[37] A. Worral, *Punishment in the community,* London, 1997, 99; S. Soković, *Alternativne krivične sankcije i mere i prevencija kriminaliteta,* u: Kazneno zakonodavstvo i prevencija kriminaliteta (ur. L. Kron), Beograd, 2008, 347-365.

[38] J. Pratt, *op. cit.,* 92.

[39] P. O' Malley, *Volatile and Contradictory Punishment,* Theoretical Criminology, 3(2), 1999, 175-196.

[40] J. Pratt, *op. cit.,* 118.

the social control is the so called prolonged formal contol. As the general characteristic of the contemporary societies, this type of control is the consequence of the application of the new technologial achievements with the aim of reducing the consequences of the state of general insecurity. Beacuse of the real or imagined danger, the supervison of almost all the public indoor spaces and many outdoor spaces is common today.[41] In the meantime, this type of control becomes to the greatst extent a separate system, and industrial which is kept and maintained by strenghtening the very insecurity it was built to reduce.

3.5. The New Penalogy

The mutual influence of the law and economy[42] in the penaological phase of the social reaction to crime can be seen in the concept of the „new penalogy". The new penalogy includes the financial and quantitative effects as the primary ones, i.e. the maintenance of the control,[43] and its task is to manage the deliquency, and not to rehabiliate the the offenders, to „normalize" the crime, not to eliminate it. It primarily deals with the identification, classification and management of the offender groups classified accroding to the level of risk of their behaviour when compared with the normed order, and only peripherally with the problems of the diagnosis and treatment of the individual offender.[44] The penalogical interventions are based on the risk principle, the principle of the criminogenous needs of the offenders, the principle of responsiveness. Namely, the risk principle is of key value for singling out the the offender who should undergo the treatment; the principle of criminogenous needs points to the circumtances to which the intervention should be directed, whereas the estimation of responsiveness should be responsible for the way

[41] J. Farrell, K. Hayward, Y. Young, *Cultural Criminology,* London, 2008, 98.

[42] B. Begović, *Ekonomska teorija generalne prevencije: osnovna pitanja;* u Stanje kriminalteta u Srbiji i pravna sredstva reagovanja, IV deo (ur. Đ. Ignjatović), Beograd, 2010, 126-141.

[43] J. F. Cauchie, G. Chantraine, *Use of Risk in the Government of Crime, New prudentalisam and New Penology, Champ penal/penal field,* Nouvelle revue internationale de criminologie, 2005/II, 409-433.

[44] G. Robinson, *Risk Mangment and Rehabilitation in the Probation Service: Collision and Collusion,* The Howard Journal, 38(4); 1999, 421; S. Soković, *Nova penologija – karakteristike i perspektive,* Pravni život, 9/2011, 823-836; S. Soković, *Nova rehabilitacija: konceptualni i praktični problemi,* Revija za kriminologiju i krivično pravo, 52(3), 2014, 9-19.

in which the complete effect of the treatment should be achieved.[45] The intensity of the treatment is based by the new penalogy on the estimation of the risk of the offender.

In the circumstances of the emphasized need to reduce the public expenses, the popularity of the new penalogy is based on the fact that its goals are more easily evaluated and presented, as well as on the fact that it points to the practitioners clear and realistic directions for the achievement of goals set up by the official crime policy within the scope of the available resources, which completely fits the general populistic approach to the crime contro.

4. THE GLOBAL CONSEQUENCES AND PERSPECTIVES

The most important consequence of the new practice of crime control is a great increase in the number of the sentenced to imprisonment, which can be explained only by the rise in the crime rate.[46] Apart from that, it is important to note that, by placing them under some kind of control, through alternative measures of non-imprisonment or through the measures of preventive control, a big number of citizens is covered. In the period between 1997-2007 the accessible statistics show that the rise of the prison population of 60-70% in the countries on all the continents, the overcrowdedness of prisons was in 2007 in about 60% of the countries which is double the number of the available capacities, and in over 20% of the countries it is over 150% of the available capacities.[47] A special attention is drawn by the case of USA with the prescribed number (quota) of prisoners of 743, when compared to the total number od prisoners which is 2 292 133 in 2009. [48] In 2007 USA had less than 5% of the total world population but also 23,4% of the total world prison population.[49] The newer data shows that over 78% of countries still marks the

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[45] D. A. Anrews, J. Bonta, R. Hoge, *Clasification for Effective Rehabilitation: Rediscovering Psyhology,* Criminal Justice and Behavior, 17(1), 1990, 19-52.

[46] S. Soković, *Stanje u zatvorima u 21. veku: uzroci i efekti visoke inkarcerizacije,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije, knj. 1 (ur. B. Vlašković), Kragujevac, 2013, 101-116.

[47] R. Walmsley, *Trends in World prison population*, 8th ed. International Center for prison Studies, London, 2008, 1-15.

[48] F. E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment,* Punishment & Society, 3(1), 2001, 161-166; D. Garland, *The Meaning of Mass Imprisonment,* Punishment & Society, 3(1), 2005, 5-7.

[49] For the sake of compariosn in the same period the quota for the imprisoned individulas in Russia is 628, Germany 88, France 96, Australia 133, England and Wales 157, New

rise in the prison population and that the number of convicts rises on all the continents except Europe.[50]

As opposed to the USA, the arise of the model „of the social state" in Europe does not have such severe consequences.[51] The overcrowded prisons and the rise of the convicted population „torment" the European countries also, but to a lesser extent.[52] The risk trends in the European countries refer to a great number of foreigners and ethical minority members who are imprisoned, who, according to some estimations can represent a bigger problem than the hyperincarceration of the Afro- and Hispano- Americans into the USA. The Scandinavian countries with the prescribed number (quota) over ten times less than the one in the USA,[53] attract attention as an exception in reference to the global trend and confrim at the same time the connection of the neo-liberal models of economic policy and the penal punitivism. The relevant researcg show that the level of punitivism is in the significantly stronger correlation with economic policy, i.e. the investment into the social policy, than to the real state of the crime and that the different types of political-economic structures lead to smaller or bigger populism in sentencing and different practical realization of respect of the human rights and human dignity.[54] The rise in the crime rate does not directly lead rise in

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Zealand 203, The Netherlands 94, Norway 71, Serbia 143, Slovenia 65. R. Walmsey, *World prison Population List,* London, 2008, 1-15.

[50] R. Walmsley, *World prison Population List,* 11th ed, International Center for prison Studies, London, 2015, 15.

[51] D. Dowenes, *The macho penal economy: Mass Incarceration in the United States - A European Perspective,* Punishment & Society, 3(1), 2001, 61-80.

[52] M. Tonry, *Why Aren´t German Penal Policies harsher and Imprisonment rates Higher?* German Law Journal, 5(1), 2004, 1187-1206.

[53] J. Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and Roots of Scandinavian Exceptionalism,* British Journal of Criminology, 48(2), 2008, 119-137; J. Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part II: Does Scandinavian Exceptionalism Have a Future?,* British Journal of Criminology, 48(3), 2008, 275-292.

[54] The study of twelve countries: USA, England, Wales, Australia, New Zealand, South Africa, Germany, the Netherlands, France, Italy, Sweden, Finland and Japan frthe point of view of the political economy system divided into four groups: the neoliberal, conservative-corporate, that the political-economic system is in a significant connection with the tendencies in the penal policy. The highest level of punitivism and the highest prescribed number of the sentenced individuals mark the neo-liberal systems, is followed by the conservative-corporate countries, whereas the Nordic social democratic societies and Japan, as oriental-corporate countries have much lower number of convicts to the prison lev and significantly lower level of new-punitivism. Cavadino, J. Digan, *Penal Policy and Political Economy;* Criminology & Crminal Justice; 6(4); 2006, 435-456;

the prescribed number of individuals sentenced to the prison sentence, rather the rise in the number of individuals sentenced to the prison sentence is in a significant manner, the consequence of the political and strategic decisions in the field of crime control.[55] In its essence, the penal policy is the result of the political choice.[56] The Scandinavian countries have the lowest rate of imprisoned individuals, but the biggest investment into the social policy, and apart from that also the highest level of public trust and political legitimacy, as well as the lowest level of the fear of the crime .[57]

The penal populism itself, obsereved in the long run, has one important inner self-limitation, which is imposed by its populistic character. The measures of the penal populism require improrttant material-financial expenses and in cases when the penal populism starts to charge citizens for its expenses in terms of lower investment into schools, hospitals and similar, beacuse of the investment into prisons, the public support to the populistic measures and the political will drop significantly. [58]

5. THE LOCAL CONSEQUENCES

The acceptance of the global trends in the local circumstances is almost inevitable, no matter how far it may seem at the first glance, independent from the expert estimations and analyses and is accelerated with time. The local variations which follow the global trends with the reception which is most often characterized by inconsistency and the neglect of the institutional and cultural incompatibility, The National crime control systems are fromed with the transfer of ideas, strategies and practice, most ofetn from the Anglo-American legal space, and the penal populism comes into the national legislations and the practice firstly as symptom of the global trend and then

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[55] M. Tonry, *Why Aren´t German Penal Policies harsher and Imprisonment rates Higher?,* German Law Journal, 5(1), 2004, 1187-1206.

[56] J. Pratt, *Penal Populism,* London, 2007, 153.

[57] The high level of trust and legitimacy is in the positive correlation with the social investment and the level of social equality, but not with the severe penal policy. Behind these correlations there is a mechanism by which the extensive social policy influences the severity of punishment. Thus the solidarity and the division of responsibility for the causes of everything which presents the social risk is developed, including crime, and enables material prosperity and economic security, due to which the tolerance and empathy is expressed more easily. S. Snacken, *Resisting Punitiveness in Europe?,* Theoretical Criminoogy, 14(3), 2010, 273-292.

[58] J. Pratt, *op. cit.,* 151.

escalates and gets and active form.[59] The positive potential of globalization in the sense of modernization and experience exchange based on the verified results, surpass the negatice consequences of accepting the global trends.

The reckless reception of the global trends, socially and institutionally unfounded, value-wise and culturally incompatible, is not the right answer to the real needs of reformation and modernising the national systems of crime control. In the field of the practical appliaction of the implemenetd solutions, the problems are quickly noticeable, beacuse of which in the ultimate outcome the effects of the application of the global trends as a rule are of the negative accumulative character because they add up the existing the existing (local) problems, which should be eradicated with the newly created implementation problems. The global order thus becomes the potential for the local chaos.

The acceptance of the global trend in the national penal-legal systms raises many questions, espceiall imprtant for the transition countries, bearing in mind that the transition is essentially the means of globalization of the capital as well as the accompanying social trends.[60] As the global economic-social trends come from the Anglo-American area, the transition countries are mostly not either geographically or nor culturally located in the same area, so the implementation of the global trends in the transition countries is complex and necessarily requires significant adaptations and the socio-cultural validation.[61] Unfortunately, the well thought out and adapted implementation is missing most often in the transition countries. Pressed by the realistic need for the reform and improvement of their legal systms in the circumstances of the transitional instability, these countries exactly are the ones which easily fall into the spiral of the media-political manipulations and imposed false perceptions, the non-critic adoption of ready made solutions which additionally deepen the instability and the social-economic crisis. The reception of the global trends is especially delicate in respect to the penal-legaal systems, taking itno consideration their legitimacy and justifies the sensitive balance of the guarantee and the protection function, the provision of the efficiency with the simultaneous complete protection of rights.[62]

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[59] G. Meško, *Prenos kriminalitetnih politik – sodobne kulture odzivanja na kriminaliteto in vloga kriminologov v procesih oblikovanja nadzorstvenih politik,* Revija za kriminalistiko in kriminologijo, 59(1), 2008, 31-38.

[60] Z. Vidojević, *Kuda vodi globalizacija?,* Beograd, 2005,162.

[61] L. Breneselović, *Recepcija „restorativne pravde" kao primer nekritičkog diskursa u pravnoj sociologiji,* Sociološki pregled, XLV(1), 2011, 45-66.

[62] D. Zolo, *Sumrak demokratije u eri globalizacije,* Crimen, 2/2012, 142.

The global march of the penal populism hit Serbia as well. The realistic need for the modernization of the domestic criminal-legal system and the necessity of harmonizing with the relevant inernational standards can partly be argument for the frequent changes in the criminal legislation, but does not justify the higher severity of other penal policy and the expansion of the criminal-legal repression.[63] The material criminal legislation in the past decade is characerized by frequent changes, the introduction of the new incriminations and the expansion of the existing ones, the prescription of the severe punishment, the change of the classical institutes opposed to the basic principles (as in the case of the prohibition to commute a sentence for certain criminal acts), making the conditions for the applications of some institutes more strict (parole).[64] The accompanying laws (The law on seizing the property which was obtained as the result of the criminal act,[65] The Law on the responsibility of the legal entities for the criminal acts,[66] The Law on the special measures for the prevention of commiting the criminal acts agianst the sexual freedom towards the minors[67]) follow the global trends and introduce the hybrid institutes, which significantly deviate from the ground principles and are applied in practice with difficulty.[68] The process legislation marks numerous changes in the same period also, the postponing of the application, partial application. Although the intention of the new codex about the criminal procedure[69] was for the criminal procedure to be made

[63] S. Soković, *Izvršenje krivičnih sankcija - mogućnosti i perspektive*, u: Kriminal i državna reakcija : fenomenologija, mogućnosti, perspektive (ur. L. Kron, B. Knežić), Beograd, 2011, 311-325.

[64] Z. Stojanović, *Krivičnopravni ekspanzionizam i zakonodavstvo Srbije*, u: Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja, IV deo (ur. Đ. Ignjatović), Beograd, 2010, 32-40; B. Ristivojević, *Negativna kriminalno-politička kretanja u materijalnom krivičnom zakonodavstvu Srbije od donošenja KZ: temeljno opredeljenje zakonodavca ili incident,* Crimen (III), 2/2012, 170-191; S. Soković, *Uslovni otpust: penološki aspekt, u: Krivične i prekršajne sankcije i mere: izricanje, izvršenje i uslovni otpust* (ur. I. Stevanović, A. Batrićević), Beograd, 2016, 387-400.

[65] Sl. glasnik RS, 32/2013.

[66] Sl. glasnik RS, 97/2008.

[67] Sl. glasnik RS, 32/2013.

[68] Z. Stojanović, *Krivično pravo u doba krize,* Branič, 1-2/2011; 27-49; B. Ristivojević, *Punitivni populizam srpskog zakonodavca – kritička analiza tzv. Marijinog zakona*, u: Nova rešenja u kaznenom zakonodavstvu i njihova praktična primena (ur. S. Bejatović), Beograd, 2013, 319-399; S. Soković, *Žrtve i kaznena politika –upotreba žrtve u savremenoj kontroli kriminaliteta,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije, knj. 3. (ur. S. Đorđević), Kragujevac, 2015, 173-185.

[69] Sl.glasnik RS, 55/2014.

more efficient, and above all faster, the newly created hybrid process system made of classical institutes and the new aversial ones typical for the Anglo-American legal space which are difficult to bind together, was crticised as opposed to the constitution in its key provisions, conceptually inconsistent and contradictory, practically very difficult to apply.[70] Executive crime legislation, faced with the rise of the prison population and the overcrowded prison capacities (which are the consequence of the punitive wave in the material and process legislation), in its base norms the concept of the new penalogy and introduces the risk estimation as the basic penalogical postulate,[71] which is further followed by laws[72] and regulations[73] in greater detail implements the concrete models. Summarizing the judicial practice in respect of decision making about the parole based on the risk estimation, shows that the concept of the risk estimation is strange and unclear to the domestic courts, beacuse of which they accept with difficulty the fact that only the quantitative risk expression based on which the categorization into a certain risk category is sufficient ground for an individual decision.[74]

6. CONCLUSION

The penal populism as a special approach to shaping the social reaction to crime has a global character and has been present for a few decades already. The global social changes connected with the appearance and strenthening of the neoliberal socio-economic system, contributed to its appearance together with the role of the media, the changes of the appearing perception of the crime and the politization of crime. The basic characteristics refer to the establishment of new strategies of crime control, significant

[70] M. Škulić, *Novi zakonik o krivičnom postupku – očekivanja od primene*, u: Nova rešenja u kaznenom zakonodavstvu i njihova praktična primena (ur. S. Bejatović), Beograd, 2013, 33-69; S. Bejatović, *Kaznena politika i reforma krivično procesnog zakonodavca (doslednost ili ne)*, u: Krivično zakonodavstvo de lege lata et de lege ferenda (ur. S. Bejatović), 2015, 7-36.

[71] Sl. glasnik RS, 55/2014.

[72] Zakon o probaciji u izvršenju vanzavodskih sankcija i mera, Sl. glasnik RS, 55/2014.

[73] Pravilnik o tretmanu, programu postupanja, razvrstavanju i naknadnom razvrstavanju osuđenih lica, Sl. glasnik RS, 66/2015.

[74] M. Alimpić, *Uslovni otpust u praksi sdova sa područja Novosadske Apelacije,* u: Krivične i prekršajne sankcije i mere: izricanje, izvršenje i uslovni otpust (ur. I. Stevanović, A. Batrićević), Beograd, 2015, 417; D. Damjanović, *Uslovni otpust u praksi sdova sa područja Kragujevačke Apelacije, u: Krivične i prekršajne sankcije i mere: izricanje, izvršenje i uslovni otpust* (ur. I. Stevanović, A. Batrićević), Institut za kriminološka i sociološka istraživanja, Beograd, 2015. 407.

criminal-legal expansionism, more severe penal policy, the strengthening and expansion of the formal control, new penaology. The most important consequence of the new criminal control practice is a great increase in the number of convicts with the prison penalty, which cannot be explained solely by the increase in crime. Since apart from the global character of the relevant social changes, the penal populism with its controversial consequences has not overtaken all the countries with the same intensity, a special attention is drawn by the countries which have kept the functional criminal-legal system out of the new punitiveness. The relevant research show that the level of punitiveness is in a significantly stronger correlation with economic policy, i.e. investments into the social policy, than with the real state of crime. The local reception of the global trends, both generally and in the criminal legislation system of Serbia, is characterized by inconsistence and neglect of the institutional and cultural incompatibility and the standardisation of thy hybrid law institutes which have a great difficulty of fitting into the national legal systems.

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GLOBALIZATION OF THE PLEA BARGAINING: LESSONS FROM COUNTRIES WITH UNLIMITED SYSTEM

Abstract

Plea bargaining is a global phenomenon among legal transplants of the criminal procedural law. It originated on the American continent, but become popular in the last 30 years around the world. Legislators, faced with the overloaded courts, found solutions in the comparative law that could solve this problem. Plea bargaining is far away from the perfect system of the solving criminal cases, since many critics follow this transplant. However, its positive sides are numerous, so it comes to life in every country where it is introduced. Of course, some states started from the beginning with rapid changes in legislations, completely turning its legal system to the Anglo-American. Others moved with significantly more caution, limiting plea bargaining on certain crimes. The author in this work deals with the agreement in countries with unlimited system of plea bargaining: Germany, Bosnia and Herzegovina and Serbia.

Key words: *plea bargaining, plea agreement, negotiation, limited and unlimited system, felony.*

1. INTRODUCTION

Plea bargaining is an essential component of the administration of justice. Properly administrated, it has to be encouraged.[1]

The term globalization is coined in the second half of the XX century.[2] In the last years, many legal problems acquired a global character, caused by the civilization development, enormous person's familiarity from one country to another and by the same problems that

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[1] Santobello v. New York, 404 U.S. 257, 260, 1971.

[2] W. Coleman, A. Sajed, *Fifty Key Thinkers on Globalization*, Oxon, 2013, 1.

follow various countries. It is, for example, the case with the euthanasia[3], physician-assisted suicide[4] or medical abortion. Citizen participation in the criminal trials is the next global solution in the criminal procedure world.[5] The mentioned period is marked by a strong legislative activity in the world aimed at increasing efficiency of the criminal proceedings.[6] Faced with the overloaded courts, legislators have tried to find better solutions for their legal systems looking into the comparative legal systems. This process is particularly visible in post-communist societies faced with rigorous requirements of the EU accession processes.[7] Changes were necessary in the field of the evidences[8] as well as on the main trial. One of the most famous legal transplants, beside the principle

[3] B. Banovic, V. Turanjanin, *Euthanasia: Murder or Not,* Iranian Journal of Public Health, 10/2014, 1316-1323; V. Turanjanin, B. Mihajlovic, *Right to die with Dignity – the Same Problems and Different Legal Approaches in European Legislations, with Special Regard to Serbia,* in: Human Rights between War and Peace, Vol. 2, 2015, 53-68; V. Turanjanin, *Eutanazija i lekarski potpomognuto samoubistvo pod lupom Evropskog suda za ljudska prava*, u: Krivičnopravni instrumenti suprotstavljanja terorizmu i drugim krivičnim djelima nasilničkog karaktera, Banja Luka, 2016, 558-576.

[4] V. Turanjanin, *Pozitivnopravno regulisanje specifične medicinske usluge u Sjdinjenim Američkim Državama,* u: XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Kragujevac, 2012, 349-362.

[5] For example see: V. Turanjanin, *Jury Systems in Europe as the Anglo-Saxon Type of Trial,* in: Arhibald Reiss Days, Vol. III, Belgrade, 2014, 279-285; V. Turanjanin, *European Systems of Jury Trials,* US-China Law Review, 2/2015, 195-207.

[6] For More about factors that determinate efficiency of criminal proceedings, see M. Kolaković-Bojović, *Completion of Criminal Proceedings in Reasonable Time (Okončanje krivičnog postupka u razumnom roku, Beograd),* doctoral dissertation, University of Belgrade, Faculty of Law, 2016, 40-148.

[7] For more about relations between EU accession negotiations and improvement of the criminal jystice system efficiency, see: M. Kolaković-Bojović, *Efikasnost krivičnog postupka, reforma pravosuđa i pristupni pregovori sa EU,* Zbornik Instituta za kriminološka i sociološka istraživanja, Vol. 33, No. 2/2014, 189 – 201; M. Kolaković-Bojović, *Pojam efikasnosti krivičnog postupka-razumemo li ideal kome težimo,* u: Kriminal, državna reakcija i harmonizacija sa evropskim standardima (ur. L. Kron, A. Jugović), Institut za kriminološka i sociološka istraživanja, Belgrade, 2013, 373-384; M. Kolaković-Bojović, *Efikasnost krivičnog pravosuđa kao sredstvo suzbijanja kriminaliteta*, u: Kriminal i društvo Srbije: izazovi društvene dezintegracije, društvene regulacije i očuvanja životne sredine (ur. M. Hugson, & Z. Stevanović), Institut za kriminološka i sociološka istraživanja, Beograd, 2015, 237-254.

[8] V. Turanjanin, M. Vostinic, I. Zarkovic, *Evidences and the New Criminal Procedure Code of the Republic of Serbia*, in: Researching Security: Approaches, Concepts and Polices, Skopje, 2016, 272-284.

of the opportunity,[9] that received the epithet of the globe[10] is the plea bargaining. Originated from the territory of the United States,[11] the plea bargaining has spread through European and world legal systems in the late twentieth century. Plea agreement on the European soil took root in Germany, then in Italy, while today it is characteristic of French, Russian, Serbian, Montenegrin, Bosnian, Croatian legislations etc.[12] However, the way in which this legal transplant is regulated varies from country to country. In this paper, we will analyze legislations in Germany, Bosnia and Herzegovina and Serbia, as well as examples where the plea agreement can be applied on all felonies from the criminal codes (that is not common characteristic of most legal systems in the Europe). At the same time, the plea agreement is regulated in Bosnia very summarily, while it is much elaborated in the Serbian legislation. In the Republic of Serbia, plea bargaining is regulated by articles 313-319 of the CPC.[13] These are very detailed provisions, which distinguish Serbian legislator from the other legislators in the region,[14] mainly from Bosnia and Herzegovina, where legislator very summarily described plea agreement and his conclusion.

[9] D. Cvorovic, V. Turanjanin, *Principle of the Opportunity as a Diversion Form of Criminal Procedure,* in: Arhibald Reiss Days, Vol. III, 2015, 317-328.

[10] M. Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,* Harvard International Law Journal, Vol. 45, No. 1/2004, 1-64.

[11] V. Turanjanin, *Transplantacija sporazuma o priznanju krivice kroz zemlje anglo-saksonskog pravnog sistema,* u: Pravna misao u srcu Šumadije (ur. B. Vlašković), Kragujevac, 2012, 247-262.

[12] See more V. Turanjanin, *Plea Bargaining,* doctoral dissertation, Faculty of Law University at Kragujevac, 2016.

[13] Plea bargaining was formerly regulated by article 282 of the SCPC, titled agreement on guilty plea. Since the guilt (mens rea) is one of the four elements of the felony concept, it had to come to the change in title of this legal transplant. Today, it is, legally, agreement on confession of felony. We will simplify it, so further it will be called plea bargaining. Otherwise, other three elements are act (actus reus), predicted in law and illegality.

[14] This deviation from the ex-Yugoslav countries existed in the moment of the implementing of the plea bargaining. Now, this field is more in detail regulated.

2. PLEA BARGAINING IN GERMANY

„Fast jeder kennt es,
Fast jeder praktiziert es,
Nur keiner spricht daruber."[15]

In recent decades jurisprudence and different solutions imposed by court decisions have a great influence on the legislation, so, Germany reminiscent on the Anglo-Saxon countries.[16] From the plea agreement aspect, which has developed in the basic structure of the criminal proceedings,[17] Germany is a country that represents a sort of paradox. Plea bargaining, in accordance with its extremely compatible nature,[18] found in this European country the first fertile ground for its development.[19] But, for many years plea agreement remained out of written legislation and official regulation. In the practice, parties were reaching plea agreement for many times,[20] which has created legal uncertainty.[21] In the German courts, unacceptable and inexplicable overloaded with cases, parties looked for the exit from such situations in

[15] „Almost everyone knows about it,
Almost everyone does it,
But no one is talking about it."
H. J. Fätkinhäuer, pseudonym Detlef Deal, *Der strafprosessuale Vergleich*, StrVert, 1982, 545. Under this pseudonym the text is published 1982. On this subject: Detlef Deal, Der Spiegel 4/1987, www.spiegel.de/spiegel/print/d-13521783.html, access: Novembar 2011.

[16] M. Bohnalder, *Principles of German Criminal Law*, Oxford – Portland, 2009, 7; E. Siegismund, *The Public Prosecution Office in Germany: Legal Status, Functions and Organization,* 120th International Senior Seminar Visiting Experts' Papers, Resource Material Series No. 60, 2003, 58.

[17] M. Heller, *Das Gesetz zur Regelung der Verständigung in Strafverfahren – No big deal?,* Hamburg, 2012, 5.

[18] For example: M. Feeley, *Perspectives on plea bargaining,* Law & Society Review, Vol. 13, No. 2, Special issue on plea bargaining, 1979, 199-209.

[19] However, there are there are perceptions that it is unclear how German plea agreement is connected with the American type, due to the large differences in the implementation. C. Safferling, E. Hoven, *Plea Bargaining in Germany after the Decision of the Federal Constitutional Court,* German Law Journal, Vol. 15, No. 1, 2014, 3.

[20] This view also in: M. Škulić, *Osnovi uporednog krivičnog procesnog prava i problemi reforme krivičnog postupka,* u: Kaznena reakcija u Srbiji, I (ur. Đ. Ignjatović), Belgrade, 2011, 108.

[21] On this topic: W. Felstiner, *Plea contract in the West Germany*, Law & Society Review, Special issue on plea bargaining, Vol. 13, No. 2, 1979, 309-325.

the informal agreement between them (*Flucht in die Absprache*)[22], which took place outside the margins of the legal regulation, in shadow.[23] To make it simple, the plea agreement was a part of the social reality, so, negotiations between prosecutor, defendant and the judge were not rare.[24] But, there was no empirical data on this phenomenon to the 1970th years of the last century, because meetings of these subjects outside the courtroom were rare.[25] Finally, on 28th May 2009 with fanfare is welcomed Law on agreements in criminal procedure,[26] incorporated into the Criminal Procedure Code (hereinafter: GCPC), at the time when the most European countries already had in their legislations implanted plea bargaining.[27]

In Germany, the plea agreement is an agreement between prosecutor, defendant with a lawyer and a main trial judge, where defendant agrees to plead guilty for the crime for which he is charged and to refrain from presenting evidences in his defense. Prosecutor promises that he will request a sentence within negotiated limits, and agrees to propose a penalty that will not exceed such limits. Thus, while the court in most countries that recognize plea bargaining in various forms appears as an impartial party in the criminal proceeding, in Germany it has the double role: as a party who concludes the agreement, but also as its supervisor.[28] Considering this, , we can

[22] V. Krey, O. Windgätter, *The Untenable Situation of German Criminal Law: Against Quantitative Overloading, Qualitative Overcharging, and the Overexoansion of Criminal Justice,* German Law Review, Vol. 13, No. 06, 2012, 579, 600.

[23] F. Bittmann, *Consensual Elements in German Criminal Procedure Law*, German Law Journal, Vol. 15, No. 1, 2014, 21.

[24] H. P. Mursch, *Grundregeln bei Absprachen im Strafverfahren*, Zeitschrift fur Rechtpolitik, 220.

[25] T. Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure,* in: Crime, Procedure and Evidence in a Comparative and International Context – Essays in Honour of Professor Mirjan Damaška (eds. J. Jackson, M. Langer, P. Tillers), Oxford – Portland, 2008, 43.

[26] BGBI I 2009, S 2353.

[27] Changing the Criminal Procedure Code towards its liberalization and party's disposition with the proceeding in the legal literature is known as "holding the requiem above the old code". On this topic: B. Schünemann, *Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaats,* Zeitschrift fur Rechtspolitik, Vol. 42, 2009, 104; H. Rosenau, *Die Absprachen im deutschen Strafverfahren,* in: Straftheorie und Strafgerechtigkeit (Hrsg. H. Rosenau, S. Kim) Frankfurt, 2010, 45, H. Rosenau, *Die Absprachen in Deutchland,* Law&Justice Review, Vol. 1, 2010, 36.

[28] J. I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View,* The American Journal of Comparative Law, Vol. 54, 2006, 214.

identify the basic characteristics of the plea bargaining in Germany: the accused admits his guilt at trial; the all main parties involved in criminal procedure participate in the negotiations; they negotiate range of penalty- not particular penalty. The most common term for plea bargaining in the German legal terminology is *Absprache*, although we could find terms *Verstandigung*, *Vereinbarung* and *Abrede*.[29] In the other words, plea agreement here is simply an agreement or court agreement, but very rarely plea agreement.

German informal agreements are, like the other countries that have adopted different types of such agreements, based on the American plea bargaining system, but significantly deviates from the original model. The main reason for it, could be found in the role of the court. More precisely in the American legal system judge mostly has a passive role, while the main actors are the prosecutor and defendant with his/her legal counsel, who reaching an agreement on mutual benefits before the trial. So, the court has a right to accept or reject such an agreement (but in the most cases court verifies it).[30] In Germany, the court is in a different position, due to fact that a judge has a main place in the whole criminal procedure, and taking an active role in the negotiations, leading to the greater transparency.[31] He is active in establishing the facts decisive of the specific case, with authority given by GCPC, manages and controls criminal proceeding, examines witnesses and presents evidences. He has access to the prosecutor's file, so, it possesses unrestricted possibility to know all facts gathered to the beginning of the trial.

The German criminal procedure is also characterized with the specificity related to the right of the defense counsel on insight in the prosecutor's files. In this way, defense counsel and defendant can introduce themselves in all facts relevant for the court. Based on that, they consider the risk of the ordinary trial, without plea bargaining. In other words, knowing all facts of the case, they can choose between a

[29] M. Kerscher, *Plea Bargaining in South Africa and Germany*, Stellenbosch, 2013, 5.

[30] On comparision between these two legal systems in terms of plea bargaining: D. Karioth, *Absprachen im Strafprozess mit rechtsvergleichendem Blick auf das „plea bargaining" im anglo-amerikanischen Strafprozess,* in: Arbeiten zu Studium und Praxis im Bundesgrenzschhutz (Hrsg. R. Ooyen, M. Möllers), Lübeck 1999/2000, 114-145.

[31] J. I. Turner, *Can We Manage Plea Bargaining Better?* Insights from Germany, Paper presented at the annual meeting of the Law and Society, 2009, http://www.law.smu.edu/faculty/Turner, November 2011.

trial and plea bargaining. During the plea bargaining procedure, any party may occur as the initiator of the negotiations. Negotiation will be between defendant with defense counsel, prosecutor and judge.[32]

In the German criminal procedure legislation, there are no legal provisions that limit plea bargaining on certain felonies, based on the prescribed sentence. The possibility to apply this legal institute even for the most serious crimes is one of the reasons why the plea bargaining in Germany is criticized. However, such forebodings have not come true. The parties reach a plea agreement, usually in the field of the secondary crime, while its conclusion for the most serious felonies is exceptional.[33] Further, plea bargaining has no place in every criminal proceeding, so, it is impossible to conclude an agreement in the proceedings where defendant is caught *in flagrante* or if he pleaded guilty in the earlier stage of the proceeding (because in the later phase he does not have anything for negotiations). Therefore, this system of agreements favors defendants who know their right to remain silent and have legal counsels capable to make harder court's work.[34]

The court has to set up upper limit that sentence will not pass. It is not allowed to agree certain penalty, so, the parties negotiate about the range of the sentence,[35] which could be higher or lower, but it does not deviate significantly from the range prescribed by the Criminal Code. As it is logical, punishment has to be proportional to the gravity of the crime, but, the reduction of the sentence is by percentage (for example, one third of the prescribed sentence etc.[36]). Usually, the penalty is reduced from one-quarter to one-third of the prescribed sentence.[37] Therefore, they determine limit within a court will impose a sentence,

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[32] J. Hermann, *Bargaining Justice – A Bargain for German Criminal Justice,* University Pittsburg Law Review, 1992, 764. So, while in the American legal system two main actors of the negotiations are prosecutor and defendant, in Germany we have another, third party: a judge. His participation guarantees that a punishment will not be determinate in the higher amount than in the plea agreement. Because of that, there is a greater possibility that defendant will choose plea bargaining. M. Langer, *op. cit.*, 43.

[33] R. Rauxloh, *Formalization of Plea Bargaining in Germany – Will the New Legislation Be Able to Square the Cricle?,* Fordham International Law Journal, Vol. 34, 2010, 304.

[34] T. Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure,* 46.

[35] H. Rosenau, *Die Absprachen in Deutchland*, 67.

[36] G. Küpper, *Konflikt oder Konsens*, HFR 14/2007, 9.

[37] J. I. Turner*, Judicial Participation...*, 235.

although, it is most frequently sentence from the upper limit line.[38] In addition, participants have an opportunity to comment limits, and the parties will reach an agreement in the moment when every party accepts a court's proposal (paragraph 257c point 3.).[39]

3. PLEA BARGAINING IN BOSNIA AND HERZEGOVINA

Plea bargaining in the Bosnian legislations is introduced by the end of 2000, when it enacted Criminal Procedure Code of the Brcko District.[40] The Criminal Procedure Code for the whole Bosnia and Hercegovina,[41] as well as CPC of the Federation Bosnia[42] and Herzegovina and CPC Republic of Srpska[43], were adopted in 2003, when the High Representative for Bosnia and Herzegovina released a set of criminal laws: Criminal Code, Criminal Procedure Code and Law on Witness Protection. With these laws, international community finished its work on the plan of developing criminal legislation in Bosnia and Hercegovina. Based on this legislation, entities adopted laws on the same matter, which represents more or less harmonized versions CPCs with the BCPC. For the first time, there was introduced prosecutorial investigation, but also cross-examination, guilty plea, plea bargaining, criminal warrant etc.[44] This type of criminal proceeding represents a mix of the continental and adversarial Anglo-American law, and it is the result of the reconciliation

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[38] *Ibid.*, 222.

[39] More on this topic in: V. Turanjanin, *Sporazum o priznanju krivice u krivičnom procesnom pravu Nemačke*, u: Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena, Zlatibor, 2013, 300-316.

[40] Official Gazette of the Brcko District, No. 7/00, 1/00, 33/13, 27/14. Bosnia and Herzegovina is a very specific country. It consists from four legislations: legislations for whole Bosnia, for its two entities (Federation Bosnia and Herzegovina and Republic of Srpska) and Brcko District. This is complicated division, so, there are numerous problems.

[41] Official Gazette of the Bosnia and Herzegovina, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 (hereinafter: BCPC).

[42] Official Gazette of the Federation Bosnia and Herzegovina, No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07 i 9/09.

[43] Official Gazette of the Republic of Srpska, No. 50/03, 111/04, 115/04, 29/07, 68/07, 119/08, 55/09, 80/09, 88/09 i 92/09.

[44] D. Kaurinović, *Praktična iskustva u primjeni novih krivičnoprocesnih ustanova: priznanje krivice, sporazum o priznanju krivičnog dela i kazneni nalog,* u: Aktuelna pitanja primjene krivičnog zakonodavstva u BiH, Neum, 2004, 1.

of these two legal cultures.[45] So, Bosnia left the system where the court had a primary role in the procedure and transits to a system in which the focus is on the prosecutor and the defendant. From the set of the transplanted legal institutes, guilty plea and plea bargaining should have a great role in the strengthening of the criminal procedure. In Bosnia, plea bargaining may occur in different forms: negotiations about the legal qualification of the felony, negotiations about the criminal sentence and negotiations on the facts of the committed crime. Usually, actors see plea bargaining as agreements on sentence, but there are authors who believe that other types of negotiations could be considered as part of the legal definition.[46]

Facing charges against him, the defendant has several legal possibilities, starting with the choice of the ordinary criminal proceeding, through the guilty plea procedure to the plea bargaining. According to the BCPC[47], the defendant and his counsel can, until the end of the trial before the court of the first instance and before the appellate court, negotiate with the prosecutor on the conditions for guilty plea (article 231 paragraph 1 BCPC). Both parties have an aim to conclude an agreement that is in their best, conflicted interest. The agreement is usually the result of the criminal cases that may lose both prosecutor and defense.[48] The desire of the defendant to enter into this type of the procedure or to avoid it[49] rests mainly at the strength of the prosecutor's evidences.[50] However, defendant cannot conclude the agreement if he, on the preliminary

[45] H. Sijerčić-Čolić *et al., Komentari zakona o krivičnom/kaznenom postupku Bosne i Hercegovine,* Sarajevo, 2005, 193.

[46] Sporazum o priznanju krivice: primjena pred sudovima BiH i usaglašenost sa međunarodnim standardima za zaštitu ljudskih prava, OSCE, 10.

[47] Due to the volume of this work, as well as equality of the entity's legal solutions regarding plea bargaining, in this work we will rely on this legal text.

[48] M. Simović, *Pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Bosne i Hercegovine (zakonska rješenja i iskustva u dosadašnjoj primjeni),* u: Alternativne krivične sankcije i pojednostvljene forme postupanja (ur. S. Bejatović), Beograd, 2009, 207.

[49] It is believed that reasons on which rely defendant's decision to choose ordinary criminal proceeding are reduced on two. First, the defendant chooses any chance to get acquittal verdict because he will be definitely convicted in plea bargaining. Second, he will choose ordinary proceeding in the case when we believe in his innocence. See: M. Colin, *Deal or no deal: why courts should allow defendants to present evidence that they rejected favorable plea bargains,* American Criminal Law Review, 2011, 1.

[50] M. N. Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence during Plea Bargaining,* Fordham Law Review, Vol. 81, 2013, 3612.

hearing, pleaded guilty (article 231 paragraph 2 BCPC). Only in the case when the accused pleaded not guilty, or remained silent (when there is a legal presumption that he is not guilty), he can enter into plea bargaining.

In the negotiations, the prosecutor offers the defendant certain benefits in exchange for the admission of guilt, which are reflected in the sentence proposal below the statutory minimum or more lenient type of criminal sanction (article 231 paragraph 3 BCPC). Since the plea agreement is a kind of the contract, the prosecutor and the defendant will negotiate in order to exchange information. This provision is a cooperation clause, which is characteristic of the adversary systems, set up to gather information about the other persons involved in crime, as well as to provide a potential testimony against those persons. Prosecutors have started to apply cooperation clauses in the particularly important cases, e.g. for war crimes, organized crime and human trafficking,[51] where they have numerous problems in the evidence gathering. So, in this case, the prosecutor could offer immunity as a part of the agreement.[52] These clauses with the testimony obligations are desirable, because they provide valid evidence to the prosecutor, which can be used in the other criminal proceeding.[53] This kind of agreement may contribute to providing evidence to the prosecutor in order to facilitate the prosecution other perpetrators.

As mentioned, in the Bosnian legal theory prevailing understanding that plea agreement can only refer to the sentence reduction, and not to the sort of indictment or to a facts of crime. The prosecutor may offer a more lenient criminal sanction (suspended sentence or judicial admonition instead imprisonment or fine), a less severe sentence (fine instead imprisonment) or to apply the provisions on sentence reduction and reduce imprisonment sentences within legal limits. In addition to this, he or prosecutor can offer security measures, as a specific type of the criminal sanctions. The parties can accurately determine the type and extent of the sentence, or they can determine just limits for the sentence. In

[51] M. Simović, V. Simović, *Napomene o sporazumima u krivičnom postupku,* u: Krivično zakonodavstvo Srbije i standardi Evropske unije (ur. S. Bejatović), Kragujevac, 2011, 171.
[52] *Ibid.*
[53] V. Ikanović, P*regovaranje o krivici nakon desetogodišnje primjene u Bosni i Hercegovini,* u: Pojednostavljene forme postupanja u krivičnim stvarima: regionalna krivičnorocesna zakonodavstva i iskustva u primeni, Beograd, 2013, 188.

any case, they must remain within the framework of the legal provisions.[54]

The competence for deciding on the plea agreement is divided. Usually, the prosecutor sends a plea agreement in written to the preliminary hearing judge or to the trial judge - depending from the phase of the procedure. On plea agreement decides judge for the preliminary hearing to the moment of the referring the case to the judge for the main trial, after confirmation of the indictment. After this moment, on plea agreement decides main judge or panel of the judges (article 231 paragraph 4 BCPC). The court may accept or reject an agreement (article 231 paragraph 5 BCPC). He firstly has to determine: whether the defendant entered into plea bargaining procedure voluntarily, consciously, with understanding and knowing of the possible consequences, including those related to damage and costs of the criminal proceeding; whether there is enough evidence of the defendant's guilt; whether defendant understands that he waive his rights to trial and appeal; whether the proposed criminal sanction is in accordance with the Criminal Code; whether defendant had an opportunity to comment victim's requests (article 231 paragraph 6 BCPC). The lack of the one of these elements inevitably leads to the agreement invalidity. This procedure has to be abandoned and the case referred to the ordinary trial. In the meantime, the defendant and the prosecutor could reach another plea agreement. Otherwise, there will be distortion of the due process principle.[55] The existence of these requirements, the court may determine only through the dialogue with the defendant, which is today, unfortunately, far from ideal. This conversation has to be exhaustive. The court shell gain full confidence in the fact that the defendant understands the consequences of his guilty plea. In practice, this dialogue is often summarized. The court poses the most important questions very quickly, in order to finish a case as early as it is possible.[56]

The court will reject the plea agreement in the case when one of the mentioned requirements missing. The main reason for the rejecting the agreement is proposal of inadequate sentence. This decision is final. Basically, the court here does not render and draft a separate written and

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[54] D. Kaurinović, *Praktična iskustva u primjeni novih krivičnoprocesnih ustanova: priznanje krivice, sporazum o priznanju krivičnog dela i kazneni nalog*, 5.

[55] M. N. Petegorsky, *op. cit.*, 3608-3609.

[56] Sporazum o priznanju krivice: primjena pred sudovima BiH i usaglašenost sa međunarodnim standardima za zaštitu ljudskih prava, OSCE, 22.

reasoned decision, on which parties should have a right to appeal. This decision shall be mandatory entered into a record.[57] The main hearing shall be scheduled within 30 days. Guilty plea cannot be used as evidence in the further proceeding (article 231 paragraph 8 BCPC). However, the problem arises in a case of guilty plea during the main trial, when the court refused to accept such plea. In the minds of judges and all presents is already solidified a confession and presumption of innocence is violated in the further course of the proceeding. This problem can be solved only with the exemption of the trial judges and their replacement with new judges. In that case, criminal proceeding shall start from the beginning.[58] Otherwise, when the court rejects an agreement, the prosecutor with the accused and his lawyer may start new negotiations. A proposed sentence, in that case, will be more severe than earlier. The procedure with new agreement is identical to the first submission.

If the court accepts an agreement, it will continue the proceeding in order to impose a sentence from the agreement (article 231 paragraph 7 BCPC). If the agreement is accepted in the main trial, judge or panel of judges will impose a sentence. The same procedure will be applied if the appellate court revokes a verdict and order a new trial.[59] A court does not have the authority to refuse a proposed sentence and instead impose a sentence that it is more adequate. This can be done only after ordinary trial, ended without plea agreement.

About results of plea bargaining, a court will notify the victim, who normally plays no role during this procedure, but has to be informed about it because of his right to a damage claim (article 231 paragraph 9 BCPC). In the other words, a victim has a right to submit a compensation claim to the end of the main trial. If a court accepts an agreement, this request also has to be addressed. It could be awarded wholly or partially (when for the rest a court may refer a victim to a civil procedure). Past practice has shown that these issues are rarely solved in the plea bargaining processes.[60]

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[57] H. Sijerčić-Čolić *et al., op. cit.,* 625.

[58] *Ibid.,* 625.

[59] M. Simović, V. Simović, *Krivično procesno pravo*, 343.

[60] Sporazum o priznanju krivice: primjena pred sudovima BiH i usaglašenost sa međunarodnim standardima za zaštitu ljudskih prava, 31.

3.1. Right to appeal in the Bosnia and Herzegovina

After initial uncertainty about the existence of the right to appeal against verdict based on the plea agreement, in theory and practice has been taken a view that the appeal is allowed legal remedy in this procedure,[61] except for the imposed sentence. However, BCPC does not exclude right to appeal, but it is pointless to grant right to appeal against agreed sentence. In a case when the court imposes different sentence, defendant would have a right to appeal on this ground.[62] Right to appeal is excluded both in a case when the prosecutor and defendant negotiated fixed penalty and range of the sentence (in this case, the court has to impose the certain penalty).[63] The possibility of the filing appeal on other grounds is not explicitly excluded, but it hardly could have an impact on the verdict in merits.[64] Supreme Court of the Republic of Srpska had also took a view that the appeal is allowed, except against the sentence, because it has to allow to higher courts to examine the correctness of the application of the substantial and procedural provisions, which accepted other courts in Bosnia and Herzegovina. Thus, the existence of circumstances related to the mental state of the defendant at the guilty plea moment, which cast doubt on the ability of the accused to freely give a guilty plea statement, obliges a court to determine a nature of the defendant's mental disorder and impact on the ability to enter into the plea bargaining procedure. Failure of the court to determine such circumstances leads to the essential violation of the criminal procedure provisions.[65] Finally, it is important to mention that, although in the narrower sense, it is possible to appeal against a verdict of the second-degree court based on the plea agreement.[66]

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[61] Opposite view: M. Govedarica, *Donošenje presude bez suđenja u krivičnom postupku Republike Srpske,* Pravna riječ, 15/2008, 190.

[62] Rješenje Vrhovnog suda Federacije Bosne i Hercegovine broj Kž. 251/05 od 07.06.2005. godine, published in: Bilten sudske prakse Vrhovnog suda Federacije Bosne i Hercegovine, 1/2005.

[63] R. Janković, *Mogućnost žalbe protiv presude kojom se optuženi oglašava krivim na osnovu sporazuma o priznanju krivice*, Pravna riječ, 29/11, 671.

[64] H. Sijerčić-Čolić *et al., op. cit.,* 624.

[65] Rješenje Vrhovnog suda Federacije Bosne i Hercegovine broj 07 0 K 005047 11 Kž 2 od 04.05.2011. godine, published in: LJ. Filipović, *Sudska praksa Vrhovnog suda Federacije Bosne i Hercegovine,* Pravna misao, 11-12/2011, 128-131.

[66] R. Janković, *op. cit.*, 678.

Table 1: The ration of the proposed penalty in BCPC and imposed sentences in plea agreements[67]

Felony	Proposed penalty	Imposed criminal sanction
Tax evasion	Fine or imprisonment up to 3 years	Suspended sentence
Accepting gifts and other benefits	Imprisonment of 1 to 10 years	Suspended sentence and fine in the amount of EUR 500,00
Abuse of position or authority	Imprisonment of 6 months to 5 years	Imprisonment of 2 months: suspended sentence
Organized crime	Imprisonment of at least 5 years	Imprisonment: 5 years, 1 year
War crimes against civilians	Imprisonment of at least 10 years	Imprisonment of 5 years
Crime against humanity	Imprisonment of at least 10 years or long-term imprisonment	Imprisonment of 8 years
Hard crime against public transport	Imprisonment of 6 months to 5 years	Imprisonment of 18 months
Endangering public traffic	Imprisonment of 2 to 12 years	Imprisonment of 5 months
Dereliction of duty	Imprisonment of 6 months to 5 years	Imprisonment of 6 months
Murder	Imprisonment of at least 5 years	Imprisonment of 10 years
Serious bodily injury	Imprisonment of 6 months to 5 years	Suspended sentence
Unauthorized production and trafficking in narcotics	Imprisonment of 1 to 10 years	Imprisonment of 4 years
Causing general danger	Imprisonment of 1 to 8 years	Imprisonment of 14 months
Participation in a fight	Imprisonment up to 3 years	Imprisonment of 60 days

In the table above, we could see statistical data related to the plea bargaining in Bosnia. Although this legal transplant is accepted and could be

[67] Verdicts are taken by method of the randomly sample. See more in: B. Simonović, V. Turanjanin, *Sporazum o priznanju krivičnog dela i problemi dokazivanja,* u: Kriminalistički i krivičnoprocesni aspekti dokaza i dokazivanja, Sarajevo, 2013, 29.

applied on every felony, its use is not as common as in the USA. The reason for that lies in a different legal culture and in the court's penal policy, which does not deviate from the penal policy expressed in the ordinary criminal proceedings. The parties most often determine prison sentence, then suspended sentence, while the least frequently they determine fines,[68] which is, after all, expected. Despite criticism, prosecutors and defendants continue to apply plea bargaining process on the whole territory of Bosnia and Herzegovina.[69] There is a tendency of the growth number of cases ended by agreement in relation to their total number.[70]

4. PLEA BARGAINING IN SERBIA

The plea bargaining is regulated by articles 313-319 SCPC. Due to the limited scope of this paper, we will explain briefly basic provisions and process of negotiations. The required condition for plea bargaining is initiative for it. In provisions that regulate the rights and duties of the public prosecutor lays his authority to conclude the plea agreement (as well as both types of testimony agreements). In a case of the plea agreement, an initiative can be viewed in two ways. Firstly, a prosecutor may refer to the defendant or his legal counsel offer for agreement with every necessary element, where, of course, criminal sanction will take a central place.[71] Secondly, a prosecutor may refer to the defendant only invitation for negotiations. Of course, the opposite is possible, but less likely. In practice, the problem can be the refraining of each side from the initiative, because of the fear that could be interpreted as weakness and which would weaken negotiate position.[72] An

[68] D. Kaurinović, *Praktična iskustva u primjeni novih krivičnoprocesnih ustanova: priznanje krivice, sporazum o priznanju krivičnog dela i kazneni nalog*, 6.

[69] Serbia is the only country in Europe that, in addition to Bosnia, had several criminal procedure codes that existed in the same time.

[70] M. Novković, *Normativna i praktična iskustva u regulisanju i primjeni sporazuma o priznavanju krivice kao novog instituta krivičnog procesnog prava u BiH,* Bilten Okružnog suda u Banjoj Luci, 2-4/2006, 22.

[71] Otherwise, regardless of plea bargaining, in the theory has been present notion that the public prosecutor should have the option to propose criminal sanction in the ordinary criminal procedure. Today, this is the legal rule anyway. D. Nedić, *Aktuelna pitanja glavnog krivičnog postupka sa aspekta javnog odnosno državnog tužioca*, u: Mogući pravci razvoja jugoslovenskog kaznenog zakonodavstva i njihove osnovne karakteristike, Beograd, 1999, 139.

[72] D. Kadiev, *Postupak dogovora o krivici a aspekta branioca,* u: Pojednostavljene forme postupanja u krivičnim stvarima, Beograd, 2013, 221.

initiative should run, in practice and for minor crimes, defendant and legal counsel, as it is case in neighboring countries, primarily in Bosnia. In Croatia, defense lawyers usually initiate negotiations in cases where is stipulated the prison sentence in the long or medium term.[73]

When the other party accept negotiation proposals on conditions for the guilty plea, plea bargaining begins.[74] Subject of the plea agreement is regulated by the article 314 of the SCPC. This article prescribes elements that plea agreement has to contain, and elements that are facultative. In the other words, plea agreement has its mandatory and facultative elements. Every plea agreement has to contain six mandatory elements:

1. Factual description of the felony[75];

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[73] N. Cambj, *Sporazumijevanje prema noveli Zakona o kaznenom postupku,* Hrvatski ljetopis za kazneno pravo i praksu, Vol. 20, No. 2/2013, 676.

[74] Before that, we have to state that the negotiation literature splits into two directions: one is reflected in the prescriptive advices how to negotiate successfully and other in the descriptive analysis of the negotiate process. D. Maynard, *Demur, Defer and Deter: Concrete Actual Practices for Negotiation in Interaction,* Negotiation Journal, April 2010, 126. Parties have to negotiate in the prosecutor's office. There is no other place where negotiations could be carried out in accordance with the law, so, this provision is logical from that aspect. The manner and place where negotiations are initiated are not at the same time essential for the place where negotiation will be carried out – it must be in the prosecution office. On this occasion, public prosecutor will instruct the defendant about his/her the right to counsel, but also about rights and obligations arising from the possible plea agreement and about the fact the he has a right to withdraw from the negotiation proposal.

[75] The legislator primarily prescribes that the plea agreement should contain factual description of the felony that is subject of the plea agreement (article 314 SCPC). Only with the complete factual description can be evaluated and illuminated all circumstances. The question is, what does it mean factual description of the crime, is it description given by defendant or prosecutor? This is an important issue, because in this procedure process of proving is not completed or it is essentially shortened. Defendant always has its own view on crime, starting with the explanation of the motives, conditions and circumstances existed at the time of the crime (i.e. that precede or followed), to the real actions of the certain individuals (victims, accomplices, witnesses etc.). The public prosecutor has a quite different view on the facts. Some time, between their two views may be large (significant) differences. If the defendant is actually perpetrator, that does not mean that he knows all circumstances that should be in the description. For example, he could be in a state of affect, or under the influence of drugs or alcohol. On the other hand, the prosecutor did not attend to the criminal event, so, he can have a picture of the event only based on the confession of the defendant and available evidences. If he concludes plea agreement in the earlier investigation phase, he will usually have fewer evidences for building his event image. He will be under the greater influence of the confession and presented facts.

2. Confession[76];
3. Agreement on the type, extent and range of the criminal sanction[77];

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[76] The basic element that must be contained in every plea agreement is a confession for one or more felonies. The decision of the defendant, whether he will confess or not is one of the most important in the criminal proceeding. In order to make the most favorable step, defendant should evaluate whether an indictment correspond to the facts of the crime. Since the prosecutor does not have to present all evidences against him, the defendant must have a sufficient information quantum in order to decide whether to confess or not. J. A. Epp, *Building on the Decade of Disclosure in Criminal Procedure*, London – Sydney, 2001, 46. Confession must be fully. It is fully if essentially and substantially correspond to the charges or to the prosecutor's attitude in the concrete indictment or indictment that should be filled. M. Škulić, *Komentar Zakonika o krivičnom postupku,* Belgrade, 2009, 937. It must be complete and comprehensive, refer to the factual substrate, contain all circumstances of the crime, motives, means, as well as any circumstance that may be known only to the defendant. Thus, confession has to be reasoned. Then, it must be given knowingly, voluntary and with the exclusion of the error possibility, although every required element should be clearly separated and described, it is particularly emphasized for this segment. D. Nikolić, *Sporazumi o priznavanju krivičnog dela kao reprezentativna forma pojednostavljenog postupanja u krivičnim stvarima*, u: Pojednostavljene forme postupanja u krivičnim stvarima: regionalna krivičnoprocesna zakonodavstva i iskustva u primeni (ur. I. Jovanović, M. Stanisavljević), Beograd, 2012, 135.

[77] One of the mandatory elements of every plea agreement is agreements on criminal sentence or more precisely, agreement on the type, extent and range of punishment or other criminal sanction. Since the ancient Romans originated many sentencing rules, like nulla poena sine lege, poena debet commensurari delicta and indicum est actum trium personarum: actoris, rei, iudicis. There are two basic rules for the legally sentencing in the plea agreement. First, the sentence could be determined in the absolute terms, in a case when the prosecutor and defendant strictly determine the sentence that will be imposed if defendant accepts the agreement. This is a system of the absolute sentence determination. The second is the system of the relative sentencing determination, where the prosecutor and the defendant determine a range within the court in the process of agreement verification will specify the sentence. Both solutions have their advantages and proponents. The legislator did not explicitly favor any solution, and theoretically, this could cause problems in the practice and lead to the different plea agreements. In the comparative law, we could find both solutions. The system of the relative sentence determination implies the determination of limits within the court will determine the sentence. Prosecutor and defendant in the agreement determine upper and lower limits for the sentence, but the court determines the precise length of the sentence. In this way the court has a significant control over the plea agreement because it does not allow the parties to determine precise sentence length. However, this is very problematic provision from the Serbian legislator's standpoint. In this legal system, the court has no obligation to collect and present evidences. So, we cannot expect from the court to individualize

4. Agreement on the costs of the criminal proceeding, on confiscation of proceeds of crime and property claim, if it is filed;

5. The waiver of the parties from the right to appeal against the court's decision on accepting of the plea agreement, except in a case when legislator provides a possibility for the lodging an appeal;

6. Signature of the parties and legal counsel.

In addition to these elements, plea agreements may also contain three optional elements:

1. The statement of the public prosecutor to abandon prosecution for felonies that are not covered by plea agreement;

2. Defendant's statement about accepting obligations imposed by opportunity principle (article 283 SCPC), if that obligation could be enforced before the filing of the plea agreement;

3. Agreement on confiscation of assets derived from the crime.

The court has to accept the plea agreement in the process of control. The plea agreement can be submitted to the end of the trial, both in the first instance and if the higher court abolishing the verdict order new trial before the court of the first instance. The court shall schedule the new hearing at which it will decide on the plea agreement. This could be the preliminary hearing. The hearing will be ordered like any other hearing in the criminal procedure, but it has to be emphasized that this is the hearing aimed at deciding on the plea agreement.[78] On this hearing, the court will invite public prosecutor, defendant and his defense counsel (article 315 paragraph 2 SCPC). Very important issue in this field is the question of the publicity. It suffered many changes until now. According to the current provision, this hearing shall be held without public (article 315 paragraph 3 SCPC).

There are three possible court decisions on the submitted plea agreement (one procedural and two in merit). The court can adopt the agreement, reject

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sentence on better ways than the prosecutor and defendant. The role of these parties is just in the negotiations, where they will determine limits for sentence. In this model of sentence determination, the legislator must better protect the defendant's rights. This model should be used in the extremely limited circumstances, usually when parties were unable to agree on the sentence, main hearing is in advanced stage and most of the evidences are presented. The system for the absolute sentence determination represents the determination of the sentence in the precise length. A multitude of the comparative legislations is based on this model. Probably, the most important argument for the claim that legislator should provide this model lies in the fact the court does not collect evidences. Parties are subjects that are the most capable for sentence determination, so, the court should just accept or reject the agreement.

[78] V. Đurđić, *Sporazum o priznanju krivice*, Revija za kriminologiju i krivicno pravo, 3/2009, 98.

it or refuse it. Each of these decisions the court shall issue towards the inside from the specific situation and conditions. When the court takes the agreement in consideration, it will firstly check whether they have fulfilled all necessary legal requirements for the further examination, i.e. does the agreement contains certain shortcomings due to which it has to be discarded. The court will discard the agreement for three reasons (two provided by the law and the third drawn from the spirit of the provisions):

1. If the agreement does not contain data required by article 314 paragraph 1;

2. If defendant, duly summoned, does not come to the hearing and does not justify his absence and

3. If parties, until the end of the hearing, abandon from the agreement.

The other decisions are in merits. The court has to determine a few facts before it adopt the agreement. In the other words: it has to determine:

1. That the defendant knowingly and voluntary confessed crime(s) that are subject of the indictment;

2. That the defendant is aware of all consequences of the agreement, especially that he waives the right to trial and accepts limiting his rights to appeal;

3. That there are other evidences that are not inconsistent with the confession;

4. That a criminal sanction is in accordance with the criminal or other law (article 317 paragraph 1 SCPC).

The court checks the facts above primarily from the plea agreement, since its first move is to check agreement, and then to examine defendant, prosecutor, defense counsel, the victim and its legal counsel. So, it checks these facts through the dialogue with subjects involved in the proceeding.

The third decision is rejecting the agreement. The court will bring this decision if it determines next:

1. There are the reasons referred to the article 338 paragraph 1 SCPC;

2. If there are no complied one or more conditions for accepting the agreement.

In the first place, the court states that the court will reject the agreement if it finds that:

1. That the act he is charged is not a crime, and there are no conditions for security measures;

2. That the prosecution for concrete felony is obsolete, or is subject to amnesty or pardon, or there are other circumstances that permanently preclude prosecution;

3. That there are insufficient evidences for a reasonable suspicion that defendant committed the felony.

After the court finds the existence of the above shortcomings, it will bring the reasonable decision on agreement rejecting. If we look at all decisions, we should note that the court adopts the agreement with the verdict, as the most important decision in the criminal procedure.

The right to appeal is allowed in the limited form. Against the verdict on the adopting plea agreement, public prosecutor, defendant and his legal counsel may appeal within eight days if:

1. That the act he is charged is not a crime, and there are no conditions for security measures;
2. That the prosecution for concrete felony is obsolete, or is subject to amnesty or pardon, or there are other circumstances that permanently preclude prosecution;
3. That there are insufficient evidences for a reasonable suspicion that defendant committed the felony and
4. The judgment does not refer to the subject of the agreement (article 319 paragraph 3 SCPC).

These reasons for appeal do not correspond to the reality and raise numerous questions. Finally, the legislator permitted extraordinary legal remedies against judgment, although it is debatable because of its success.

5. CONCLUSION

The process of globalization has inevitably had to affect the field of criminal procedure. As a typical example of the global legal institute in the criminal proceeding, authors mainly specify plea agreement, which represents the efficient method of simplifying a very long and inefficient procedure. In this work we have covered three systems that implemented plea bargaining in their legislations. In them, negotiations on plea agreement are possible for every felony that exists in the criminal code. This is not characteristic of the numerous European criminal proceedings and this solution has attracted attention of many authors, and a flood of the objections. However, we could say that every legal solution contained in the criminal procedure code related to the limiting plea agreement attracts a lot of criticism. Both solutions have a number of the advantages and disadvantages, but the authors of these lines follow a group that justifies extension plea agreement to all crimes, since it is very necessary in the prosecution of the serious crimes. The power of the United States in this region definitely influenced legal solutions in Bosnia and Serbia.

In Serbia, as in other countries, plea bargaining has its supporters and opponents. However, supporters are more numerous, but particular justified and reasoned objections should not be ignored. Some objections are not correct, for example, discordance with the basic principles of the criminal procedure. It is an objection that has to be rejected. We believe that co-existence of the opposite principles can lead to the more effective criminal proceeding. This is the case both in Serbia and other countries. Plea bargaining is not a perfect legal solution, but we are aware of all difficulties in the criminal procedure without it.

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JOBS THAT DEAL WITH ORGANIZED CRIME - DRUG TRAFFICKING

Abstract

There is no a single spot on our planet where the organized crime on drug trafficking has not spread its tentacles, as a suprasystemic creature, it embraced all countries in the world - there is no a single isolated jolly island left! The extreme adaptability of this phenomenon, its unbelievable magnetism in gluttony for making profit, porosity of state borders and their interconnection at all levels....represent the basic driving engine for drug trafficking. Unfortunately, it has been proved that the "balloon" in the businesses of narco bosses can be endlessly inflated. This assessment may seem exaggerated and terrifying, but the author points out, that therefore it is understanding why the efforts are invested in outsmarting and blocking all the circumstances which surround and support the manifestation of this kind of organized crime.

Key words: *misuse of narcotics, organized crime, unauthorized manufacture and trade, possession of narcotics for personal use, criminal liability, sanctions.*

1. CONTEMPORARINESS OF THE PROBLEM

Narcotics misuse has been and still is the follower of the epoch we live in. As a mortal infection, the illness is not located at a single place, in a single country or region, spreading instead across all the states of the world. That phenomenon has become global and transgresses the state borders without recognizing state sovereignty.

In a permanent expansion and with frightening consequences we are witnessing here one of the biggest problems for all countries in the world, a "planetary pestilence" that undermines the very foundations of social values. At present 185 million people are using the narcotics. According to official UN data, the majority of them are inhabitants of developing countries.[1] That this illicit use is drastically increased is probably best evidenced by the report

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[1] D. Petrovic, *Organizovanje zločinačkih udruženja*, Beograd, 1996, 51-58.

of International Agency for Narcotics Control in terms of which this phenomenon assumed, only in 1986 the proportion of epidemics, so that with more than 48 million of drug addicts, the situation has become alarming.[2]

At the beginning of eighties, some 50 million, at the end of the first decade of the present century – three times more! And more than that! According to some indicators, at the end of 2000, more than 700 billion dollars was the value of world trade in narcotics. Enormous financial force and assuming a merging of all smugglers into a single multinational company that would be a third corporation in the world, between Ford and Standard Oil.[3]

According to a recent research of the European Center for Supervising Drugs and dependency from drugs (EMCDA), there exist at present in the EU countries between 1.2 and 2.1 million of drug consumers, among which between 850,000 and 1.300,000 intravenous users. Furthermore, 1.500,000 persons in the entire territory of Europe consume cocaine within a single month, while another 12 million – cannabis. Abuse of drugs is particularly spread among the young ones, in some countries even up to 8 percent. Recently, a phenomenon of mixing various kinds of narcotics is also noticed, most often with alcohol and medical pills ("e-poly drug use"). In addition, the number of those infected with AIDS and hepatitis has increased in some of the countries of the region, which is especially true for 2005, with the figure around 26,000 persons.[4]

In spite of intensive police activities in preventing the manufacture and dealing with narcotics, according to Interpol assessment, only 5 to 10% of illicit trade in drugs has been discovered and confiscated. Worth of attention is also the information disclosed by International Organization of Criminal Police according to which even where six seventhes of drug is seized, the whole "business" is still remunerative.[5] Even in our country this exceptionally dangerous form of criminality is deeply infiltrated into every

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[2] M. Schiray, *Introduction: drug trafficking, organized crime and public policy for drug control, Drug trafficking: Economic and Social Dimensions,* International Social Science Journal, UNESCO 2001, 355-357.

[3] Quoted from: M. Nicović, *Povezanost opojnih droga i organizovanog kriminala,* Organizovani kriminalitet i korupcija (Organized crime and corruption), Kopaonik, March 1996, 81.

[4] EMCDDA (2005b) Thematic papers – illicit drug use in the EU: legislative approaches. htpp://www.emcdda.eu.int.index.cmf?fuseaction=public.content&nnadied=70798slanguageiso=EN

[5] V. Rakočević, *Krivično delo neovlašćene proizvodnje i stavljanja u promet opojnih droga, problemi u praksi i zakonodavna rešenja,* Krivično zakonodavstvo Srbije i Crne Gore, 2003, 124.

cell of the "system of living", ruining thus in a direct way the health, psycho-social, economic and cultural spheres of society. Geographic position of our country on the shortest continental connection between Asia[6] and Europe, but also the civil war and the sanctions in the 1990s, resulted in the increase of an already large market of its consumers. In spite of a dense network on that road with the accompanying infrastructure, it is almost useless to warn that in a transitional and post-war Serbia, burdened by considerable political and social problems, remain large quantities of these drugs.[7] Consequently, it is no wonder that in that "small" Serbia there is now three times more drug addicts than ten years ago. In addition, one should note that 95% of heroine from Turkey, Bulgaria, Albania and Kosovo traverses through Serbia and that in 2006 some 700 kg. of heroine was confiscated in this country, while in 2004, 2005 and 2006, that figure was 1.5 ton – most often at the Gradina border crossing. Particularly interesting is the information that 100.000,000 EUR is spent every month in Serbia for buying drugs – a really frightening amount.[8]

Unfortunately, such extremely unfavorable state of affairs remains constant. Hiding behind important efforts to set some limits to such kind of conduct, is a befogged view. Although a drug story has been told long time ago and although everything was already known and clear, so that there was nothing new to be said, it seemed that the discussion of the problem was always at the start and that it was indispensable to begin its deciphering as

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[6] D. Zhenlai *et al.*, *Drug trafficking and consumption in China: two case studies, Drug trafficking: Economic and Social Dimensions,* International Social Science Journal, UNESCO 2001, 417.

[7] According to Ministry of Interior of the Republic of Serbia and Montenegro, in addition to 700 kg. of heroin, mostly of Afghan origin, 13 kg. of cocaine , 60 kg. of hashish and 19,000 ecstasy pills have been confiscated in 2006.. Almost 90% of these quantities continues to the West, while the rest stays for drug-addicts population in our country. Cocaine mainly comes from South America, synthetic drugs from Holland and Belgium, while marihuana is a "specialty" of this region. In 2006 only, 2 tons of that drug has been confiscated as well as a total of 6,300 kg. of all narcotics in the entire state. To all that one should add that only in course of that year The Customs Administration of Serbia managed to confiscate drugs valued at some 4.500,000 EUR. The problem of abuse of narcotics is a serious problem in all EU member states, particularly due to the fact that their manufacture and trade are in the hands of well organized criminal groups. Quoted from: M. Reljanović, *Pojavni oblici organizovanog kriminala, trgovina drogom, u: Borba protiv organizovanog kriminala u Srbiji,* Beograd, 2008, 81.

[8] C. Geffray, *Drug trafficking and consumption in China: two case studies, Drug trafficking: Economic and Social Dimensions,* International Social Science Journal, UNESCO 2001, 421-425.

soon as possible.[9] As for now, there is no conjurer's wand yet that would at least accelerate the positive trends and eventually halt, prevent and absolutely eliminate all these misfortunes. But with a more responsible approach along that line and with enormous efforts and resources, narcotics could be placed under control to a considerable degree, with the aim of preventing and beating back in such a way their misuse.

2. GENERAL INSTRUCTIONS FOR ACTION

The problem of regulation and control of the use of drugs may be viewed from two levels: preventive, as clearly a useful approach, and the other – repression, which still remains in contemporary society a prevailing instrument of struggle. In fact, each one of these two ways of reaction has both positive and negative features, although often their mutual relation becomes forgotten.

We opt for strengthening of prevention, in spite of this being a slow and difficult process. Naturally, some forms of conduct in this sphere are so full of problems, that no prevention or control would help without being coupled with repression.

A rising complexity in understanding this phenomenon combined with explanation that the problem focuses on the inefficiency of legal and judicial control has strategic importance for future actions.[10] To be true, the present situation, with all the confusion and uncertainty is not a good climate to settle the drugs problem. New approaches are necessary and possible instead, although the unacceptable, the absurd and the unripe ideas in this respect should by all means be rejected. Consequently, by abandoning the former basic principle of generally preventive effects of punishment and the criminal law enforcement, with all its institutions, new framework should be established, but with a changed and reasonable content, and always paying attention to avoid extreme approaches.[11]

The emphasis should be on the coordinated action of all social factors and the multidisciplinary approach, including certain specific instruments and measures to be invented in accordance to the problem at issue.[12]

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[9] A. A. Block and W. J. Chambliss, *Organizing crime,* New York, 1981, 56.
[10] D. Petrović, *Moderni koncept terorizma : krivičnopravni aspect,* Kragujevac, 2007, 14.
[11] T. Schott, *Mafia - Mentalitar and Parastaat,* Kriminalistik, No. 11/00, Heidelberg, 115.
[12] D. Petrovic, G. Gasmi, *Efficiency of legal norms in the context of suppressing the misuse of narcotics : case study of Serbia and comparative legal review,* Fiat Justitia, 1/ 2014, 67.

This is generally the leading idea in determining the content and the essence of future way of reaction which should also consider the need for guaranteeing human rights in combination with preventing their abuse. It goes without saying that this line of activity may not be realized either in the short-run or easily.[13]

3. CRIMINAL ACTS RELATED TO OPIATES

Serbian Criminal Law (CL) specifies (chapter XXIII) a group of two criminal offences of drug abuse under the title" Criminal offences against human health". The terms used are "unauthorized manufacture, possession and trade of narcotics (art. 246) and "making available the use of narcotics" (art.247).

However, the September 2009 Law on amending the CL of Serbia, this "group" indicated the change to some degree of these offences. Introduction of a new offence of "unauthorized possession of narcotics" through art. 246 a has extended the part of Law (2009) which specifies the criminal liability for that kind of criminal offences[14]. But is this provision new or old? That question also implies another one: what is happening with arts. 246 and 247,

[13] A.A. Block, G. Geis, Man, *Crime and Society,* New York, 1965, 208-210.

[14] Article 246 - "Unauthorized manufacture of and trade of narcotics"
"(1) Whoever without authorization manufactures, processes, sells or offers to sell or who, for the purpose of sale, purchases, possesses or mediates in purchasing and selling, or in some other way puts in circulation the substances or preparations that are proclaimed as narcotics, shall be punished by imprisonment of from three to twelve years.
(2) Whoever without authorization grows poppy or psycho-active hemp or other plants, shall be punished by imprisonment of from six months to five years.
(3) Should the offence specified in para. 1 of the present article be committed by a group, or should the perpetrator of this offence organize a network of resellers or mediators, he shall be punished by imprisonment of from five to twelve years.
(4) Should the offence specified in para. 1 of the present article be committed by an organized criminal group, the perpetrator shall be punished by imprisonment up to ten years, at the minimum.
(5) A perpetrator of the offence specified in paras. 1 through 4 of the present article who uncovers the one he obtained the narcotics from, may be exempted from punishment.
(6) Whoever without authorization makes, procures, possesses or makes available the equipment, material or substances, knowing that these are intended for the manufacture of narcotics, shall be punished by imprisonment of from six months to five years.
(7) Narcotics and means for their manufacture and processing shall be confiscated." Službeni glasnik RS (Official Gazette of Republic of Serbia), No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 94/2016.

i.e. is the change only terminological or the one of conception of that group of offences? Namely, are the changes formal or substantial?

Let us consider the very essence of all three offences. But before exposing the underlying issues for its bold relief the understanding necessary to make one more remark. In fact, this is not about to offenses which will debate that the water in two or three tracks: first, in the light of the Penal Code (2005), then from the perspective of its changes and amendments, but at the same time pointing out the peculiarities of the historical development of criminal offenses related to narcotic drugs. Beginning with determining the sense and the very nature of these incriminations and with defining their general notion, context and grounds. This is to be followed by considering some theoretical and practical dilemmas and problems relating to the offence of unauthorized manufacture and trade of narcotics as well as the offered solutions and proposals for efficient elimination of that most destructive form of criminality.

As far as previous formulation of that criminal offence specified in the CL of Serbia is concerned, it is possible to conclude that the provision of article 246 of the Law amending the CL is rather similar with that one, and thus also with the formulation of the offence specified in article 247 of the General Criminal Law (GCL). But still, some differences of substantive character do exist. It is obvious that amendments have intervened in several areas: paragraph 1, for instance, is almost identical in all three legislative texts, except for the heading and the prescribed penalties. Thus, the amending Law defines paragraph 1 in the same way, and the only change refers to the amount of penalty. In art. 246 the threatened penalty is raised from two to three years. Consequently, the GCL, although identical in terms of terminology and essence of the offence, differs regarding the amount of penalty and is, therefore, stricter (the minimum penalty is 5 years of imprisonment). The lawmaker incriminates that offence with a special minimum of threatened penalty, while in the other case the amendments have raised that minimum for another year, while meting out the penalty along the range between 3 and 12 years. In recent modifications CC (94/2016 of 24 November 2016) present an identical solution.

Paragraphs 2 through 4 are significantly modified, since para. 2 is the new one, reading: "whoever grows poppy or psycho-active hemp or other plants…", while specifying the range of penalties of from six months to five years of imprisonment. So, there is a difference in relation to art 245 of the GCL as well as in relation to art 246 of the CL of Serbia. Furthermore, paragraphs 3 and 4 provide for more serious forms and include situations of acts of commission by a group or a perpetrator who organized a network of

resellers or mediators with the aim of committing that offence, while in para. 4 another qualifying circumstance was added should the offence be committed by an organized criminal group. In para. 3 previous formulation is omitted, i.e. that the persons involved have associated in order to commit criminal offences, but the threatened penalty remained the same. With such penalty and/or frame- work for its imposing, the Law has accepted the solution existing in the CL as adequate.

Let us look now this solution in a wider context, suggesting that a better one, in contemporary conditions, would be the solution specified in the GCL. Relevant in this respect is the fact that comparative law unfortunately reveals the picture of rather different approaches and conceptions that, although offering some improvement, often are transformed into mere façade or apparently ideal solutions. The essence of regulation has in fact remained the same: strictness and prescribing a wide range of penalties deemed as sufficient way of suppressing this exceptionally dangerous phenomenon. There is no convincing argument that would shake that construction in the struggle against that type of collective criminality or favor some other solution. By enacting the CL of Serbia and already mentioned amendments, these and other provisions became genuinely modern and more appropriate to respond to radical changes in our society. However, some objections still could be raised: inclination towards the perpetrators engaged in an organized way in manufacturing and distribution of narcotics by keeping the lower limit of the possible penalty. Consequently – why that minimum is 5 years and how to justify the range of 5 – 15 years, having in mind the criminal policy in assessment of offences and the need for their punishment? In this case the decisive element should be the extreme seriousness of committing offences in the group and the degree of danger for society. This is especially true in the case of a modern code, which should include strict penalties and norms otherwise provided in international acts.

Paragraph 4, however, considerably sets aside that objection. Obviously, in the first and the second case, less strict forms and lower number of group members (loose association, short period of criminal activity, etc.) are at issue here. Committing the basic offence in an organized group is threatened by imprisonment of ten years at least, meaning that the law-maker considered that offence as a more serious and more dangerous one than the previous two. In addition to providing the incrimination of "group" and "organized network", the law-maker specified yet another form – "organized criminal group", considering it as particularly dangerous form belonging to the most severe offences. The appropriate court practice should make more precise that legal standard in practical implementation. Moreover, that solution

appears more logical because following the corresponding international documents.

The provision of article 5 specifies the possibility of exemption from punishment of a perpetrator who reports the person he procured the drugs from. This is a motivation for prospective perpetrators to reveal the other ones, usually more dangerous perpetrators in the process.

Consequently, having in mind the seriousness of the offence, the danger for society and damaging effects in term of health, at the one hand, and enormous difficulties in discovering that criminal offence and supplying evidence at court, the Law provides for specific benefits. So, the introduction of a "special institute" of exemption from criminal liability is fully justified as an instrument of shaking the existing and planned ways of discretion in the chain of sale and distribution of narcotics. However, isn't that solution appropriate only if looked as a specific case of perpetrators of such serious offence? Although rather efficient in the sphere of collecting evidence, this measure of exempting only one perpetrator in the chain who wants to cooperate, is at least not along the lines of proportionality in punishing while considering the whole perspective of the situation. Such objections are justified if one has in mind the implied indefiniteness which makes possible arbitrary court decisions (and thus a possible abuse of that legislative solution). The aggravating circumstance here is that usually drug sellers do not know the identity of their supplier or do not want to risk their lives in becoming informants.[15]

Consequently, the amending Law did not succeed to improve the situation and establish clearer indicators that would at least attenuate uncertainty and inequality in this matter. And one idea more: a too favorable attitude towards perpetrators willing to cooperate should rather be corrected by court's possibility only to "decrease" the penalty (to impose a minimum or a half of the penalty…).

This specific parallelogram of the GCL (General Criminal Law) and CL of the Republic of Serbia solutions shows that the identical para. 3 in these texts does not exist in the Law amending the CL (2009) as well as later adopted amendments of our criminal legislation which applies also to the place of para. 4 of the CL. However, para. 4 of the GCL and para. 5 show that the formulation of these provisions "moves" along the identical line of proceeding and that there was no need to change anything in the light of the reform that has been carried out.

[15] M. Reljanović, *op. cit.,* 84.

In the Law on Amending the Criminal Law, after article 246, a new article 246a is added[16] reading:*"Unauthorized possession of narcotics"*. It has already been noted that crimes relating to narcotics represent, in terms of their size and way of committing, a great danger for society. Adding to that are ever more organized forms, specialization and professional approach present these days in the sphere of such crimes. All in all, the whole problem is more and more complicated through various elements which have a considerable impact on the choice of most adequate solutions.

The heart of the matter is in the whole atmosphere of the society dismembered by egotistic attitude, cold indifference, difficult general atmosphere permeating our lives, establishing selfish and limitless interests and excessive appetites full of anomalies, deviations and at the same time becoming dominant and normal style of living for many "other people". In the series of other reasons for such extremely bad situation, this form of organized crime looks like a game of chance with adjusted mechanism. The only winners are those on top of the pyramid, highly placed on the ladder of drugs middlemen, while all the rest are but losers. An individual consuming the drug becomes a mere puppet in the hands of his supplier, passively aware that "things are as they are"[17] and that he can do noting about them. Simply said, such way of his life is like a high wall before his face, becoming the only way he knows and the one he can not change. And here we come again to the complexities of the problem aggravated by parallel damaging processes and obstacles to attempts at searching for adequate solutions. In this way that social and individual phenomenon is transformed into unsolvable puzzle at the detriment of both private and social interests. A realistic look into the future brings about immediately the dark menaces and warnings about possible disastrous consequences.

The next topic we discuss concerns the incrimination of the offence of possessing narcotics (art. 246a). Since a more definite answer to the question posed in relation to that article is not possible, it suffices to present various conceptions and possible connections characteristic of this criminal offence.

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[16] "(1) Whoever without authorization possesses small quantities for his own use of substances or preparations that are proclaimed as narcotics, shall be punished by a fine or imprisonment of up to three years, and may be exempted from punishment.
(2) A perpetrator of the offence specified in para. 1 of the present article who discloses the one he procured the narcotics from may be exempted from punishment.
(3) The narcotics shall be confiscated."

[17] D. Petrovic, *Suppressing the misuse of narcotics: new dimensions in narcotics control,* in: Serbian Law in Transition: changes and challenges (ed. M. Milosevic), Belgrade: Institute of Comparative Law, 2009, 260.

The "new" legislative solution restores the "old idea in new appearance" and/or the "old-new" form of the offence expressed in incrimination of the very possession of narcotics. The CL, namely keeps the incriminations that existed in the current criminal legislation and that are "verified". However, the nature of that offence is characterized by specific circumstances which, as such, determine the less serious and privileged form of its perpetration.

And again the same question: repressive approach or liberal methods?

The following answers will help us: what is the quantity to be considered for personal use only (5, 10 or 15 grams, or 100 grams of marihuana in 80 packages, or 10-20 grams of heroine hidden in perpetrator's house This might be a key point and the peak of indefiniteness of a given criminal offence, giving ground for abuses in the sphere of meting out the penalty. On the other hand, such solution should not be entirely disregarded due to a rather wide range of actual possibilities: court interpretation anyhow faces in all other cases almost the same problem of indefiniteness of the regulated matter.[18]

So, the debate is conducted along two opposing tracks, each with its own *pro et contra* arguments. Nevertheless, our legislation succeeded to produce a provision defining this criminal offence. Although there are no justified criminal law policy reasons for a conspicuously repressive public attitude regarding the misuse of narcotics in general, supported by some international documents (adopted after intensive pressure by the U.S.A.) as well as by court practice etc., it was sufficient to again actualize the punishment of the very act of procuring and possessing of drugs for personal use.[19] We say "again" since the same wording has been introduced in the 2003 Amendments. This new form is unknown to CL.

4. CONTROL OF OPIATES – EXPERIENCE AND COMPARISON

It is certain that contemporary criminal law, in regulating this kind of conduct, differs from country to country. Already a summary view on some criminal codes reveals the differences in accepted solutions, some of them rather contradictory; on the other hand, there exist similar conception, in some cases even identical. The following comparative review is inspired by

[18] *Ibid.*, 263-264.

[19] Z. Stojanović, *Nove tendencije u savremenoj nauci krivičnog prava i neka pitanja našeg materijalnog krivičnog zakonodavstva,* Symposium on new trends in our criminal theory and legislation, Zlatibor Mountain, 2005, 36.

the intention to search for best available solutions, in spite of obvious risk of such attempt. In fact, the only way the insight of this complex of problems could be encompassed as an entirety is to discern some other relevant approaches and solutions.

Our research in the field of most adequate normative regulation of this kind of conduct begins with reviewing various legislative solutions. What is the degree of making relative the fact of "small quantity of drugs", of possessing them "in a public place", of possessing all kinds of drugs or consuming "only" cannabis, of habitual perpetration within a single year, of the first, the second or the third perpetration? Perhaps, however, as the preceding one, the question: is not the noted phenomenon the issue of freedom of an individual and the one of choice of one's own way of life, but of an individual belonging to the "relation of the network"?! And here again, we are at the beginning. So, how to draw a line between the strict legal principles and the practice approaching human life as one's own matter motivated "exclusively" and "sincerely" by reasons of humaneness and purposefulness?

To be true, the problems with this offence in almost every country are solved in "their own way". This is rather important since it does always provoke thinking. Different opinions and starting points result in rather different solutions. That still does not mean that there is no respect for the difference![20]

Legislative solutions for the offence of procuring and possessing drugs for personal use distinguish between the consumption of drugs as such (so-called common use) and/or possessing (holding) them. In France, Greece, Finland, Sweden, Norway, Luxemburg (except for cannabis) as well as in Cyprus, the "common use of drugs" is considered a criminal offence. In Estonia, Spain, Portugal and Latvia such use is treated as infraction only. Some other states do not directly ban the consumption, but do that only indirectly by prohibiting "preparation acts preceding the use of drugs". This particularly concerns the act of possession. The conception of "possessing small quantities of drugs", consequently, includes not only the idea of individual use but also the preparation acts. Speaking of illicit possession, these acts are expressly banned in the Czech Republic, Ireland, Spain, Italy, Spain, Belgium and Luxemburg. The sanctions are various, but where there are no aggravating circumstances – as the case is also with possessing small quantities of drugs for personal use – the law excludes imprisonment as a penalty. And conversely, with aggravating circumstances and recidivism, the

[20] D. Petrović, G. Gasmi, *op. cit.*, 72-73.

law provides the imprisonment. In Luxemburg, Belgium and Ireland this refers to cannabis only, while in Spain, Italy, Portugal and Czech Republic this includes all dangerous drugs.

Entirely contrary, the courts in China may order execution against anyone possessing 50 grams of heroine, while smaller quantities entail the sentence for life. In Malaysia the danger for society is graded on the ground of the basic criterion: the kind and quantity of drugs found at the perpetrator.

According to the 1952 Dangerous Drugs Act (USA), the offence does exist after finding at the perpetrator less than 2 grams of heroine, morphine, MAM etc., while the penalty provided is 5 year imprisonment or a fine amounting to 100,000 rignits, or both these penalties. For a more serious form (exceeding 2 grams and less than 5 grams of cannabis or 15 grams of cocaine, etc.), the minimum imprisonment is 2 years and the maximum – 5 years, as well as the additional penalty – 3 to 5 lashes. The most serious forms entail even death penalty.[21]

Most criminal codes in continental Europe distinguish between possession and use, and there is no imprisonment for the use.

We continue with submitting the assignment of reasons for solutions applied to this form of offence. In Italy, for instance, possessing drugs for personal use (which includes their purchase and importation), the sanction includes taking away of perpetrator's driver's license for a period of from 1 to 3 months (for cannabis) and 2 – 4 months for other dangerous drugs. These measures include also taking away of permit to carry arms, passport and sojourn permit (in case of foreign citizens). The first-time perpetrator with small quantity of drugs may be only warned by the court (reprimand).[22]

The Austrian 1998 Drugs Act simplifies the whole procedure in the case of cannabis by eliminating the requirement of having an opinion of health care agencies which does not apply in the case of other dangerous drugs In the case of small quantities, the specified penalty is imprisonment of up to 6 months or a fine. Otherwise this Act provides for more freedom to public prosecutor not to plead for punishment for purchasing or possession of small quantities of drugs for personal use.[23]

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[21] D. Petrović, *Organizovanje zločonačkih udruženja*, 23.

[22] Codice penale… Giudici del Tribunale Milano, 1952. Compendio di Diritto penale, Parte generale e spciale 2004; R. Marino, G. Gatti, *Codice penale e leggi complementari,* Napoli, 1992.

[23] Drugs and the darknet: Perspectives for enforcement, research and policy, EMCDDA–Europol Joint publications, Publications Office of the European Union, Luxembourg, 2017, 10. htpp://www.emcdda.eu.int, date of visit: 22.11.2017.

Consuming and possessing of drugs for personal use in a public place, as well as if there exist aggravating circumstances (consuming during driving the car, leaving the used needle at the public place), in Spain entails a fine.[24]

In Belgium (2003) and Luxemburg (2001) consumption of cannabis (as well as purchase, transporting and possessing it for personal use) entails a fine for the perpetrator. In Luxemburg, more concretely, should such consumption be treated as "dangerous for others" (e.g. at work post or in the school) still requires the penalty of imprisonment of from 8 days to 6 months, and up to 2 years should the drugs be consumed in the presence of one or several under-age persons. Otherwise, in prescribing sanctions, this Law makes no distinction between different kinds of other drugs. In addition, if the cannabis consumer creates no problem, i.e. does not commit new infractions, and if there is no indication of his being addicted, there shall be no criminal prosecution. First transgression is punishable by fine only and its amount is to be increased within a year after pronouncing the first penalty should the perpetrator commit another offence. Such perpetrators are also subject to imprisonment of from 8 days to 1 month, coupled with the fine. In this case the Law distinguishes between "problematic consumption" and "disorder in a public place", the latter threatened by stricter punishments, e.g. imprisonment of from 3 months to 1 year combined with the fine (although with the alternate application of only one of these). For those using a minimal quantity of cannabis, i.e. 3 grams, sufficient according to Law for 24 hours, the prescribed measure is only to be entered into police records.[25]

According to the Dutch 1996 Opium Act, the possession of all kinds of drugs is punishable. In terms of art. 11 (5) there shall be no punishment should the quantity of marihuana or hashish for personal use fail to exceed 5 grams. Sale, possession and consumption of cannabis in coffee shops is not prosecuted if following conditions specified by so-called AHOJ-G criterion are met[26] and one of them is that "Maximum quantity of drugs permitted to be sold and kept is limited to 5 grams per person".[27] The implementation of this Act is entrusted to prosecutors and the police who are bound to follow

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[24] *Ibid.*

[25] *Ibid.*, 11.

[26] A) Prohibited drugs must not be advertised, H) "Hard" drugs must not be sold; O) Coffee shops must not create problems in the public; J) Drugs must not be sold to under-age persons (under 18), who otherwise are not admitted to such shops;

[27] http: //www.emcdda.eu.int.index.ctfm?fuseaction=public.content&nnodeid=70798 slanguageiso=EN

only the purposefulness principle and the general guidelines of the Prosecutors' Board.[28]

The similar liberal approach regarding cannabis consumers is applied in France and Denmark.

According to the existing Law in Germany, as amended in 1998, the public prosecutor decides to refrain from punishment in the cases of "minor" transgressions, if criminal prosecution is not in public interest and if someone "cultivates, imports, exports or purchases drugs for personal use only", i.e. in minimum quantities. Illustrative of this point is the 1994 verdict of the Karlsruhe Federal Constitutional Court where the emphasis in a cannabis case was placed on the "ban on excessively strict penalties".[29]

According to the British 1971 Drugs Abuse Act, all psycho-active substances are classified into three categories – A, B, and C, on the ground of their respective levels of danger. Cannabis was in the B group in 2002, but the government decided to put it in C group since it represented a lesser danger. However, the police is still authorized to confiscate that substance and notify the prosecutor accordingly should there be no aggravating circumstances. If these are present, the punishment threatened is the imprisonment of up to 2 years. After the new Act entered into force in 2005, special law enforcement "agencies" are empowered to test the arrested persons for coke and heroin; aggravating circumstances are also provided for cases of selling drugs near schools or using children as couriers.[30]

In Hungary in the 1999 – 2003 period the drug consumption has been punishable as criminal offence. But under the new Criminal Code enacted in March 2003, this is no more the case, so that punishments may not be imposed against drug addicts.[31]

In Lithuania, Estonia and Latvia possessing of small quantities of drugs is not treated as criminal offence. However, such "offence" as well is threatened by "a sanction" of home custody of 15, 30 or 45 days.[32]

An interesting solution in the form of gradual penalties for habitual offenders is provided in the 1977 Irish Drugs Abuse Act. The first time

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[28] D. Petrovic, *Suppressing the misuse of narcotics: new dimensions in narcotics control*, 264.

[29] European Monitoring Centre for Drugs and Drug Addiction (2017), Drug trafficking penalties across the European Union: a survey of expert opinion, Technical report, emcdda.europa.eu/publications/technical-reports/trafficking-penalties, date of visit: 22.05.2017.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

cannabis offender, for instance, is fined by 63 EUR; the second infraction entails the fine of 127 EUR, while the third one – of up to 317. In some cases this penalty – at court's discretion – may include imprisonment. This progressive penalty system, however, does not apply in case of possessing other kinds of drugs where the punishment may be a combination of fine at the amount of 317 EUR and imprisonment of up to 12 months.[33]

Possession of drugs in the U.S.A territory is not permitted and is treated as infraction. Since this matter is not regulated by federal law, there exist various laws at the states' level. In addition to differences, they have some identical solutions as well. The requirement for criminal liability is the need of proving "criminal intent". Distinguishing between "simple possession of drugs" and "possession with the aim of distributing" is crucial. In the first case "the prosecution must prove actual possession or constructive possession, together with awareness about the presence and character of the given substance". This is a rather widely accepted rule in the states' legislation, where the law specifies the quantities to be considered[34] as possessed only, i.e. without intent to be distributed.

Insisting on special explanation of offered solutions in fact means insisting on the need for a thorough insight into different legislative and judicial solutions, especially enhanced by the interest to discern new possibilities in approaching our problem. One, however, has to admit that the heterogeneity in this area is suppressed by a different, and first of all, more liberal strategy.

[33] *Ibid.*

[34] S. Champman, *Narcotics and Crime Control*, Springfield, Illinois, 1988, 109.

5. LIBERAL APPROACH - "MAKING POSSIBLE THE USE OF NARCOTICS"

The changes in relation to article 247[35] of the CL of Serbia are those introduced by two new paragraphs, while the basic formulation of the offence remains the same, i.e. as in its more serious form (novel from 2009). However, this same change also included the paragraph 4 - a very dubious norm which entailed a series of dilemma. Later on it was deleted.[36] The existing incrimination now provides for yet another qualifying circumstance – death of a passive subject, caused by making available the use of narcotics, while the former qualifying circumstance involved a minor victim or several persons, or should the offence entail serious consequences (para. 2). The Law amending the CL introduced new form of incrimination (para. 3), with the sanction being imprisonment of from 3 to 15 years.

This comment applies also to the provision of article 246 of the GCL, although, as already said, these two legislative texts differ regarding the amount of specified penalties – imprisonment of from 1 to 10 years according to GCL (para. 1) and/or 3 years as the minimum in case of serious form (para. 2), while the CL reduces the penalty down to imprisonment of from 6 months to 5 years. On the other hand, opting for that amount of punishment opens up the possibility of imposing, on the ground of article 66, paras. 1 and 2 of the CL, a suspended sentence against a perpetrator of the basic offence.[37]

Justification of that legislative solution in terms of criminal policy is clear since such conduct by its nature may not be compared with those of manufacturing and distributing of substances considered as narcotics.

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[35] Article 247 (New Criminal Law of Serbia, Official Gazette, No. 104/2013):
"(1) whoever incites another to use narcotics or provides him with narcotics in order to use them for himself or by another person, or makes available an accommodation for the purpose of using narcotics, or in some other way makes possible to another the use of narcotics, shall be punished by imprisonment of from six months to five years.
(2) If the offence specified in paragraph 1 of the present article is committed against a minor person or against several persons, or entails particularly serious consequences, the perpetrator shall be punished by imprisonment of from two to ten years.
(3) Should due to commission of the offence specified in paragraph 1 of the present article cause the death of a person, the perpetrators shall be punished by imprisonment of from three to fifteen years.
(4) Narcotics shall be confiscated."

[36] Dj. Ignjatović, M. Škulić, *Organizovani kriminalitet*, Beograd, 2010, 212.

[37] M. Reljanović, *op. cit.*, 84.

But, immediately, a counter-argument: one of the basic characteristics of drug addiction now is the rise in the number of addicts induced by various forms of making drugs available. On the other hand, due to the importance of the offence, i.e. numerous negative consequences, both for the individual and the society, the law-maker attempted to find "a golden mean" by bringing closer all relevant circumstances.

However, already making precise the essence of that offence (in its title, too) as well as of the offence specified in article 246, which relate to the phenomenon of drugs abuse, while still distinguished by their essential definition, is absolutely sufficient to explain law-maker's attitude in defining the given incrimination: persons whose activity does not amount to direct sale of drugs but "only" indirectly influences the expansion of the circle of their users.[38]

6. CONCLUSION

One thing is sure, however: all those who consider in the form of deep analysis the issue of the manufacture and trade of narcotics cannot help but to experience a series of dark pressures and disgust as well as a terrible sense of repugnance and anxiety. Here is then the occasion for a wide range of academic disciplines to thoroughly grasp this problem – the phenomenon which in these difficult times full of evil makes us feeling bound, burdened and discouraged.

But at that very point the hesitation begins. Judging by the former practice, many questions remain unanswered. Unfortunately, it seems that this time again the outcome might not be the one we expect. Genuine answers may entail various interpretations, numerous messages and a hill of comments. However, should one begin with such ideas, one reaches the end of the end even before making the first step, i.e. before efficiently starting to settle the problem we consider. Therefore, we can conclude that the reduction of possible penalties in no way complies with an efficient suppression of the manufacture, misuse and trade of drugs and the strategy of opposing this form of organized crime. Besides prevention attempts at the state level as well as at the international level, the repression in the form of efficient legal norms and adequate sanctions remain the essential arm to fight against the misuse of narcotics.

[38] *Ibid.*

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PART FOUR

EUROPEAN PRIVATE LAW

Perspectivs and Problems of Harmonization and Unification

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IMPLEMENTATION OF EU DIRECTIVE ON PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENTS IN EUROPEAN NATIONAL LEGISLATIONS

Abstract

On the 25th of November 2015 the new Directive on package travel and linked travel arrangements was enacted. This Directive clarifies previous Directive on package travel, package holidays and package tours (1990), and adjusts it to the legal and market development. The new Directive introduced significant changes in the legal regulation of organized travel arrangements. The subject of this paper is analysis of the changes regarding the concept of the package travel and linked travel arrangement. At the beginning, the definitions and solutions from the new Directive on the concept of the package travel and linked travel arrangement were presented. Afterwards, the author presents current state of legislation with respect to the concept of the package travel in many European Union member states. Finally, the author presents the state of legislation in the Serbian law on the issue which is subject of the paper. The aim of this paper is determination which steps EU member states, and states which are approaching to the European Union (such as Serbia) should conduct in order to harmonize national legislations with the changes occurred after enactment of the Directive on package travel and linked travel arrangements.

Key words: *package travel, linked travel arrangement, Directive on package travel and linked travel arrangements, transport, accommodation.*

1. INTRODUCTION

A necessity to uniquely regulate agreement on travel arrangement at the EU level, then EEC, emerged in the eighties of the last century. The process of harmonization of regulation and practices in tourism of the EU member states, particularly in the field of the organized travel arrangement, showed differences. Because of that, there was a common opinion that existence of

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unified rules, which would comprehend definition of organized (travel) arrangement, the content of agreement, duties and responsibility toward passenger (consumer), will contribute to removal of evident legal uncertainty present on the market of tourist services. The Council of European Communities enacted on 13 June 1990 Directive on package travel, package holidays and package tours (hereinafter: Directive 90/314/EEC).[1] The objective of Directive 90/314/EEC was primarily to prevent unfair competition, strengthen consumer's protection, and brought it on the same level in EU countries, by means of harmonization of legislations of particular member states. However, since the moment of enactment of Directive 90/314/EEC passed more than two decades. Meanwhile, travel services market underwent significant changes, especially thanks to internet, that is to the fact that travel services now are often obtained online, due to increased number of internet users, as well to the formation of new combinations of travel services. Although nowadays many EU passengers still buy package travels in traditional way (visit travel agency in order to pay their travel arrangement prepared in advance by the agency with all relevant details), increased number of passengers pay different parts of its travel separately or pay tailored arrangements, combined by related traders in accordance with passengers' needs and preferences, particularly online.

In this new market environment, Directive 90/314/EEC did not satisfy enough consumers' (passengers') and traders' (travel organizers, sellers of travel arrangements, i.e. travel agencies) needs. The consequence of outdated scope of application of Directive 90/314/EEC was the fact that consumers, who considered that they were protected, were actually losers, after purchase of travel arrangements, which were not covered by Directive 90/314/EEC. Also, different rules in different member states, as a consequence of the so called minimal harmonization,[2] made difficult for traders to sell their travel products in other member states, i.e. to broaden its activities in other EU member states, since they were not doing business on equal footing.[3]

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[1] Council Directive of 13 June on package travel, package holidays and package tours, Official Journal of the EU, L 158/59, 23. 06.1990.

[2] EEC Commission Report (1999) 1800 on implementation of Directive 90/314/EEC emphasized that nationals laws, which implemented Directive 90/314/EEC, demonstrated significant differences, due to the application of minimal harmonization approach in Directive 90/314/EEC, and therefore member states had broad discretionary rights, as well as due to a lack of clarity in the text of Directive 90/314/EEC.

[3] The European Commission - Health and Consumers DG, Study on Consumer Detriment in the Area of Dynamic Packages, London, 2009, available at:

Another concomitant consequence was decreased choice for consumers. In practice, legal rules and its application could have been different, depending on the fact how and where arrangements were offered, although travel services could have been entirely the same.

On the 9th of July 2013, the proposal[4] of a new directive, which changed and repealed Directive 90/314/EEC, was processed in the ordinary legislative procedure. After first reading, the European Commission proposal was accepted, with amendments from European Parliament.[5] On the 25th of November 2015 (new) Directive on package travel and linked travel arrangements (hereinafter: Directive EU 2015/2032)[6] was enacted.

Directive EU 2015/2032 clarifies previous Directive 90/314/EEC and adjusts it to the legal and market development. Concretely: its scope of application is broader and other than "traditional" package travel, it comprises new combined travel arrangements, since it includes in its scope of application different forms of online package travels and linked travel arrangements; it provides more transparency, enabling passengers to clearly recognize whether package travel was offered to them or not, avoiding confusion in that way; barriers for conducting business in another member states are removed, thanks to unified rules on responsibility, *ad hoc* mechanism for mutual acknowledgment of protection programs in case of insolvency and so on, and all of this open to traders more possibilities to broaden its activities in different member states; special rules on brochures are repealed, but it is still provided that passenger should receive all key information before contract conclusion, and that he/she must be notified about every change afterwards; passengers are provided with new rights on

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http://ec.europa.eu/consumers/archive/rights/docs/study_consumer_detriment_dyna_packages_en.pdf, 10.3.2015.

[4] Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, COM(2013) 512 final - 2013/0246 (COD), 9.7.2013.

[5] European Parliament legislative resolution of 12 March 2014 on the proposal for a directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, COM(2013)0512-C7-0215/2103/0246(COD),12.3.2014.

[6] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

withdrawal; rules on prices are more equitable and predictable, since upper limit of price increase was introduced; clearer legal remedies and better legal system of protection in case of irregularities in enforcing contractual obligations are provided, making a relation with recently adopted EU legislation on alternative dispute resolution and online dispute resolution; rules on contract liability are more rational; rules on protection in case of trader's insolvency are clarified (member states are obliged to enable mutual recognition on national protection programs in case of insolvency within a frame of a structural mechanism of cooperation).

2. PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENT ACCORDING TO THE DIRECTIVE EU 2015/2302

The scope of application of Directive EU 2015/2302, although still focused on package travels, is broader, in comparison with Directive 90/314 EEC, and it comprises new combined travel arrangements, considering different ways in which travel services may be combined. Directive EU 2015/2302 applies on package travels, as well as on linked travel arrangements.

According to art. 3 (2) of Directive EU 2015/2302 package' means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if: (1) those services are combined by one trader, including at the request of or in accordance with the selection of the traveller, before a single contract on all services is concluded (services offered later does not present essential part of the contract[7]); or (2) irrespective of whether separate contracts are concluded with individual travel service providers, those services are: (a) purchased from a single point of sale and those services have been selected before the traveller agrees to pay[8]; (b) offered, sold or

[7] Some authors deem that as well subsequently agreed upon tourist services should be considered as an essential part of package travel. More: V. Gorenc, A. Pešutić, *Razgraničenje organizatora i posrednika putovanja*, Zbornik radova Pravnog fakulteta u Zagrebu, special edition, 2006, 30.

[8] 'Point of sale' means any retail premises, whether movable or immovable, or a retail website or similar online sales facility, including where retail websites or online sales facilities are presented to travellers as a single facility, including a telephone service. (Directive EU 2015/2302, art. 3(2)).

charged at an inclusive or total price;[9] (c) advertised or sold under the term 'package' or under a similar term; (d) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services; (e) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service (so called dynamic package travels)[10]. Recitals 8, 10 and 11 give closer explanation of the notion "package travel" from art. 3 (2) of Directive EU 2015/2302.[11]

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[9] According to Directive EU 2015/2302, unique, total price is not mandatory, "cumulative" element of package travel, but "alternative" (D. Vujisić, U *susret novoj Direktivi o „putnim aranžmanima"*, Pravo i privreda, 4-6/2015, 347).

[10] Dynamic package travel entails that passengers individually combine tourist services from different service providers. Dynamic package travel entails separation of agreement, since tourist services are sold individually to passengers. We do not have only one agreement here, but more agreements on providing specific tourist services. These agreements are often concluded with different traders. Those are, primarily, concluded on the internet, through special web cites, which enable passengers to individually combine more different tourist services. After a passenger put desired tourist services in a so called basket, a payment follows. According to Directive 90/314/EEC, these agreements are not covered by the scope of application, and therefore, considering that they are becoming more often in business practice, a consequence is decreased potential trader's liability, i.e. decreased passenger's protection. For those reasons (frequency in practice, non liability of traders, decreased passenger's protection), the Proposal of Directive broadened the concept of package travel, including in the mentioned concept the so called dynamic package travels. More: V. Radović, *Predlog nove Direktive o paket aranžmanima i povezanim putnim aranžmanima,* u: Usklađivanje poslovnog prava Srbije sa pravom EU, Pravni fakultet, Univerzitet u Beogradu, Beograd, 2014, 455-456; On dynamic package travels also: The European Commision - Health and Consumers DG, Study on Consumer Detriment in the Area of Dynamic Packages, London Economics, 2009.

[11] Recital 8: Since travel services may be combined in many different ways, it is appropriate to consider as packages all combinations of travel services that display features which travellers typically associate with packages, in particular where separate travel services are combined into a single travel product for which the organiser assumes responsibility for proper performance. In accordance with the case-law of the Court of Justice of the European Union, it should make no difference whether travel services are combined before any contact with the traveller or at the request of or in accordance with the selection made by the traveller. The same principles should apply irrespective of whether the booking is made through a high street trader or online.

"Linked travel arrangement" means at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates: (1) on the occasion of a single visit or contact with his point of sale, the separate selection and separate payment of each travel service by travellers (so called „separated booking procedures", which means that a passenger first books one travel service and accepts to pay a price for it, and then he/she books another travel service and accepts to pay a price for that service, whereby a worker in an agency's office helps him to combine these services, or separated booking procedures are available to worker at the same network station); (2) in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service (for example, where, along with the confirmation of the booking of a first travel service such as a flight or a train journey, a traveller receives an invitation to book an additional travel service available at the chosen travel destination, for instance, hotel accommodation, with a link to the booking website of another service provider or intermediary[12]).

Packages should be distinguished from linked travel arrangements, where online or high street traders facilitate the procurement of travel services by

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Recital 10: In the light of market developments, it is appropriate to further define packages on the basis of alternative objective criteria which predominantly relate to the way in which the travel services are presented or purchased and where travellers may reasonably expect to be protected by this Directive. That is the case, for instance, where different types of travel services are purchased for the purpose of the same trip or holiday from a single point of sale and those services have been selected before the traveller agrees to pay, that is to say within the same booking process, or where such services are offered, sold or charged at an inclusive or total price, as well as where such services are advertised or sold under the term 'package' or under a similar term indicating a close connection between the travel services concerned. Such similar terms could be, for instance, 'combined deal', 'all-inclusive' or 'all-in arrangement'.

Recital 11: It should be clarified that travel services combined after the conclusion of a contract by which a trader entitles a traveller to choose among a selection of different types of travel services, such as in the case of a package travel gift box, constitute a package. Moreover, a combination of travel services should be considered to be a package where the traveller's name, payment details and e-mail address are transmitted between the traders and where another contract is concluded at the latest 24 hours after the booking of the first travel service is confirmed.

[12] See Recital 13.

travellers leading the traveller to conclude contracts with different travel services providers, including through linked booking processes.[13] At the same time, linked travel arrangements should be distinguished from travel services which travellers book independently, often at different times, even for the purpose of the same trip or holiday. Online linked travel arrangements should also be distinguished from linked websites which do not have the objective of concluding a contract with the traveller and from links through which travellers are simply informed about further travel services in a general way, for instance where a hotel or an organiser of an event includes on its website a list of all operators offering transport services to its location independently of any booking or if 'cookies' or meta data are used to place advertisements on websites.[14]

In order to identify package travel and linked travel arrangement, a combination of at least two kinds of different travel services should be considered, and those services should be passengers' transport; accommodation, which is not inseparable part of passengers' transport and is not for residential purposes; rental of car, other motor vehicles, or motorcycles, which require Category A drivers' licence (a volume and strength of engine is irrelevant)[15]; or any other tourist service not intrinsically part of services related with passengers' transport, accommodation, rental of car, other motor vehicles, or motorcycles, which require Category A drivers' licence.[16] If (only) two services of the same kind are rendered (for instance, bus transport and railway transport), a package travel or a linked travel arrangement does not exist. On the other hand, the issue whether a combination of air transport and car rental at the final destination represents a package travel, is resolved now, and the answer is positive (so called *fly drive travels*).[17] A combination of only two „other tourist services", without combination with transport, accommodation or rental of cars, other motor vehicles, or motorcycles, which require Category A drivers' licence, does not represent a package travel.

Accommodation for residential purposes, including for long-term language courses, should not be considered as accommodation within the

[13] See Recital 9.

[14] See Recital 12.

[15] Business practice shows that (particularly in some countries) it is often a case that travel organization includes sports activities, such as mountain biking. More: V. Radović, *Širenje pojma ugovora o organizovanju putovanja,* Pravo i privreda, 9/2014, 304. However, Directive EU 2015/2302 does not cover this sort of travels.

[16] Directive EU 2015/2302, art. 3(1).

[17] S. Mason, M. Gatenby, *Proposals for a new Package Travel Directive: the definition of "package" and "assisted travel arrangemnent"*, TLQ, 2013, 197.

meaning of Directive EU 2015/2302. Financial services such as travel insurances should not be considered as travel services. In addition, services which are intrinsically part of another travel service should not be considered as travel services in their own right. This includes, for instance, transport of luggage provided as part of carriage of passengers, minor transport services such as carriage of passengers as part of a guided tour or transfers between a hotel and an airport or a railway station, meals, drinks and cleaning provided as part of accommodation, or access to on-site facilities such as a swimming pool, sauna, spa or gym included for hotel guests. This also means that in cases where, unlike in the case of a cruise, overnight accommodation is provided as part of passenger transport by road, rail, water or air, accommodation should not be considered as a travel service in its own right if the main component is clearly transport.[18]

Other tourist services which are not intrinsically part of carriage of passengers, accommodation or the rental of motor vehicles or certain motorcycles, may be, for instance, admission to concerts, sport events, excursions or event parks, guided tours, ski passes and rental of sports equipment such as skiing equipment, or spa treatments. However, if such services are combined with only one other type of travel service, for instance accommodation, this should lead to the creation of a package or linked travel arrangement only if they account for a significant proportion of the value of the package or linked travel arrangement, or are advertised as or otherwise represent an essential feature of the trip or holiday. If other tourist services account for 25% or more of the value of the combination, those services should be considered as representing a significant proportion of the value of the package or linked travel arrangement. It should be clarified that where other tourist services are added, for instance, to hotel accommodation, booked as a stand-alone service, after the traveller's arrival at the hotel, this should not constitute a package. This should not lead to circumvention of this Directive, with organisers or retailers offering the traveller the selection of additional tourist services in advance and then offering conclusion of the contract for those services only after the performance of the first travel service has started.[19]

The scope of application of Directive 2015/2032 (art.2. and 3.) does not include: (a) packages and linked travel arrangements covering a period of less than 24 hours unless overnight accommodation is included[20]; (b) packages

[18] Recital 17.

[19] Recital 18.

[20] Since there is less need to protect travellers in cases of short-term trips, and in order to avoid an unnecessary burden for traders, trips lasting less than 24 hours which do not

offered, and linked travel arrangements facilitated, occasionally and on a not-for-profit basis and only to a limited group of travellers (for example, trips organised not more than a few times a year by charities, sports clubs or schools for their members, without being offered to the general public; adequate information on that exclusion should be made publicly available in order to ensure that traders and travellers are properly informed that those packages or linked travel arrangements are not covered by Directive EU 2015/2302[21]); (c)packages and linked travel arrangements purchased on the basis of a general agreement for the arrangement of business travel between a trader and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession (the majority of travellers buying packages or linked travel arrangements are consumers within the meaning of Union consumer law; at the same time, it is not always easy to distinguish between consumers and representatives of small businesses or professionals who book trips related to their business or profession through the same booking channels as consumers; such travellers often require a similar level of protection; in contrast, there are companies or organisations that make travel arrangements on the basis of a general agreement, often concluded for numerous travel arrangements for a specified period, for instance with a travel agency; the latter type of travel arrangements does not require the level of protection designed for consumers; therefore, this Directive should apply to business travellers, including members of liberal professions, or self-employed or other natural persons, where they do not make travel arrangements on the basis of a general agreement[22]); (d) combination of travel services, when at the most one kind of travel service (transport, accommodation, rental of cars, other motor vehicles, or motorcycles) is combined with one or more "other" tourist services, is not a package travel, if the "other" services do not account for a significant proportion of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination; or are selected and purchased only after the performance of a travel service; (e) if at the most

include accommodation (Recital 19). However, this exemption has been seriously criticized in legal theory, because, for example, one day excursions, when they meet requirements to be treated as a package travel, are often more expensive than another package travels, and therefore passenger's assets are more threatened in these situations, comparing with many another travel arrangements. Besides that, sometimes passenger's life and health are threatened more in these situations (for example, mountain climbing, paragliding, etc.), compared with classical package travels. Therefore, there is increased need to protect passengers in these situations. More: V. Gorenc, A. Pešutić, *op.cit.*, 31-33.

[21] Recital 19.

[22] Recital 7.

one kind of travel service has been purchased (transport, accommodation, rental of cars, other motor vehicles, or motorcycles), and one or more "other" tourist services, a linked travel arrangement does not exist, if the "other" services do not account for a significant proportion of the combined value of the services and are not advertised as and do not otherwise represent an essential feature of the travel or vacation; the same applies as well on a single travel service agreements;[23] (f) a package travel, consisting of passengers' transport, which also includes accommodation, is excluded from the scope of application, if the transport is clearly the main component of travel and that transport is only combined with another travel service, that is accommodation (overnight accommodation provided as part of passenger transport by rail should not be considered as a package travel, unlike, for example, in the case of a cruise which comprises cruise transport and accommodation in adequate cabin[24]); (g) also, following contracts which encompass financial services (for instance, insurance contracts), as well following contracts referring to travel services which are additional rendered, and a travel organizer did not participate in a reservation of these additional services.[25] From the recital 21, however, follows that EU member states should remain competent, in accordance with EU law, to apply the provisions of Directive EU 2015/2302to areas not falling within its scope. Member states may therefore maintain or introduce national legislation corresponding to the provisions of this Directive EU 2015/2302, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive EU 2015/2302. For instance, Member States may maintain or introduce corresponding provisions for certain stand-alone contracts regarding single travel services (such as the rental of holiday homes) or for packages and linked travel arrangements that are offered or facilitated, on a not-for-profit basis to a limited group of travellers and only occasionally, or to packages and linked travel arrangements covering a period of less than 24 hours and which do not include accommodation.

3. PACKAGE TRAVEL IN NATIONAL LEGISLATIONS OF EUROPEAN UNION MEMBER STATES

Prior to the adoption of Directive 90/314/EEC, only a few European countries had directly legislated in the field of travel contracts. Of course, general rules and principles of contract law (e.g. with regard to the quality of

[23] Recital 15.

[24] More: V. Radović, *Širenje pojma ugovora o organizovanju putovanja*, 304-306.

[25] Recital 17.

goods or services provided, information duties, doctrine of misrepresentation) were applicable to package travel arrangements, *inter alia*, in Austria, Denmark, Finland, Ireland, Latvia, Malta, the Netherlands, Poland, Slovakia, and the United Kingdom. Some European states had individual acts regulating travel contracts.[26] However, national rules in this area differed substantially, both in terms of coverage and detail.

After the adoption of Directive 90/314/EEC, EU member states aimed to implement the Directive and the definition of "package" into national legislations. The methods of transposition of Directive 90/314/EEC were different. Some EU member states have created a special law on package travel in which the definition of package can be found. Others have included the definition of package into an existing, more general law, for example the Civil Code (the Netherlands and Lithuania), a Consumer Protection Act or Consumer Code (Austria, Italy), or a Tourism Act (Bulgaria, Estonia, France, Latvia, Lithuania).[27]

The term used to denote a "package travel" is also different in different European states. The majority of EU member states seem to use the term "package" (some with slight amendments, e.g. package travel), as proposed in the Directive 90/314/EEC. French law, for example, uses the term "tourist package".[28] German and Dutch law simply refer to "travel contracts". The Belgian legislator opts for the term "travel organization contract", and the Lithuanian legislator uses the term "contract for the provision of tourist services". In Poland, the term "tourist event" is used. The Austrian legislator uses the term 'package' in the Consumer Protection Code, whereas the term 'travel event' is used in the Decree on travel insurance. The term "tourist travel with general price" is used in Bulgarian law, while the Czech and Slovakian legislator use the quite uncommon term "excursion".[29]

About half of the EU member states have transposed the definition of 'package' as stated in the Directive 90/314/EEC, whereas the other member states' definitions deviate from the Directive 90/314/EEC. Some of the European countries, which have substantially equivalent definitions of "package travel" to the definition stated in the Directive 90/314/EEC, are France, Spain, Greece, Cyprus, Malta, Belgium, Estonia, Lithuania,

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[26] H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, *EC Consumer Law Compendium - Comparative Analysis,* Brussels, 2008, 217.
[27] *Ibid,* 239.
[28] Besides France, term "package" is used in Austria, United Kingdom, Italy, Spain, Portugal, Cyprus, Denmark, Finland, etc.
[29] H. Schulte-Nölke *et al., op. cit.,* 240.

Luxembourg, Ireland, Bulgaria, Denmark, Netherlands, etc.[30] Therefore, these states define "package travel" in the following manner: a 'package' means the pre-arranged combination of no fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation: (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.[31] Directive 90/314/EEC also prescribed that the separate billing of various components of the same package shall not absolve the organiser or retailer from the obligations under Directive.[32] On the other hand, deviations in transposition of the said definition mainly concern the need for overnight accommodation and duration of at least 24 hours on the one hand and the significant proportion of other travel services on the other.[33] We will focus ourselves in the following text on the mentioned deviations from the definition of package travel used in the Directive 90/314/EEC.

In Austria, the Directive's definition is transposed in three different legislative acts, each with varying content. More importantly, the definitions of 'package' vary across these different legislative acts. In the two legislative decrees (Regulation on travel agencies implementing Art. 7 Package Travel Directive, Regulation on travel agencies), the original text of the Directive 90/314/EEC is used. On the contrary, in the Consumer Protection Act, the definition is wider, not stipulating the need for duration of at least 24 hours or overnight accommodation. Moreover, the other services do not need to be a significant proportion of the package.

The German legislator has not specifically transposed the definition, but decided to keep the existing definition of a 'travel contract' in the Civil Code,[34] as it was believed that it should be cast wider than the Directive. According to this definition, by a package travel contract, a travel organiser is obliged to render for the traveller a complete set of travel services (travel package) for the traveller, and the traveller is obliged to pay the travel

[30] *Ibid,* 243.

[31] Directive 90/314/EEC, art. 2(1).

[32] Austria, Estonia, Finland, France, Germany, Ireland, Latvia, The Netherlands, and Poland did not transpose regulation on separate billing in the national laws.

[33] H. Schulte-Nölke *et al., op. cit.,* 241.

[34] In 1979, Germany introduced a sub-chapter on package travel contracts in §§ 651a-k of the Civil Code.

organiser the agreed price for the travel package.[35] Therefore, the definition does not refer to a combination of certain elements. However, it is considered that the form of words used ('a complete set of travel services') means the combination of at least two services.[36] Concerning the duration of at least 24 hours and overnight accommodation, different provisions exist. Article 651a (1) of the Civil Code (concerning the rights of the traveller) is also applicable to trips with a duration of less than 24 hours or without overnight accommodation, whereas, in the Article 651k (6) of the Civil Code (concerning security in the event of insolvency), only services with a duration of at least 24 hours or with an overnight stay are included.

In the United Kingdom, the definition of the "package" is substantially similar to the definition from the Directive 90/314/EEC, with one additional element, which makes the scope of application wider than what is laid down in the Directive 90/314/EEC. The United Kingdom regulation explicitly states that the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions (whether modified or not) shall not of itself cause it to be treated as other than pre-arranged.[37]

In the Czech Republic, the definition is very similar to the one in the Directive 90/314/EEC. Only with regard to the proportion of the other tourist services is it stated that they need to constitute a significant part of the package or that their price must be at least 20 % of the overall package price. In the following paragraph, certain contracts are explicitly excluded from being a package, such as those governing combinations arranged on individual request.[38]

In Poland, there is no specific legislative transposition of the definition of package. Polish Law on Tourism refers to tourist services, defined as services like tour guiding, accommodation and all other services offered to tourists or visitors. Tourist events are characterized as a combination of at least two tourist services to create one programme and covered by an inclusive price, where these services include sleeping arrangements or have a duration of at least 24 hours or if the programme contains a change of place.[39] Thus, this

[35] German Civil Code (BGB), Section 651a(1).
[36] H. Schulte-Nölke *et al., op. cit.,* 241.
[37] The Package Travel, Package Holidays and Package Tours Regulations 1992, art. 2(1); On the other hand, for instance, in Germany, a combination arranged at the request of the consumer has not historically been regarded as a package.
[38] Act 159/1999 on conditions of business operation in the tourism industry, Article1(2).
[39] Act on Tourist Services, Article 3(2).

deviates from the Directive insofar as duration of at least 24 hours or an overnight stay are not necessary if the package includes a change of place.

Slovakian law makes use of the term 'excursion'. This is also a previously arranged stay including accommodation only; the duration must be at least three nights and the accommodation must be in a single establishment including tents, caravans or private lodgings.[40] According to the new amendment, in order for a combination of services to be viewed as 'previously' arranged, it is sufficient that they are arranged at the moment the contract is concluded.[41] Furthermore, the notion also includes a combination of services based on individual requirements. On the other hand, insurance for package travellers is explicitly excluded from being a service in that sense.

In Portugal, the definition was transposed as per the Directive. Additionally, there are examples given for 'other services'. These are "in particular those connected with sporting, religious or cultural events, as long as they represent a significant part of the trip".[42] According to the Hungarian definition, a package requires a combination of transport, accommodation or other services. Examples of other services (meals, guided tours, cultural programmes) are given in the Civil Code, as well in the Government Decree. The other services do not need to be a significant proportion of the package. Additional examples of other services are adduced also in the national legislations of Italy, Slovenia, and Slovakia.[43]

4. PACKAGE TRAVEL IN SERBIAN LAW

In the Serbian law, agreement on travel arrangement has been regulated in two legal sources – Law on Consumer Protection (hereinafter: LCP)[44] and Law on Obligation Relations (hereinafter: LOR).[45] LCP has primacy, so that LOR provisions apply only on the issues which were not regulated by LCP; LOR provisions on agreement on travel arrangement apply subsidiary, to the extent they were not precluded by LCP special provisions.

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[40] Act No. 281/2001 on Package Travel, Article 2(2); Act No. 281/2001 after entry into force of Amending Act No. 186/2006 on 1 January 2007.Art. 2(3).

[41] Act 281/2001 amended by Act 186/2006 (entry into force on 1 January 2007), Article 2(2).

[42] Decree-Law No. 198/93,Article 17(2).

[43] H. Schulte-Nölke *et al., op. cit.*, 243-244.

[44] Law on Consumer Protection (Zakon o zaštiti potrošača), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 62/2014 and 6/2016.

[45] Law on Obligation Relations, Official Gazette of the Socialist Federal Republic of Yugoslavia (Službeni list SFRJ), No. 29/78, 39/85, 45/89).

LOR (art. 859) defines agreement on travel arrangement as an agreement in which travel organizer (travel agency) obliges himself/herself to obtain for a passenger a set of services, which contain transport, accommodation, and another related services, and a passenger obliges himself/herself to pay to an organizer total price (lump sum). From this definition stems a conclusion that a set of services comprehends at least two services. However, in terms of kind of required services which are part of a set of services, in domestic legal literature a dilemma has emerged. Primarily, this dilemma is concerned with the issue whether transport and accommodation are mandatory elements of a set of services.[46] According to one opinion, the definition should be interpreted in a manner that it requires transport and accommodation as mandatory elements of a set of services. The consequence of adoption of this opinion would be a fact that travel could not be limited to obtaining of transport service without accommodation in tourist destination (transport and another tourist service), and *vice versa* (accommodation and another tourist service). According to another opinion, transport and accommodation are adduced only as examples, and therefore transport is not a mandatory element of a set of services. The justification for this opinion is the fact that in practice passenger's travels by their own car are more often, and it would not be fair to exclude these travels from the definition of this agreement.[47] It means that travel arrangement implies a set of at least two kind of tourist services (transport and accommodation, transport and another tourist service, or accommodation and another tourist service, and so on).

According to LCP, package travel, which *as a rule* includes transport, accommodation, and another tourist services, is prepared combination of two or more tourist services, established by the trader (travel organizer) independently or upon consumer's request, in a duration longer than 24 hours, or in shorter duration which includes one overnight stay, as well as multi day stay which includes only accommodation service in certain dates (terms) or certain duration, regardless of a separate calculation or payment of individual services.[48] LCP, therefore, eliminates mentioned dilemma in terms of kind of services which make a set of services, considering that definition of package travel indicates that transport and accommodation are adduced only

[46] M. Dragašević, *Ugovori u turizmu*, Nikšić, 1990, 99.
[47] D. Vujisić, *Poslovno pravo - Trgovinsko pravo*, Banja Luka, 2009, 237.
[48] LCP, art. 5(25).

as examples.[49] The specificity of definition of package travel from LCP, in comparison with LOR, is also an extension of the package travel concept on multi day stay which includes only accommodation service (accommodation service thus obtained primacy in comparison with transport and other tourist services, since it is sufficient for existence of package travel[50]). Further, in accordance with European Court of Justice case law, LCP includes in the package travel definition not only travel determined in advance by travel organizer, but also travel which travel agency organizes upon request and with details précised by travel user.[51] Contrary to LOR, which adopts the concept of unique price (a passenger pays total price - lump sum, and not each service separately; total price may be equal to a sum of particular travel services, and higher or lower than a sum of particular travel services), according to LCP, separate calculation or payment of individual services do not influence on the existence of package travel. LCP's specificity, in comparison with definition of agreement on travel arrangement in LOR, refers also to the duration of travel. LCP's general rule on duration of agreement on travel arrangement provides that this agreement should last longer than 24 hours; but it may last shorter if it includes one overnight stay (if travel lasts longer than 24 hours, it is important to combine two kinds of tourist services, irrelevant which services are these, and if it lasts shorter than 24 hours, it must contain one tourist service, and it must be a service of accommodation with overnight stay). LOR does not contain time limitation of agreement on travel arrangement, and therefore it is important that combination of at least two services exists, irrespective from a travel duration (it could be shorter than 24 hours).

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[49] D. Vujisić, *Ugovor o organizovanju putovanja – pojam i karakteristike*, u: XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Pravni fakultet, Univerzitet u Kragujevcu, Kragujevac, 2011, 65.

[50] V. Radović, *Širenje pojma ugovora o organizovanju putovanja*, 301.

[51] D. Vujisić, *Ugovor o organizovanju putovanja – obaveze organizatora putovanja i putnika,* u: Pravo i usluge (ur. M. Mićović), Pravni fakultet, Univerzitet u Kragujevcu, Kragujevac, 2012, 304.

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ECJ: THE CONCEPT OF 'THE PLACE OF DELIVERY OF THE GOODS' in TERMS of ARTICLE 5(1) (b) of BRUSSELS I REGULATION (*CAR TRIM CASE*)

Abstract

The paper discusses the judgment C-381/08 of the European Court of Justice (ECJ) of 25 February 2010 on a reference for preliminary ruling made by the German Federal Court of Justice (BGH) in the case of the Car Trim. This reference for preliminary ruling concerns the interpretation of Article 5(1) (b) of Brussels I Regulation and, more specifically, concerns the issue of how to determine the place of delivery of the goods in the case of contracts involving carriage of goods. The question of BGH was whether in case of a sales contract involving carriage of goods, the place where the goods were delivered or should have been delivered is to be determined by reference to the place of physical transfer to the purchaser. ECJ came to the conclusion that in the case of a sale involving carriage of goods, the first indent of Article 5 (1) (b) of Brussels I Regulation must be interpreted as meaning that the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

Key words: *European Court of Justice, contract for the sale of goods, place of delivery of the goods, jurisdiction*

1. INTRODUCTION

Article 5(1) of Brussels I Regulation[1] deals with special international jurisdiction in the matter of contracts. Compared with Article 5(1) of Brussels

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[1] Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001. Brussels I

Convention 1968[2], article 5(1) of Brussels I Regulation introduces a sub-classification of contracts with different connecting factors and reads as follows:

A person domiciled in a member State may, in another member State, be sued:

- In matters relating to a contract, in the court for the place of performance of the obligation in question;

- For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of the services, the place in a Member State where, under the contract, the services were provided or should have been provided,

- if subparagraph (b) does not apply than subparagraph (a) applies.

This provision is a result of the European legislator's policy and idea that the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and must always be available on this ground, but in addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on the close link between the court and the action or in order to facilitate the sound administration.[3] Thus, the Article 5(1) of Brussels I Regulation, like other special, alternative jurisdiction rules, foresees in additional forum for claims related to contractual matters. This solution is initially justified on two grounds. First, it justified by the objective of proximity or close connection between the forum and the claim. Second, it aims at procedural balance

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Regulation is the key European instrument on jurisdiction and enforcement in civil and commercial matters. This Regulation is not only the most relevant EU regulation for international litigations in practice, it is also a symbolically loaded pieces of EU cooperation. This Regulation has undergone an extensive review and has been replaced by the recast Brussels Regulation (Regulation (EU) No 1215/2012 OJ L 351/1 (the 'Recast Regulation') which is applicable in EU Member States from 10 January 2015. Article 5(1)(b) of Brussels I Regulation essentially has remained unrevised except numbering - in Recast Brussels Regulation it is Art (7)(1).

[2] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, of 27.09.1968. as amended, OJ C 027, 26.01.1998 (consolidated version).

[3] See the recital 11 and 12 in the preamble to Brussels I Regulation.

between parties, by giving the plaintiff a choice to bring proceedings to a forum of his convenience, rather than to the *forum rei*.[4]

Article 5(1) of the Brussels I Regulation comprehends a *general* contract jurisdiction rule under Article 5(1)(a) which applies to all types of contracts and *lex speciali* jurisdiction rule under Article 5(1)(b) for two specific types of contracts: contracts for sale of goods and contracts for the provision of services.[5] These two rules establishes a deferent connecting factors: the rule under Article 5(1)(a) confers jurisdiction on 'the place of performance of the obligation in question', while the rule under Article 5(1)(b) is based on the close connection justification and confers jurisdiction on 'the place where the goods were delivered or should have been delivered' (contracts for sale of goods) and 'the place where the services were provided or should have been provided' (contracts for provision of services) respectively.

Practical application of the connected factor of a *general* jurisdiction rule has been problematic from the very beginning since the concept of 'obligation in question' was interpreted differently and it was the reason that national courts referred to European Court of Justice (ECJ) a lot of questions for a preliminary rulings.[6] So, the new rule of subparagraph (b) was expected to overcome the main difficulties raised in practice.

According to Article 5(1) (b) of Brussels I Regulation, 'the place of performance of the obligation in question shall be (...) in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered'. So, the obligation to deliver, which is generally considered as the characteristic obligation of a sales contract, is the determinative obligation for contract jurisdiction under the first indent of Article 5(1) (b) of Brussels I Regulation. The connecting factor consists in an objective localization of the place of performance for sales

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[4] See Jenard Report on the Convention on the jurisdiction and the enforcement of judgments in civil and commercial matters, (1968) OJ No C59/1, at 22; R. Michaels, *Re-Placements. Jurisdiction for Contracts and Torts under the Brussels I Regulation When Arts. 5(1) and 5(3) Do Not Designate a Place in a Member State,* International Civil Litigation in Europe and Relations with Third States, 2005, 129-156, 149.

[5] See H. van Lith, *International Jurisdiction and Commercial Litigation – Uniform Rules for Contract Disputes,* The Hague, 2009. 85.

[6] Shortly after the Brussels Convention entered into force, the Court was asked to clarify what was meant with 'the place of performance of the obligation in question' (two crucial cases were: Tessili case (Case 12/76 Tessili v. Dunlop, 1976, ECR 1473) and the De Bloos case (Case 14/76 De Bloos v. Bouyer, 1976, ECR 1497). See more: M. Petrović, *Posebna međunarodna nadležnost za sporove iz ugovornih odnosa prema pravu EU i pravu Republike Srbije,* Anali Pravnog fakulteta u Beogradu, Beograd, 2014, 48-50.

contracts, i.e. the place of delivery, regardless of the obligation that forms the basis of the legal proceedings.[7] By introducing this new rule, the European legislator wanted to create an 'autonomous' rule, independent of the *lex causae*.[8]

Although the Article 5(1) (b) of Brussels I Regulation was generally welcomed, the determination of the place of delivery was more problematic than it was initially thought to be and needed further clarification or interpretation by the ECJ. In other words, new questions and new problems have arisen, such as for example, the meaning of the word 'under the contract', than the question of factual delivery without a contractual place of delivery, than non-delivery and no specified place of delivery or wrongful delivery, delivery in a third state or the question what should be in the case of multiple places of delivery.[9] Keeping in mind that one of the main objectives of Brussels I Regulation is to avoid multiplication of competent forums, especially when these are located in different Member States, and to avoid irreconcilable judgments,[10] importance of uniform interpretation of these notions is doubtless.

Only in the year 2010 and in the first half of 2011, the Court of Justice has rendered several decisions concerning the Brussels I Regulation. For some authors, the 'star' of the year has been Article 5(1) (b), one of the most often applied European provisions on jurisdiction in civil and commercial matters.[11]

This paper deals with *Car Trim* case and ECJ decision rendered in that matter.[12] In this case the Court had to decide what is the place of delivery in the case of sale contract involving carriage of goods. One has to wonder whether this is the place of final destination of the goods or whether the relevant place is that where the goods are handed over to the first independent carrier. Since the Brussels I Regulation itself does not allow one

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[7] U. Magnus and P. Mankowski, *European Commentaries on Private International Law - Brussels I Regulation,* European Law Publisher, 2007, paragraph 100, 136.

[8] See F. Ferrari, *Remarks on the autonomous interpretation of the Brussels Regulation,* in particular of the concept of "place of delivery" under Art.5(1)(b), and the Vienna Sales Convention (on the occasion of a recent Italian court decision) available at: www.ialsnet.org/meetings/ business/Ferrari franko-USA.pdf

[9] For more details see: H. van Lith, *op.cit.,* 87-94.

[10] See C-125/92 Mulox v. Geels, (1993) ECR 4075, para. 11.

[11] M. A. Lupoi, *A Year in the Life of Regulation (UE) N. 44 of 2001,* available at: www.academia.edu/887924/Ayear-in-the-life-of-regulation-EU-44-of-2001, date of access: April 15, 2016.

[12] Case C-381/08, Car Trim GmbH v. KeySafety Systems Srl, ECLI:EU:C:2010:90.

to infer an answer from either its legislative history or its wording, the Court was asked to clarify and determine this concept.

The aforementioned decision is worth being commented since it defined the concept of the 'place of delivery' in the case of sales contract involving carriage of goods. This means that all national courts of the Member States have to interpret this concept in the same way, what further means that the uniform application of Article 5(1) (b) of Brussels I Regulation is ensured. Nevertheless, one can wonder whether it means that there are no remaining uncertainties concerning this matter.

2. THE CIRCUMSTANCES OF THE CASE

KeySafety, which is established in Italy, supplies Italian car manufacturers with airbag systems. Between July 2001 and December 2003, KeySafety purchased from Car Trim components used in the manufacture of those systems, in accordance with five supply contracts. ('the contracts').

KeySafety terminated the contracts with effect from the end of 2003. On the view that those contracts should have run, in part, until summer 2007, Car Trim claimed that the terminations were in breach of contract and brought an action for damages before the Landgericht Chemnitz (Regional Court, Chemnitz), which at that time had jurisdiction for its place of production. Landgericht Chemnitz rejected the action as inadmissible, on the ground that the German courts have no international jurisdiction.

The Oberlandesgericht (Higher Regional court) dismissed the appeal brought by Car Trim. The claimant (Car Trim) then brought an appeal on a point of law before the Bundesgerichtshof (German Federal Court of Justice). According to the Bundesgerichtshof, the success of that action turns on whether the Landgericht Chemnitz was wrong in denying that it had international jurisdiction, an issue which has to be determined on the basis of Brussels I Regulation.

The answer to that question depends on the interpretation of Article 5(1)(b) of Brussels I Regulation, given that KeySafety has its 'business domicile' – which, under Article 2 of Brussels I Regulation, can determine jurisdiction – in Italy, and the Oberlandesgericht found that the German courts neither have exclusive jurisdiction under Article 22 of Brussels I Regulation, nor express or implied jurisdiction under Articles 23 and 24 of that regulation respectively.

Consequently, it is possible for the German courts to have jurisdiction to adjudicate the action for damages only if the place of production is to be

regarded as the place of performance of 'the obligation in question' within the meaning of Article 5(1) of Brussels I Regulation.

The Bundesgerichtshof considers that jurisdiction lies with the court which has the closest geographical connection to the place of performance of the obligation which characterises the contract. For those purposes, it is necessary to identify the preponderant contractual obligations, which, in the absence of any other suitable connection, must be determined by reference to economic criteria.[13]

In the event that the place of performance determining jurisdiction is the place identified in the first indent of Article 5(1)(b) of Brussels I regulation, it would be necessary to determine the place to which the goods sold were delivered, or should have been delivered, under the contracts. The Bundesgerichtshof considers that, even in the case of sales contracts involving carriage of goods, that place of performance refers to the place where, under the contracts, the purchaser obtained, or should have obtained, actual power of disposal over the delivered goods.

In those circumstances, the Bundesgerichtshof decided to stay the proceeding and to refer the matter to the ECJ.

3. THE QUESTION REFERRED FOR A PRELIMINARY RULING

The question referred was whether, "in the case of a sales contracts involving carriage of goods, the place where, under the contract, the goods sold were 'delivered' or should have been 'delivered' within the meaning of the first indent of Article 5(1)(b) of Brussels I Regulation is to be determined by reference to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser".[14]

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[13] The criterion of the preponderant economic obligation is also that specified in Article 3(2) CISG or Article 6(2) of the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974. See para. 24 of the ECJ Judgment C-381/08.

[14] See para 26.2. Actually, it was the second question referred to ECJ. The first one essentially asked whether contracts for the supply of goods to be produced or manufactured were contracts for the sale of goods or contracts for the provision of services, in particular where the customer has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced. In other words, this question concerned the distinction of contracts for the sale of goods and contracts for the provision of services within the meaning of Article 5(1) (b) Brussels I

The second possibility in defining the concept at hand, referred by Bundesgerichtshof, is actually implicit in United Nations Convention on Contracts for the International sale of Goods (CISG) (1980) which is the international substantive law instrument. Namely, under the Article 31(a) CISG the place of delivery relevant for the purpose of establishing jurisdiction is that where 'the goods (are handed) over the first carrier for transmission to the buyer'.[15]

By this question, the referring court essentially asks the Court to interpret the meaning of 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' in the first indent of Article 5(1)(b) Brussels I Regulation in order to determine the place of performance of the obligation, which is a linking factor to determine the competent court in matters relating to contract.[16]

It should be recalled that all requests from the national court for a preliminary ruling are published in the Official Journal, in order inter alia to give other institutions and Member States the opportunity for submitting observations. In this particular case, written observations were submitted by the defendant in the main proceedings, the German, Czech and United Kingdom Governments and by the Commission of the European Communities.

4. THE JUDGMENT OF ECJ

With regard to the referred question, the Court (Fourth Chamber) held that 'the first indent of Article 5(1)(b) of Brussels I Regulation must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of

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Regulation in the case of contracts for the supply of goods to be produced where the customer has specified certain requirements. Id. 26.1.

[15] Opinion that 'autonomous' interpretation can be achieved by resorting to the ('autonomous') definition contained in CISG has been criticized, on the grounds that an international procedural law instrument of European origin, such as the Brussels I Regulation, cannot be interpreted in the light of a substantive law instrument of 'extra-European' origin such as the CISG. See Tribunale di Rovereto, 28 August 2004, International Lis, 2005, 132, cit. according: F. Ferrari, *op cit.*, 9. Generally, this question made national courts of Member States confused, since some of them decided contrary (see Tribunale di Padova, 10 January 2006, Giurisprudenza italiana, 2006).

[16] See para 27 of The Opinion of Advocate General Mazak delivered on 24 September 2009, ECLI:EU:C:2009:577.

that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction'.

5. EXTRACT FROM THE REASONS

In order to answer the question referred, the Court based its considerations on the origins, objectives and scheme of Brussels I Regulation (see Case C-386/05 *Color Drack* (2007) ECR I-3699, paragraph 18, and Case C-204/08 *Rehder* (2009) ECR I-0000, paragraph 31).[17] In that sense, Advocate General stressed that the interpretation sought must take account of the objectives of proximity and predictability and be in conformity with the requirement of legal certainty.[18]

The Court started by recalling that it is the settled case-law that the rule of special jurisdiction in matters relating to a contract, as set out in Article 5(1) of Regulation, reflects an objective of proximity and the existence of a close link between the contract and the competent court, with the further corollary that provisions on the special jurisdiction are justified only in so much as they enhance in this principle, vis a vis the general rule which grants jurisdiction to the place where the defendant is domiciled.[19]

Moreover, the Court then moved to examine the historical context in which Article 5(1) of the Brussels Convention of 1968 came to be redrafted in the context of the new Regulation. In particular, the Court reminded that the Commission, in its Proposal of 14 July 1999, stated that it was intended 'to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised' and that that 'pragmatic determination of the place of enforcement' was based on a purely factual criterion.[20] From this point of view, the Court came to conclude that autonomy of the linking factors provided for in Article 5(1)(b) precludes the application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder.[21]

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[17] See para. 47 of the ECJ Judgment C-381/08.
[18] See para 37 of The Opinion of Advocate General Mazak
[19] See para. 48 of the ECJ Judgment C-381/08.
[20] *Ibid.,* at 52.
[21] *Ibid.,* at 53.

According to the Court, the rule of special jurisdiction in matters relating to a contracts of sale of goods, contained in the first indent of Article 5(1)(b) of Regulation establishes the place of delivery as the autonomous linking factor based on the close connection between the contract and the court called upon to hear and determine the case. The place of delivery, as the autonomy linking factor need to be applied to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself (*Color Drack,* paragraph 26).[22]

Keeping in mind that the Regulation is silent as to the definition of the concepts of 'delivery' and 'place of delivery' for the purposes of the first indent of Article 5(1)(b) thereof,[23] the Court has concluded that the first indent of Article 5(1)(b) of the Regulation must be interpreted as meaning that, in the case of sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered, must be determined on the basis of the provisions of the contract. By this the Court made it explicitly clear that parties enjoy a freedom to contract in defining the place of delivery of the goods. The court must therefore determine whether the place of delivery is 'apparent' from the provisions of the contract, without reference to its substantive law. If it is, then that place is to be regarded as the place of delivery for the purposes of Article 5(1)(b) of Regulation.[24] Where the contract is silent however, regardless of the substantive law of the contract, according to the Court, it is necessary to determine that place in accordance with another criterion which is consistent with the origins, objectives and scheme of the Regulation.[25]

After considering that both places proposed by the referring court seem to be the most suitable,[26] the Court concluded that the place where the goods were physically transferred or should have been physically transferred to the purchaser at their final destination is the most consistent with the origins, objectives and scheme of the Regulation as the 'place of delivery' for the purposes of the first indent of Article 5(1)(b) of that regulation. According to the Court, that criterion is highly predictable. It also meets the objective of

[22] *Ibid.,* at 50. According to the Explanatory Memorandum of the Regulation's proposal, the place of delivery applies 'regardless of the obligation in question, even where this obligation is the payment of the financial consideration for the contract. It also applies where the claim relates to several obligations' (see Explanatory Memorandum, 14).
[23] See para. 51 of the ECJ Judgment C-381/08.
[24] *Ibid.,* at 54 and 55.
[25] *Ibid.,* at 57.
[26] *Ibid.,* at 59.

proximity, in so far as it ensures the existence of a close link between the contract and the court called upon to hear and determine the case. The Court pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place after performance of the contract. Furthermore, according to the Court, the principal aim of a contract for the sale of goods is the transfer of those goods from the seller to the purchaser, an operation which is not fully completed until the arrival of those goods at their final destination.[27]

In the opinion of Advocate general, given interpretation makes the place of physical transfer of the goods to the purchaser the basis for determining the place of delivery of the goods, without reference to the national law of the various Member States. By him, that criterion is easily identifiable and easy to prove, so that the court with jurisdiction can be identified without any difficulty.[28]

6. WRITTEN OBSERVATIONS SUBMITTED

The defendant and Czech and German Governments unanimously agree, in principle, that, in the case of contracts involving carriage of goods, the place where, under the contract, the goods were delivered or should have been delivered should be determined according to the place of their physical transfer to the purchaser.[29]

The Commission's answer corresponds, in principle, to the answer proposed by the defendant and Czech and German Governments. In the Commission's view, in the case of sales which require the carriage of goods and for which the seller has to hand over those goods to the first carrier for transmission to the purchaser ('sale by consignment'), the place of delivery must be determined according to the place where the purchaser obtains actual possession of the goods or should have obtained it under the contract (place of destination of the goods sold).[30]

According to the United Kingdom Government, the determination of the place of delivery depends on the terms of the contract. In cases where the seller's essential obligation is to ship the goods and (if applicable) provide documents transferring title to the buyer, then, subject to any contractual terms to the contrary, the relevant place of delivery is that at which the goods

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[27] *Ibid.*, at 61.
[28] See para. 40 of The Opinion of Advocate General Mazak.
[29] *Ibid.*, at 28.
[30] *Ibid.*, at 30.

were handed over to the carrier for transmission to or at the direction of the buyer.[31]

7. CONCLUSION

Generally, Article 5(1) (b) of Brussels I Regulation, which provides for jurisdiction in matter of contracts for sale of goods and provision of services, was welcomed as it introduces autonomous fact-based concepts for the purposes of establishing jurisdiction.

Concerning the contracts for sale of goods, the 'place of delivery' of the goods is determined as linking factor for establishing jurisdiction. Although it was welcomed, this factual concept is more problematic than it was initially thought to be and needed further clarification and interpretation by the ECJ. The question is particularly troublesome in case of sales contract involving carriage of goods.

In *Car Trim* case the Court was ready to make clear that the place of delivery of the goods is in principle to be that agreed by the parties in the contract. Where it is possible to identified the place of delivery in that way, without reference to the substantive law applicable to the contract, therefore, it is that place which is to be regarded as the place where, under the contract, the goods were delivered or should have been delivered, for the purposes of the first indent of Article 5(1) (b) of the Regulation. It means that the courts of the Member States are supposed to examine the contract and check whether it contains and express provision on the place where the goods are supposed to be delivered. The Court then went on to determine the place of delivery in the absence of an agreement between the parties. The answer to this question, given by the Court, is that place of delivery is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sale transaction. According to the Court, such criterion should be preferred because it is highly predictable and also because it meets the objective of proximity, in so far as it ensures the existence of a close link between the contract and the court seized to hear and determine the case.

It must be stressed that the facts underlying *Car Trim* do not reveal the use of a particular INCOTERM nor another contractual clause governing the delivery. The Court did not examine the role of these clauses in determining jurisdiction issue in disputes concerning contracts of sale. Indeed, the Court

[31] *Ibid.,* at 31.

was not required to consider in details that question and examine whether that kind of contracts terms could constitute agreement concerning the place of delivery. So, this very important question has remained without the answer in this Court decision.

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THE PATENTABILITY AND RELATED PROTECTION OF INVENTIONS FOR SECOND MEDICAL INDICATIONS

Abstract

Nowadays purpose-related product protection is permitted for each second medical use inventions. In that manner the range of old dilemmas and inconsistencies relating to the format of German-type use claims and Swiss-type claims have been resolved. The introduction of purpose-related product protection resulted in the limitation of a physician's activities. Therefore, in a number of countries the potential introduction of a solution, according to which physicians' activities may be exempted from the effects of a patent under certain circumstances, is being analysed.

Key words: *augenfällige Herrichtung, generic manufacturer, physician's activities, indirect infringement, direct infringement.*

1. INTRODUCTION

The original meaning of the term inventions of second medical indication entails inventions of composition of matter or material already used as a medicament for the treatment of one or more specified diseases, conditions or symptoms and ongoing or later research finds that the medicament is useful for the treatment of other diseases as well. This concept has a more broader interpretation nowadays and it can refer to a new therapeutic use of a known pharmaceutical composition or substance for treatment of specified diseases, conditions or symptoms not originally contemplated by the medicament, use of known pharmaceutical composition or substance for treatment of a known indication in a new patient group, use of a known pharmaceutical composition or substance for treatment of a known

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indication in a new dosage form, use of a known pharmaceutical composition or substance for treatment of a known indication with a new dosage regime; complete with a new therapeutic use of a known pharmaceutical composition or substance based on various levels of its technical effect.

Second medical use inventions cannot be patented in all countries. However, even in the countries where they are considered patentable subject matter, there are notable exceptions relating not only to the type of second medical uses which are considered as an invention eligible for patent protection but to the format of patent claims as well. The examples of second medical use claims found to be acceptable: use of a composition (or substance) X in the manufacture/preparation of a medicament for treating disease Y; use of a composition (or substance) X in the treatment of disease Y and a composition (or substance) X for use in the treatment of disease Y. Even regarding use claims of the same type, there is a notable difference in protection obtained based on patent eligibility. Lack of harmonisation of patent protection for second medical uses and adequate regulations impact both originator and generic pharmaceutical companies by creating uncertainty both for patent holders and assumed infringers. According to the relevant provisions found in Articles of the TRIPS Agreement, patents shall be granted to second medical use claims provided that they fulfill all the other requirements of patentability. It means that they are new, involve an inventive step and are capable of industrial application.

The potential forms of patent protection for second medical use inventions, complete with the impact they have on the typical activities of medical practitioners and generic manufacturers are contemplated in the paper itself. In this respect, the questions of indirect and direct patent infringement were analysed in the cases of different forms of patent protection of the abovementioned inventions.

2. PATENT FOR USE IN GERMAN PATENT LAW AND SWISS-TYPE PATENT CLAIMS

The content and effects of the German-type use claims have considerably been transformed in the German patent law over the course of time. Initially, the starting point of the use of a patent as the relevant patent-related action, was not considered to be the point of a composition of matter formulation,

but the point of its putting to a particular purpose.[1] However, the abovementioned solution indicates that the patent for use is of no practical significance in the pharmacy field.[2] Namely, the treatment of the human (or animal) body by therapy was excluded from patent protection. The exclusion of treatment procedures from patentability used to be based on a legal fiction referring to such actions as not being susceptible or capable of industrial application.[3] An invention shall be considered as susceptible of industrial application if it can be made or used in any kind of industry. Medical procedures are not considered as industrially applicable, because the term industry does not include a medical profession as a liberal profession.[4]

In the earlier period of German patent law, the patent protection of second medical use inventions was provided in the following form of patent claims use of compound X for treating/preventing disease Y.[5] Such a solution was based on the fact that there were no regulations addressing protection of second medical use, compared to first medical use inventions. Taking into consideration the fact that purpose-related protection in respect of a chemical compound was obtained for first medical use inventions, that kind of protection could not be obtained for second medical use inventions. Therefore, the only prospective form of protection was a use claim.[6] However, second medical use inventions are employed in therapeutic procedures which are not susceptible of industrial application. It implies that the major problem regarding the abovementioned form of a patent claim was related to the manner in which its industrial applicability could be construed.

Accordingly, the German Federal Supreme Court reached a solution on the abovementioned issue and concluded in its decision

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[1] Rechtsprechung Bundesgerichtshof vom 24.02.1970, Az. X ZR 49/66 „Schädlingsbekämpfungsmittel", Gewerblicher Rechtschutz und Urheberrecht, 7/1970, 361.

[2] Z. Miladinović, S. Varga, M. Radojković, *Patent law protection of inventions in medicine and pharmaceutical industry,* Vojnosanitetski Pregled, 6/2013, 600–605.

[3] B. Vlašković, *Patentna zaštita pronalazaka druge medicinske indikacije*, u: Međunarodna konferencija o pravu intelektualne svojine-Aktuelna pitanja prava intelektualne svojine i prava konkurencije: pogled sa Balkana (ur. S. Marković, D. Popović), Pravni fakultet Univerziteta u Beogradu, Biblioteka Zbornici, Beograd, 2016, 71-87.

[4] J. Straus, K. Herrlinger, *Zur Patentierbarkeit von Verfahren zur Herstellung individuumspezifischer Arzneimittel*, Gewerblicher Rechtschutz und Urheberrecht Int, 11/2005, 869-876.

[5] B. Vlašković, *Tehnički efekat i obim patentne zaštite hemijskih i biotehnoloških pronalazaka,* Zbornik radova Pravnog fakulteta u Novom Sadu, 2/2013, 7.

[6] *Ibid.*, 16.

"Benzolsulfonylharnstoff"[7] that the use of a substance for combating a disease, in which the medicinal benefit of the substance is exploited, does not take place only by the physician's use or prescription of the medication, but also routinely includes a number of activities which do not, like the physician's activities, exist ouside the scope of commercial use, for instance: the formulation and the confectioning of the medication, its dosage and its packaging in a form ready for use. All these activities preceding physicians precribing a composition for a course of therapy are embraced by the filed use claim. In that manner, the viewpoint according to which the application does not start with a composition formulation itself, which is sporadically expressed at the earlier stage of court practice, is disregarded. Based on the abovementioned activities, a use claim is considered as industrially applicable, due to which one of the fundamental patent eligibility requirements is met.[8]

Products are not excluded from patentability in the circumstances when there are other ways of patent application which are not considered to be of an industrial character. The abovementioned case is found in other technical fields. A contradictory viewpoint has the following consequences: inadequate limitations of patent granting procedure. Namely, the patent eligibility requirement means that an invention is susceptible of industrial application and certainly it does not mean that any other possibility of a non-industrial application is being denied. This viewpoint is not contrary to the ''Glatzenoperation''[9] decision due to which the patent claim for a surgical treatment procedure for the purpose of prevention and treatment of baldness is rejected. This type of a procedure lies exclusively in the hands of physicians, meaning that there is no possibility of its industrial application.

The same considerations is supported in the conclusion ''Sitosterylglykoside''[10] rendered while resolving the patentability of an invention entailing the use of a known active substance for the treatment of a specific disease. Namely, the substance had already been used for plant growth promoting, and its effect at reducing blood sugar level had been

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[7] Beschluss Bundesgerichtshof vom 20. 1. 1977, Az. X ZB 13/75 „Benzolsulfonylharnstoff", Neue Juristische Wochenschrift, 11/1977, 1104.

[8] *Ibid.*, 1107.

[9] Beschluss Bundesgerichtshof vom 26.9.1967, Az. Ia ZB 1/65 „Glatzenoperation", Gewerblicher Rechtschutz und Urheberrecht, 3/1968, 142.

[10] Beschluss Bundesgerichtshof vom 3.6.1982, Az. X ZB 21/81 „Sitosterylglykoside", Gewerblicher Rechtschutz und Urheberrecht, 9/1982, 548.

presented as well. So far it has been established that the abovementioned substance can be used for the treatment of benign prostate hyperplasia and rheumatic diseases. In other words, any piece of knowledge for which a patent claim is filed – is comprised of indicating a new purpose for a known active substance. However, according to the German Federal Patent Court in this case it is the knowledge which is not considered as industrially applicable. Additionally, it is of no relevance whether it is comprised of measures referring to the industrial application. Namely, they are already known and they neither express the knowledge indicated in the application itself nor is an expert encouraged to undertake some new activities such as the specific formulation of a known active substance, its confectioning or its dosage and the use of such a dosage form in medicine.

The German Federal Supreme Court did not comply with the arguments rendered by the Federal Patent Court. Namely, the patentability of knowledge presented in a patent claim is exclusively based on the surprising effect of an active substance in the treatment of the abovementioned diseases. It means that the key points relevant in granting patent procedure are: novelty, technical advancement and inventive level of the compound use in the treatment of the diseases given[11]. Referring to its previous decision ''Benzolsulfonylharnstoff", the Court specifically emphasizes that for establishing the industrial application of an invention related to the use of a substance for the treatment of a disease – it is of no significance whether the substance is already used for the claimed purpose. This particular question exclusively refers to novelty and an inventive step of an invention and does not refer to its industrial applicability. The patent eligibilty requirements have to be examined separately and must not be combined. When meeting the requirements for industrial applicability it cannot be demanded that the treatment of another disease, performed by using a substance already known as a medication, is conducted in a form differing from the existing one in terms of the substance preparation intended for use. Namely, even the form which does not differ from the existing one is realized in an industrial area, which is considered as the grounds for its industrial applicability criterion of patentability.[12]

In this context, the German Federal Supreme Court made a particularly significant decision ''Hydropyridin''[13]. A leading decision of the Federal

[11] *Ibid.*

[12] B. Vlašković, *Patentna zaštita pronalazaka iz oblasti hemije,* Beograd, 1989, 152.

[13] Beschluss Bundesgerichtshof vom 20.9.1983, Az. X ZB 4/83 „Hydropyridin", Neue Juristische Wochenschrift, 5/1984, 663.

Supreme Court is the following: an invention, which involves the use of a substance already known as a pharmaceutical for the treatment of a disease which has not previously been treated with this substance, is not excluded from patentability and is not in contradiction with Article 3 (3) Patentgesetz 1981.[14] In the concrete case the compound was known as a pharmaceutical for the treatment of coronary diseases, and it was later found to be effective against changes in cerebral blood flow.

According to the viewpoint of the German Federal Patent Court, essential parts of knowledge presented in a patent claim are related to the use of a substance already known as a pharmaceutical for the treatment of a disease which has not previously been treated with this substance. Namely, according to the opinion of the Court: the making of a galenic medicinal product which involves the use of a known active substance, its packaging in a form ready for use, the use of a known substance or composition for a specified new and inventive therapeutic application, storage and distribution of a known pharmaceutical product for a new purpose, the first steps in the patent registration procedure and product information provided by written labels on the packaging and package inserts for patients or directions for use and cautionary statements enclosed within the packaging itself – are not covered in the patentable subject matter. On the contrary, technical knowledge reflects in a purposefully attained application, that is, prescribing and administering of a known pharmaceutical for a new purpose. It is a procedure intended to be used for the treatment of human body by therapy, which is not considered as industrially applicable. The treatment of cerebral insufficiency does not demand the use of a product manufactured in a different manner in comparison with the one that has previously been described. The novelty of the manufacturing process is not based on referring to the use of a known substance for achieving a new effect untill the moment of all its variations being presented.[15]

However, the German Federal Supreme Court disagreed with that view, thus referring back to its previous legal practice. Moreover, it emphasized that the subject matter of the patent directed to the protection of its use does not depend on the kind of a substance applied, for the patent used as protection of the substance for the purpose of attaining a specific aim

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[14] Z. Miladinović, *Zaštita prava intelektualne svojine u EU: stanje i perspektive,* u: Pristup pravosuđu-instrumenti za implementaciju evropskih standarda u pravni sistem Republike Srbije (ur. N. Petrušić), knj. 4, Pravni fakultet Univerziteta u Nišu, Centar za publikacije, Niš, 2008, 18-20.

[15] Beschluss Bundesgerichtshof vom 20.9.1983, Az. X ZB 4/83 „Hydropyridin", op. cit., 667.

provides protection against evident measures of a substance manufacturing, irregardless of whether it is used to attain a therapeutic aim or any other aim, such as the prevention of weed gemination and harmful insects or other animals.[16] Based on the patent for use one cannot file any claims against the third party involved in the manufacturing process of a known substance and its use as a medication in the treatment of conorary diseases. Namely, its manufacturing and administration for the purpose stated in the indications falls into the category of a technics state. The treatment of cerebral insufficiency by therapy does not request a different method for manufacturing a substance compared to the manufacturing process of a substance applied for the treatment of conorary diseases. However, the patent protection directed to the use and cerebral insufficiency treatment indications by all means comprises manufacturing of drug packaging including specifications stating that the substance is to be administered for the purpose given in the indications. In other words, the preparation of a composition of matter or material can additionally be reflected within the patient's instructions for use enclosed.[17] This action is not part of a genuine manufacturing process per se, but in theory it has to be attributed to the process for the purpose of its differentiating from the state of technics. In general, marketing and advertising campaigns related to the patented use, not taking into account distribution of a pharmaceutical product itself, are not sufficient and can be perceived as the grounds for indirect infringement of the patent for use in circumstances of a concrete case. The aforementioned campaigns are not considered as the ''augenfällige Herrichtung''[18] of matter or material which is put on the market. Such general marketing and advertising campaigns do not demonstrate necessary and indirect link with the product itself, which may only guarantee that the composition of matter or material is going to be used for the patent-protected purposes. Unlike the activities included in the preparation of mattter or material itself, instructions and usage information given in generally used marketing leaflets are not

[16] B. Vlašković, *Apsolutno dejstvo patenta u vezi sa pronalascima sekvenci gena,* Pravo i privreda, 7-9/2012, 218-232.

[17] Urteil OLG Düsseldorf vom 31.1.2013, Az. 2 U 54/11 „Cistus incanus Präparate", http://openjur.de › OLG Düsseldorf › Rechtsprechung, date of visit: 23.8. 2015.

[18] In German national law the subject - matter of a claim directed to the use of a chemical substance to treat an illness extends beyoned the treatment of the illness to the "augenfällige Herrichtung", which, as has been said, includes at least the packaging of the substance with instructions for use in the treatment of the illness.

likely to be noticed by the drug user.[19] Accordingly, it is not clear whether the matter or material will be used for the patented purpose as well. In the practice of the German courts, it has not been given a complete clarification of whether the subject matter of a patent, within the meaning of the definition, refers specifically to a drug administration and not to other types of a substance. The German Federal Supreme Court finally resolved the abovementioned dilemma by pointing out the following: ''Contrary to the belief of the Enlarged Board of Appeal, the patent protection whose claimed subject-matter, within the meaning of the definition, is not limited to the use of an active substance contained in medications – does not depend on the type of a substance applied. On the contrary, this subject-matter protected by the patent is inherent in all patent use claims, whereas a known composition of matter or material or an object is used for a new and inventive purpose. A patent for use of a known object does not include exclusively the activities directly referring to the protected use, but non-industrial activities as well, used in the evident preparation of the subject-matter for uses according to the patent itself.''[20]

3. PURPOSE-RELATED PRODUCT PROTECTION

Purpose-related product protection conferred to a very substance or composition refers to its being protected as a means of realization of a particular goal. According to the prevailing view in German court practice, a final element, namely a particular attainment of purpose, is inherent in purpose-specific product protection, which constitutes an essential component of the protected invention.[21] If this purpose is neither striven for nor purposefully attained, but rather another purpose than that claimed is attained, then no use of the subject matter of the patent exists.

In a concrete case the inherent nature of patent purpose is considered as prevention and treatment of viral diseases by therapy.[22] Patent-eligible

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[19] B. Vlašković, *Ponovna proizvodnja pronalaska i zamena nekih njegovih delova*, u: Slobode i prava čoveka i građanina u konceptu novog zakonodavstva Republike Srbije (ur. S. Bejatović), knj. 4, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2005, 233-241.

[20] Rechtsprechung Bundesgerichtshof vom 21.11.1989, Az. X ZR 29/88 „Geschlitzte Abdeckfolie", Gewerblicher Rechtschutz und Urheberrecht, 7/1990, 505.

[21] Rechtsprechung Bundesgerichtshof vom 21.11.1989, Az. X ZR 51/86 „Antivirusmittel", Gewerblicher Rechtschutz und Urheberrecht, 11/1987, 794.

[22] *Ibid*., 796.

subject matter is used by actions devoted to realizing this specific goal. On the contrary, the subject matter is not used by actions directed towards the prevention or treatment of other types of diseases. It is necessary to establish a practically reasonable degree in order to differentiate whether it is the purpose recited in the patent claim that is being achieved or another one. The fact itself that a means is eligible for achieving the purpose defined in a patent claim still does not imply that it is the very means by which the abovementioned purpose is being achieved. On the contrary, the fact that the purpose inherent to the invention is being achieved to a practically reasonable degree – has to be taken into consideration in case of the use of purpose-related product inventions.

The German Federal Supreme Court emphasizes the fact that the answer to the question of what is the protected subject matter may be found in the patent claim, that is, patent records data. The purpose of the patent achieved in practice by the patent holder is of no significance for defining the subject matter, if there is a notable difference between the purpose stated in the patent claim and the one defined in patent records respectively.[23]

The composition, which is protected as a means for the prevention and treatment of viral diseases, was stated by the defendant in the indications exclusively as a means for the treatment of Parkinson's disease by therapy, that cannot be associated with viral infections, for it is characterized by the decline of the numbers of nerve cells in Parkinson's patient brains. Having established a practically reasonable dosage form, in this constellation the use of the abovementioned means in the treatment of Parkinson's disease cannot be considered as the attainment of prevention and treatment of viral diseases. An antiviral drug given to the non-infected patient indicates that a particular attainment of purpose of the patent reflected in the treatment of viral diseases is completely left out. When considering the circumstances of the sporadically occuring cases of prevention of viral diseases reported when administering the medications used to treat the symptoms of Parkinson's disease, they cannot be considered as an attainment of the patent purpose which is achieved to a practically reasonable extent. When administering the medications, the treatment of Parkinson's disease primarily depends on a responsible and conscientious medical therapy management in comparison with the sporadic cases of prevention of viral infections which are not purposefully attained and which are not in the foreground.[24]

[23] *Ibid.*, 799.
[24] *Ibid.*

Taking into consideration the aforementioned fundamental views of the German Federal Supreme Court, The District Court of Düsseldorf reaches a decision ''Az. 4a O 12/03" where it emphasizes that medication usage is exclusively related to the case of the intended specific purpose being striven or purposefully attained.[25] Medication usage is excluded in the case of another purpose being attained.[26] The purpose-related protection of a composition of matter or material includes not only the activities covered in its direct use, but the ones performed during the ''augenfällige Herrichtun'' of a comosition of matter or material for the intended use. Such ''augenfällige Herrichtung'' can be reflected in a specific manner of shaping matter or material. However, the instructions and usage information enclosed should be considered as well. The ''augenfällige Herrichtung'' does not spring from the instructions and usage information enclosed, but merely presents pointing out the uses of matter or material in a combination therapy.

4. DIRECT PATENT INFRINGEMENT IN THE CASE OF SECOND MEDICAL USE PATENTS

A typical German-type use claim, by means of which second medical use inventions are protected, is directly infringed by the act of ''augenfällige Herrichtung'', that is, manufacturing of raw composition of matter intended for application for patent-protected purpose. The same statement applies for Swiss-type patent claims, considering the fact that the act of production is a constituent part of a very claim formulation.

Generic drug manufacturer offering drugs for use as drugs for first medical indications, the protection of which obtained by the patent has expired – is not considered to be a direct patent infringer for second medical uses inventions.[27] Namely, in such a case there is no ''augenfällige Herrichtung'' of a drug. It means that a conditio sine qua non for the infringement of German-type use claims and Swiss-type patent claims is related to the '' ''augenfällige Herrichtung'' of a drug''.

Another issue, which has been raised, is drawing specific attention to the position of a physician who prescribes a medication or directly uses it for particular purposes that are formally approved and covered by a valid patent

[25] Urteil LG Düsseldorf vom 24.2.2004, Az. 4a O U 12/03, http://openjur.de›LG Düsseldorf›Rechtsprechung, date of visit: 29.5. 2016.

[26] B. Vlašković, *Pravo industrijske svojine*, autorizovana skripta, Kragujevac, 1990, 43-54.

[27] Z. Miladinović, *Subjektivna prava intelektualne svojine: sticanje, sadržina, ograničenja, zaštita,* Niš, 2004, 25-33.

for second medical indications. It is associated with difficulties primarily arising from the circumstances of a physician prescribing or using medications during his/her regular treatment activities. In addition, one should bear in mind the circumstance of physician's activities not being exempted from the effects of a patent, meaning that a physician is a patent infringer in the case of his/her using or prescribing a medication that directly infringes the patent. However, regarding second medical use inventions, a physician does not use a medication already infringing the patent, considering the fact that it is not the medication which is ''augenfällige Herrichtung'' for a specific use. On the contrary, in this case the physician is using a medication which is not protected by the patent itself, but due to its being prescribed or used – attains the purpose covered by a valid patent for second medical indications.[28]

5. DIRECT INFRINGEMENT IN THE CASE OF PURPOSE-RELATED INVENTIONS RELATING TO SECOND MEDICAL INDICATIONS

Due to the amendments of the European Patent Convention (Revision Act 2000), the purpose-related protection was introduced for second medical use inventions as well.[29] This type of protection was not limited by existing ''augenfällige Herrichtung'' of a drug in the same manner as it used to be the case in the earlier period. In the year of 2010, the Enlarged Board of Appeal of the European Patent Office made a decision ''G 2/08'' where it emphasized that the patent holder is granted a larger scope of protection compared to the one obtained by the analyzed forms of German-type use claims and Swiss-type patent claims. Simultaneously, it was emphasized that the freedom of physicians while prescribing or administering generic substances can be limited by extending the scope of protection.[30] Tight linking with the qualified act of manufacturing of a drug is not immanent in the purpose-related patent protection, which means that the patent-protected purpose of the use given may derive from other accompanying circumstances as well, even at the point when a drug as such is still not ''augenfällige Herrichtung'' for the patent-protected purpose. Therefore, even a drug prescription and its

[28] F. Hufnagel, *Der Schutzbereich von Second Medical Use Patente*n, Gewerblicher Rechtschutz und Urheberrecht, 2/2014, 124.
[29] Z. Miladinović, *Pravo industrijske svojine,* Niš, 2007, 135.
[30] Entscheidung EPA vom 19.2. 2010, G 2/08 „Abbott Respiratory LLC", Amtsblatt EPA 10/2010, 456-493.

administration for the patent-protected purpose can be considered to be one of the accompanying circumstances. In other words, at that point a physician is considered as a direct patent infringer for second medical use inventions.[31] The fundamental difference between a use claim, whether it is a German-type use claim or Swiss-type patent claim, and purpose-related protection is the meaning of the ''augenfällige Herrichtung'' or drug manufacturing with a view to use it for the patent-protected purpose. In the case of the first two patent claim forms such preparation or manufacturing are considered as the essential condition for patent infringement. On the contrary, in the case of purpose-related protection such preparation or manufacturing is only one of the relevant accompanying circumstances, but not the condition for patent infringement.

6. INDIRECT PATENT INFRINGEMENT IN THE CASE OF SECOND MEDICAL USE INVENTIONS

Apart from direct patent infringement, in some countries there is indirect patent infringement as well, which is the result of a joint endeavour to expand the effects of a patent to non-patented invention parts. This institute can be regulated in various manners. In currently valid German law the content of the aforementioned institute means that without the grant issued by the patent holder the third party is forbidden to offer or deliver the means related to the essential part of the invention under the condition that the third party possesses the knowledge, or that it is obvious, based on the circumstances of a concrete case, that the abovementioned means are eligible and intended for application while using the invention.

The authorization of the patent holder regarding offering for sale or delivery of non-patented invention parts is not of the same quality and intensity in comparison with the authorization regarding the offer or delivery of the invention itself or invention parts which are patented individually. For instance, based on the patent the third parties may be prohibited from offering for sale or delivering patented invention parts at any time.[32] In contrast, offering for sale and delivery of non-patented invention parts can be prohibited only under the precisely defined terms and conditions. If they are

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[31] A. Schrell, *Zur Anspruchsformulierung bei zweckgebundenem Patentschutz*, Gewerblicher Rechtschutz und Urheberrecht Int, 5/2010, 363-369.

[32] Z. Miladinović, *Neka otvorena pitanja u našim propisina iz oblasti intelektualne svojine,* u: Građanska kodifikacija (ur. R. Kovačević-Kuštrimović), knj. 4, Pravni fakultet Univerziteta u Nišu, Centar za publikacije, Niš, 2004, 105-115.

not fulfilled, the authorization is not valid and consequently the third parties can freely deliver non-patented invention parts.[33] The basic question is whether a generic manufacturer and physician can be considered as indirect infringers of adequate patents under certain circumstances. As regards a physician as an indirect patent infringer, his liabilty is excluded by the very definition of indirect infringement, considering the fact that his activities are not covered in the concept of medication offer or delivery. For instance, prescribing a medication cannot be considered as an offering activity which is an element constituting the term indirect patent infringement.[34] The position of a generic manufacturer is fairly different as opposed to the position of a physician regarding indirect infringement. In that context, there has been raised a considerably significant question of whether the generic manufacturer fulfills subjective conditions for determining indirect patent infringement, that is, whether the manufacturer knows that the composition of matter stated above is eligible and determined for a specific purpose while using the invention, or that knowledge is evident based on the circumstances of the concrete case. Namely, in this particular case subjectively determing the aim by the generic manufacturer is not derived, but the very information is obtained from patient's instructions for use enclosed inside of a drug packaging. Therefore, in the abovementioned instructions the use of a drug intended for the purpose of second medical use inventions is neither pointed out nor is there advertising of its use intended for that particular purpose, generally speaking. Certainly, even the advertising itself can be qualified as indirect patent infringement. For that reason, generally speaking, it is the circumstances of a concrete case that will be crucial for whether a generic manufacturer will find it obvious that the medicines are eligible and determined for the use intended for the purpose protected by the patent for second medical use inventions, although he/she has delivered the medication with a view to be used for the purpose of first medical use not protected by the patent.[35] There may be a variety of such circumstances. For instance, a generic manufacturer can know about its use intended for the purpose protected by the patent for second medical use considering the fact that the expert literature refers to physicians who can automatically use a generic drug for the purpose of second medical indications. In addition, it is possible to take into consideration the quantity of drug prescriptions,

[33] B. Vlašković, *Sadržina i povreda patenta*, Kragujevac, 1999, 175-186.
[34] F. Hufnagel, *op.cit.*, 123.
[35] Z. Miladinović, *Pravilo EU o uvođenju certifikata o dodatnoj zaštiti za medicinske proizvode,* Evropsko zakonodavstvo, 3/2003, 68-70.

particularly if it is known that in practice a number of drug prescriptions for second medical indications exceeds the number of drug prescriptions for first medical indications to a considerable degree.

7. REACTION OF SOME COUNTRIES WHEN FACING THE IMPLEMENTATION OF PURPOSE-RELATED PRODUCT PROTECTION FOR SECOND MEDICAL USE INVENTIONS

After the revised Patent Law came into effect, the Swiss law was adjusted to the provisions of the Convention on the Grant of European Patents of the version of 29 November 2000. This revision came into effect on 1 July 2008. The protection of second medical uses is possible exclusively in the form of so-called ''Swiss claim''. This form of a patent claim provides protection only for the procedure for manufacturing of a drug for the purpose of a new medical use and not for a medicinal use of a composition itself. Considering the very limits of such patent protection, physicians cannot be prohibited by law from prescribing a medication dosage (in case that a medication is no longer protected by the patent) for the treatment of a disease described in another patent claim. Namely, it is about the cases when a patent protection expires for a medication used in the treatment of disease X. That medication as a generic substance is found on the market, and later it is found that the same composition of matter or material can be used in the treatment of disease Y in another dosage form. In that case, a new patent can be obtained for the second medical use claim.

However, the Enlarged Board of Appeal of the EPC reached a decision G 2/08 which radically changed the current legal practice. They took the following stand: patents for second and further medical indications are not limited to the use of a composition of matter for manufacturing a medication intended for the treatment of another disease. The Swiss-type patent claim is no longer allowed. The protection of a broader scope is obtained nowadays, because it refers to the use of a medication as well. In other words, purpose-related protection is obtained for second medical use inventions as well. The subject-matter of patent protection is a composition of matter itself if it is used in terms of a specific indication, not just the use of a composition of matter for manufacturing a medication intended for a specific purpose. The consequence of this decision refers to the European patent holder who could now take some measures against any person prescribing a generic substance for a new medical indication described in a patent claim. Physicians risk infringing the patent for second medical indications and the lawsuit can be

filed against them by the patent holder. The Enlarged Board of Appeal of the EPC comments the aforementioned issue by solely stating that freedom of physicians, if it is necessary, can be protected by using other legal remedies at the national level.

Taking into account a new European practice, the Swiss Federal Supreme Court believes that in the case of an emerging need for the protection of physicians' freedom a law can be applied by implementing a suitable exception from the effects of a patent. However, this court emphasizes that the fact that there is not a specific provision in national legislation, according to which physician's activities are not generally considered as patent infringement, cannot be taken as an argument susceptible to various interpretations of the European Patent Convention and it also cannot be used for the expansion of exceptions from patentability.[36]

Taking a new practice into consideration, it can be stated that physicians are no longer free when deciding on a drug they are about to prescribe. On the contrary, in the case of existing patent protection they have to administer an original medicine, which is valid even in the case of availability of the identical substance in terms of being a generic one in relation to the treatment of other diseases. Otherwise, a lawsuit could be filed against them by the holder of the patent obtaining protection for second medical indications.

The decision made by the Enlarged Board of Appeal is valid for all countries that are members of the EPC, but neither one of the national patent legislations have presented a solution for the existing challenge so far. According to the off-the-record announcement of the EPC not a single member country has started legal actions for defining legal exceptions from the effects of the patent. However, numerous discussions initiated in Switzerland along with the examination of various options have demonstrated that indicating exceptions from the effects of the patent is the most eligible means for the consequent maintenance of freedom during a medical treatment. Accordingly, some amendments of the Patent Laws have been suggested in Switzerland, the purpose of which is resolving possible conflicts between the patent law and freedom of medical treatments, that can arise based on the altered practice of the Enlarged Board of Appeal of the EPC. The Swiss Patent Law should be amended in the following manner: Firstly, the effects of the patent do not refer to the actions performed within a medical activity related to a drug administration, which refers to a person or animal, and particularly to a medication prescription, dispensing or administration performed by the person skilled in the state of the art. This

[36] Z. Miladinović, *Konvencija o evropskom patentu*, Evropsko zakonodavstvo, 12/2005, 48-50.

provision does not entail the production, import, export, transit or distribution of medications. In addition, medical products such as injection syringes, bandage materials or pacemakers are not considered as medications.

Secondly, the effects of a patent do not refer to indirect individual preparation of medications in pharmacies on the basis of a physician's prescription given, nor to the actions referring to the medication prepared in such a manner. This provision refers only to ad hoc preparation, and it does not refer to medication storage either, nor does it refer to the fact of its being manufactured in large quantities or its preparation for a greater number of patients or for the defective state of a medication being prepared and stored in advance, whereas a future user for whom the medication is intended does not have to be known at that moment. It means that this type of manufacturing is something between ad hoc and serial industrial manufacturing.[37]

8. CONCLUSION

The field of patent protection for use in the case of second medical indications is associated with the ''augenfällige Herrichtung'' of a composition of matter. In addition, this field comprises the actions related to the exclusive jurisdiction of the patent only if they refer to the product obtained in such a manner. The actions not referring to such a product or a product obtained in another manner can be performed freely, even in the case of the realization springing from the accompanying circumstances into the patent-protected purpose.

On the contrary, purpose-related protection of second medical use inventions is not unconditionally linked with the ''augenfällige Herrichtung'' of a composition of matter or material. This type of manufacturing is only a possible alternative form of its use, that is, an accompanying circumstance due to which the intended indirect realization of the patented use of a specific composition of matter is pointed out to an expert.

The purpose-related protection of second medical use inventions has been confirmed even in the current German legal practice. It is obtained irrespective of whether the patent claim in its wording is directed towards a medication use, or towards its preparation for a specific purpose of the use,

[37] F. Addor, C. Vetter, *Der* Schutz der *medizinischen Behandlungsfreiheit vor patentrechtlichen Verletzungsklagen,* https://www.ige.ch/en/legal.../patent-law.html, date of visit: 14.2.2015.

or specifically towards the purpose-related protection of a composition of matter or material.

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THE OFFER OF SHORT VIDEOS AVAILABLE ON THE INTERNET AS AUDIOVISUAL MEDIA SERVICE

Abstract

One of the greatest challenges that lawmakers all over the world, particularly in the European Union and its Member States face, is establishing the legal framework of turnover on the internet. Variety that has been unknown until recently and almost indefinite amount of available information, absence of state borders that could significantly limit the flow of information, the easiness of internet users' providing any kind information to almost indefinite number of recipients, and eventually separation of virtual, digital from the real world- demand development of new legal tools that often are based on completely new grounds. Besides, that reality changes with speed that far surpasses the ability of lawmakers to respond to the changes. Applying the rules of analog world in the digital era results in a number of difficulties. Dilemmas of institutions in charge of supervision of enforcement of rights and market regulation are certainly a part of the difficulties. Thus, in this work the author will analyse the valid decision of the European Court of Justice regarding provision that is the offer of short videos available on internet, and their qualification as audiovisual media services.

Key words: *Directive 2010/13; audiovisual media service; internet; videos; television broadcasting.*

1. INTRODUCTION

Audiovisual sector influences both individuals and companies to great extent, which makes it a core part of the European creative and digital economy. Traditional audiovisual media services, such as television, and on-demand audiovisual media services offer significant possibilities for employment in the European Union, particularly in small and medium enterprises, and increase economic growth and investments.[1] After the

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[1] S. Lučić, *Ovlašćenje autora na pravičnu naknadu u slučaju umnožavanja autorskog dela za privatnu upotrebu,* Glasnik prava, God. VI, br. 3 (2015), 22-23.

Directive 2007/65 was enacted, audiovisual media space has significantly changed due to the media convergence. New ways of development of content and ways of approach to consumers, the beneficiaries of the content have been created, so media have faced numerous changes in this field.[2] The Audiovisual Media Services Directive that was enacted in 2010 defined the issues such as participation and responsibilities of all market participants, promotion of European acts, advertising and protection of minors.

The Directive 2010/13 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) provides a legal framework for the subject matter analysed in this work. However, for proper understanding of the dispute, it is necessary to take into account not only provisions of the Directive, but also some of the recitals in preamble that give insight into what application area lawmaker had intended for the Directive. Therefore, the definition of audiovisual media service, for the purposes of this Directive, covers only audiovisual media services, both television broadcasting and on-demand audiovisual media services that are the services of mass media that are intended for reception and can have an explicit influence on significant part of general public. Its application area should be limited to services as per the description given in Treaty on the Functioning of the European Union; therefore all kinds of economic activities should be included, including the activities of public services. On the other hand, it must not include the activities that are not primarily economic and those that are not competition for television broadcasting, such as private websites and services consisting of providing or distribution of audiovisual media content developed by private beneficiaries for the purposes of sharing and exchange within interest groups.[3] On-demand audiovisual media service (non-linear audiovisual media service) stands for audiovisual media service provided by a media service provider for watching program at a time chosen by the beneficiary, at the individual request of beneficiary and based on the program catalogue chosen by the media service provider. The application area of this Directive does not include electronic versions of newspapers and magazines.

Reference for a preliminary ruling referring to the interpretation of Article 1, Paragraph 1, Item (a, subitem i) and Item (b) of the Directive 2010/13 was made referring to the dispute between New Media Online

[2] *Ibid.*

[3] See recital 21 in preamble of the Directive on Audiovisual Media Services.

GmbH, with headquarters in Innsbruck (Austria) and Federal Communications Commission regarding the decision of the Austrian Regulatory Authority referring to the estimation of a part of the services that prosecutor proposed in the main proceedings as "on-demand audiovisual media services", which were, as a result, obliged to report, as prescribed by adequate regulations. In the aim of correct understanding of the dispute that is a subject matter of this work, facts will be provided in the continuation.

2. FACTS, PROCEDURE, QUESTIONS REFERRED

The prosecutor regulates internet newspaper "Tiroler Tageszeitung online" (http://www.tt.com) in the main proceedings. A link on subdomain http://video.tt.com was on the website, which mostly contained text articles, on the day when the facts were made in the main proceedings. The link was called "Video" (hereinafter referred to as "video subdomain") and it led to a website on which more than 300 videos were available on the search catalogue.

Videos that were posted on the internet in the described manner were actually arranged news of various duration, from 30 seconds to several minutes long, referring to various topics, such as local news and events, questions on popular topics asked to passersby, sport events, movies announcements, "do it yourself", activities for children and readers' videos selected by editorial staff. Only a small number of videos offered on video subdomain were related to the articles posted on the website of Tiroler Tageszeitung newspaper.

The decision referring to the video subdomain, made on November 9, 2012 by the Austrian Regulatory Authority, prescribed that the prosecutor provided on-demand audiovisual media services in terms of jointly enforced Provisions of the Article 2, Items 3 and 4 of the Austrian Law on Audiovisual Media Services (hereinafter referred to as: AMD-G) that were obliged to report as per the Article 9, Paragraph 1 of AMD-G. [4] The video subdomain was of television nature and was autonomous in respect of the rest of the Tiroler Tageszeitung newspaper website. Its main purpose was providing programs aiming to inform, entertain or educate public. Thus, according to the Austrian Regulatory Authority, the video subdomain lies within the application of AMD-G and its regulatory demands.

[4] Law on Audiovisual Media Services (Audiovisuelle Mediendienste-Gesetz, BGBl. I, 84/2001).

The prosecutor denied the decision in the main proceedings and filed a complaint to Federal Communications Board.[5] The Board rejected the complaint by the decision made on December 13, 2012 for reasons named by the Austrian Regulatory Authority. The prosecutor in the main proceedings then filed a complaint to the Administrative Court. The prosecutor claimed that audiovisual media content available on the video subdomain were just an addition to its main web page and did not have a form of audiovisual media service. Besides, the prosecutor presumed that short videos available within the video subdomain, according to their form and content, were not comparable to the service of television broadcasting.

The Court's dilemma was whether the videos could be qualified as „program" as per Article 1, Paragraph 1 (b) of the Directive 2010/13. More precisely, whether the videos from the main proceedings are in accordance with the request given in the named Provision that prescribes that videos' form and content is to be comparable to the form and content of television broadcasting. The Court in question starts from the premise that comparability of the inquired service with the television broadcasting can be assumed in case that kind of service is provided within the latter. However, Court's doubts are based in the fact that the service in question consists of the offer of short videos that match short sequences of news and such do not exist on „classic" television.

Secondly, the Court that filed the request raises a question whether the service that is the subject matter of the main proceedings, has a program aiming to inform, entertain or educate public, as its main purpose. According to the Courts' opinion, the Directive 2010/13 does not provide a clear answer to the question whether a service should be qualified as audiovisual media service in terms of the „main purpose" based on the entire variety of services of service providers, or separate inquiry of each service is necessary. The named Court presumes that the purpose of the Directive benefits to the second approach, since otherwise service provider could, in that case, omit services from the area of application of the Directive by increasing the range of services. Under these circumstances, the Appellate Court decided to terminate the proceedings and to refer the following questions to the Court:

„1. Should Article 1(1) (b) of Directive 2010/13 be interpreted as meaning that the form and content of a service under examination can be considered to be sufficiently comparable to the form and content of television broadcasting if such services are also offered in television broadcasting which

[5] Bundeskommunikationssenat – the highest authority for radio broadcast, with HQ in Vienna.

can be regarded as mass media and which are intended for reception by, and could have a clear impact on, a significant proportion of the general public?

2. Should Article 1(1)(a)(i) of Directive 2010/13 be interpreted as meaning that an assessment of the principal purpose of a service offered in the electronic version of a newspaper can be based on a subsection mainly providing a collection of short videos, which in other sections of that website are used only to supplement text articles in the online newspaper?"

3. HISTORICAL DEVELOPMENT OF THE DIRECTIVE 2010/13

Even though European Court of Justice treated television broadcasting as a service as per the Contract on EEC in 1974, that field was not of interest to lawmakers of the European Union until 1980s. That fact was in direct connection to the circumstance that classic earth television was dependent on the availability of radio frequencies. Those radio frequencies were granted to some television stations by states that, at the same time, gave them concessions for broadcasting exclusively on the territory of their states. Thus, the significance of these television services was small abroad. That circumstance has changed with the appearance of cable, and even more, satellite television. The new technologies not only increased the number of channels, but also made the channels available to recipients in other countries beside the state where the HQ of the television station was. That started the creation of joint market of television services. Law-making began with the Green Book made by the Commission in June 14, 1984 on topic „Television without Frontiers". The outcome of that work was the Directive called „Television without Frontiers".[6] That Directive regulated the principle of the availability of a country's television broadcasting on the territory of other Member States. In return, the Directive defined the minimal standards, mandatory for all television stations in the Union, for quantitative and qualitative limitations of advertising, sponsorship, television sales, minors' protection and public policies, as well as the right to reply. The principles provided by the Directive in terms of determining court jurisdiction of some State Members guaranteed that only one country is in charge of each TV station, thus the station is responsible only to the Regulatory Authority of the country. Besides, as per the Directive, TV stations were in obligation to promote European actions. When the Directive „Television without

[6] The Directive 89/552 on the adjustment of particular Provisions regulated by Laws and other regulations of Member States regarding the television broadcasting.

Frontiers" was modified in 1997, the State Members were granted the ability of choosing the events whose broadcasting must not be reserved only for commercial televisions.[7] The boost of technology from the area of electronic media, that took place on a crossing from one century to another, caused not only further increasing of a number of traditional television broadcasting offer, but also the appearance of new audiovisual media services, particularly various on-demand media services. Special novelty, both from the perspective of new contents offer and from the perspective of availability to beneficiaries, was internet as the new medium of the 21 century. The technological prosperity was followed by gradual change of behaviour and expectations of beneficiaries. While the legal status remained intact, the novelties caused increasingly strong disturbance of the audio-visual media services market competition. In terms of that, the Commission filed for changes in its Fifth Report on the application of the Directive 89/552 and Communication on the future of the European regulatory audio-visual policies. After the implementation of a voluminous counselling process, the work was completed and the Commission proposed a draft of the Directive on the modification of the Directive 89/552. The proposal was, even though slightly modified, eventually accepted as the Directive 2007/65. The Directive 2007/65 significantly changed the Directive 89/552. In the first place, the name of the Directive was changed, which was the result of the usage of new terminology in which they no longer spoke about television broadcasting services but audiovisual media services instead. Material legal Provisions of the Directive were significantly modified and liberalized, particularly in the area of advertising and other forms of promotion of goods and services. However, the most important change for the Dispute, which is a subject matter of this work, is broadening of the application field of the Directive on, so called, non-linear audiovisual media services, colloquially called „on-demand audiovisual media services". Those services were, in the most elemental manner, regulated by the Provisions on the protection of minors and public policy, on advertising and promotion of European actions. The more thorough rules are pertaining to linear audiovisual media services, that is the traditional television broadcasting. The Directive 2010/13 is actually the refined text of the Directive 89/552 after the changes brought about with the enacting of the Directive 2007/65.[8]

[7] See the Directive 97/36 on the modification of the Directive 89/552.

[8] On the development of rights of the European Union in terms of audiovisual media services, see more at M. Burri-Nenova, *The New Audiovisual Media Services Directive:*

Supervening from the abovementioned, the rules on non-linear audiovisual media services provided in the Directive 2010/13 are only derived from the Provisions on linear audiovisual media services, that is the television broadcasting. The definition of audiovisual media services in the Directive, particularly the definition of non-linear audiovisual media services, must be, considering the history of its development, interpreted with consideration of the reality of information society.

3.1. The definition of audiovisual media services in the context of information society

Along with the abovementioned changes of television broadcasting, a new phenomenon, sometimes considered revolutionary, was developing- the appearance and expansion of worldwide information network, the internet. After only several decades, the internet developed from the point of technical curiosity intended for limited circle of experts, into a public and everyday means for work, education and entertainment. A number of various activities, partially or entirely, were transferred to the internet: electronic mail takes the place of traditional correspondence, web portals extrude newspapers, e-shopping replaces visits to shops in real world, etc. Internet also brought along many new perspectives characteristic only for that medium, such as new forms of communication like forums or social networks, of which the most popular are Facebook and Twitter.

„Internetization" did not stop with the audiovisual media services. The development of the, so called, broadband internet through the multiple acceleration of data transfer, enabled the distribution of traditional audiovisual, both linear and non-linear, media services through the internet (Internet Protocol Television, IPTV) on one hand, and created almost infinite number of new service providers and new types of audiovisual media services on the other.

Another aspect relevant to these examinations and at the same time connected to the broadband internet is multimedia. In analog era and at the beginning of the internet development, word, sound and image, moving images in particular, were relatively strictly separated one from another. Newspapers and books were the sources of written word sometimes supported by photographs or drawings, radio was strictly audio medium, while movies and television were audiovisual media, that is they combined

Television Without Frontiers, Television Without Cultural Diversity, Common Market Law Review, Vol. 44 (2007), 1689, 1693, etc.

moving images and sound. The internet provides public distribution of content that incorporates the three forms of transmission in a unity. Therefore, web portals are not limited to text, but they can support it with illustrations and audiomaterial, science and education institutions can enrich the content of lectures with videos, sport clubs can illustrate the sport reports with videos, etc.

Beside the text, every reputable web portal contains graphic and audiovisual elements that are, to variable extent, connected to the rest of the portal content. These elements can be constituent parts of written texts, but they also may be independent as well. Apart from that, websites are designed in a manner that the audiovisual elements are sorted out in separate subpages, which are parts of thematic areas, or they make a completely separate heading, typically named as „video" or „TV" (even though it is not the television, that is the linear media service).

From the legal perspective, the question remains whether the audiovisual media contents of this kind can be considered as audiovisual media services, and if not, where the boundary should be set.[9] The application of the Directive in terms of these contents creates a dilemma, thus there are differences in law-making and the practice of regulatory authorities of some Member States.[10] This situation is contrary to the request for unified application of Provisions of the Directive on the whole territory of the European Union.

4. ANSWERS TO THE QUESTIONS REFERRED

The Court that filed the request basically raises the question whether the term "program", as per the Article 1, Paragraph 1 (b) of the Directive 2013/13, should be interpreted in a manner that it contains the offer on the subdomain of short videos that represent short sequences of local news, sport or entertainment on newspaper website. It should be pointed out that, according to the statement of the Court that filed the request, videos that are the subject of the main proceedings, conform to the sequences of news of various duration and with various topics. The named videos refer to the

[9] F. J. Cabrera Blázquez, *On-demand Services: Made in the Likeness of TV?,* in: What Is an On-demand Service, IRIS-Plus 2013-4, European Audiovisual Observatory, Strasbourg, 2013, 7.

[10] J. Metzdorf, *The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities. National Responses to Regulatory Challenges,* Journal of Intellectual Property, Information Technology and Electronic Commerce Law, Vol. 5 (2014), Issue 2, 88.

reports on local events, particularly from the area of politics, culture, sports and economy. In terms of that, the Court that filed the request expresses dilemma whether the offer of short videos that correspond to the short sequences of local news, sports or entertainment, are comparable to the television broadcasting as per the Article 1, Paragraph 1 (b) of the Directive 2010/13, taking into account that such compilation of short videos has not been offered on traditional television broadcasting so far.

Upon the fact consideration, the Court answered that the term "program" as per Article 1, Paragraph 1 (b) of the Directive 2010/13 should be interpreted as providing short videos that correspond to short sequences of local news, sports and entertainment on the subdomain of newspaper website.

The Court that filed the request raises the second question- the main purpose of videos provided on electronic version of newspapers should be determined based on which criteria, as per Article 1, Paragraph 1. Item a, Subitem i of the Directive 2010/13?

In terms of that, the Directive 2010/13 says that the electronic version of newspapers, despite the audiovisual elements that it contains, should not be considered as audiovisual media service in case those audiovisual elements are incidental parts and their purpose is only to complement written articles. The recital in preamble 22 of the Directive 2010/13 provides the principle according to which the services "whose audiovisual content is incidental part and not its main purpose" do not fall under the definition of the "audiovisual media service" as per the Article 1, Paragraph 1, Item a, Subitem i of the Directive. The recital in preamble 28, on the other hand, provides that "electronic versions of newspapers and magazines" are not within its field of application. The Austrian Authorities thus decided that the website of the prosecutor in the main proceedings is not an audiovisual media service. However, according to the claim of the European Court of Justice, recital in preamble 28 of the Directive 2010/13 cannot be interpreted in a way that audiovisual media services should be systematically excluded from the area of application of the Directive just because service provider of website is a newspaper publisher. If videos on website fulfil the conditions to be qualified as on-demand audiovisual media services, they do not lose the quality of on-demand audiovisual media services for a single reason that they are available on the newspaper website. Namely, according to the statement of the Luxembourg Court, the approach that would generally exclude the services provided by daily newspapers from the application of the Directive, due to their multimedia character without estimating the "main purpose" of the service from one case to another, does not take into

consideration the variety of possible situations and bears a risk of service providers that actually provide the audiovisual media services as per the Article 1, Paragraph 1, Item a, Subitem I of the Directive, using portals with multimedia information for avoiding the application of the Law in that field.

Furthermore, individualized approach based on the qualities of service providers that takes into account all the services offered by service providers in order to estimate their individual purpose on the grounds of which the service provider would be either included or excluded from the application of the Directive 2010/13 for all the services provided through its website, does not provide us with the possibility of adequately estimating specific situations such as those in which society acts in various domains, increases the range of its activities or connects to other societies.

In terms of that, according to the statement of the Court, it should be pointed out that one of the major purposes of the Directive 2010/13, in terms of recital in preamble 10, is achieving equal conditions for competition on the audiovisual media services market.

Consequentially, the estimate of the "main purpose" of a website does not depend on whether the website, taken as a whole, is in accordance with the main action of the society or with the action that has a less important role for the society.

Taking into consideration the abovementioned views, the Court's answer to the second question was that the Article 1, Paragraph 1 (a), Subitem i of the Directive should be interpreted in a manner that the ground for estimation of the main purpose of videos available on the electronic version of newspapers should be the examination of the fact whether the service, as such, has a content and function independent from the service provider- newspaper activity and is not only inseparable addition to the activity, particularly due to the connection of audiovisual and textual offer. The Court that filed the request should base the estimation on these grounds.

5. APPLICATION OF THE DIRECTIVE 2010/13 ON AUDIOVISUAL MEDIA ELEMENTS OF INTERNET PORTALS

The Austrian Regulatory Authority gave a wide-range interpretation of the term "audiovisual media services" in its decision pertaining to the main proceedings, starting from the point that that kind of services are audiovisual contents offered on the website of „Tiroler Tageszeitung Online" in the "Video" heading. Even though that point of view can be defended based on

the Directive 2010/13, that kind of expansion of the application of the Directive has many deficiencies. First of all, it is not compatible with the aims that lawmaker wanted to accomplish by enacting the Directive on Audiovisual Media Services. As stated above, the Provisions on non-linear audiovisual media services of this Directive were only derived from the Provisions pertaining to linear services, that is the traditional television.[11] The explanation of the draft Directive 2007/65 and recitals in preamble of the Directive 2010/13 provide that the expansion of application of the regulation to non-linear audiovisual media services should prevent the competition among similar economic sectors, in a way that the same rules are applied to them, at least regarding the basic issues. Our opinion is that the aim cannot be interpreted to that large an extent, as if that regulation covered the services that are not in direct competition with television broadcasting.

Also, the interpretation given by the Austrian Regulatory Authority in the main proceedings provides that great number of economic entities succumb to the Provisions of the Directive on Audiovisual Media Services, and those provide websites with audiovisual content even though their main activity is not providing audiovisual media services in terms of the Directive. The obligations imposed by the Directive to non-linear service providers are not heavy, but when the services succumb to the Provisions whose aim is the application of the Directive, in the practice of national Regulation Authorities it means at least obligation of registration, and in some Member States other obligations as well, such as paying taxes (United Kingdom) or submitting reports (France). Even if the registration itself cannot be considered as business permission, it still results in the fact that a significant part of the internet business society succumbs to administrative supervision, which might create an impression that the freedom of that media is limited.

The intention to extend the administrative supervision to a wider area of internet would, at the same time, represent a great challenge for Regulatory Authorities in Member States, mainly due to the small capacities needed in order to create websites with any kind of content, including audiovisual content as well. The efforts to apply wide area of regulation might result in the Directive losing efficiency even in the area intended by the Provisions.

Finally, the view of the Austrian Regulatory Authority makes the application of the Directive dependent on the organization of a concrete website. According to that view, audiovisual media service exists only in case it is a part of the audiovisual contents catalogue. If, on the other hand, the

[11] Traditional in terms of the content and program scheme, but not in terms of the distribution technique.

contents are spread on different parts of the portal, they are considered its integral parts, and not separate services, so they do not succumb to the Provisions of the Directive. According to our opinion, that is only a technical solution that must not affect the application of the Directive. The decision whether a service succumbs to the Directive must be based on the nature of the service instead the structure of internet portal that provides the service.

It is not disputable that the text of the Directive 2010/13 may contribute to the interpretation of the Austrian Regulatory Authority or at least to the fact it is about the possible interpretation of the Directive. However, that interpretation can hardly be in connection with the lawmaker's intentions. For the abovementioned reasons, it does not serve either the efficient accomplishment of the aims of the Directive, or contribute to its unified application in all Member States.

The Directive on Audiovisual Media Services did not turn out to be progressive, even though the intention of the Directive's author was.[12] Many of its formulations are either incorrect or do not fit the reality of the broadband internet. However, we are of opinion that the dynamic interpretation of the Provisions of the Directive may enable the Directive to keep its original meaning, even in the up to date internet world.

6. THE ELEMENTS OF DEFINITION OF AUDIOVISUAL MEDIA SERVICE UNDER THE DIRECTIVE 2010/13

Audiovisual media service has been defined in the Article 1, Paragraph 1 (a) of the Directive 2010/13 and some of the terms used in the definition have been defined in further Subitems of the same Article. Non-linear media service has been defined in Article 1, Paragraph 1 (g) of the Directive. Legal framework, which defines the field of application of the Directive 2010/13, also consists of some of its recitals in preamble that either directly pertain to the definitions of the Article 1, or generally can be applied to its field of application.

As per the Article 1, Paragraph 1 (a), Subitem i of the Directive 2010/13, in terms of its recital in preamble 29, audiovisual media service must meet the following criteria:

– economic nature
– editorial responsibility of media service provider
– preparation of audiovisual media services as the main purpose

[12] V. Reding, *The Audiovisual Media Services Directive: the Right Instrument to Provide Legal Certainty for Europe's Media Business in the Next Decade,* ERA Forum, 2006-2, 265.

– preparation of the program with the aim of informing, entertaining and educating public through electronic communication network.

Recital in preamble 29 of the Directive 2010/13 provided that those features, along with the features named in other recitals in preamble, should be simultaneously present in order to qualify a service as audiovisual media service as per the Directive. In our opinion, that indicates that it was lawmaker's intention to include only specific kinds of services in the definition, thus to include only these services in the area of application of the Directive. That view contributes to the restrictive interpretation of the audiovisual media services term.

The first feature includes the services as per the Treaty on the Functioning of the European Union, that is the services provided within economic activities. As per the recital in preamble 21 of the Directive 2010/13, its application should not include "private websites and services that consist of providing or distribution of audiovisual media services developed by private beneficiaries with the aim of sharing and exchange within interest groups". At issue are private websites of all kinds developed and maintained by private entities without economic interest, such as blogs and video blogs, as well as portals like You Tube.

The website of a printed newspaper, such as „Tiroler Tageszeitung Online", serves as an economic activity without any doubt, thus the first feature can be applied. However, such a distinction will not always be as obvious. Namely, it often happens that advertisements are placed on the most popular private websites with compensation, thus they become sources of profit for authors, and a kind of economic activity as well. On the other hand, professional channels (so called *branded channels*) show up on portals like You Tube and their contents are not created by beneficiaries. The question whether the Directive 2010/13 can be applied to these contents and to what extent as well, remains to be a challenge for National Regulatory Authorities and Courts.

The feature of electronic communication networks is not particularly helpful for public either, in terms of distinguishing the area of application of the Directive 2010/13 from the wanted perspectives. Internet is an electronic communication network *par excellence* and all the contents that do not fall under any group of beneficiaries are available to the public. Providing program in order to report, entertain or educate is not a selective feature either, since it covers almost every possible audiovisual media content, particularly if the content is aiming to be commercial and public.

The definition of joint responsibility in the Article 1, Paragraph 1 (c) of the Directive 2010/13 is very broad- not in terms of the responsibility for the

content of each provided audiovisual material ("program" according to the terminology of the Directive), but only in terms of the choice and organization of the contents within the service. Namely, the feature basically serves only to make a difference between the media services service providers and economic entities that guarantee the transmission of data (such as cable TV or Internet service providers).

For the correct understanding of the subject matter of the dispute that has been analysed in this work, it is necessary to research two features whose interpretation was requested by the Austrian Court as well. According to the abovementioned features, audiovisual media service exists only if its main purpose is providing of audiovisual contents. The Austrian Regulatory Authority considered the video catalogue placed on the website as a separate service in its decision in the main proceedings. The main purpose of a service determined in such a way is providing audiovisual contents. However, the feature of the main purpose in terms of that interpretation does not make any sense since, as mentioned before, the area of application of the Directive seems dependent on the structure of a particular website in a particular moment.

Article 1, Paragraph 1 of the Directive 2010/13 contains the definition of a program. It is the adjusted definition and its original form was in the original version of the Directive 89/552. In accordance with that, program is a separate item in the schedule within linear services or catalogue of non-linear services. Furthermore, the form and content of program must be comparable to the form and content of television broadcasting. That distinction refers to the lawmaker's intention to exclude audiovisual media contents that are not typically broadcasted on television from the area of application of the Directive.

Besides the general definition of audiovisual media services, the Article 1, Paragraph 1 (g) of the Directive 2010/13 provides the definition of non-linear audiovisual media services (referred to as on-demand audiovisual media services). According to that definition, a beneficiary can choose programs within non-linear audiovisual media service, from the catalogue chosen by media service provider and watch them at any time. Based on that, it seems that the Austrian Regulatory Authority concluded that since there was a video catalogue on „Tiroler Tageszeitung Online" website, the website (that is, the part of the website that contains the catalogue) represented the on-demand audiovisual media service.

However, we are of opinion that the term *catalogue* should not be given that much of importance in the interpretation of the definition. The definition provided in Article 1, Paragraph 1 (g) of the Directive is a reflection of the

definition of linear audiovisual media service (that is, the television broadcasting) provided in the same Paragraph under the Item (e). The catalogue in the non-linear audiovisual media service is equivalent to the "schedule", program timeframe in the linear audiovisual media service. Non-linear audiovisual media service differs from the linear audiovisual media service in that fact that the programs are not provided at a given time schedule but are available to the beneficiary at any time. Therefore, there must be a catalogue from which the beneficiaries will choose the programs. However, that request must not be understood in a way that the very existence of a catalogue means that the service is audiovisual media service in terms of the Directive 2010/13.

Further implications of the application of the Directive 2010/13 to non-linear audiovisual media services are provided in recitals in preamble of the Directive. Thus, as per the recital in preamble 24, non-linear audiovisual media services must be "similar to television broadcasting", that is, they must be intended for the same audience as television broadcasting.

However, it is hard to assume that the television is intended only for a specific group or groups of beneficiaries. It provides a wide range of contents intended for all possible groups of beneficiaries, satisfying their needs for reporting, entertainment and education. The recital in preamble represents the intention of a lawmaker to provide the balanced competition among economic entities operating in various areas, through applying similar Provisions on them, at least in terms of the elementary issues. For that reason, the similarity of non-linear audiovisual media services with the television broadcasting should be understood in a limited way: in accordance with the intention of the lawmaker, the Directive 2010/13 is applied only to the extent to which the development of telecommunication technology enables providing of the same contents in non-linear form, which could have been provided only through television broadcasting earlier, that is within linear audiovisual media service. As opposed to that, the intention of the lawmaker was not to expand the area of application of the regulation to innovations that appear along with the internet expansion, particularly the broadband internet, such as the arrival of multimedia websites. The second sentence of the recital in preamble 24 of the Directive confirms our conclusion and states that the term "program" is to be interpreted in a dynamic way, taking into consideration the development of the television broadcasting. That condition actually means that the application of the Directive in terms of non-linear audiovisual media services is to take into consideration the development in the area of linear audiovisual media services that are the main subject of the Directive. Non-linear audiovisual media services are not to be taken as

independent regulatory area of the Directive. That actually caused that all the new kinds of audiovisual media services that may not have anything in common with the linear audiovisual media services (television broadcasting) are to be covered.

As stated above, as per the recital in preamble 28 of the Directive 2010/13, electronic versions of newspapers and magazines do not fall under the application of the Directive. That recital in preamble should also be viewed from the perspective of the development of information society services. At the same time, services of mechanical transmission of hard copy versions of newspapers and magazines to the internet are not in question here. First of all, that kind of a service could not contain the audiovisual media service, which, by its nature, is not available in the domain of hard copy media. Secondly, the decrease of the number of newspaper and magazine websites that post solely the articles from hard copy editions, has been noticed. Those portals are rather comprehensive, containing a larger variety of materials than hard copy editions, particularly audiovisual material.

That is particularly in case when it comes to daily newspapers whose websites typically are in the form of portals containing information in terms of news, analyses, more through articles, etc. „Tiroler Tageszeitung Online" website is just an example of such a portal. Besides, portals of that kind function not only within newspapers, but they also can be owned by television or radio stations, particularly the portals with news, or they function only as internet portals. All those portals have their own specificities, but their general structure and contents are similar. Therefore, treating internet portals that contain information in a different way only because they are owned by newspapers or magazines would be unjustified and present an unequal treatment. Thus, in our opinion, the recital in preamble 28 of the Directive 2010/13 should have been interpreted as the intention of lawmaker to exclude all kinds of internet portals with multimedia information, that is, those that, among other, provide multimedia contents, from the area of application of the Directive.

7. CONCLUSION

The Audiovisual Media Services Directive (2010/13/EU) sets forth rules for provision of audiovisual media services, which include television broadcasts as well as on-demand audiovisual media services. Most of the requirements under the directive, such as time limitations on advertising, apply only to television broadcasts. This essentially has to do with traditional

television channels, where the programme schedule is set by the broadcaster (linear services).

But a certain set of basic obligations also apply to on - demand services which may compete with traditional television. This involves for example identification of advertising and requirements for the ad content, product placement, sponsored programmes, and protection of minors.

In practice, the classification of a specific service as an on - demand audiovisual media service can be doubtful, particularly when the service offers video materials online. One of these disputed instances was considered by the Court of Justice of the European Union in New Media Online GmbH v Bundeskommunikationssenat (Case C - 347/14), interpreting for the first time the concept of "audiovisual media service."

The judgment of the Court of Justice is of great importance not only for the growing number of newspapers that have expanded their online editions to include sections with video materials, but also potentially other online services offering various types of materials - so long as they take editorial responsibility for the content. Unfortunately, the court did not explain more extensively when the connection between videos and the text context of the site is strong enough to exclude the application of the directive.

Thus there is a risk that videos by certain bloggers or vloggers, for example, could be classified as on - demand audiovisual media services, particularly if they conduct economic activity on a certain scale and target their programmes to the general public. Treating short video clips as programmes, and requiring the catalogue of such videos to be examined on their own merits apart from the overall content of the website, could result in a significant expansion of the application of the Audiovisual Media Services Directive.

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UNIDROIT 90th ANNIVERSARY: FORTHCOMING 2016 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Abstract

This paper begins with a general overview of the UNIDROIT contributions to the modernisation and harmonisation of private law during the 90 years of its existence. Special attention was paid to the UNIDROIT Principles of International Commercial Contracts. Welcomed from their first appearance as "a significant step towards the globalisation of legal thinking", they represent one of the Institute's most successful projects and one of the most important "soft-law" instruments. The paper explores the recently adopted amendments and additions to the 2010 UNIDROIT Principles particularly relevant in the context of long-term contracts. The analysis is limited to the notion of long-term contracts and supervening events. In the case of hardship, the UNIDROIT Principles, inspired by the principle favor contractus, which is one of the basic ideas that underlie them, encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it. Similarly, in the case of force majeure, parties to long-term contracts may provide, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, the continuation, whenever feasible, of the business relationship and envisage termination only as a last resort. Although the preconditions differ from that in hardship clauses, in respect to the procedure for the solution of the problems and certain future consequences, they may be similar if not identical.

Key words: *The International Institute for the Unification of Private Law (UNIDROIT), The UNIDROIT Principles of International Commercial Contracts, Long-Term Contracts, Force Majeure, Hardship.*

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1. THE UNIDROIT CONTRIBUTIONS TO THE MODERNISATION AND HARMONISATION OF PRIVATE LAW

The International Institute for the Unification of Private Law (hereinafter: UNIDROIT or the Institute) is an independent intergovernmental[1] organisation with its headquarters in Rome. Its purpose is to study the needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform legal instruments, principles and rules to achieve those objectives. Set up in 1926[2] as an auxiliary organ of the League of Nations, the

[1] Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from all continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds. A list of member States is available at: http://www.unidroit.org/about-unidroit/membership, date of access: 20.08.2016.

[2] To celebrate the 90th anniversary of its foundation, UNIDROIT has held a series of events devoted to the role and place of private law in supporting the implementation of the international community's broader cooperation and development objectives. These events include: "Practicing International Law at the United Nations", organized in cooperation with the Italian Society for the International Organization (SIOI), by hosting a keynote lecture delivered by Mr Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel; "The League of Nations and UNIDROIT", aimed to address the legacy of the League of Nations and its relationships with UNIDROIT; "Private Law, International Cooperation and Development", an International Symposium held on the occasion of the Special session of the General Assembly of the International Institute for the Unification of Private Law (UNIDROIT) celebrating the 90th anniversary of its foundation; "Creating a favourable Legal Environment for Contract Farming", an International Conference hosted by UNIDROIT in collaboration with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) under the auspices of the Ministry of Foreign Affairs and International Cooperation of Italy; the "United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts: Contrast and Convergence", an International Contract Law Conference organized in cooperation with the CISG Advisory Council on the occasion of the 95th session of the UNIDROIT Governing Council; and "Eppur si muove: The age of Uniform Law – Festschrift for Michael Joachim Bonell, to celebrate his 70th birthday". See http://www.unidroit.org/unidroit-90th-anniversary, date of access: 08.08.2016.

Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute.[3]

The Institute has an essentially three-tiered structure, made up of a Secretariat, a Governing Council and a General Assembly. The Secretariat is the executive organ of UNIDROIT responsible for carrying out its Work Programme from day to day. It is headed by a Secretary-General appointed by the Governing Council on the nomination of the President of the Institute. The Secretary-General is assisted by a team of international civil servants and supporting staff. The Governing Council supervises all policy aspects of the means by which the Institute's statutory objectives are to be attained and in particular the way in which the Secretariat carries out the Work Programme drawn up by the Council. It is made up of one *ex officio* member, the President of the Institute, and 25 elected members, mostly eminent judges, practitioners, academics and civil servants. The Governing Council is chaired by the President of the Institute. The General Assembly is the ultimate decision-making organ of UNIDROIT: it votes on the Institute's budget each year; it approves the Work Programme every three years; it elects the Governing Council every five years. It is made up of one representative from each member Government. The Presidency of the General Assembly is held, on a rotating basis and for one year, by the Ambassador of one of the Organisation's member States.

The Institute's basic statutory objective is to prepare modern uniform rules of private law understood in a broad sense.[4] However, experience has demonstrated a need for the occasional incursion into public law, especially in areas where hard and fast lines of demarcation are difficult to draw or where transactional law and regulatory law are intertwined. Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules, they will only include uniform conflict of laws rules incidentally. New technologies and international commercial practices call for new, harmonised and widely acceptable solutions. Generally speaking, the eligibility of a subject for harmonisation or even unification will to a large extent be conditional on the willingness of States to accept changes to domestic law rules in favour of a new international solution on the relevant subject. Legal and other arguments in favour of harmonisation have to be accordingly weighed carefully against such perception. Similar considerations will also tend to determine the most appropriate sphere of

[3] Available at: http://www.unidroit.org/about-unidroit/institutional-documents/statute, date of access: 08.08.2016.

[4] See Statute of UNIDROIT, Article 1.

application to be given to uniform rules, that is to say, whether they should be restricted to truly cross-border transactions or extended to cover internal situations as well. While commercial law topics tend to make for most of the international harmonisation initiatives, the broad mandate given to UNIDROIT allows the organisation to deal with non-commercial matters as well.

The uniform rules drawn up by UNIDROIT have, in keeping with its intergovernmental structure, generally taken the form of international Conventions, designed to apply automatically in preference to a domestic law once all the formal requirements for their entry into force have been completed. Conventions were adopted by diplomatic Conferences convened by member States of UNIDROIT.[5] However, alternative forms of unification and harmonization have become increasingly popular in areas where a binding instrument is not felt to be essential. Such alternatives may include model laws[6] which States may take into consideration when drafting domestic legislation or general principles[7] which the judges, arbitrators and contracting parties they address are free to decide whether to use or not. Where a subject is not judged ripe for uniform rules, another alternative is the legal guides,[8] typically on new business techniques or types of transaction or on the framework for the organisation of markets both at the domestic and the international level. Generally speaking, "hard law" solutions (i. e. Conventions) are needed where the scope of the proposed rules transcends

[5] Convention on Agency in the International Sale of Goods; UNIDROIT Convention on Substantive Rules for Intermediated Securities; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; UNIDROIT Convention on International Factoring; Convention relating to a Uniform Law on the International Sale of Goods (ULIS 1964); Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC 1964); UNIDROIT Convention on International Financial Leasing; Convention on International Interests in Mobile Equipment (The Cape Town Convention); Convention providing a Uniform Law on the Form of an International Will; International Convention on Travel Contracts (CCV).

[6] Model Franchise Disclosure Law; UNIDROIT Model Law on Leasing; UNESCO – UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects.

[7] UNIDROIT Principles of International Commercial Contracts (further in footnotes: the UNIDROIT Principles or the Principles); Principles on the Operation of Close-out Netting Provisions; ALI (American Law Institute)/UNIDROIT Principles of Transnational Civil Procedure.

[8] UNIDROIT/FAO (the Food and Agriculture Organization of the United Nations)/IFAD (the International Fund for Agricultural Development) Legal Guide on Contract Farming; UNIDROIT Guide to International Master Franchise Arrangements.

the purely contractual relationships and where third parties' or public interests are at stake as is the case in property law,[9] because they most care about achieving balance between leading legal systems.[10]

UNIDROIT's work has also served as the basis for a number of international instruments adopted under the auspices of other international organisations. By reason of its expertise in the international unification of law, the Institute is moreover at times commissioned by such other organisations to prepare comparative law studies and/or draft Conventions designed to serve as the basis for the preparation and/or finalisation of international instruments in those Organisations. The Hague Conference on Private International Law, UNIDROIT and the United Nations Commission on International Trade Law (UNCITRAL), the three private-law formulating agencies, are quite appropriately referred to as "the three sisters".[11]

2. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

2.1. General remarks

The UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles or the Principles)[12] represent a non-binding codification or international restatement of the general principles of contract law. Welcomed from their first appearance as "a vital contribution to the process of international unification of law"[13] and "a significant step towards the globalisation of legal thinking",[14] over the years they have been well received not only by academics but also in practice, as demonstrated by the extensive body of bibliography and the numerous court decisions and

[9] See http://www.unidroit.org/about-unidroit/overview, date of access: 08.08.2016.

[10] I. Spasić, *UNIDROIT – Doprinos unifikaciji nekih od najvažnijih pitanja međunarodnog trgovinskog prava,* Strani pravni život, 2/2009, 31.

[11] See http://www.unidroit.org/about-unidroit/overview, date of access: 08.08.2016.

[12] The UNIDROIT Principles were first published in 1994. The second edition came exactly ten years after the appearance of the first edition, while the third edition was published in 2010.

[13] Foreword to the 1994 edition of the UNIDROIT Principles.

[14] Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts (further in footnotes: UPICC Model Clauses), Introduction, para. 1, http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses, date of access: 12.08.2016.

arbitral awards rendered world-wide that refer in one way or another to the UNIDROIT Principles.[15]

There is, however, a clear perception that the potentialities of the Principles in transnational contract and dispute resolution practice have not yet been fully realised. This is due to a large extent to the fact that the UNIDROIT Principles are still not sufficiently well-known among the international business and legal communities so that much remains to be done to bring them to the attention of all their potential users worldwide. While this is true of all international uniform law instruments, with respect to the UNIDROIT Principles there is an additional factor to be taken into consideration. Unlike binding instruments, such as e. g. the 1980 United Nations Convention on Contracts for the International Sale of Goods, which are applicable whenever the contract falls within their scope and the parties have not excluded their application, the Principles offer a greater range of possibilities of which parties are not always fully aware.[16] Being a "soft law" instrument, their acceptance will depend upon their persuasive authority.[17]

Since the UNIDROIT Principles are intended to provide a system of general rules[18] especially tailored to the needs of international[19] commercial[20]

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[15] For an up to date collection of international case law and bibliography on the UNIDROIT Principles see the database UNILEX: http://www.unilex.info, date of access: 12.08.2016.

[16] UPICC Model Clauses, Introduction, para. 2.

[17] See R. D. Vukadinović, *Lex mercatoria kao pravedno pravo u međunarodnom trgovinskom (privrednom) pravu,* Pravni život, 9-10/1994, 1220.

[18] The UNIDROIT Principles provide a set of rules covering virtually all the most important topics of general contract law, such as formation including the authority of agents; validity including illegality; interpretation; content, third party rights and conditions; performance; non-performance and remedies; set-off; assignment of rights, transfer of obligations and assignment of contracts; limitation periods; as well as plurality of obligors and of obligees.

[19] The international character of a contract may be defined in a great variety of ways. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries to the adoption of more general criteria such as the contract having "significant connections with more than one State", "involving a choice between the laws of different States", or "affecting the interests of international trade". The UNIDROIT Principles do not expressly lay down any of these criteria. The assumption, however, is that the concept of "international" contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is involved, i. e. where all the relevant elements of the contract in question are connected with one country only. Notwithstanding that, there is nothing to prevent private persons

contracts, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.[21] There are a number of significant ways in which the UNIDROIT Principles may find practical application, the most important of which are explained in the Preamble.

They shall be applied when the parties have agreed that their contract be governed by them.[22] There are several reasons for which parties – be they

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from agreeing to apply the Principles to a purely domestic contract. Any such agreement would however be subject to the mandatory rules of the domestic law governing the contract. Comment 1 and 3 to the Preamble of the UNIDROIT Principles.

[20] The restriction to "commercial" contracts is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, i. e. to make the application of the Principles dependent on whether the parties have the formal status of "merchants" (commerçants, Kaufleute) and/or whether the transaction is commercial in nature. The idea is rather that of excluding consumer transactions from the scope of the Principles, which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i. e. a party who enters into the contract otherwise than in the course of its trade or profession. (Comment 2 to the Preamble of the UNIDROIT Principles). On the notion of consumer in the European Union Law see J. Vujičić, *Pojam potrošača: slučaj Costea,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), knjiga 3, Kragujevac, 2015, 513-525.

[21] See Introduction to the 1994 edition of the UNIDROIT Principles.

[22] The parties may refer to the Principles exclusively or in conjunction with a particular domestic law or "generally accepted principles of international commercial law" which should apply to issues not covered by the Principles. In all these cases the parties may refer to the UNIDROIT Principles either in their entirety or with the exception of individual provisions thereof which they do not consider appropriate for the kind of transaction/dispute involved. Parties intending to indicate in their contract more precisely in what way they wish to see the UNIDROIT Principles used during the performance of the contract or when a dispute arises might use one of the UPICC Model Clauses. If the parties refer to the UNIDROIT Principles without specifying the edition, it should be presumed that the reference is to the current edition.

Parties are well advised to combine such a choice of law clause with an arbitration agreement. The reason for this is that domestic courts are bound by the rules of private international law of the forum, which traditionally and still predominantly limit the parties' freedom of choice in designating the law governing their contract to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result of this treatment of non-state rules, the Principles will bind the parties only to the extent that they do not conflict with the rules of the applicable law from which the parties may not contractually derogate (mandatory rules). The situation is different if

powerful "global players" or small or medium businesses – may wish to choose the UNIDROIT Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. Parties are usually reluctant to agree on the application of the domestic law of the other. The choice of a "neutral" law, i. e. the law of a third country, to avoid choosing the domestic law of either party presents obvious inconveniences, since such "neutral" law is foreign to both parties and to know its content may require time consuming and expensive consultation with lawyers of the country of the law chosen. Moreover, and even more importantly, the UNIDROIT Principles, prepared by a group of eminent jurists in the field of contract law and international trade law, representing the major legal systems and regions of the world,[23] and available in in a large number of languages,[24] are aiming to establish a balanced set of rules designed for use throughout the world irrespective of

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the parties agree to submit disputes arising from their contract to international commercial arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to act as amiable compositeurs or ex aequo et bono. In such a case the arbitral tribunal will apply the UNIDROIT Principles as the rules of law governing the substance of the dispute only to the extent that their strict application does not lead to an inequitable result in the dispute at hand. But even in the absence of such an authorization, the parties are nowadays generally permitted to choose "soft law" instruments such as the UNIDROIT Principles as the "rules of law" in accordance with which the arbitral tribunal shall decide the dispute (see e. g. Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration). In line with this approach, in arbitration the UNIDROIT Principles, as the "rules of law", would apply to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract. Since such "overriding" mandatory rules are for the most part of public law nature (e. g. prohibition of corruption; exchange control regulations; anti-trust rules; environmental protection rules; etc.), their application along with the UNIDROIT Principles normally will not give rise to any true conflict. See UPICC Model Clauses; R. D. Vukadinović, *Međunarodno poslovno pravo, opšti i posebni deo,* Kragujevac, 2012, 888.

[23] See Introduction to the 1994, 2004 and 2010 edition of the UNIDROIT Principles.

[24] The official Languages are: English (black-letter and integral), French (black-letter and integral), Spanish (black-letter and integral), German (black-letter) and Italian (black-letter). The Principles (black-letter) are also available in other languages: Arabic, Chinese, Greek, Hungarian, Japanese, Persian, Portuguese, Romanian, Russian, Turkish and Ukrainian. See http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010, date of access: 12.08.2016.

the legal traditions and the economic and political conditions of the countries in which they are to be applied.[25]

Other than an explicit choice by the parties, the Principles may be applied as a manifestation of general principles of law, the *lex mercatoria* or the like referred to in the contract.[26] They may also be applied even when the parties have not chosen any law to govern their contract. If the contract is silent as to the applicable law, it has to be determined on the basis of the relevant rules of private international law. In the context of international commercial arbitration such rules are very flexible, permitting arbitral tribunal to apply "the rules of law which it determines to be appropriate".[27]

Other possible uses of the Principles are to serve as a means of interpreting and supplementing international uniform law instruments[28] and

[25] See UPICC Model Clauses, Model Clauses choosing the UNIDROIT Principles as the rules of law governing the contract (Model Clauses No. 1), General remarks, para. 1. This goal is reflected both in their formal presentation and in the general policy underlying them. The UNIDROIT Principles deliberately seek to avoid the use of terminology peculiar to any given legal system. The international character of the UNIDROIT Principles is also stressed by the fact that the comments accompanying each single provision systematically refrain from referring to national laws in order to explain the origin and rationale of the solution retained. Regarding their substance, the UNIDROIT Principles are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice. At the same time they attempt to ensure fairness in international commercial relations by expressly stating the general duty of the parties to act in accordance with good faith and fair dealing (Article 1.7) and, in a number of specific instances, imposing standards of reasonable behaviour. See Introduction to the 1994 edition of the UNIDROIT Principles.

[26] However, such reference by the parties to not better identified principles and rules of a supranational or transnational character has been criticised, among other grounds, because of the extreme vagueness of such concepts. See Comment 4 lit. b) to the Preamble of the UNIDROIT Principles.

[27] See e. g. Article 21(1) of the 2012 Rules of Arbitration of the International Chamber of Commerce. This may occur when it can be inferred from the circumstances that the parties intended to exclude the application of any domestic law (e. g. where one of the parties is a State or a government agency and both parties have made it clear that neither would accept the application of the other's domestic law or that of a third country), or when the contract has connecting factors with many countries none of which is predominant enough to justify the application of one domestic law to the exclusion of all the others. Comment 4 lit. c) to the Preamble of the UNIDROIT Principles.

[28] International uniform law instrument, even after its incorporation into the national legal system, only formally becomes an integrated part of the latter, whereas from a substantive

domestic law. The Principles may in addition serve as a model to national and international law-makers for the drafting of legislation in the field of general contract law or with respect to special types of transactions.[29] The list set out in the Preamble of the different ways in which the Principles may be used is not exhaustive. They may also serve as a guide for drafting contracts. Furthermore, the Principles may be used as course material in universities and law schools, thereby promoting the teaching of contract law on a truly comparative basis.[30] Last but by no means least, it is necessarily to point out that the UNIDROIT Principles, by the very fact of their existence, prove that the reasonable compromise between different legal systems is possible.[31]

2.2. Adoption of additional rules and comments to the UNIDROIT Principles concerning long-term contracts

The Principles were originally conceived mainly for ordinary exchange contracts such as sales contracts to be performed at one time. In view of the increasing importance of more complex transactions – in particular long-term contracts – the UNIDROIT Governing Council at its 95th Session, which was held in Rome from 18 to 20 May 2016, adopted the amendments and additions to the 2010 UNIDROIT Principles recommended by the Working

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point of view it does not lose its original character of a special body of law autonomously developed at international level and intended to be applied in a uniform manner throughout the world (For this approach see e. g. Article 7 of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG)). Transformation of the mandate to fill gaps by reference to the general principles on which the CISG is based into reference to the sources outside that instrument is subjected to criticism. See H. M. Flechtner, *The Exemption Provisions of the Sales Convention, including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court,* The Annals of the Faculty of Law in Belgrade – Belgrade Law Review, No. 3, 2011, 84-101. In order to achieve its goal, since international uniform law instrument often risk remaining little more than a dead letter, it is necessary to be familiar with case law, drafting history and travaux préparatoires which refer to it (J. Vujičić, *Opozivost ponude prema uniformnim pravilima*, Pravo i privreda, 10-12/2012, 88-89).

[29] The UNIDROIT Principles most recently have been cited as a source of inspiration for the parts devoted to contract law of the new Argentinian Civil Code. See UNIDROIT 2015 – Study L – Misc. 31 Rev. – March 2015, 1, http://www.unidroit.org/english/documents/2015/study50/s-50-misc31rev-e.pdf, date of access: 12.08.2016.

[30] See Comment 8 to the Preamble of the UNIDROIT Principles.

[31] J. Perović, *Principi evropskog ugovornog prava i UNIDROIT Principi*, u: Budvanski pravnički dani – Aktuelna pitanja savremenog zakonodavstva (ur. S. Perović), Beograd, 2000, 410.

Group on Long-Term Contracts,[32] with the exception of the new provisions

[32] The Memorandum prepared by the Secretariat concerning possible future work on long-term contracts recalled that the UNIDROIT Principles as they now stand (UNIDROIT Principles 2010) already contain a number of provisions which take into account, at least to a certain extent, the special needs of long-term contracts. Yet at the same time the Memorandum pointed out that there were still issues particularly relevant in the context of long-term contracts that the Principles in their present form did not address at all or only in part. The Governing Council expressed its appreciation for the Secretariat's Memorandum which provided a useful basis for further examination of the topic and invited the Secretariat to undertake preliminary in-house steps to identify the issues related to long-term contracts that might be given more adequate consideration in a future edition of the UNIDROIT Principles. Following this decision the Secretariat undertook an inquiry among the members and observers of the Working Group that had prepared the 2010 edition of the UNIDROIT Principles as well as other experts who over the years had shown particular interest in the Principles, soliciting additional comments and suggestions as to the proposed work on long-term contracts. All the replies received stressed the importance of the topic which would constitute a useful integration of the current version of the Principles, and welcomed the decision of the Governing Council to recommend it for inclusion in the Institute's Work Programme 2014-2016. On the basis of a second Memorandum of the Secretariat containing an analytical survey of specific issues that might be addressed in the envisaged work on long-term contracts, the Governing Council decided to instruct the Secretariat to set up a restricted Working Group composed of experts that had shown particular interest in the proposed work on long-term contracts for the purpose of formulating proposals for possible amendments and additions to the black letter rules and comments of the current edition of the Principles.
The Working Group's first session was held at UNIDROIT's seat in Rome from 19 to 22 January 2015. The session, which was attended also by a number of observers representing international organisations and other interested bodies (UNCITRAL; the CISG Advisory Council; the ICC Commission on Arbitration and ADR; the International Law Institute, Washington, DC (USA); the Norwegian Oil & Energy Arbitration Association; ENI SpA, Milan), was devoted to the examination of a position paper on "The UNIDROIT Principles of International Commercial Contracts and Long-term Contracts" prepared by the Chairman of the Working Group Michael Joachim Bonell, Emeritus Professor of Law at the University of Rome I and consultant to UNIDROIT, and containing a list of issues with related proposals or questions for further consideration by the Working Group (UNIDROIT 2014 – Study L – Doc. 126 – October 2014, http://www.unidroit.org/english/documents/2014/study50/s-50-126-e.pdf, date of access: 15.08.2016). After careful examination and lengthy discussion, the Working Group decided to focus on particular issues and reached conclusions with respect to each of them. Various members of the Group were appointed to serve as Rapporteurs and prepare drafts based on those conclusions for the next session. The Working Group's deliberations and conclusions are recorded in detail in the Report of the first session (UNIDROIT 2015 – Study L – Misc. 31 Rev. – March 2015). The Working Group's second

on termination for compelling reason, to take into account also the characteristics and needs of these transactions and authorised the Secretariat to prepare and publish a new edition to be known as the "2016 UNIDROIT Principles of International Commercial Contracts".[33] Such amendments and additions are: Preamble – amendments to the footnote and Comment 2; Article 1.11 (Definitions) – addition to a black letter rule and of a new Comment 3; Article 2.1.14 (Contract with terms deliberately left open) – amendments to a black letter rule and Comments 1-3, and addition of a new Comment 4; Article 2.1.15 (Negotiations in bad faith) – amendments to Comment 2 and addition of a new Comment 3; Article 4.3 (Interpretation – Relevant circumstances) – amendments to Comment 3 (which will become Comment 4) and addition of a new Comment 3; Article 4.8 (Supplying an omitted term) – amendments to Comments 1-3; Article 5.1.3 (Co-operation between the parties) – amendments to Comment (which will become

session was held in Hamburg from 26 to 29 October 2015 at the kind invitation of the Max Planck Institute for Comparative and International Private Law. The deliberations at the session were based on a Note summarising the conclusions of the Group's first session and drafts prepared in advance of the session by the Rapporteurs on the following topics: Notion of "long-term contracts" (Michael Joachim Bonell and Neil Cohen); Contracts with open terms (Sir Vivian Ramsey); Agreements to negotiate in good faith (Neil Cohen); Contracts with evolving terms (Michael Joachim Bonell); Supervening events (Neil Cohen); Co-operation between the parties (Michael Joachim Bonell); Restitution after ending contracts entered into for an indefinite period (Reinhard Zimmermann); Termination for compelling reasons (Sir Vivian Ramsey and Reinhard Zimmermann); and Post-contractual obligations (Catherine Chappuis). After careful examination of the Note and various drafts, the Working Group reached agreement on its recommended amendments and additions to the UNIDROIT Principles' black-letter rules and comments. The Working Group's deliberations are reflected in the Report of the second session (UNIDROIT 2016 – Study L – Misc. 32 – January 2016, http://www.unidroit.org/english/documents/2016/study50/s-50-misc32-e.pdf, date of access: 15.08.2016). In April 2016 the Secretariat submited to the Governing Council for its consideration and adoption the Working Group's recommended amendments and additions to the provisions of the UNIDROIT Principles 2010, with the exception of Articles 6.3.1-6.3.2 on termination for compelling reason which would be new provisions. See UNIDROIT 2016 – C. D. (95) 3 – April 2016, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 15.08.2016.

[33] See UNIDROIT 2016 – C. D. (95) Misc. 2 – May 2016; Summary of the Conclusions of the 95th Session of the UNIDROIT Governing Council, Rome 18 – 20 May 2016, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-misc02-e.pdf, date of access: 15.8.2016.

Comment 1) and addition of a new Comment 2; Article 5.1.4 (Duty to achieve a specific result; Duty of best efforts) – addition of a new Comment 3; Article 5.1.7 (Price determination) – amendments to a black letter rule and Comments 2-3; Article 5.1.8 (Contract for an indefinite period) – amendments to a black letter rule and existing Comment (which will become Comment 1) and addition of a new Comment 2; Article 7.1.7 (Force majeure) – addition of a new Comment 5; Article 7.3.5 (Effects of termination in general) – amendments to Comment 3 and addition of a new Comment 4; Article 7.3.6 (Restitution with respect to contracts to be performed at one time) – amendments to Comment 1; and Article 7.3.7 (Restitution with respect to contracts to be performed over a period of time) – amendments to a black letter rule and both Comments 1 and 2.

2.2.1. Notion of Long-Term Contracts

The 2010 edition of the UNIDROIT Principles does not separately address long-term contracts, but it does not ignore them completely. There is no express reference to long-term contracts in the black-letter rules[34] and only three references in the comments.[35] While these provisions contain the only explicit references to long-term contracts, there are several other provisions related specially to, or particularly relevant to, long-term contracts.[36]

Although the Principles take long-term contracts into consideration, they do not define them. Given their rather vagueness, the notion of long-term contract is by addition to the black letter rule of Article 1.11 (Definitions)

[34] For the sole purpose of laying down different rules on restitution in case of termination, Articles 7.3.6 and 7.3.7 refer to "contracts to be performed at one time" and "contracts to be performed over a period of time". In accordance with the addition to the black letter rule of Article 1.11 (Definitions), the notion "contracts to be performed over a period of time" was replaced with the notion "long-term contracts". See UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016; Proposed Amendments/Additions to the UNIDROIT Principles on the Notion of "Long-Term Contracts", Rapporteurs: Professors M. J. Bonell and N. Cohen (further in footnotes: UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016), 5-6, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 15.08.2016.

[35] See Comment 3 Illustration 2 on Article 2.1.6 (Acceptance of offer by silence or inactivity); Comment 1 on Article 2.1.14 (Contract with terms deliberately left open) and Comment 5 on Article 6.2.2 (noting that hardship will normally be of relevance to long-term contracts, i. e. those where the performance of at least one party extends over a certain period of time).

[36] See e. g. Comment 5 on Article 6.2.2 (Definition of Hardship).

defined as a contract which is to be performed over a period of time and which normally involves, to a varying degree, a complexity of the transaction and an ongoing relationship between the parties.[37] Therefore three elements typically distinguish long-term contracts from ordinary exchange contracts with instantaneous performance (so-called "discrete" or "one-shot" contracts): duration of the contract, an ongoing relationship between the parties and the complexity of the transaction. "If one were to describe the difference using a metaphor, it could be said that the difference between a one-shot contract and a long-term contract is the difference between a trade and a marriage."[38] The contrast is between a single exchange at a single time between parties who may be strangers to each other and, on the other hand, an extended relationship involving repeated performance with some degree of mutual interdependence between the parties. For the purpose of the Principles, the essential element is the duration of the contract, while the latter two elements are normally present to varying degrees, but are not required. The extent to which, if at all, one or the other of the latter elements must also be present for the application of a provision or the relevance of a comment referring to long-term contracts depends on the rationale for that provision or comment.[39] Depending on the context, examples of long-term contracts may include contracts involving commercial agency, distributorship, franchising, leases, concession agreements, contracts for professional services, supply agreements, construction contracts, industrial cooperation, contractual joint-ventures, etc.[40]

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[37] See UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016, 3.

[38] Comments and Suggestions by Professor Neil B. Cohen, in: Annex I of UNIDROIT 2014 – Study L – Doc. 126 – October 2014, ii.

[39] For instance, the new Comment 2 on Article 5.1.3 (Co-operation between the parties) presupposes an ongoing relationship between the parties and a transaction involving performance of a complex nature (e. g. contract for the construction of industrial works, distributorship agreement or franchising agreement). See UNIDROIT 2016 – C. D. (95) 3, Annex 6 – April 2016; Proposed Amendments/Additions to the UNIDROIT Principles on Co-operation between the Parties, Rapporteur: Professor M. J. Bonell, 3, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 15.8.2016.

[40] New Comment 3 on Article 1.11 (Definitions). See UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016, 3-4.

2.2.2. *Force majeure and Hardship*

Long-term contracts are by nature subject to supervening events. The problems with their legal consequences has for many years played a certain role in the law of contracts of different countries. The question is how to overcome their influence on existing contracts. Currently this phenomenon is gaining increasing importance, in particular for international commercial contracts. The rationale is extensive. The increasing internationalisation of economic life has heightened the interdependence not only of individual countries, but also of individual partners and economic processes. Disturbances in one part of the world may therefore affect contracts between parties located in quite different parts of the world.[41] The characteristics of modern international commercial contracts make them especially sensitive to change of circumstances; the time horizon of contracts has prolonged, the subject matter of contracts has become more complex, for the achievement of certain economic aims often a whole network of contracts becomes necessary, the importance of the fulfilment of certain contracts is growing, not only for the parties, but also for their respective countries.[42]

The impediments to contracts that are not attributable to the parties are various. Some impediments make the fulfillment of the contract wholly or partially impossible either temporarily or permanently. In practice such impediments are covered frequently by force majeure clauses. The main purpose of these clauses is the exemption in case of breach of contract.[43] More recently force majeure clauses envisage, besides this function, special legal

[41] There have been a number of global events in recent years that have jeopardised the fulfillment of international commercial contracts. Firstly, there was the 2008 financial crisis and global recession. This was followed by a number of natural disasters, including the 2010 eruption of the Icelandic volcano Eyjafjallajokull which caused enormous disruption to air travel across western and northern Europe, the 2011 Japanese earthquake and tsunami which caused nuclear accidents in Fukushima, floods and droughts affecting the export of commodities such as coal and wheat crops, etc. There has also been revolutionary wave of demonstrations and protests, riots, and civil wars in the Middle East and North Africa.

[42] UNIDROIT 1983 – Study L – Doc. 24; Progressive Codification of International Trade Law, Proposed Rules on Hardship with Introduction and Explanatory Report (prepared by Prof. Dr. D. Maskow of the Institut für ausländisches Recht und Rechtsvergleichung, Potsdam–Babelsberg) – Rome, February 1983 (further in footnotes: UNIDROIT 1983 – Study L – Doc. 24), 1, http://www.unidroit.org/english/documents/1983/study50/s-50-024-e.pdf, date of access: 19.08.2016.

[43] *Ibid.*, 4.

consequences aimed at overcoming effects of force majeure on the contractual obligations, *inter alia* by modification of the contract.[44] In the case of force majeure, parties to long-term contracts can anticipate that, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, they would have an interest in continuing rather than terminating their business relationship. The question was whether for long-term contracts provisions on force majeure could be adapted to meet the concern of keeping the contract alive to the greatest extent possible. Accordingly, the new Comment 5 on Article 7.1.7 (Force majeure) of the UNIDROIT Principles, inspired by the principle *favor contractus*, states that the parties to long-term contract may wish to provide in their contract for the continuation, whenever feasible, of the business relationship even in the case of force majeure, and envisage termination only as a last resort.[45]

Another category are impediments that, although not making the performance of the affected obligations impossible,[46] fundamentally alter the

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[44] Comment 4 on Article 7.1.7 (Force majeure), after recalling that the definition of force majeure in paragraph 1 of this Article is necessarily of a rather general character and that international commercial contracts often contain much more precise and elaborate provisions in this regard, openly invites the parties to adapt the content of this Article, whenever appropriate, so as to take into account the particular features of their transaction.

[45] Such provisions can take a number of forms. For instance, a long-term contract may contain a provision to the effect that, except where it is clear from the outset that an impediment to a party's performance is of a permanent nature, the obligations of the party affected by the impediment are temporarily suspended for the length of the impediment, but for no longer than 30 days, and any right of either party to terminate the contract is similarly suspended. The provision can also state that, at the end of that time period, if the impediment continues the parties will negotiate with a view to agreeing to prolong the suspension on terms that are mutually agreed. If such agreement cannot be reached within a given period of time, disputed matters will be referred to a dispute board pursuant to the ICC Dispute Board Rules and the parties will be bound by that procedure. See New Comment 5 on Article 7.1.7 (Force majeure). UNIDROIT 2016 – C. D. (95) 3, Annex 5 – April 2016; Proposed Amendments/Additions to the UNIDROIT Principles on Supervening Events, Rapporteur: Professor N. Cohen (further in footnotes: UNIDROIT 2016 – C. D. (95) 3, Annex 5 – April 2016), 2-3, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 19.08.2016.

[46] In both cases the presupposition is that the events are beyond the control of the disadvantaged party, but in the hardship case the events only make performance much more burdensome for one party or useless for the other, whereas in the force majeure case

equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.[47] In order to deal with this kind of impediments, hardship

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the events make performance impossible, temporary or permanently. These differences constitute the reason for having different rules, but in practice sometimes it is not possible to draw a sharp distinction between these two situations. In rerum natura there does not necessarily have to be difference. There could be factual situations which could be qualified in both ways. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms. That is why rules on force majeure must be read together with provisions dealing with hardship. Only under one condition one can clearly say that force majeure is one thing and hardship another, and that condition is when one confines force majeure to impossibility which is objective and absolute. Then one can say that everything else is either irrelevant or will maybe become relevant under the hardship provisions. Since the concept of force majeure is no longer confined to absolute impossibility, as it has been softened to include also situation where performance is possible but very very burdensome, at that point there is no longer a clear line of division between the cases. UNIDROIT 1992 – P. C. – Misc. 16; Working Group for the preparation of Principles for International Commercial Contracts, Summary records of the meeting held in The Hague from 19 to 23 November 1990 (prepared by the Secretariat of UNIDROIT) – Rome, October 1992 (further in footnotes: UNIDROIT 1992 – P. C. – Misc. 16), 11 et seq., http://www.unidroit.org/english/documents/1992/study50/s-50-misc16-e.pdf, date of access: 19.08.2016. See also Comment 6 on Article 6.2.2 (Definition of hardship), Comment 3 and new Comment 5 on Article 7.1.7 (Force majeure) – UNIDROIT 2016 – C. D. (95) 3, Annex 5 – April 2016, 2.

[47] See UNIDROIT Principles, Article 6.2.2 (Definition of hardship). The nature and importance of the events as such is not relevant, their effects for the contract must be decisive. Changes with minor consequences shall not be taken into consideration. The consequences must be serious. Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations (UNIDROIT Principles, Article 6.2.1 (Contract to be observed)). This makes it clear that it is not simply a question of changed circumstances, but of an extraordinary change of circumstances leading to imbalance beyond the normal risks of the contract. The principle of the binding character of the contract is not however an absolute one. When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in the UNIDROIT Principles as hardship. These rules are intended to strengthen the principle pacta sunt servanda by providing for exemption where an application of this principle would lead to a breakdown of the contract rather than to its performance, thus having an effect which is the opposite of that it is intended to have. The importance of the changes

clauses[48] can be used, which balance business people's legitimate expectations of performance with the harsh reality that circumstances can change to make performance so hard that the contract simply must change. By definition hardship does not render performance impossible, therefore the adaptation of the contract to the changed circumstances is the most suitable reaction to a hardship situation.[49] Most often, the modification will take the form of an increase of remuneration, but it can also take the form of a change of the non-monetary performance, or even of both performances, or it may

for the contract is described in an abstract manner in order to cover all relevant cases. This is the most important aspect of a hardship situation. What is "fundamental", obviously depends on the circumstances of the case. It is not possible to make hard and fast rules. Most important are, of course, alterations in the value of the performances (e. g. alterations of the equilibrium of 50% or more should be considered as fundamental). Determination whether or not hardship situation exists represents an application of law, however vague the relevant criteria may be. UNIDROIT 1990 – Study L – Doc. 46; Working Group for the Preparation of Principles for International Commercial Contracts, Chapter 5: Performance, Section 2: Hardship (Draft and Comment prepared by Professor Dietrich Maskow, Hochschule für Recht und Verwaltung Potsdam, pursuant to the discussions during the meeting of the Working Group held in Rome from 14 to 17 April 1986 and 20 to 23 May 1987) – Rome, September 1990 (further in footnotes: UNIDROIT 1990 – Study L – Doc. 46), 1, 4. and 9, http://www.unidroit.org/english/documents/1990/study50/s-50-046-e.pdf, date of access: 19.08.2016.

[48] The general approach to the unification and harmonisation of international trade law taken by UNIDROIT has been described by professor Michael Joachim Bonell as to "be based on current trade practice as reflected in international conventions or in instruments of purely private character such as general conditions or standard forms of contract, rather than on the principles traditionally adopted by the various national laws". (UNIDROIT 1981 – P. C. – Misc. 3; Informal Working Group on the Progressive Codification of International Trade Law, Report on the second meeting held in Hamburg from 23 to 25 February 1981 (prepared by the Secretariat of UNIDROIT), 16) This approach is of special importance in respect of hardship. International conventions are rather reluctant to deal with the problem of hardship, while some countries have regulations or established court practices covering elements of this problem. (UNIDROIT 1983 – Study L – Doc. 24, 6) The phenomenon of hardship has been acknowledged by various legal systems under the guise of other concepts such as frustration of purpose, Wegfall der Geschäftsgrundlage, imprévision, eccessiva onerosità sopravvenuta, etc. All of these terms has a very specific meaning in particular legal systems, and their using would be the same as making a tacit reference to those specific meanings. The term "hardship" was chosen because it is widely known in international trade practice as confirmed by the inclusion in many international contracts of so-called hardship clauses. See Comment 2 on Article 6.2.1 (Contract to be observed).

[49] UNIDROIT 1990 – Study L – Doc. 46, 7.

result in the termination of the contract with a regulation of its legal consequences.

As primary legal consequence, hardship entitles the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract. The request shall be made without undue delay and shall indicate the grounds on which it is based.[50] The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.[51] The reason for this lies in the exceptional character of hardship and in the risk of possible abuse of the remedy. Whether or not it is right to suspend performance will depend on the circumstances. Thus in extraordinary situations, in order to avoid greater difficulties, it may be justified to withhold performance of the contract.[52]

If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, paragraph 3 of Article 6.2.3 (Effects of hardship) of the UNIDROIT Principles authorises either party to resort to a court. Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not have a positive outcome. How long a party must wait before resorting to the court will depend on the complexity of the issues to be settled and the particular circumstances of the case.[53]

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[50] UNIDROIT Principles, Article 6.2.3 (Effects of hardship) para. 1. The requirement of an indication of the grounds is intended to enable the other party better to assess whether or not the request for renegotiations is justified. An incomplete request is to be considered as not being raised in time, unless the grounds of the alleged hardship are so obvious that they need not be spelt out in the request. (Comment 3 on Article 6.2.3 (Effects of hardship)) In the second situation it would amount to an abuse of right if the other party insisted on the grounds being expressly given. UNIDROIT 1990 – Study L – Doc. 46, 8.

[51] UNIDROIT Principles, Article 6.2.3 (Effects of hardship) para. 2.

[52] For example, A enters into a contract with B for the construction of a plant. The plant is to be built in country X, which adopts new safety regulations after the conclusion of the contract. The new regulations require additional apparatus and thereby fundamentally alter the equilibrium of the contract making A's performance substantially more onerous. A is entitled to request renegotiations and may withhold performance in view of the time it needs to implement the new safety regulations, but it may also withhold the delivery of the additional apparatus, for as long as the corresponding price adaptation is not agreed. See Comment 4 on Article 6.2.3 (Effects of hardship).

[53] Comment 6 on Article 6.2.3 (Effects of hardship). By stating that the intervention of the court may be requested in cases where either the renegotiations have not commenced or no agreement between the parties has been reached "within a reasonable time", this provision makes it clear that there is a time limit for opening the renegotiation process

At this second step, a court which finds that a hardship situation exists may react in a number of different ways.[54] A first possibility is for it to terminate the contract. However, since termination in this case does not depend on non-performance by one of the parties, its effects on the performances already rendered might be different from those provided for by the rules governing termination in general. Accordingly, paragraph 4 (a) provides that termination shall take place "at a date and on terms to be fixed" by the court. Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium (paragraph 4 (b)). In so doing the court will seek to make a fair distribution of the losses between the parties. The adaptation will not necessarily reflect the full loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.[55] Paragraph 4 of Article 6.2.3 (Effects of hardship) of the UNIDROIT Principles expressly states that the court may terminate or adapt the contract only when this is reasonable. The circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume

("without undue delay") and also one for reaching an agreement, but their exact determination can only be made in each single case. In other words, since the time limit may vary depending upon the different situations, it was preferable to adopt a flexible approach instead of their fixing. (UNIDROIT 1986 – P. C. – Misc. 9; Working Group for the preparation of Principles for International Commercial Contracts, Report on the meeting held in Rome from 14 to 17 April 1986 (prepared by the Secretariat of UNIDROIT) – Rome, April 1986, 15, http://www.unidroit.org/english/documents/1986/study50/s-50-misc09-e.pdf, date of access: 20.08.2016) Where the time limit is not observed the disadvantaged party does not lose its right to ask for renegotiations, but it will be liable for any damages resulting from the fact that the other party was requested to renegotiate with delay. The delay in making the request may also affect the finding as to whether hardship actually existed and, if so, its consequences for the contract, i. e. the outcome of the negotiations and/or the decision of the court as far as the adaptation or the terms of termination of the contract are concerned. When the court finds that a party has not invoked hardship on time the conclusion may be that the party is not as affected as it claims and therefore the terms for any revision or the termination of the contract may be less favourable than if it has invoked it much earlier. However, in some situations hardship may develop over time, and it may be difficult to fix the exact time at which it becomes true hardship. Comment 2 on Article 6.2.3 (Effects of hardship); UNIDROIT 1992 – P.C. – Misc. 16, 25 et seq.

[54] See UNIDROIT Principles, Article 6.2.3 (Effects of hardship) para. 4.

[55] Comment 7 on Article 6.2.3 (Effects of hardship).

negotiations with the view to reaching an agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand.[56]

It may be doubted whether a court decision modifying a contract can be considered to be within the jurisdictional function of the court, and indeed in certain countries this is not accepted. On the other hand, there is a tendency both at national and at international level to attribute greater powers to the courts also in this respect. The decisions a court is empowered to take are clearly intended to overcome a possible deadlock developing between the parties. The extensive powers of the court might work as an incentive for the parties to come to an agreement, perhaps with the assistance of a court, instead of running the risk of having unexpected terms imposed upon them.[57]

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[56] *Ibid.*

[57] UNIDROIT 1990 – Study L – Doc. 46, 9; UNIDROIT 1992 – P.C. – Misc. 16, 19.

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PART FIVE
CIVIL LAW
Historical Background and Comparative Perspectives

I Roman Law

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DIE BEDEUTUNG VON ERFORSCHUNG UND VERMITTLUNG DES RÖMISCHEN RECHTS IN SERBIEN**

Abstract

Die Entwicklung des serbischen mittelalterlichen Rechtes basiert, mehr als andere Rechtsordnungen, auf der langen Tradition des byzantinischen Rechts. Nach der osmanischen Besatzung kommt es zur rechtlichen Diskontinuität, um danach diese Tradition Anfang des 19. Jahrhunderts, jedoch auf mittelbarem Wege, nach Serbien zurückzubringen (durch das Serbische bürgerliche Gesetzbuch aus dem Jahre 1844.) Anfang des 19. Jahrhunderts, nach der Befreiung vom osmanischen Reich, kommt in jeder Hinsicht die Periode der Entwicklung Serbiens, auch auf dem Gebiete des Schul- und Bildungswesens. Es wird die Hohe Schule, das Lyzeum, und danach die Universität gegründet; an ihr nahm das Rechtsstudium, wie an allen anderen europäischen Universitäten dieser Zeit, eine zentrale Stellung ein. Als man mit der Erforschung des römischen Rechts anfing, war eine der wichtigsten und am häufigsten aufgeworfenen Fragen die Frage nach den ersten Professoren und nach den Lehrbüchern, die zur Prüfungsvorbereitung dienten, eine wichtige Frage, die nicht nur damals, sondern auch heute gestellt wird. Die Erforschung des römischen Rechts erfuhr eine kontinuierliche Entwicklung, auch nach dem Zweiten Weltkrieg, wo gesellschaftliche Umstände eher dafür sprachen, das römische Recht als Lehrfach aus den Lehrprogrammen wegzustreichen. Dies geschah zum Glück nicht. Die juristische Fakultät in Belgrad war eine Zeit lang die einzige juristische Fakultät in Serbien, jedoch zwangen die Notwendigkeiten der Gesellschafts - und Staatsentwicklung dazu, neue juristische Fakultäten zu gründen. Nach den neuesten Ereignissen (dem Bürgerkrieg) sind in Serbien juristische Fakultäten in Belgrad, Kragujevac, Niš, Novi Sad und Priština (mit Sitz in Kosovska Mitrovica) erhalten geblieben. Die neuesten Studienprogramme wurden nach dem Hochschulgesetz gemäß dem Bologna-Prozess entwickelt. Das Lehrfach Römisches Recht wird an allen

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Fakultäten gelehrt. Professoren und Mitarbeiter, die dieses Fach unterrichten, setzen eine lange Tradition der Erforschung des Römischen Rechts in Serbien fort.

Schlüsselwörter: *Römisches Recht; Rezeption; Serbisches Bürgerliche Gesetzbuch; Die Romrechtler und Fachliteratur zum Römischen Recht in Serbien.*

Es scheint, dass die Bedeutung, die dem römischen Recht in Serbien zukam, am besten durch folgende Feststellung deutlich wird: „sav naš istorijski život protekao je u klasičnoj domovini rimskog prava i da smo, što se tiče pravnih ideja, jednako živeli pod uticajem i upravo pod gospodovanjem rimskog prava."[1,2] Zu der Einflussnahme des römischen Rechts auf das serbische kam es schon im Mittelalter, über das byzantinische Kirchenrecht. Dieser Einfluss manifestierte sich in zweierlei Formen: als Rezeption und als Tradition[3]. Seit der Zeit von Stefan Nemanja ist die christliche Kultur in Serbien dominant, sodass man seither den Einfluss des byzantinischen Rechts verfolgen kann. Mit der Religion gehen auch Gesetze einher – es handelt sich dabei vor allem um kirchliche Gesetze, die in der christlich-orthodoxen Kirche eine unantastbare Macht hatten, aber auch um Gesetze innerhalb des Ehe- und Familenrechts. Als Beispiel für den Einfluss des byzantinischen auf das serbische Recht von Anfang an nennen wir die Tatsache, dass Stefan Nemanja während seines Kampfs gegen Bogomilen die Grundsätze des byzantinischen Strafrechts anwendete: Dem Anführer ließ er die Zunge abschneiden, eine Großzahl der Bogomilen ließ er verbrennen und manche wurden vertrieben. Er wendete also nicht die Normen des Gewohnheits-, sondern des byzantinischen Rechts an.

Für den großen Einfluss des byzantinischen Rechts war allerdings die 1219 von St. Sava angefertigte Übersetzung des Nomokanons von entscheidender Bedeutung. Es handelt sich hierbei um die Übersetzung einer neueren Version, des sog. Nomokanons des Photios aus dem Jahr 883, der alle noch heute in der gesamten christlich-orthodoxen Kirche geltenden Normen (Kanons) umfasste. Der Nomokanon des St. Sava war nicht nur eine bloße Übersetzung des Originals, sondern beinhaltete auch etliche persönliche Merkmale des Übersetzers, sodass er neben dem Auszug aus

[1] S. Novaković, *Srednjovekovna Srbija i rimsko pravo,* Arhiv za pravne i društvene nauke, Beograd, 1999/1-2, 206-226.

[2] „All unser Geschichtsleben war im klassischen römischen Recht beheimatet, sodass wir, was die Rechtsideen anbelangt, dauernd unter dem Einfluss und ja geradezu unter der Vorherrschaft des römischen Rechts gelebt haben." – Eigene Übers.

[3] A. Solovjev, *Istorija slovenskih prava,* Službeni list SRJ, Beograd, 1998, 188.

den Novellen Justinians (Novellae) und dem sog. „Gesetz Moses" (Kap. 48) ebenso den ganzen „Prochiron" enthielt. Über den „Prochiron" nimmt das serbische Recht zum ersten Mal die Institute des römisch-byzantinischen Rechts[4] an. Das dürfte zweifellos der Weg gewesen sein, über den byzantinische weltliche Gesetze nach Serbien[5] gelangten.

Bei der Besiedlung der Gebiete des Römischen Reichs brachten die Slawen zwar ihre Gewohnheitsrechte mit, konnten aber dabei die in einer bestimmten Form vorgefundene, jahrhundertelange Kultur der Römer nicht gänzlich auslöschen. In den so besiedelten Gebieten, insbesondere in den Städten, blieb eine beträchtliche Zahl der griechischen und römischen Bevölkerung zurück, die zwangsläufig das gesellschaftliche Leben maßgeblich beeinflusste. Dieser Einfluss spiegelte sich vor allen Dingen in der Erhaltung der byzantinischen Rechtstradition und zwar hauptsächlich in höheren Bevölkerungsschichten. Stadtbewohner, Kaufleute, Lehnsherren und Klerus wandten sich im 11. und 12. Jahrhundert in ehe- und erbrechtlichen Streitfällen an die griechischen Behörden, wobei sie die Begrifflichkeiten und Institute des byzantinischen Rechts nutzten. So wurde beispielsweise ein Kaufvertrag zu Zeiten des Zaren Dušan in Prizren, das schon seit 1220 unter serbischer Herrschaft stand, nach griechischem Muster verfasst. Nachdem König Milutin Skopje erobert hatte, wollte er an der bestehenden Rechtsordnung nichts ändern, weshalb er alle bis dato erlassenen Bullen anerkannte. Es ist selbstverständlich, dass die bestehende römische Rechtstradition nach der Eroberung byzantinischer Gebiete einen starken Einfluss auf das serbische Recht ausübte. Jedoch erfolgte der größte Einfluss der römischen Rechtstradition über die Gesetzgebung von Zar Dušan.[6] Obwoh die meisten Forscher sich über die Bedeutung des Gesetzbuchs von Zar Dušan einig sind, bestehen über den Einfluss des byzantinischen Rechts auf seine gesamte Gesetzgebung durchaus unterschiedliche Meinungen. Wie dem auch sei, ist der große Einfluss der byzantinischen Kultur und des byzantinischen Rechts im alten serbischen Staat nicht zu leugnen. Zar Dušan hat die Informationen über das römische Recht nicht, wie seine slawischen Zeitgenossen, von den in Bologna lebenden und lernenden Konfidenten erhalten. Seine Informationen bekam er

[4] Der "Prochiron" war in Byzanz bis 1453 gültig. Inhaltlich stellt er Auszüge aus Justinians Institutionen dar.

[5] E. Stanković, *O Srpskom građanskom zakoniku*, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2009, 14, 16.

[6] *Ibid.*, 17.

vielmehr unmittelbar aus dem byzantinischen Alltag.[7] Seine ganze Herrschaft war von dem römisch-byzantinischen Rechtssystem geprägt. Deshlab bildeten die byzantinischen Gesetzbücher die Grundlage für sein Gesetzbuch. Nach dem Nomokanon wurde 1348 das „Syntagma kata stoicheion" von Mathaios Blastares ins Serbische übersetzt. Dieses Werk stellt nämlich eine Enzykolpädie des byzantinischen kirchlichen und weltlichen Rechts dar. Zur gleichen Zeit war auch der sog. Codex Iustinianus in Anwendung. Hier handelte es sich um eine 33 Artikel umfassende Gesetzessammlung, deren Bestimmungen vor allem die Agrarverhältnisse regelten. Die meisten Bestimmungen wurden dem Bauerngesetz, Nomos georgikos, entnommen, das ebenfalls ins Serbische übersetzt wurde. Die Quellen anderer Bestimmungen waren die „Basiliken", das „Prochiron" und die „Ekloge ton nomon". Diese Fakten lassen die Schlussfolgerung zu, dass das mittelalterliche serbische Recht auf der byzantinischen Tradition fußte und deshalb fortschrittlicher war als alle anderen westlichen Rechssysteme der damaligen Zeit.

Eine zweite Phase des mittelbaren Einflusses des römischen Rechts auf das serbische erfolgte im 19. Jahrhundert. Dies geschah im Jahr 1844 durch bürgerliche Kodifizierung, bzw. die Verabschiedung des Serbischen bürgerlichen Gesetzbuches. Nach dem starken Einfluss des byzantinischen Rechts auf das serbische mittelalterliche Recht tritt zuerst die Zeit der türkischen Besatzung und rechtlichen Diskontinuität ein. Das war gleichsam ein in jeder Hinsicht rückschrittlicher Zeitabschnitt in der serbischen Geschichte. Ein erneuter Einfluss des römischen Rechts auf das serbische stellte sich erst nach der Befreiung von der türkischen Herrschaft und der Gründung des serbischen Staates wieder ein. Dieser Einfluss zeigte sich bei der Verabschiedung des Serbischen bürgerlichen Gesetzbuches. Natürlich konnte man von einem indirekten Einfluss des römischen Rechts erst dann sprechen, nachdem sich die wirtschatlichen und sozialen Umstände der kapitalistischen Gesellschaft entwickelt hatten und dominant wurden.[8] Zudem soll das Bestreben Miloš Obrenovićs, Serbien nach der Befreiung von der türkischen Macht Europa näher zu bringen und ja dazuzurechnen, nicht vernachlässigt werden. Es eschien ihm vernünftig, dies durch Stärkung der Beziehungen zu der damals äußerst mächtigen Österreichisch-ungarischen Monarchie zu tun. Dies dürfte einer der Gründe gewesen sein, weshalb bei der Verfassung des Serbischen bürgerlichen Gesetzbuches als Vorlage gerade

[7] *Ibid.,* 19.

[8] R. Guzina, *Istorijski osvrt na karakter i značaj Srpskog građanskog zakonika iz 1844. godine,* Istorijski glasnik, Beograd, 1949, 28.

das Österreichische bürgerliche Gesetzbuch diente. Da es außerdem in Serbien damals an gebildeten Menschen fehlte, bat Fürst Miloš die österrechische Regierung, in die Übersiedlung von Jovan Hadžić, einem aus Novi Sad stammenden Senator nach Serbien einzuwilligen, damit dieser sich an der Ausarbeitung des Serbischen bürgerlichen Gesetzbuches beteiligen konnte. Trotz des Standpunktes, das Serbische bürgerliche Gesetzbuch solle auf dem Gewohnheitsrecht gründen und trotz der Versprechungen dem Fürsten gegenüber, dass es auch so sein würde, nahm Hadzić das Österreichische bürgerliche Gesetzbuch als Modell, in dem Glauben, es vermöge, den serbischen Ansprüchen zu genügen. Dieser Schritt Hadžićs ist einleuchtend, wenn man bedenkt, dass er Student an der Universität Budapest war, an der er auch später promovierte. Dort hat er naturgemäß auch das römische und Pandektenrecht studiert. Außerdem studierte er auch zwei Jahre an der Universität Wien. Darum ist seine Hinwendung zum Österreichischen bürgerlichen Gesetzbuch, dem das römische Recht zugrunde lag[9], überhaupt nicht verwunderlich. Zudem muss herausgestellt werden, dass das Serbische bürgerliche Gesetzbuch zu dieser Zeit das vierte bürgerliche Gesetzbuch in Europa war[10].

Zu Beginn des 19. Jahrhunderts befreien sich die Serben von der türkischen Herrschaftsmacht und leiten den Wiederaufbau des Staates ein. Gleichzeitig kommt es zu einer Reihe von Ereignissen, die sich als gesellschaftliche, kulturelle und wissenschaftliche Revolution verstehen lassen. 1835 verabschiedet Serbien die erste Verfassung, dann wird 1838 das Lyzeum gegründet, an dem man ab 1841 auch Jura studieren konnte. Als 1844 das Lyzeum zur Hochschule wird, ist eine der drei Abteilungen auch die juristische. Und 1844 erlässt der Fürst nach Zustimmung des Rates endlich das Serbische bürgerliche Gesetzbuch. Das war für Serbien die Eintrittskarte zu dem damaligen Europa.[11] Die ersten bourgeoisen Rechtskodifizierungen Ende des 18. und Anfang des 19. Jahrhunderts entstanden sowohl auf der Grundlage des Naturrechts als auch des rezipierten römischen Rechts. In diesen Kodifizierungen nahmen die Regelungen des römischen Rechts somit den zentralen Platz ein.[12] Natürlich

[9] E. Stanković, *Evropske kodifikacije građanskog prava XIX veka i Srpski građanski zakonik, Srpska* politička misao, br. 3/2011, 291.

[10] E. Stanković, *The Serbian Civile Code-the fourth Codification in Europe,* Meditationes de iure et historia Essays in honour of Laurens Winkel, Fundamina, editio speciale, Pretoria, 2014, 20-2, 881.

[11] E. Stanković, *Evropske kodifikacije građanskog prava XIX veka i Srpski građanski zakonik,* Srpska politička misao, Beograd, vol. 33, br. 3/2011, 293.

[12] E. Stanković, *The Serbian Civile Code...,* 881.

übten die ersten bourgeoisen Kodifizierungen, das Französische bürgerliche Gesetzbuch und das Österreichische bürgerliche Gesetzbuch, weiterhin den Einfluss auf die Etablierung neuer Kodifizierungen und wirkten durch die Rezeption als Vorbilder für neue Gesetze. Beide Gesetzbücher entstanden auf der Grundlage des Naturrechts und der Rezeption des römischen Rechts und zwar mit der Systematik, die Gaius in seinen Institutionen (Gali Institutiones) postuliert hatte. Die Rezeption vor allem des Französischen bürgerlichen Gesetzesbuchs und des Österreichischen bürgerlichen Gesetzesbuchs resultierte aus der Kulturmacht dieser beiden Staaten sowie aus der Qualität deren Gesetzbücher. Deshalb kann konstatiert werden, dass in all den Ländern, in denen die Gesetzbücher nach dem Muster dieser beiden Gesetzbücher ausgearbeitet gewesen waren, der indirekte Einfluss des römischen Rechts sowie des Naturrechts bemerkbar war.[13]

Als in Serbien die Idee zur Ausarbeitung des Gesetzbuchs aufkam, wurde zuerst eine Übersetzung des Französischen bürgerlichen Gesetzbuches in Auftrag gegeben. Nach der Übersetzung wurde das Gesetzbuch abgeschlagen, weil Fürst Miloš unzufrieden war. Danach entschied er sich für das Österreichische bürgerliche Gesetzbuch. Warum hat Serbien zwischen dem französischen und dem österreichischen Einfluss Letzteren gewählt? Wahrscheinlich handelt es sich hier um den Kampf der Großmächte um Vormachtstellung und Einflussnahme in Europa. Auf den Auftrag zur Übersetzung des Französischen bürgerlichen Gesetzbuchs reagierte die englische Diplomatie mit der Bemerkung, Serbien benötige keine geschriebenen Gesetze und es wäre in diesem Sinne besser, die Anwendung der Gewohnheitsrechte fortzusetzen. An der Vorstellung von der Rezeption eines fremden Rechts und somit von der Ausbreitung eines fremden und dabei nicht ihres Einflusses fanden die Franzosen ja keinen Gefallen. Die österreichische Diplomatie stimmte teilweise mit der englischen überein, teilweise aber auch nicht. Ihre Übereinstimmung mit England spiegelte sich in den Bestrebungen, den über das Gesetzbuch geförderten französischen Einfluss in Serbien zu unterbinden. Im Unterschied zu England hatte Österreich andererseits schon ein eigenes bürgerliches Gesetzbuch. Da die Regierung in Serbien das Anliegen hatte, fremde, ausländische Gesetzbücher übersetzen zu lassen, um diese dann als Vorlage für ein eigenes bürgerliches Gesetzbuch zu verwenden, sah Österreich darin seine Chance, seinen Einfluss im Nachbarland Serbien auszubauen. Das war der Grund, warum der österreichische Konsul Mihanović zwei Serben aus Österreich delegiert hat, die ausgebildete Juristen waren und bei der

[13] E. Stanković, *Prirodno pravo, rimsko pravo i kodifikacije,* Pravni život, 11/2009, 1-1144.

Gesetzgebung zu helfen hatten. Diese zwei Juristen waren Jovan Hadžić und Vasilije Lazarević. Und so wurde das Österreichische bürgerliche Gesetzbuch nach Serbien „verpflanzt". Und diese „Verpflanzung" war gelungen. Das war nicht die einzige „Verpflanzung" rechtlicher Normen oder sogar ganzer Gesetze. Von dieser Praxis der „Verpflanzung" fremder Normen wurde eigentlich häufig Gebrauch gemacht. „Verpflanzt" wurde meist aus einem kulturell und wirtschaftlich entwickelteren Land in ein Land, das gerade dabei ist, sich an die moderne Lebensweise zu gewöhnen.[14]

Die Bedeutung der Verabschiedung des Serbischen bürgerlichen Gesetzbuchs ist jedenfalls immens. Obwohl es oft für eine gekürzte Fassung des Österreichischen bürgerlichen Gesetzbuchs gehalten wird, darf die Tatsache nicht vernachlässigt werden, dass es im Bereich der familien- und erbrechtlichen Regelungen Abweichungen gibt. Man muss ebenfalls im Auge behalten, dass sich Jovan Hadžić während seines Jurastudiums mit dem römischen und Pandektenrecht beschäftigte und als ein hervorragender Jurist sicherlich auch Originalquellen des römischen Rechts verwendete, allen voran die Kodifizierung des Justinian. Er hat sich also ganz gewiss bei der Ausarbeitung der Kodifitierung nicht nur des Österreichischen bürgerlichen Rechts, sondern auch der Originalquellen bedient, sodass wir heute von einem indirekten aber auch direkten Einfluss des römischen Rechts auf das Serbische bürgerliche Gesetzbuch sprechen können. Den stärksten und offensichtlichsten Einfluss des römischen Rechts kann man im Bereich des Sachenrechts verzeichnen (die Gliederung wie bei Gaius: Grundprinzipien des Eigentums, das romanische Konzept des Staatseigentums, das Miteigentum, die Eigentumsklage (rei vindication), Elemente des Pfandrechts). Doch besonders hervorzuheben ist der Bereich der Dienstbarkeiten (servitutes), in dem der Einfluss des römischen Rechts direkt zum Tragen kommt. Eine ausführliche Auflistung und die Annahme aller Dienstbarkeiten des römischen Rechts sind von besonderer Wichtigkeit. Das Grundprinzip der römischen Dienstbarkeiten (Pomponius D. 8,1,15,1) ist in § 342 des Serbischen bürgerlichen Gesetzes enthalten. Eine Ausnahme von dieser Regelung hat Pomponius, D. 8,1,15,1, begründet und sie ist in § 348 des Serbischen bürgerlichen Gesetzes enthalten. Durch die Regelungen des römischen Rechts wurden Dienstbarkeiten in dingliche und persönliche eingeteilt (Marcianius, D. 8,1,1). Dies ist in § 334 und § 338 des Serbischen bürgerlichen Gesetzes enthalten. Gaius, D. 8,2,2 zählt städtische Dienstbarkeiten auf, die Bestandteil des § 336 des Serbischen bürgerlichen

[14] A. Votson, *Pravni transplanti: pristup u uporednom pravu,* Pravni fakultet, Beograd, 2000, 172.

Gesetzes sind. Laut Regelungen des römischen Rechts werden Diensbarkeiten per Gerichtsurteil, Legatum per Vindicationem oder durch Verjährung festgelegt (C. 3,34,1 und C. 7,33,12,4). In § 340 des Serbischen bürgerlichen Gesetzes heißt es, dass die Dienstbarkeiten per Gesetz, durch Vertrag, durch den letzten Willen, per Gerichtsurteil oder durch Verjährung festgelegt werden. Der Grundsatz der beschränkten Ausübung von Dienstbarkeiten war in den Regelungen des römischen Rechts vorhanden (Pomponius, D. 8,3,24), sowie in § 345 des Serbischen bürgerlichen Gesetzes, aber auch in modernen Rechtssystemen. Es werden eigentlich heutzutage beinahe alle diese Regelungen im Rahmen des positiven Rechts angewendet. Die römische Regelung, nach der es bei Grunddienstbarkeiten zur Konfusion (Erlöschen) kommt, wenn ein Subjekt Eigentümer beider Grundstücke wird (Gaius, D. 8,6,1), ist in § 388 des Serbischen bürgerlichen Gesetzes enthalten. Unter dem Strich gibt es recht viele römische Rechtsregelungen, die das Institut „servitutes" begründet haben und durch Rezeption ein Bestandteil moderner Rechtssysteme wurden.[15] Das von Diokletian eingeführte Institut „laesio enormis" ist durch Rezeption in einer etwas abgewandelten Form Teil der meisten bourgeoisen Kodifizierungen geworden. So ist es in unserem Fall auch im Ursprungsgesetzbuch, dem Österreichischen bürgerlichen Gesetzbuch sowie im Serbischen bürgerlichen Gesetzbuch enthalten. Trotzdem unterscheidet sich das Institut laesio enormis von Gesetzbuch zu Gesetzbuch, wobei der Einfluss des römischen Rechts auf dieses Institut im Serbischen bürgerlichen Recht direkter und stärker ist. So kann eine Vertragskündigung infolge einer über die Hälfte hinausreichenden Schädigung immer dann gefordert werden, wenn ein Missverhältniss zwischen gegenseitigen Leistungen vorliegt. Dies bedeutet also ein weiteres Anwendungsgebiet und größere Ähnlichkeit mit den Regelungen des römischen Rechts, in denen das Institut begründet ist.[16]

Wie groß war der direkte Einfluss des römischen Rechts bei der Verabschiedung des Serbsichen bürgerlichen Gesetzbuches und konnte er noch größer sein? Bisher bleibt eine detaillierte Untersuchung aus, durch die diese Fragen geklärt werden könnten. Nichtsdestotrotz ist der Einfluss des römischen Rechts sowohl in dieser Phase des serbischen Rechts als auch im

[15] E. Stanković, *Službenosti u rimskom i srpskom pravu*, u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2015, 36.

[16] E. Stanković, *Laesio enormis u Srpskom građanskom zakoniku*, u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2014, 34-36.

mittelalterlichen Recht eindeutig. Daher leuchtet durchaus ein, dass das römische Recht in Serbien im Rahmen des Jurastudiums seit dessen Begründung gelehrt und gelernt wurde.

1. In der Zeit der osmanischen Herrschaft gab es in Serbien fast keine Bildungseinrichtungen; die wenigen existierenden waren vorwiegend privat und auf dem Niveau bloßer grundschulischer Bildung. In der Wojwodina sah jedoch die Bildungslage günstiger aus, dort gab es Schulen, sogar Gymnasien, schon im 18. Jahrhundert. Anfangs des 19. Jahrhunderts, nach der Befreiung von der osmanischen Herrschaft, begann in Serbien die Entwicklung des Bildungswesens.

Unter Fürst Miloš Obrenović gab es in Serbien keine gebildeten Menschen, obwohl dies die Notwendigkeit für einen Staat im Entstehen ist. Die wenigen gebildeten Menschen waren damals die sogenannten „Serben von Drüben", d. h. die aus der Wojwodina stammenden Serben. Sie kamen nach Serbien auf Berufung oder nach Bedarf und nahmen einige der wichtigsten Posten in Staatsverwaltung, Bildungs- oder Gerichtswesen ein. Trotz seiner natürlichen Begabung für Politik wie auch seines reellen Verständnisses der politischen Beziehungen seiner Zeit unterschätzte Fürst Miloš Obrenović wegen seiner mangelnden Bildung die Bedeutung und Rolle der gebildeten Menschen und der Bildung überhaupt; ja er fürchtete sich sogar in den späteren Jahren seiner Herrschaft vor den „Schulknaben". Fürst Miloš setzte sich nicht besonders für die Eröffnung von Schulen ein, obgleich ihn Vuk Stefanović Karadžić schon seit 1820 (letztlich vergebens) von einer unbedingten, aus der Realität erwachsenden Notwendigkeit der Eröffnung von Schulen zu überzeugen versuchte.[17] Ein echtes Bemühen um Schuleinrichtungen war leider erst etwa fünfzehn Jahre danach bemerkbar, als der Staat Schulen zu errichten anfing.[18]

2. Noch zu der Zeit der Befreiung von der osmanischen Herrschaft, genauer im Jahre 1808, wurde in Belgrad die Hohe Schule gegründet. Es ist anzunehmen, dass die Gründung der Hohen Schule auf Initiative von Ivan Jugović, Professor am Gymnasium zu Sremski Karlovci, und von Dositej Obradović erfolgte. Die Hohe Schule war ihren Lehrinhalten nach eine Bildungseinrichtung zwischen Gymnasium und einer höheren Lehranstalt. Die Ausbildung an dieser Schule dauerte drei Jahre lang, wobei in den ersten zwei auf einer gymnasialen Ebene unterrichtet wurde; das dritte Jahr verlief auf einem höheren Bildungsniveau. Die Hohe Schule besuchten

[17] Vukova prepiska II, 654 (Vuks Korrespondenz II, 654).

[18] M. M. Nikolić, *Kragujevačka Gimnazija 1833-1933,* Kragujevac, 1934, 27 (M. M. Nikolić, Das Gymnasium zu Kragujevac 1833-1933, Kragujevac, 1934, 27).

„Vaterlandssöhne", die sich darauf vorbereiteten, Beamte, Richter und Offiziere zu werden. Wegen der Umstände im Lande schloß jedoch diese Schule ihre Türen im Jahre 1813, um erst im Jahre 1830 wieder aufzumachen. Im Jahre 1833, also drei Jahre danach, wurde die Hohe Schule nach Kragujevac verlegt.

Fürst Miloš Obrenović verlegte im Jahre 1818 auch seine Staatskanzlei von Crnuće nach Kragujevac, und seit diesem Zeitpunkt wurde Kragujevac zur Hauptstadt Serbiens. 1834 wurde auch die Druckerei aus Belgrad nach Kragujevac verlegt. In demselben Jahr wurde das erste Theater in Serbien unter dem Namen „Knjaževsko-srbski teatar" (Fürstlich-serbisches Theater) gegründet. Zwei Jahre später wurde eine Bibliothek für das Lyzeum zu Kragujevac eingerichtet, welche der Grundstock zur späteren Nationalbibliothek wurde. Warum hatten die Aufständischen gerade Kragujevac zur Hauptstadt auserwählt? Die Auswahl scheint logisch und natürlich zu sein. Kragujevac liegt nahe dem geographischen Mittelpunkt des Landes, während Belgrad eher an der Peripherie liegt, damals direkt vor den österreichischen Kanonen.[19] Außerdem gab es fast keinen Türken in der Stadt, „in der Stadt gab es 193 serbische Häuser ... und ein einziges türkisches Heim."[20] Jedoch blieb Kragujevac nicht lange die Hauptstadt Serbiens.

3. Kurz vor dem Ende der Herrschaft des Fürsten Miloš waren in Serbien 72 Grundschulen vorhanden, darunter nur 26 staatliche Schulen, dazu ein fünfjähriges Gymnasium in Kragujevac. Zwei Jahre danach, also 1838, wurde auf Vorschlag des Kultusministers der Beschluss gefasst, „unser Gymnasium zum Lyzeum zu erheben".

In der Zeit, wo das Lyzeum auch das Gymnasium umfasste, wurde in den ersten drei Jahren Unterricht gehalten, der die sogenannte „grammatikale Klasse" bildete. Diese Bezeichnung ist durch die antiken Bezeichnungen inspiriert und nach dem Vorbild anderer europäischer Länder bestimmt. In der vierten und fünften Klasse wurden hauptsächlich Geisteswissenschaften gelehrt, sie trugen die Bezeichnung „humanistische Klasse". Nach der Verselbständigung des Lyzeums war nur die philosophische Richtung vorhanden. Der ursprünglichen Idee nach wurde das Lyzeum mit dem Ziel gegründet, die gebildeten Menschen auf ihre beruflichen Tätigkeiten in der Staatsverwaltung vorzubereiten. Das Lyzeum wurde dann im Jahre 1841 nach Belgrad verlegt.

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[19] R. Guzina, *Upravni i politički centar autonomne Srbije,* Glasnik Pravnog fakulteta u Kragujevcu, 1978/79, 231-261 (R. Guzina, Verwaltungs- und politisches Zentrum des autonomen Serbiens, Der Bote der juristischen Fakultät zu Kragujevac, 1978/79, 231-261).
[20] J. Vujić, *Putešestvije,* I, 174 (J. Vujić, Reiseberichte, I, 174).

4. Schon seit der Gründung der Hohen Schule im Jahre 1808 wurden dort juristische Fächer unterrichtet, wie Naturrecht, Völkerrecht, Staatsrecht und Strafverfahrensrecht. Das Naturrecht umfasste auch Elemente aus dem römischen Recht. Am späteren Lyzeum wurden selbstverständlich juristische Fächer unterrichtet, was durch das gesetzte Ziel der Schule gerechtfertigt war, staatliche Beamte auszubilden. Zwei Jahre nach der Gründung des Lyzeums, also im Jahre 1840, wird die juristische Richtung gegründet. Der Bedarf nach einer solchen Ausbildung erwuchs aus der Erweiterung der Staatsverwaltung während der Regierung der Monarchen.

Der erste Juraprofessor am Lyzeum war Jovan Sterija Popović, er unterrichtete „Naturrecht und Staatswissenschaft". Wir verfügen über keine Angaben, welche juristischen Disziplinen an der Juristischen Sektion gelehrt wurden; sicher ist jedoch, dass das römische Recht nicht vertreten war. Im Lehrplan, den der erstgewählte Juraprofessor, Jovan Rajić, zusammenstellte, wird das Römische Recht nicht vermerkt.[21] Jovan Sterija Popović hatte schon im Jahre 1842 beim Kultusministerium beantragt, das Unterrichtsfach Römisches Recht zu bewilligen „… zunächst deshalb, weil das römische Recht die Grundlage aller neuen Gesetzbücher darstellt, und zum anderen, weil an allen Universitäten, wo schon eine längere Zeit unterrichtet wird, Römisches Recht gelehrt wird."[22] Dieser Vorstoß zur Einführung des römischen Rechtes in den Lehrplan ist allerdings zunächst gescheitert.

Ende April 1843 richtete aber das Kultusministerium an das Rektorat seine Entscheidung, dass im Schuljahr 1843/1844 ein neuer Kurs einzuführen sei, und zwar Römisches Recht. Auch dieser Beschluss wurde nicht in die Praxis umgesetzt; eine neue Entscheidung wurde jedoch getroffen, dass anstatt des römischen Rechtes das im Jahre 1844 in Kraft getretene serbische Bürgerliche Gesetzbuch zu unterrichten sei.

Durch dieses Gesetz aus dem Jahre 1844, dessen Schöpfer der genannte Sterija war, wird das Lyzeum als „Große Lehranstalt" angesehen, an welcher „höhere Wissenschaften" unterrichtet werden.[23] Die juristische Sektion hatte den Status einer Fachschule und wurde zum Vorläufer der juristischen Fakultät. Die philosophische Sektion hatte diesen Status nicht, weil sie als Erweiterung des Gymnasiums angesehen wurde, das damals sechs Klassenstufen umfasste. In der Praxis konnte man nach der Beendigung der

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[21] Arhiv Srbije, fond Liceuma, 1841 (Archiv Serbiens, Lyzeumsbestand, 1841).

[22] Državna arhiva u Beogradu, odeljenje Ministarstva prosvete, FV, 311/1842 (Staatsarchiv in Belgrad, Kultusministerium, FV, 311/1842).

[23] S. Jovanović, *Sabrana dela,* Srpska književna zadruga, Beograd, 1990, tom 3, 39 (S. Jovanović, Sammelwerke, Serbische Literaturgenossenschaft, Beograd, 1990, Band 3, 39).

philosophischen Sektion keinen konkreten Beruf ausüben, sondern sich nur weiter an der juristischen Sektion ausbilden lassen. Faktisch setzte sich das Lyzeum nur aus einer einzigen Fakultät zusammen, und zwar aus der juristischen. Es ist daher verständlich, warum die juristische Fakultät als die erste Fakultät gegründet wurde. In der Zeit des Ausbaus der Verwaltung und des Gerichtswesens in Serbien war der Bedarf an Juristen der dringendste. Seit 1850 dauerten juristische Studien nicht mehr zwei, sondern drei Jahre lang, wie an anderen juristischen Fakultäten in Europa.

5. Im Dezember 1848 forderte das Kultusministerium an, die Ausbildung von Juristen auf drei Jahre zu verlängern, sowie noch einen Lehrstuhl mit dem Jahresgehalt in Höhe von 600 Talern zu gründen, und zwar für das Fach „Institutionen des Justinian und gekürzte justinianische Pandektenwissenschaft".[24] Dieser Antrag wurde durch Beschluss des Fürsten und des Rates Anfang Februar 1849 angenommen, so dass dieses Jahr die Einführung des römischen Rechtes als selbständiges Lehrfach (Institutionen des Justinian und gekürzte justinianische Pandektenwissenschaft) in Serbien kennzeichnet.

Auf Verlangen des Kultusministeriums wurde im Jahre 1850 Rajko Lešjanin[25] durch Erlass des Fürsten zum Professor für Römisches Recht berufen. Aus dem Schreiben des Kultusministeriums an das Rektorat geht hervor, dass unter dem Fach Römisches Recht Institutionen des Justinian und Pandekta zu verstehen seien. Das Römische Recht wurde als Lehrfach im zweiten Studienjahr unterrichtet, mit sechs Stunden wöchentlich, über zwei Semester. Professor Lešjanin unterrichtete in den ersten Jahren nur Institutionen, wahrscheinlich deshalb, weil dieser Lehrstoff weniger anspruchsvoll war als die Pandekta. diese Beschneidung des Unterrichtsstoffes wurde vom Hauptschulinspektor Platon Simonović kritisiert.[26] Lešjanin veröffentlichte sein Lehrbuch endlich im Jahre 1857 unter dem Titel Justinianische Institutionen des römischen Rechts., es hatte 550 Seiten.[27] Naturgemäß war es stark von der Literatur jener Zeit verfasst (Savigny, Puchta, Vangerow, Hugo, Niebuhr und andere).

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[24] V. Grujic, *Licej i Velika skola,* Srspka akademija nauka i umentnosti, Beograd, 1987, 39 (V. Grujic, Das Lyzeum und die Hohe Schule, Serbische Akademie der Wissenschaften und Künste, Belgrad, 1987, 39).

[25] Rajko Lešjanin studierte in Belgrad, danach in Heidelberg und eine kurze Zeit in Paris. Er war Rektor von 1854 bis 1856.

[26] Auszug aus dem Bericht von Platon Simonović, des Hauptschulinspektors, an den Rat des Lyzeums, Archiv Serbiens, Lyzeumsbestand, 1853.

[27] R. Lešjanin, *Institucije Justinijanovog rimskog prava*, Beograd 1857, 4.

An der juristischen Sektion des Lyzeums lehrte Professor Dr. Stojan Veljković das römische Recht im Schuljahr 1860/61, und zwar nach folgendem Lehrplan: Geschichte über die Quellen des römischen Rechtes, Römisches Privatrecht.

6. Parallel zur Entwicklung des serbischen Staates in der zweiten Hälfte des 19. Jahrhunderts stieg der Bedarf nach sachkundigen und gebildeten Leuten. Es ist deshalb kein Wunder, dass das Hauptaugenmerk auf die juristische Ausbildung gerichtet war, weil jedem Staat, so auch dem serbischen, in der Entwicklungsperiode diese juristischen Kräfte am meisten fehlten. Der Entwicklung der Gesellschaft wurde von der Entwicklung des Bildungssystems begleitet. Ein wichtiger Moment in der Entwicklung des Bildungswesens in Serbien war die Umwandlung des Lyzeums in die Hohe Schule. Die Hohe Schule hatte drei Fakultäten: die philosophische, die juristische und die technische Fakultät.[28] Die Studien an der juristischen Fakultät dauerten vier Jahre lang. Das römische Recht wurde im zweiten Studienjahr mit sechs Wochenstunden über zwei Semester gelehrt. Damals wie auch heutzutage war es nicht leicht, qualifizierte Professoren für römisches Recht zu finden. Professor Stojan Veljković lehrte römisches Recht in der Zeitspanne von 1847 bis 1867 und hielt sich an den Lehrplan des früheren Professors Rajko Lešjanin. Im Schuljahr 1865 lehrte römisches Recht Nikola Krstić, Professor für Zivilgesetzbuch und Zivilverfahrensrecht. Professor für römisches Recht in der Zeit von 1867 bis 1890 war Gliša Geršić. In diesem Zeitraum, und zwar nur zwei Jahre lang, 1885 und 1886, lehrte römisches Recht Andra Djordjevic, Professor vom Lehrstuhl für bürgerliches Recht, er lehrte Zivilprozessverfahren und Völkerrecht. Römisches Recht in der Zeit von 1890 bis 1895 lehrte Prof. Živko Milosavljević.

An der Hohen Schule benutzte man in dieser Zeit die von Prof. Lešjanin und Prof. Geršić verfassten Lehrbücher. Als sekundäre Literatur wurden die Übersetzung der Institutionen des Justinian benutzt, und zwar die von Mihailo Radovanović aus dem Jahr 1864, sowie die Übersetzung der Lehrbücher des römischen Rechts von Salkowski.[29]

Die erste Übersetzung der Institutionen des Justinian wurde im Jahre 1864 vom Juristen Mihailo Radovanović veröffentlicht. Im Vorwort ist die Geschichte der römischen Kodifikationen kurz zusammengefasst, mit besonderer Berücksichtigung des Codex Iustinianus. Der Verfasser sagt ausdrücklich, dass seine Kommentare auf den Arbeiten von Ortholan und

[28] An dieser Stelle meinen wir die Zeit von 1863 bis 1895.

[29] Karl Salkowski war Professor für Jura in Königsberg, sein Lehrbuch hat den Titel: Institutionen mit der Geschichte des römischen Privatrechtes.

Lagrange fußen. Es ist denkbar, dass sich Radovanovic nicht nur im Vorwort, sondern auch beim Übersetzen aus dem Lateinischen der französischen Version der Institutionen der beiden vorgenannten Autoren bediente. Von ihren Auffassungen der geschichtlich-juristischen Schule beeinflusst, hielt Radovanović die Interpolationen von Justininans Kompilatoren für „Verkrüppelungen" der klassischen Texte. Radovanović hatte sich überlegt, ob er in seinem Buch nur eine Übersetzung bringen sollte, oder sollte es zusammen mit dem lateinischen Text eine zweisprachige Ausgabe werden? Seines Erachtens war die Anführung des lateinischen Originaltextes zusammen mit der Übersetzung die bessere Lösung, aber auch die teurere. Er entschied sich für den goldenen Mittelweg: Der lateinische Text wurde fragmentarisch gedruckt und die Übersetzung im Ganzen. Natürlich waren es die seines Erachtens nach wichtigsten Fragmente aus den Originaltexten, und zwar vor allem die häufig zitierten Fragmente, die Sentenzencharakter hatten. Das Buch hatte in dieser Fassung insgesamt 293 Seiten.

Der Wert dieser Übersetzung, wie des Lehrbuchs von Lešjanin, liegt besonders in der Entwicklung der fachsprachlichen Ausdrücke. Obwohl zu dieser Zeit die Sprache noch nicht fachbezogen ausgebaut war und über keine festgefügte Terminologie verfügte, sind einige sprachliche Lösungen der beiden Professoren immer noch im Gebrauch. Unter Berücksichtigung der Entstehungszeit dieser Übersetzung könnte man sagen, dass sie ziemlich gut ist. Die Übersetzung von Radovanović stellte in einem Lande, in welchem die Mehrheit der Bevölkerung des Schreibens nicht mächtig war, in welchem das Schulwesen, insbesondere das Hochschulwesen, noch am Anfang stand, und schließlich in einem Lande, wo es in den Städten Garnisonen des osmanischen Heeres gab, allein durch sein Dasein einen beträchtlichen Erfolg dar.

Bedauerlicherweise istdiese übersetzerische Pionierleistung fast in Vergessenheit geraten. In den modernen Enzyklopädien, bibliographischen Werken und Lehrbüchern wird der Name Radovanović gar nicht erwähnt. Eine andere, jüngere Übersetzung der Institutionen des Justinian wird genannt, und zwar die Übersetzung aus dem Jahr 1905 von Luj Bakotić, die im Geiste der sprachlichen Reform von Vuk Stefanović-Kradžić entstanden ist.

Professor Gligorije Geršić hatte Jura in Wien und Pest studiert. Als Professor für römisches Recht verfasste er im Jahre 1882 das Lehrbuch System des römischen Privatrechtes (Institutionen). In demselben Jahr

veröffentlichte er das Werk Besitzesnatur.[30] Zum Zeitpunkt der Veröffentlichung dieses Buches war die Literatur über das römische Recht in unserem Raum sehr dürftig.[31] Deshalb ist es kein Wunder, dass sich Geršić jüngere ausländische Autoren zum Vorbild nahm: Scharlo, Heldern, Müller und Salkowski. Nach Geršićs Konzeption hatte das römische Recht die Funktion eines einführenden Teilbereiches in das Privatrecht.

Professor Živko Milosavljević studierte in Belgrad und in Paris. Das römische Recht lehrte er zunächst fünf Jahre lang gegen Honorar, weil er Mitglied des Kassationshofes war. Er veröffentlichte im Jahre 1890 das Buch Römisches Recht und sein Einfluss auf die europäischen Gesetzgebungen und die juristische Ausbildung im Allgemeinen sowie das Buch Römisches Privatrecht (für den Bedarf seiner Zuhörer), Band I 1899; Band III 1900; die Bände II und IV wurden nicht herausgegeben.

7. In der Tätigkeit der Hohen Schule fielen einige Mängel auf, so dass im Jahre 1894 ihre Umgestaltung angeordnet wurde. Insbesondere hob man hervor, dass die Studenten mit den allgemeinen Lehrfächern überfordert waren und dadurch keine entsprechende Ausbildungsstufe erwarben. Nächstes Jahr, also im Jahre 1895, kam es zur verlangten Umgestaltung und in Verbindung damit zur Verselbständigung der juristischen Fakultät. Juristische Studien dauerten nach dieser Reorganisation acht Semester lang, und zugelassen zum Studium wurden fertige Gymnasiasten. In der späteren Entwicklung, und zwar im Jahre 1905, entstand aus der Hohen Schule die Universität, wobei die juristische Fakultät ihr wichtiger Bestandteil wurde.

In damaligen Lehrplänen der juristischen Fakultät war der Unterricht des römischen Rechts im ersten Studienjahr mit sechs Stunden wöchentlich vorgesehen. Im Vergleich zu anderen Fächern war das eine große Zahl an Unterrichtsstunden. Über das Vorlesungsprogramm spricht auch folgende Notiz des Professors Dragoljub Aranđelović aus dem Jahre 1905: „In diesem Semester lehre ich Geschichte des römischen Rechts und System des römischen Privatrechts mit vier Stunden die Woche. Die Geschichte des römischen Rechts umfasst: a) Geschichte der römischen Staatsordnung; b) Geschichte der römischen Rechtsquellen; c) Überblick über die Entwicklung des Privatrechts und Privatrechtsverfahrens. Das System des

[30] G. Geršić, *Sistem rimskog privatnog prava,* Beograd, 1882, 1 (G. Geršić, *System des römischen Privatrechtes,* Beograd, 1882, 1).

[31] Es gab drei Lehrbücher: eines von Professor Lešjanin und zwei Lehrbücher von Professoren der Zagreber juristischen Akadmie, Šuhaj und Spevec.

römischen Privatrechts umfasst den allgemeinen Teil, Sachenrecht, Schuld-, Familien- und Erbrecht".[32]

In diesem Zeitraum gab es mehrere Professoren, die Römisches Recht lehrten: Živko Milosavljević von 1895 bis 1902; Dozent Dragoslav Kovanović 1903 und 1904 und Professor Dragoljub Aranđelović im Jahre 1905.

Zu dieser Zeit wurde eine wichtige neue Unterrichtsform eingeführt, nämlich das Seminar Römisches Recht. Die Seminare wurden von den Professoren durchgeführt, von den Dozenten nur mit Erlaubnis des Fakultätsrates. Das Ziel dieser Seminare war es, das bei den Vorlesungen errungene Wissen zu festigen, zu erweitern und die Studenten in die Forschungsarbeit einzuführen.

In dieser Zeitperiode gab es an der juristischen Fakultät im Vergleich zu früheren Zeiten umfangreichere wissenschaftliche Literatur. Zu den schon erwähnten Lehrbüchern wurde Das römische öffentliche Recht seit Willems veröffentlicht. Es wurden auch die Institutionen des römischen Rechts von Filippo Serafini, Professor für Römisches Rechts an der Königlichen Universität in Pisa (1895) in die serbische Sprache übersetzt.

8. Die Entwicklung der juristischen Fakultät setzte sich auch im Rahmen der Universität in Belgrad in der Zeit von 1905 bis 1945 fort. Dazu ist anzumerken, dass der Unterricht während des Ersten Weltkrieges (1914-1918) nicht stattfand. Im Zeitraum von 1905 bis 1945 wurde das römische Recht im ersten Studienjahr gelehrt, und 1908 führte man Übungen im Lehrfach Römisches Recht als eine neue Unterrichtsform ein. Im Jahr 1937 fanden beispielsweise Vorlesungen und Übungen im Lehrfach Römisches Recht sechs Stunden wöchentlich statt, was im Vergleich zu den anderen Lehrfächern eine bedeutend größere Anzahl ausmachte.[33] In dieser Zeit fing man mit den postgraduierten Studien an, so dass 1910 spezielle Doktorandenkurse auf dem Gebiet des römischen Rechts eingeführt wurden.

Professor Relja Popović (1924-1945) lehrte Römisches Recht die längste Zeit und mit großem Erfolg. Seine Ausbildung bekam er in München und Berlin, den Doktortitel erlangte er 1917 in Zürich. Zum außerordentlichen Professor wurde er im Jahre 1910 ernannt. Den Unterricht im Lehrfach Römisches Recht führte auch Professor Dragoljub Aranđelović durch. An sein Programm hielt sich auch in den Jahren 1906 und 1907 der Professor für Kirchliches Recht Čedomilj Mitrović. Im Jahr 1922 wurde Konstantin

[32] D. Aranđelović, *Beleška,* AS, fond Velika škola, Pravni fakultet, 1905 (D. Aranđelović, *Die Notiz,* AS, Bestand der Hohen Schule, Juristische Fakultät, 1905).

[33] S. Petrovic, *Unterricht des Römischen Rechts auf dem Lyzeum, auf der hoher Schule und an der Universität bis 1941.*, Belgrad, 1988.

Smirnov, Professor für Römisches Recht in Odessa, zum Professor für Römisches Recht ernannt.

Das Lehrbuch Das römische Recht ist ein Werk des Professors Aranđelović, das 1938 veröffentlicht wurde, in welchem systematisierte Vorlesungen dargestellt sind; dieses Lehrbuch ersetzte frühere Skripten. In den Zwischenkriegsjahren hatten sogar 60% der Professoren an der Belgrader Universität ein ausländisches Diplomzeugnis. Noch größer war die Zahl derjenigen, nämlich 70% der Professoren, die an ausländischen Universitäten ihren Doktortitel erlangten.

9. Nach der Befreiung 1945 stand vor allem die Notwendigkeit der Erforschung des römischen Rechts zur Diskussion wie auch die Stellung und die Bedeutung des Faches im universitären Unterricht. Man suchte nach einem Lehrplan, der den Ansprüchen des neuen Jugoslawiens entgegenkommen konnte, wobei Privateigentum als Grundlage der Entstehung des römischen Institutionensystems nicht mehr gegeben war. Die Ansichten über den Nutzen des römischen Rechts waren sehr unterschiedlich und reichten von denen, welchen die Erforschung bejahten, bis zu denjenigen, die sie völlig negierten. Jedoch überwog die Meinung, dass das römische Recht eine sehr wichtige rechtsgeschichtliche Disziplin ist, die für die Juristenausbildung unentbehrlich ist, nicht weniger wichtig ist als die grundlegenden positivrechtlichen Disziplinen. So „wurde das römische bzw. Pandektenrecht zur Grundlage der europäischen Rechtswissenschaft und der Theorie überhaupt, wobei die Terminologie des römischen Rechts zur juristischen Terminologie aller zivilisierten Völker" gehört.[34]

Nach der Befreiung wurde das römische Recht als Pflichtfach im ersten Studienjahr gelehrt; es hatte die Rolle eines einführenden geschichtlichen Faches. Das Lehrprogramm für dieses Lehrfach umfasste zu diesem Zeitpunkt Römisches Privatrecht, Staatsordnung und rechtliche Quellen, römisches Strafrecht und Strafverfahren. Als 1956 und 1958 die Lehrpläne der juristischen Fakultät geändert wurden, wurde die Gesamtzahl der Unterrichtsstunden um eine Stunde wöchentlich reduziert, was inhaltlich bedeutete, dass man nur das römische Privatrecht lehrte.

Nach weiteren Lehrprogrammänderungen 1960/61 wurde das römische Recht im dritten Studienjahr nur zwei Stunden pro Woche gelehrt, und zwar an der Sektion für Rechtsassessoren unter dem Namen Römisches Privatrecht. In diesem Zeitraum diente das römische Recht der Vertiefung der geschichtlichen Kenntnisse für diejenigen Studenten, die sich mit der

[34] So M. Horvat, *Rimsko pravo u našem pravnom studiju*, Zagreb, 1951, 106 (M. Horvat, *Das Römische Recht in unserem Rechtsstudium,* Zagreb, 1951, 106).

Erforschung des bürgerlichen Rechts beschäftigten. Für die Doktorstudien war es ein Wahlfach innerhalb der rechtsgeschichtlichen und zivilrechtlichen Sektion.

Erst ab 1967 wurde das Lehrfach Römisches Privatrecht im ersten Studienjahr als Pflichtfach für alle Studenten eingeführt. Während der postgraduierten Studien wird Römisches Recht an der rechtsgeschichtlichen Sektion gelehrt. Der Kampf um den Status des Lehrfaches, um seine Abschaffung oder Aufrechterhaltung, war heftig; er wurde gerade in diesem Jahr, obwohl nur vorübergehend, beendet.[35]

Die Beibehaltung eines Lehrfaches, dessen Inhalt im direkten Widerspruch zur derzeitigen Machtideologie stand, war ein großer Erfolg. In diesem Kampf hat Professor Dragomir Stojčević sehr viel zu seinem endgültigen positiven Ende beigetragen. Sein Lehrbuch Das Römische Privatrecht war eine Zeit lang das einzige Lehrbuch in Serbien.[36] Mit dem Romanisten Antom Romac aus Zagreb veröffentlichte er die Sammlung Dicta et regulae iuris, die mehr als 8000 Rechtssentenzen enthält, viel mehr als in jeder bis zu diesem Zeitpunkt veröffentlichten Sammlung.[37] Stojčević absolvierte ein Vertiefungsstudium in Italien; in seinen wissenschaftlichen Auffassungen ist der große Einfluss der neapolitanischen romanistischen Schule ersichtlich.

Die erste Professorin für römisches Rechts an der juristischen Fakultät der Belgrader Universität war Dr. Jelena Danilović. Als ausgezeichnete Expertin war sie der lateinischen Sprache sowie vieler anderer Weltsprachen mächtig und tat sehr viel für die Behauptung des Faches – bei uns, aber auch international.[38] Der Gegenstand ihrer Forschung war das Statut von Dubrovnik. Eine Zeitlang lehrte sie auch das Lehrfach Moderne Rechtssysteme. Actio popularis ist ein Werk, in dem sie, sich der

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[35] Jede Umstruktuierung von Lehrplänen begann mit der Hetze auf geschichtsbezogene Lehrfächer, denen meiner Ansicht nach zu Unrecht auch das Römische Recht zugerechnet wird.

[36] D. Stojčević, *Rimsko privatno pravo,* 1. ed. 1960, 2. ed. 1969, 3. ed. 1970, je ca. 300 Seiten. Zuvor schon erschien ein ebenfalls mehrfach aufgelegtes Lehrbuch zum römischen Obligationenrecht. Die CDRom Bibliotheca Iuris Antique [BIA, 2, ed. 2000] verzeichnet überdies diverse Aufsätze in westeuropäischen Sammelwerken.

[37] Beograd 1969, 539 Seiten. Noch weit umfassender ist: A. Romac, *Minerva: Florilegium sententiarum latinarum,* Zagreb 1988, VII und 833 Seiten; angezeigt von A. Wacke, SZ 109 (1992) 571 f.

[38] Jelena Danilović (1921-2006) absolvierte ihre Spezialisierung bei Max Kaser in Hamburg. Siehe den Nachruf von Žika Bujuklić, SZ 124 (2007) 725 ff.

komparativen Methode bedienend, von der römischen actio ausgehend, diese Institution bis in die modernsten Zeiten erforschte.[39]

Einen großen Beitrag zur Entwicklung der Romanistik bei uns leistete und leistet immer noch Prof. Dr. Obrad Stanojević. Gescheit und wissenschaftlich neugierig nutzte er seine Forschungsaufenthalte in Italien und in den USA nicht nur zur eigenen Weiterbildung, sondern auch zur Implementierung der erworbenen Kenntnisse an seiner Fakultät. So wurde schon 1970 auf seine Initiative das Forum Romanum an der juristischen Fakultät in Belgrad gegründet (ein Klub für Liebhaber der Antike, dessen erster Vorsitzende Prof. Dragomir Stojčević war). Stanojević, ein sehr fruchtbarer Autor und einer der wenigen, der auch im Ausland veröffentlichte,[40] verfasste eine Monographie über Gaius. Sein Gaius noster, Beitrag zur Geschichte der römischen Rechtswissenschaft, erschien im Jahre 1976 in Belgrad. Eine erweiterte Fassung dieses Werkes in französischer Sprache veröffentlichte er unter dem Titel Gaius noster, plaidoyer pour Gaius im Jahr 1989 in Amsterdam.[41] In dieser Monographie betont er die außerordentliche Bedeutung von Gaius, vor allem mit dem Hinweis, dass Gaius der erste römische Theoretiker ist, der sich um die Fundierung eines Rechtssystems, der sogenannten Tripartition, verdient machte. Stanojević erwähnt auch andere Klassifikationen, die bis zu heutigen Tagen dem Zahn der Zeit widerstanden. Da sich Stanojević mit besonderer Aufmerksamkeit der Erforschung von Leben und Werk des Gaius widmete, veröffentlichte er 1982 die Übersetzung der Institutionen des Gaius in serbischer Sprache.[42] Das war die einzige Gaius-Übersetzung auf dem Boden Ex-Jugoslawiens. Im Vorwort seiner Übersetzung sagt er (S. 72): „Das Schicksal hat nicht zufällig ein Buch auserwählt, um es vor Vergessenheit und Zerfall zu schützen. Das Werk von Gaius wäre nicht auf uns gekommen, wenn man es nicht als das beste Lehrbuch in jenem Volk benützt hätte, das allen Völkern auf der Welt eine Lektion auf dem Gebiete des Rechts erteilte". Das ebenfalls von ihm

[39] J. Danilović, *Popularne tuzbe od rimskog do savremenih prava* [Le azioni popolari. Studio storico e di diritto comparato], Beograd 1968, 248 Seiten. Daraus J. Danilović, *Observations sur les actiones populares,* Studi Grosso VI (Torino 1974) 13-43.

[40] Über Darlehen in Labeo 15 (1969) 311-326 und Studi Volterra II (1971) 429-444, über „Protezione dei poveri" in Acc. Costantiniana 7 (1985) 495-55 und über laesio enormis ebenda 8 (1990) 217-226.

[41] 184 Seiten (Großformat). Rezensiert von W. Litewski, SZ 108 (1991) 456 ff. Siehe auch seine Aufsätze: Gaius et les romanistes, Sodalitas, Studi Guarino V (Napoli 1984) 2507-2517 und Gaius and Pomponius, Notes on David Pugsley, RIDA 44 (1997) 333 ff.

[42] O. Stanojević, *Gaj, Institucije,* Beograd, 1982, 72 (O. Stanojević, *Gaius, Institutionen,* Beograd, 1982, 72).

1980 verfasste Lehrbuch „Das Römische Recht" bewertete man als das gelungenste Lehrbuch im Lande. Mehrmals wurde er als Gastprofessor von Universitäten in Amerika und Europa eingeladen. Mit seinem wissenschaftlichen Opus trug er bedeutend zum Ansehen des Lehrstuhls für Rechtsgeschichte bei, aber auch zum Ansehen der juristischen Fakultät. Wegen seiner pädagogischen Qualitäten bleibt er in der Erinnerung vieler Studentengenerationen.

10. An der juristischen Fakultät in Belgrad wurden Professoren auf dem Gebiet des römischen Rechts für fast alle anderen juristischen Fakultäten in Ex-Jugoslawien ausgebildet. Diese Praxis blieb bis zum jüngsten Ausbruch des Bürgerkrieges bestehen. Dank der erwähnten Professoren der Belgrader juristischen Fakultät wurden an den neugegründeten Zentren für Rechtsstudien wie Novi Sad, Niš, Kragujevac, Priština, Titograd (Podgorica) auch Lehrstühle für Romanistik eingerichtet. An allen Fakultäten (Kosovska Mitrovica ausgenommen) wird Römisches Recht als besondere rechtswissenschaftliche Disziplin mit einer beträchtlichen Stundenanzahl und ECTS-Punkten gelehrt. Das römische Recht überstand also auch die neuesten, gemäß dem Bologna-Prozess durchgeführten Reformen im Hochschulwesen.

An der juristischen Fakultät in Belgrad lehren drei Professoren Römisches Recht, und zwar: Miroslav Milošević, der sich besonders intensiv mit dem Eigentumskonzept der Agrarverhältnisse in Rom beschäftigt; Prof. Milena Polojac befasst sich mit dem Gesellschaftervertrag und mit der noxalen Haftung und Prof. Žika Bujuklić, der die Rezeption des römischen Rechts in den mittelalterlichen Stadtgemeinden und das Gesetz als Rechtsquelle im antiken Rom untersucht. Dr Vladimir Vuletić, Dr Andreja Katančević.

An der juristischen Fakultät in Kragujevac ist Emilija Stanković Professorin für Römisches Recht. Sie beschäftigt sich mit dem Preisedikt von Diokletian und mit der Rezeption des römischen Rechts, unter besonderer Berücksichtigung seines Einflusses auf das mittelalterliche Recht, aber auch auf die bedeutende serbische Rechtskodifikation, nämlich das Serbische Bürgerliche Gesetzbuch aus dem Jahre 1844 (die vierte europäische Kodifikation). Dr Srđan Vladetić widmete sich der Erforschung der fideikommissarischen Institution, nicht nur im römischen Recht, wie auch der komparatistischen Untersuchung moderner fiduziarischer Rechtsgeschäfte.

An der Juristischen Fakultät in Niš lehrt Römisches Recht Prof. Mila Jovanović. Sie beschäftigt sich insbesondere mit der Erforschung des Familienrechts, mit dem Hauptaugenmerk auf die Lage der Frauen in Rom.

In ihrem Opus findet auch die Rezeption des römischen Rechts ihren Platz, insbesondere der Vergleich der Frauenlage im römischen und im serbischen Recht (im Mittelalter und nach dem serbischen bürgerlichen Gesetzbuch). Dr. Marija Ignjatović steht die Berufung zur Dozentin bevor, sie beschäftigt sich mit dem Familienrecht, besonders im Hinblick auf die Eigentumsaspekte unter Ehegatten.

An der juristischen Fakultät in Novi Sad lehrte Römisches Recht Prof. Antun Malenica (schon im Ruhestand). Sein Verdienst ist die Übersetzung des ersten Buches der Digesta in die serbische Sprache. Heute lehren an dieser Fakultät Prof. Magdolna Sič Fejoč, die sich besonders mit dem Codex Theodosianus beschäftigte, und die Dozentin Nataša Deretić, deren Untersuchungsschwerpunkt auf dem Familienrecht und den Eheverträgen vom römischen bis zum modernen Recht liegt.

Abschließend möchten wir hervorheben, dass fast alle Professoren für Römisches Recht in Serbien mit wissenschaftlichen Beiträgen regelmäßig an dem bekanntesten Symposium auf diesem Gebiet teilnehmen: an den Sessions de la Société Internationale „Fernand De Visscher" pour l'Historie des Droits de l'Antiquité.[43]

Emilija Stankovic*

Summary

The Importance of Teaching and Researching Roman Law in Serbia

Serbian medieval law has developed, much more than other ones, on the Byzantine legal tradition. After the Turkish occupation, the legal discontinuity occurred, but at the beginning of the 19th century, at that time indirectly, Roman legal tradition was re-established (through Serbian civil code from 1844). The beginning of 19th century was the period of overwhelming development for Serbia in all fields, including the education. The Great school was founded, Lyceum, and after that the University, at

[43] 1961 organisierte M. Horvat einen Kongress der (später sogenannten) SIHDA in Split. Es blieb der einzige Kongress dieser internationalen Société in einem der kommunistisch beherrschten Länder, und er wurde nur möglich im blockfreien ehemaligen Jugoslawien. Siehe den Bericht von G. Nicosia, RIDA 9 (1962) 479 ff. = Iura 13 (1962) 214 ff. Über das Auftreten von Johannes Irmscher in Split siehe Wacke, OIR 9 (2004) 246 ff.

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which, like at any other University at the time, studies of law had the highest importance. When the research of Roman Law began, who where the first professors, and what literature was used for the preparation of exams is a very important issue, not only for that moment but also for studying law at modern times. Roman Law research continued its development even after WW2, when the social context was favourable for exclusion of those curricula from the studying programs. But fortunately, that never happened. For the long time, the Faculty of Law in Belgrade was the only one, but soon the needs of social and national development, created a need for opening more faculties. After the latest historical events in Serbia there are faculties of law in Belgrade, Kragujevac, Nis, Novi Sad and Pristina with its seat in Kosovska Mitrovica. The latest curricula of those faculties, developed according to the Law on Higher Education , which is in accordance with Bologna Declaration, include the Roman Law as a subject on each faculty. Professors and teaching assistants engaged as lecturers of this subject are continuing the rich and fruitful tradition of Roman Law research in Serbia.

Key words: Roman law, reception, Serbian Civil Code of 1844, roman law experts, Serbian literature of roman law

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SOME REMARKS ON A VERY FIRST FORM OF PROTECTION OF *FIDUCIA*

Abstract

By concluding a fiducia, or by conditional transfer of ownership, the ancient Romans achieved different purposes (preservation of things, money loans etc.) and bypassing the legal formalism at the time. Initially, like many other institutes, fiducia was not protected by lawsuits, but the transferee (fiduciant) he achieved his protection through the institute of usureceptio fuduciae, as a special type of usucapio that Gaius analysed in his Institutes. This paper focuses on the reasons why the transferor had a right on protection by usureceptio fiduciae, possibilities of this protection in the cases of fiduciary agreement concluded with a friend and in the cases where this agreement is concluded with a creditor. Also, this paper is an attempt to answer the question: does the transferor commit the theft with taking over the transferred item?

Key words: *fiducia, usucapio, usureceptio fiduciae, sciens rem alienam usucapit, furtum fiduciae.*

1. INTRODUCTION

Fiduciary transfer is nothing more than a process where one person - transferor, through the *mancipatio*, or *in iure cessio*, transfers the ownership over thing to the other - transferee. This transfer is limited with informal agreement (*pactum fiduciae*) which imposes an obligation for transferee to return the thing after expiration of some time period or when certain conditions are met or to perform some other arranged actions. Firstly *fiducia* was used for safe-keeping of things and it's always been concluded with a friend (*fiducia cum amico contracta*), but latter it has been used to secure creditor's assets and this form of *fiducia* was concluded with creditor (*fiducia cum creditore contracta*). It's also been used in some other cases, such as:

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manumissio, *emancipatio*, *adoptio*, *coemptio*, *mancipatio familiae*, *donatio mortis causa, noxae deditio,* and in the cases of representation in legal procedures[1].

For a long time *fudicia* hasn't been the subject of legal protection. *Actio fiduciae* has been established as an outcome of the fact that, in the conditions of development of Roman economy, there was increased number of cases in which the *fide* has been violated, probably in the first half of 2nd *centurie* B.C[2].

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[1] Gai Inst. II, 60; D. 17, 1,27,1; Gai Inst. I, 132, 134, 114, 115, 115a; Gai Inst. II, 102; D. 39, 6, 42 pr.; Coll. 2, 3, 1; D. 4, 7, 4, 3. See also S. Vladetić, *Zastupanje u postupku i fiducija u starom Rimu,* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Knj. 6, Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2015, 329-331. S. Vladetić, *Prvobitni oblik poklona za slučaj smrti = Donatio mortis causa,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. B. Vlašković), Knj. 1, Kragujevac: Pravni fakultet, Institut za pravne i društvene nauke, 2013, 33-38.Throught the interpretation of the Gaius' Institutiones' text (II, 60) some authors (H. Göppert, *Zur fiducia cum amico contracta,* Zeitschrift der Savigny – Stiftung für Rechtsgeschichte 13, 1892, 325; G. Grosso, *Sulla fiducia a scopo di "manumissio"*, Rivista italiana per le scienze giuridiche (N. S.) 4, 1929, 259; C. Longo, *Corso di diritto romano: La fiducia,* Milano, 1933, 151) considers that those other cases of applying fiducia have been conducted in the type of fiducia cum amico, or that actually there were only two types of fiducia - fiducia cum amico and fiducia cum creditore. Other authors are sharing the opinion that those cases of using the fiducia couldn't be classified as fiducia cum amico, or that there were several types of fiducia. (W. Erbe, *Die Fiduzia im römischen Recht,* Weimar, 1940, 64 and 65; B. Noordraven, *Die fiduzia im römischen Recht,* Amsterdam, 1999, 45 and 48).

[2] H. F. Jolowicz, *Historical introduction to the study of roman law,* Cambridge, 1954, 299; B. Noordraven, *Die fiduzia im römischen Recht*, 8 and B. Noordraven, *Von der "fiducia" zur Treuhandschaft,* Österreichische Notariatszeitung, 127, 1995, 256; C. Vladetić, *Fiducia cum creditore,* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Knj. 4, Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2013, 18; Compare M. Kaser, *Eigentum und Besitz im älteren römischen Recht*, Köln – Graz, 1956, 154 and M. Kaser, *Das römische Privatrecht*, I: Erster Abschnitt: Das altrömische, das vorklassische und das klassische Recht, München, 1971, 461; A. Watson, *The origins of fiducia,* Zeitschrift der Savigny – Stiftung für Rechtsgeschichte 79, 1962, 329 and A. Watson, *The Law of Obligations in the Later Roman Republic*, Oxford, 1965, 172. Also, probably it has been firstly conceived in factum and it also has a clause „ut inter bonos bene agier oportet et sine fraudatione", and later, at the times of Mucius Scaevola, formula in ius, with clause „ex fide bona", overwhelmed the formula in factum. Gai Inst., IV, 62; Cic., De off., 3, 17, 70; Cic., Top. 17, 66; Cic., Ad fam., 7, 12, 2; C. Longo, *op. cit.*, 33, 36-37; H. F. Jolowicz, *op. cit.,* 299 (note 7), 301. Compare O. Lenel, *Das Edictum Perpetuum,* Leipzig, 1927, 292; O. Karlowa, *Römische Rechtsgeschichte II,* Leipzig, 1901, 564; B. Noordraven, *op. cit.,* 324; G. Grosso, *Fiducia,* Enciclopedia del diritto XVII, 1968, 387; W. Erbe, *op. cit.,* 91, 93, 129; A. Burdese, *Fiducia,* Novissimo Digesto Italiano, 7, Torino, 1961, 296; A. Watson, *The Law of Obligations…*, 177. According to Lenel (O. Lenel, *Das Edictum Perpetuum*, 293), fiducia has

Until than the only available mean of protection for the transferor was *usureceptio fiduciae*.

Origin of the term *usureceptio* comes from *usu recipere* which means - to acquire ownership over certain property after the expiring of determined period of time. Because of the fact that for this sort of getting ownership rights over some property there were no demands for the *iusta causa* and *bona fides, usureceptio* as well as *usucapio pro herede* could be classified into the special sorts of usucapio. *Usureceptio fiduciae*, which is going to be analysed in this paper, presents reacquiring of the item (object, thing, assets) transferred through *fiducia*[3].

Sources of information on this institute are very limited. Some data on *usureceptio fiduciae* could be found in Gaius' Institutiones (II, 59 and 60, and III, 201). Moreover, the literature of Roman law criticises this source stating that Gaius wrote *ex professo* about *usureceptio*. These critics go even to the level of claims that he was not able to explain all issues regarding this institute[4]. Therefore, there is misunderstandings in literature about general characteristics of *usureceptio fiduciae*, the moment from which it could be used and also about the theft of transferred object.

2. GENERAL CHARACTERISTICS

(Gai Inst. II, 59): Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit. Nam qui rem alicui fiduciae causa mancipio deveri vel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, etiem soli si sit. Quae species usucapionis dicitur usureceptio, quia id, quod aliquando habuimus, recipimus per usucapionem.

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been protected in the Legis Actio Procedure with legis actio fiduciae. However, that led to demand for introducing new words and accordingly to the adoption of the new law (About that see P. Oertman, *Die fiduzia im römischen Privatecht,* Berlin, 1890, 93 and 221) that couldn't be found in sources (Compare B. Noordraven, *op. cit.,* 292. See also S. Vladetić, *Nastanak Actio Fiduciae.* Pravni život, 11/2008, 617).

[3] Besides it, there are two other kinds of usureceptio –usureceptio servitutis, reacquiring of servitudes, (P. S. 1, 17, 2; D. 41, 3, 2) and usureceptio ex prediatura, reacquiring of the the article that has been, due to unpaid debt, sold on public sale (Gai Inst. II, 61). See also G. Franciosi, *Usureceptio,* Novissime Digesto Italiano 20, Torino, 1975, 390; S. Vladetić, *Usureceptio fiduciae,* Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke – Janus (Beograd), 2008, 33-34.

[4] W. Erbe, *op. cit.,* 65-66; F. B. J. Wubbe, *Usureceptio und relatives Eigentum*, Tijdschrift voor rechtsgeschiedenis 28, 1960, 29.

In this text Gaius presents some of general characteristics of *usureceptio fiduciae*. There are no doubts about second part of this text. In this part Gaius explains what is the very essence of *usureceptio* or, to be more precise, he presents the fact that if transferor gets the object (even by using the force) that he has given into *fuducia*, he shall be in position to establish the ownership over it by *usucapio* after the expiration of period of one year (without *bona fides* and *iusta causa*), notwithstanding whether the object in matter is moveable or immovable thing. Furthermore, he elaborates that this form of usucapio is called *usureceptio* because with it we are regaining the item which was in our property before.

Also his formulation *si eandem ipse possederit* (regardless the way of getting the item) tells us that this is a very old institute which has been, accordingly to the vast majority of authors, established before the adoption of Law of Twelwe Tables (accordingly the same stays for *fiducia* itself)[5].

However, the first sentence or, more precisely, first part of the first sentence - „*sciens rem alienam usucapit*" - has made more than a few doubts and discussion in academic circles and it's also very important because of the fact that the determination of its meaning could define the moment from which transferor could use *usureceptio*. There are few different theories about meaning of this expression.

According to the first, and most commonly used theory, the term "*sciens rem alienam usucapit*" means that the *transferor acquires* the thing, although he knows that it still belongs to the other person - transferee. When this was the case? In accordance with the rule that contract has to be terminated in the same form that it has been created - *prout quidque contractum, ita et solvi debet,* item which has been passed to transferee by mancipatio or *in iure cessio* has to be returned to transferor in the same form. If the transferee in the process of returning the object uses *traditio* instead of *mancipatio* or in *iure cessio*, transferor shall not become the owner but only possessor. Transferor knows that the object is still formally in the ownership of transferee. However, he has a possibility to reacquire the ownership in the shortened period of

[5] O. Karlowa, *op. cit.,* 569; N. Bellocci, *La struttura della fiducia II: Riflessioni intorno alla forma del negozio dall'epoca arcaica all'epoca classica del diritto romano,* Napoli, 1983, 236 and 237; A. Manigk, *Fiducia,* Pauly-Wissowa Realencyklopadia der classischen Altertumswissenschaft. VI, 2, Stuttgart, 1909, 2290; A. Watson, *The origins of fiducia*, 329 – 334 and A. Watson, *The Law of Obligations…,* 172 –179; Th. Mayer – Maly, *Studien zur Frügeschichte der usucapio I,* Zeitschrift der Savigny – Stiftung für Rechtsgeschichte 77, 1960, 37; B. Noordraven, *op. cit.,* 188; G. Franciosi, *op. cit.,* 388-399. See also W. Erbe, *op. cit.,* 65; M. Kaser, *Das römische Privatrecht, I,* München, 1971, 127; F. B. J. Wubbe, *op. cit.,* 32 and 34.

usucapio (*usureceptio fiduciae*), despite of the fact that he is aware that the object belongs to the other person. Therefore, according to this theory, *usureceptio fiduciae* has been used only in cases when transferee returns in informal way the item that has been transferred to him formally[6].

According to the Wubbe's theory, *sciens rem alienam usucapit* means that transferee does not want to return the object or that *usureceptio fiduciae* has been granted to transferor in the cases in which transferee fails to perform his obligation of returning the item[7].

Apostolova – Maršavelski shares the opinion presented by the mostly accepted theory, but only for the period of classical law and she makes a difference whether the item in matter is movable or immovable. With regard to movable things, transferor has right to use regular *usucapio*. However, if thing is immovable, he is entitled to *usureceptio fiduciae*. According to Apostolova – Maršavelski, Gaius describes *usureceptio* of classical law which has been corrective institute of *fuducia cum creditore* or a substitute for evaded form (under the condition that the thing in matter is immovable)[8]. In the previous period, if the transferee wouldn't return the thing (even in those cases where, for example, the debt has been paid), transferor has been entitled to seize it and acquire through usureceptio fiduciae, with no difference if the item is movable or immovable thing. In this way, transferor re-establishes disturbed legal balance and brings the situation back in order[9].

We would have to be aware that Gaius explains *usureceptio fiduciae* in the parts of his text where he writes about usucapio (Gai Inst. II, 41-61)[10]. At the beginning Gaius says: "But if I neither sell an item to you nor surrender it in court, but only deliver it to you, the item becomes yours by bonitarian law, but still remains mine by *quiritarian* law, until you, through *possession*, acquire

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[6] R. Jacquelin, *De la fuducia,* Paris, 1891, 124-126; P. Oertman, *op. cit.,* 253; A. Manigk, *op. cit.,* 2306; W. Erbe, *op. cit.,* 66; M. Kaser, RPR I, 144, *Eigentum und Besitz im älteren römischen Recht,* 296 and Studien zum römischen Pfandrecht II, Actio pigneraticia und actio fiduciae, TR 47, 1979, 331; D. 46, 3, 80.

[7] F. B. J. Wubbe, *op. cit.,* 15-18. This theory was accepted by A. Watson, *The Law of Property in the Later Roman Republic,* Oxford, 1968, 43 and B. Noordraven, *Die fiduzia im römischen Recht,* 187.

[8] M. Apostolova – Maršavelski, O *Gajevu osvrtu na institut usureceptio fiduciae*, Zbornik Pravnog fakulteta u Zagrebu, 52 (5), 2002, 928-931 (which has been the very first article in our region dedicated to detailed analyses of usureceptio fiduciae, and at the same time to institute of fiducia, because usureceptio fiduciae has been the very first form of protection of fiducia).

[9] *Ibid,* 920.

[10] F. B. J. Wubbe, *op. cit.,* 13.

it by *usucapio*. As soon as usucapio is completed, the item becomes absolutely yours". As we could see there is no difference between cases in which transferee returns object given in *fuducia*, and cases where someone uses *traditio* for transferring *res mancipi*. In both cases parties knew that, in accordance to civil law, article still belongs to the transferor and they have agreed that possession should be transferred to transferee and that it would be transformed into ownership after the expiration of period proscribed for *usucapio*. So, when transferee informally returns item that has been transferred to him formally, transferor shall use regular form of *usucapio* instead of *usureceptio fiduciae*.[11] On the other hand, it seems pretty much illogical that *usurecptio fiduciae* has been established only because transferee didn't return the thing in prescribed form. It is more logical to assume that most often situation was that economically superior transferee wouldn't want to return the item exclusively from lucrative reasons even in the cases in which transferor has paid his debt or fulfilled the terms arranged in fiduciary agreement. For transferor it is much better when the object is returned to him even in informal way (because it is in his possession and he has the opportunity to regain it after the certain time period expires -through the regular *usucapio*), comparing to the situation when transferee didn't return the item. Therefore, the Wubbe's theory which stipulates that the expression sciens rem alienam usucapit represents the awareness of transferor that transferee doesn't want to return the item (but not awareness that he acquires something that already belongs to somebody else), seems mostly acceptable.[12] From the moment when transferor becomes aware that transferee doesn't want to return the item to him, he shall be entitled to usureceptio.

There is one more reason that could lead to conclusion that „*sciens rem alienam usucapit*" means the awareness that transferee doesn't want to fulfill his obligation of returning the object. According to some authors who claims that this expression means the awareness of acquiring item that belongs to other person, *usureceptio* should be used, same as regular *usucapio*, in the cases in which *traditio* has been used for the *res mancipi* transfer instead of *mancipatio* or in *iure cessio*. These claims do not seem logic. Why there are two institutes for the same purpose? On the other hand, this could mean that the time of establishing *usureceptio fiduciae* was the same as the time when the first informal ways of transferring *res mancipi* has appeared, because according to their words it has a purpose to transform possession into the

[11] F. B. J. Wubbe, *op. cit.*, 15-16; B. Noordraven, *Die fiduzia im römischen Recht*, 187
[12] F. B. J. Wubbe, *op. cit.*, 18.

ownership after the expiration of one year and that is probably the second half of the period of Republic. If we accept, as correct, this timeline of events, than we would have to conclude that *fiducia* hasn't been protected for more than three centuries or simply to conclude that *fiducia* itself has generated in the second half of the Republic period, because first type of it's protection has been *usureceptio fiduciae*. However, we witnessed that all of the authors place *fiducia* and *usureceptio fiduciae* back in time, most further to the period when the Law of Twelve Tables has been presented (this is the opinion even of those authors who stand on the position that previously mentioned expression means the awareness that someone is acquiring item that belongs to someone else, which presents certain contradiction).

At the very end, main purpose of concluding *fiducia* (that arises from fiduciary agreement) has been contradictory to such explanations of Gaius' formulation. Transferor is not concluding the *fiducia* with the intention to transfer ownership to transferee and make him an owner. He could do that without *fiducia*. He is entering into this arrangement and transfers his ownership, as the Isidorus explains in his *"Origines"* - " with the purpose of getting money loan from transferee"[13] (*fiducia cum creditore*), and then item is used as guarantee that he shall pay his debt, and it has to be transferred to him again after he fulfils his obligation or for the reasons of safe-keeping when he is ill or absent, but after he recovers or comes back he expects that the object is to be returned to him *(fiducia cum amico). Usureceptio fiduciae* was established for the cases where the confidence (fides- from this word the term *fuducia* originates)[14] has been infringed by transferee and not by bypassing prescribed form for ownership transfer. If transferee does not fulfil his obligation of returning the object which he took upon fiduciary agreement, transferor may claim the protection in form of *usureceptio fiduciae*.

3. IMPLEMENTATION OF USURECEPTIO AT FIDUCIA CUM AMICO AND FIDUCIA CUM CREDITORE

(Gai Inst. II, 60): Sed cum fiducia contrahitur aut cum creditore pignoris iure, aut cum amico, quo tutius nostrae res apud eum essent; et si quidem cum amico contracta sit fiducia, sane omni modo conpetit usureceptio; si vero cum creditore, soluta quidem pecunia omni modo conpetit, nondum

[13] „Fiducia est, cum res aliqua sumendae pecuniae gratie vel mancipatur vel in iure ceditur" (Isidorus, Origines, V, 25, 23).

[14] Polybii Historiae, XX, 9 (Polibije, *Istorije I i II*, prevod: M. Ricl, Novi Sad, 1988); M. Horvat, *Bona fides u razvoju rimskog obveznog prava,* Zagreb, 1939, 22-25.

vero soluta ita demum competit, si neque conduxeriteam rem a creditore debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usus capio conpetit.

In this text Gaius says that in the cases of *fiducia cum amico contracta* there is always possibility of *usureceptio fiduciae*. Where the *fiducia cum creditore* has been contracted, the *usureceptio fiduciae* is always possible if the debt has been paid. But if the debt is not paid, transferor is entitled to *usureceptio fiduciae* only if he didn't rent the thing or the thing wasn't given to him in *precarium* by transferee. This *usucapio* Gaius called lucrative.

Firstly, from this text comes out that in the both types of *fiducia* item could be given to *precarium* or rent. *Fiducia cum amico* has been contracted because of the reasons such as going to war, going on the long lasting travel, but also because of the fear from robbery or political opponents. In these cases the property has been transferred to the persons with higher social and political status, to those with better sources of protection, but actually it would stay to transferor in *precarium* or rent[15]. Where *fiducia cum creditore* has been contracted the thing remained into *precarium* or rent to transferor, because that was in mutual interest. Transferor keeps the items (cattle, slaves or land) that are necessary for his existence and also it makes it easier to him to complete his duties to transferee.[16]

In *fiducia cum amico* as well as in *fiducia cum creditore* when the debt is paid of, there are no doubts that *usureceptio fiduciae* is allowed, even if the transferor holds the item in *precarium* or rent. It is only demanded that transferor, who still holds the item due to precarium or rent, sends a request to the transferee for returning of the object in matter, because the conditions from fiduciary agreement are met (for example, he has return from war) or to pay his debt. These requirements are set because transferor who gets the item in *precarium* or rent does not hold it for himself (*pro se*), but for other person (*pro alio*), and for possession the will of a person to hold the thing for himself

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[15] V. Arangio – Ruiz, *Istituzioni di diritto romano,* Napoli, 1921, 190; B. Noordraven, *op. cit.,* 19.

[16] E. Huschke, *Ueber die usureceptio fiduciae,* Zeitschrift für geschichtliche Rechtswissenschaft 14, 1848, 262; P. Oertman, *op. cit.,* 254; O Karlowa, *op. cit.,* 569; A. Manigk, *op. cit.,* 2305; W. Erbe, *op. cit.,* 70 and 75; B. Noordraven, *Die fiduzia im römischen Recht,* 197; M. Kaser, *RPR I,* 460. Against the possibility that item could be left to transferor is F. B. J. Wubbe, *op. cit.,* 18, 23 and 33, because, according to his words, transferee is safe only until the item is left to him and he could give it, due to precarium or rent, to any other pearson, except transferor. G. Franciosi, *op. cit.,* 389 and that opinion is also shared by M. Apostolova – Maršavelski, *op. cit.,* 924-926 who considers that precarium and rent are the creations of classical law and that before that period item has always been left to transferee.

has to be publicly expressed (in the form of mentioned request at the *fiducia cum amico*, or in the form of paying the debt in the cases of *fiducia cum creditore*)[17].

Part of Gaius' text that causes most doubts (II, 60) is related to the case of *fiducia cum creditore* when the debt is not paid. For it Gaius claims that there is a possibility of *usureceptio fiduciae* under the condition that the transferee holds the item, and that sort of *usureceptio* he calls lucrative. Different opinions that exist in academic circles are even more supported by the Gaius' previous text about *usucapio pro herede*. There Gaius estimates this specific sort of *usucapio* not only unfair (*inproba*), but also lucrative (*lucrative*), because someone consciously is getting profit from the thing that belongs to someone else, and he says that such *usucapio pro herede* was possible until the time of Hadrian when the Senat enacted the decision (*senatus consultum*) that *usucapio pro herede* is not possible if there is any of mandatory heirs[18]. So Gaius explains why the lucrative and unfair *usucapio pro herede* is not allowed, but doesn't explain why the lucrative *usureceptio* is allowed in cases of *fiducia cum creditore* when the debt is not paid and item is in the possession of transferee.

Erbe, Wubbe and Watson[19] have an opinion, that Gaius' silence about this issue shows that he hasn't been able to define reasons, and according to Wubbe and Erbe, the final part of Gaius' text, (II, 60) – „*quo casu lucrativa usus capio competit*" (this sort of usucapio is called lucrativ) simply "limps" compared to previous parts of the text. Therefore, Erbe considered that this part was added by some of glossators and that Gaius actually wanted to say that *precarium* and rent prevent the transferor from using *usureceptio*. Wubbe had an opinion that this doesn't change the fact that *usureceptio* was allowed in a case when the debt is not paid and undertaken because of self-interests[20]. Wubbe uses this case of application of *usureceptio fiduciae* as an confirmation for the theory of existence of divided ownership, where the object belongs to transferee, but to the certain extent, it still belongs to transferor[21].

Because of Gaius' claim that *usureceptio fiduciae* is always allowed in the case of *fiducia cum amico* (the first form of fiducia), Noordraven thinks that

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[17] D. 43, 26, 11; F. B. J. Wubbe, *op. cit.,* 22-23; B. Noordraven, *Die fiduzia im römischen Recht,* 195-198; M. Apostolova – Maršavelski, *op. cit.,* 923.

[18] Gai Inst. II, 52-58

[19] W. Erbe, *op. cit.,* 65, 66 and 75; F. B. J. Wubbe, *op. cit.,* 29 (note 47); A. Watson, *The Law of Property…*, 46.

[20] W. Erbe, *op. cit.,* 65, 66 and 75; F. B. J. Wubbe, *op. cit.,* 29-30 (note 49).

[21] This theory has been created by M. Kaser, *Eigentum und Besitz im älteren römischen Recht,* 8 and RPR I, 126, and it was also developed by F. B. J. Wubbe, *op. cit.,* 34-36.

mentioned rule has to been expended on *fiducia cum creditore*, included the cases where the debt is not paid and the item is not holded by transferor in *precarium* or rent[22].

Apostolova – Maršavelski thinks that Gaius explained everything on this matter at *usucapio pro herede* and that *usureceptio fiduciae* was not allowed in classical law. She pointed out that Gaius in his text on *usureceptio fiduciae* mentiones its older version, which was possible even if the transferor didn't paid his debt, as well as classical version which was possible only if the transferor paid his debt[23].

This Gaius' text illustrates all of complexity of issues related to the *usureceptio fiduciae*. Firstly, it is hard to accept that *usureceptio* is possible when someone doesn't pay his debt. Even if it wasn't classified as a lucrative by Gaius, it would be certainly defined as such by all academics.

In the case of *fiducia cum amico*, usureceptio is allowed notwithstanding whether the object is held by transferor or transferee *(„sane omni modo conpetit usureceptio")*, and it's possible that this rule has been expended on *fiducia cum creditore* too[24]. In the case of *fiducia cum creditore* the thing has been (almost) always left to transferor, so the *usureceptio fiduciae* in the case of *fiducia cum creditore* (when the debt is not paid and the item has been left to transferee) was very rare in the practice.[25]

Why would the transferees, who had started professionally to work as money loaners in the period of commercialization of Roman economy,[26] put themselves to unnecessary waste of time and money needed for maintenance expenses for the objects transferred to them due to financial debt (for example: feeding and healthcare for cattle)[27]? It was much easier for them to left the object to transferor. On the other hand, it was comfortable solution for transferor itself, because he could use the object in order to take care of his family and collect the funds for paying his debts (for example, production and sale of dairy products). Erbe says that giving the objects (items) in

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[22] B. Noordraven, *Die fiduzia im römischen Recht*, 196, 199.

[23] M. Apostolova – Maršavelski, *op. cit.*, 922-923.

[24] B. Noordraven, *Die fiduzia im römischen* Recht, 199.

[25] E. Huschke, *op. cit.*, 262; P. Oertman, *op. cit.*, 254; W. Erbe, *op. cit.*, 70; G. Diósdi, *Ownership in Ancient and preclassical Roman law,* Budapest, 1970, 118; B. Noordraven, *Die fiduzia im römischen Recht*, 197 (note 140) and 199.

[26] B. Noordraven, *Von der "fiducia" zur Treuhandschaft*, 256 and 259.

[27] G. Diósdi, *op. cit.*, 118; S. Vladetić, *Fiducia cum creditore*, u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Knj. 4. Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2013, 19.

precarium or rent has been widely accepted very fast and *precarium* was something that has been assumed[28].

However, it could happen that transferor leaves the item to the transferee, if it wasn't necessary for his existence (movable thing)[29]. According to Oertman, there were some exceptional cases of *usureceptio fiduciae* before the debt has been paid. For example, when the transferee didn't take the item, nor did he leave it to transferor in which case he showed no interests in respect of the item that should serve for securing the claim[30]. It is not completely clear in which situation this could happen (maybe when the item was left "on the street"). However, we could imagine that transferee kept the item for himself, but he carelessly looked after it and it started to decay in front of the eyes of transferor (we should have in mind that the item always had greater value than transferor's debt) who had no legal means to prevent it. Due to lack of legal sources, it should be assumeed that in these extremely rare (almost theoretical) situations *usreceptio fiduciae* was allowed, even if the debt hasn't been paid.

4. REPOSSESION OF THE ITEM FROM TRANSFEREE

Gai Inst. III, 201: Rursus ex diverso interdum alienas res occupare et usucapere concessum est, nec creditur furtum fieri, veluti res hereditarias, quarum heres non est nactus possessionem, nisi neccessarius heres extet; nam necessario herede extante placuit nihil pro herede usucapi posse. Item debitor rem, quam fiduciae causa creditori mancipaverit aut in iure cesserit, secundum ea quae in superiore commentario rettulimus, sine furto possidere et usucapere potest.

Again, on the other hand, it is sometimes permitted to seize and acquire by *usucapio* property which belongs to another; and in such cases theft is not held to have been committed; as for instance, where property belonging to an estate of which the heir has not taken possession is seized, unless there is a necessary heir; for when there is a necessary heir, it has been decided that *usucapio* cannot take place in favor of a party acting as the heir. Likewise, in accordance with what we have stated in a former Commentary, a debtor who has transferred property to his creditor by mancipation or surrendered

[28] W. Erbe, *op. cit.,* 75 and 108 recalling D. 13, 7, 22, 3 that probably has been interpolated and originally dealt with fiducia (see also C. Longo, *op. cit.,*157; B. Noordraven, *op. cit.,* 274-275).
[29] B. Noordraven, *Die fiduzia im römischen Recht*, 197 (note 140) and 199. D. 13, 7, 22pr.
[30] P. Oertman, *op. cit.,* 254.

it in court on account of a trust, can take possession of the property, and acquire it by *usucapio*, without being guilty of theft.

Despite the fact that in literature we could find different opinions on this text[31], majority of authors share the common one, that Gaius says that transferor who uses the *usureceptio fiduciae* does not commits a theft[32].

First of all, the text presented in III, 201 is a part of Gaius' presentation on theft (III, 182-209), in which he analyses different sorts of theft, theft of free persons (e.g. gladiators), theft in the cases of deposit, actions, penalties, etc. So, the text III, 201 is a part of a larger complex and it can be analysed only in correlation with previous paragraphs dedicated to theft[33] as well as with some parts of individual texts.

If we took a point of view that seizing the object from transferee presents the theft, than we could conclude that *usureceptio fiduciae* hasn't been used, because it has a purpose only if we don't consider seizing of item as a theft. It would mean that transferee, who breaks confidence and doesn't return the item to the transferor after the fulfilment of condition or after paying the debt, has not been sanctioned at all until the establishment of *actio fiduciae***.** That is illogical. Why would Gaius than even mention *usureceptio fiduciae*?

At first, it looks logical to consider that transferor makes a theft when he seizes the item that belongs to transferee, because Gaius says in previous paragraph of *Instutiones* that debtor from *pingus* commits a theft if he secretly seizes his own item which he has given to creditor on behalf of the debt[34]. However, first sentence of paragraph 201 starts with the words *rursus ex diverso* – opposite of that, or to be more precise opposite to the statement given in paragraph 200 in which Gaius writes that seizing of own item could be considered as a theft[35]. So, in the first sentence of paragraph 201 Gaius wanted to emphasize that opposite to statements given in paragraph 200 it is sometimes allowed to seize someone's belonging and establish ownership by *usucapio*, and as example for this he gives the *usucapio pro herede*. After that he starts the second sentence of paragraph 201 with the words "*item debitor*..." – "the same as debtor..." It means that (as it is a case with *usucapio pro herede*)

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[31] P. Oertman, *op. cit.,* 250; W. Erbe, *op. cit.*, 73.

[32] E. Huschke, *op. cit.,* 251; R. Jacquelin, *op. cit.,* 127; H. Dernburg, *Das Pfandrecht nach den Grundsätzen des heutigen römischen Recht I,* Leipzig, 1860, 25; O. Karlowa, *op. cit.,* 570 A. Manigk, *op. cit.,* 2305; G. Grosso, *op. cit.,* 266; A. Watson, *The law of property…*, 43; F. B. J. Wubbe, *op. cit.*, 28; G. Diósdi, *op. cit.*, 118; B. Noordraven, *Die fiduzia im römischen Recht,* 189, 194 and 197.

[33] F. B. J. Wubbe, *op. cit.,* 19. See also: B. Noordraven, *Die fiduzia im römischen Recht*, 190.

[34] Same Erbe, W., *op. cit.* 73.

[35] B. Noordraven, *Die fiduzia im römischen Recht,* 190-191.

fiduciary debtor could seize the object and that action wouldn't be considered as a theft and also he could acquired ownership by *usucapio* (*usureceptio fiduciae*). At the end of text III paragraph 201 Gaius said: "*secundum ea quae in superiore commentario rettulimus*"- "accordingly to the mentioned in previous book". With these words Gaius recalls the paragraphs 59 and 60 of the Second book in which he writes that *usureceptio* is always allowed (*omni modo*) in the cases of *fiducia cum amico* as well as in the cases of *fiducia cum creditore*, except in the cases when the debt is not paid and the transferor holds the item due to *precarium* or rent[36]. Accordingly, where *fiducia cum amico* or *fiducia cum creditore* has been concluded and transferor seizes the item from the transferee in order to reacquire ownership by *usucapio* in the period of one year, it shall not be considered as a theft.

Considering that this is the main condition for applying the *usureceptio fiduciae,* it stopped to apply since this condition has been eliminated. The time when it happened could be determinated in Ulpian's text D. 13,7,22,pr which is considered to be interpolated[37]. The other part of Ulpian's text deals with the case in which the transferor seizes the item that has been left to transferee who is entitled to bring *actio furti* or *condictio furtiva* (without the obligation to calculate it into the debt of transferor)[38]. Permission for using of these two

[36] F. B. J. Wubbe, *op. cit.,* 19. See also: O. Stanojević, *Gaj: Institucije,* Beograd, 2009, 273 (zabeleška 71).

[37] Si [pignore subrepto] <fiducia subrepta> furti egerit creditor, totum, quidquid percepit debito eum imputare Papinianus confitetur, et est verum, etiamsi culpa creditoris furtum factum sit. multo magis hoc erit dicendum in eo, quod ex condictione consecutus est. sed quod ipse debitor furti actione praestitit creditori vel condictione, an debito sit imputandum videamus: et quidem non oprtere id ei restitui, quod ipse ex furti actione praestitit, peraeque relatum est et traditum, et ita Papinianus libro nono quaestionum ait. Lenel was the first one who pointed out that this text has been interpolated (O. Lenel, *Das Edictum Perpetuum,* 291 (note 2 and 3) and O. Lenel, *Palingenesia Iuris Civilis I (1023-1028)* and *Palingenesia Iuris Civilis II (579-619),* Neudruck Graz, 1960) and he based his opinion on the fact that Ulpian analysed the pignus on separate places at the commentary of edict (28. ad Edictum i 30. ad Edictum). Same A. Manigk, *op. cit.,* 2306; P. Oertman, *op. cit.,* 252; W. Erbe, *op. cit.,* 54; C. Longo, *op. cit.,* 78; H. Ankum, *Furtum pignoris und furtum fiduciae im klassischen römischen Recht I,* RIDA 26, 1979, 150 and Furtum pignoris und furtum fiduciae im klassischen römischen Recht II, RIDA 27, 1980, 123; F. B. J. Wubbe, *op. cit.,* 24; A. Watson, *The law of property…,* 42 (note 2); M. Kaser, *SRP II,* 324 (note 254); B. Noordraven, *Die fiduzia im römischen Recht,* 18; M. Apostolova – Maršavelski, *op. cit.,* 924.

[38] P. Oertman, *op. cit.,* 252; W. Erbe, *op. cit.,* 73; C. Longo, *op. cit.,* 122; F. B. J. Wubbe, *op. cit.,* 29 (note 46); S. Vladetić, *Fiducia cum creditore,* 18. That here we have the case of embezzlement instead of theft claims A. Manigk, *op. cit.,* 2306; A. Watson, *The law of property…,* 42 (note 2); H. Ankum, *Furtum pignoris und furtum fiduciae im klassischen*

means points out that basic condition for using *usureceptio fiduciae* was abolished in the time of Ulpian.

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römischen Recht II, RIDA 27, 1980, 131 (Compare Furtum pignoris und furtum fiduciae im klassischen römischen Recht I, RIDA 26, 1979, 150); B. Noordraven, *Die fiduzia im römischen Recht,* 210.

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II Property and Inheritance Law

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THE CONCEPT OF CONDOMINIUM IN THE PRELIMINARY DRAFT OF THE CIVIL CODE OF THE REPUBLIC OF SERBIA

Abstract

The author makes an observation that manner in which condominium is regulated in the law and its concept are very important because millions of people all over the world as well in Serbia live no longer in individual houses but in flats within multi-storey buildings. Subject of author's analysis in the paper is how is the issue of condominium regulated in the Preliminary Draft of Serbian Civil Code. First part of the paper deals with considerations of alternative solutions for definition of condominium to those proposed by the Preliminary Draft. Second part of the paper is dedicated to the concept of condominium adopted in the Preliminary Draft, while in the third part the author analyses novelties in regulations pertaining to the subject of condominium. Concluding part of the paper sums results of the analysis and presents evaluation of solutions brought by the Preliminary Draft and proposals for its corrections.

Key words: *property law, property, condominium, Serbian Civil Code.*

1. INTRODUCTION

Although we may say that each institute of the property law is relevant and indispensable, this statement is specifically applicable in the case of condominium since we can no longer imagine life without condominium in big cities and gradually even in smaller place. Millions of people all over the world live no longer in individual houses but in flats in multi-storey condominiums. Due to intensive growth of population in cities[1], as well due to lack of construction space and its high prices[2], construction of

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[1] G. Flattet, *Le retablisement de la propriete par etages dans la legislation Suisse,* Annales de la Faculte de droit d´Istanbul, No 23-24-25, T. XVI, Istanbul, 1966, 113; J. Limpens, *Copropriete par appartements et propriete horizontale en droit Belge,* Rapports Belges au VIII-e Congres international de droit compare, Pescara, 1970, 171-172.

[2] A. Meier-Hayoz, *Schweizerisches privatrecht V/I - Sachenrecht,* Basel-Stutgart, 1977, 87-88.

condominiums is spreading during last several decades. From an institute which was only "running harmony of the classic system"[3], it slowly became "formula of the present"[4]. Expansion of multi-storey buildings was also followed by corresponding regulations all over world.

Although practice of condominiums construction was evolving in our region in almost same pace as in other countries[5], situation with regulation(s) was specific. Construction of new condominiums was banned[6] before the IIWW as well during short period of time immediately after it. Some legal writers even referred to condominiums as „...perversion and exotic plant for which there is no fruitful soil here„[7]. Construction of this type of property was allowed just in 1959 and matter regarding it regulated by the Law on Ownership of Building Parts[8] which was initially enforced as federal law and latter, i.e. since 1971 as republic regulation in Serbia. The 1996 Decision of the Federal Constitutional Court[9] repeals this Law. Consequently, condominiums related issues are nowadays partially regulated in several legal acts: The Law on Fundaments of Ownership Relations[10] (hereinafter: ZOSPO), The Law on Habitation[11], The Law on Maintenance of Residential Buildings[12], The Law on Planning and Construction[13] and The Ordinance on

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[3] Data originate from: V. Krulj, *Svojina na delovima zgrada (etažna svojina) i izgradnja stambenih zgrada (stanova) neposredno za tržište,* Beograd, 1969, 6.

[4] A. Ionasco, *Copropriete par appartements et copropriete horizontale,* Academie internationale de droit compare, VIII-e congres, rapport general, Pescara, 1970, 16.

[5] More on this topic in: N. Planoevič, *Istoričeskoe razvitie sobstvennosti na žilbe,* Rossiĭskoe pravo v Internete, 4/2010.

[6] More on this topic in: N. Planojević, *Upis etažne svojine u zemljišnu knjigu i katastar nepokretnosti,* Anali Pravnog fakulteta u Beogradu, 1-6/2000, 189-221.

[7] Quotation from: R. Lenac, *Kućna communio pro diviso – Etažna svojina,* Zagreb, 1939, 34.

[8] Official Gazette of the Socialist Federal Republic of Yugoslavia (Službeni glasnik SFRJ), No. 16/59, 43/65, 57/65.

[9] Official Gazette of the Federal Republic of Yugoslavia (Službeni glasnik SRJ), No. 33/96, decision IU 23/95. The Law was repealed due to discrepancies of some provisions with the Constitution of FRY and federal laws.

[10] Official Gazette of the Socialist Federal Republic of Yugoslavia (Službeni glasnik SFRJ), No. 6/80, 36/90; Official Gazette of the Federal Republic of Yugoslavia (Službeni glasnik SRJ), No. 29/96, Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 115/2005.

[11] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 47/94, 48/94, 44/95, 49/95, 16/97, 46/98, 26/01, 101/05, 99/11.

[12] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 44/95, 46/98, 1/01, 101/05, 27/11, 88/11.

Maintenance of Residential Buildings and Flats[14]. This is not only complex to manage, but these regulations are also incomplete and not in harmony, and this is inacceptable situation for a legal institute which is so represented and relevant in everyday life.

This is the reason why Preliminary Draft of the Civil Code of the Republic of Serbia got such attention of domestic experts (hereinafter: the Preliminary Draft): it regulates numerous legal institutes in a new manner[15], including also condominium related matters. After twenty years matter of condominiums is stipulated in one document, in a systematic and comprehensive manner. Since this is a massive text (condominium related matters are regulated in 35 articles of the Preliminary Draft), object of our considerations in this paper will be three most relevant issues regarding this institute. These are: notion, concept and subject of condominium. Due to limitations in the volume of the paper we will not deal with only one important issue in this area: regulations stipulating maintenance of buildings in condominium legal regime[16]. These issues will be analysed by comparison and comments of solutions from the Preliminary Draft and existing positive legal solutions, as well solutions given in comparative law. Our objective is to make evaluation of analysed regulation in the concluding part of the paper as well to give suggestions for potential corrections. Since public discussion of

[13] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 72/09, 81/09, 64/10, 24/11, 121/12, 42/13, 50/13, 98/13, 132/14, 145/14.

[14] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 43/93.

[15] In the area of property law this specifically refers to rights to construction, gaining property from property non-owners, mortgage, etc. More on this topic in: N. Planojević, *Sticanje svojine od nevlasnika: glas protiv zabrane iz člana 1717 nacrta Građanskog zakonika Srbije,* u: Aktuelna pitanja savremenog zakonodavstva (ur. S. Perović), Savez udruženja pravnika Srbije i Republike Srpske, Beograd 2016, 55 - 71; N. Planojević, *Sticanje svojine od nevlasnika u Nacrtu zajedničkog pojmovnog okvira Studijske grupe za Evropski građanski zakonik,* Zbornik Matice srpske za društvene nauke, 135/2011, 279-291.

[16] More on this in: N. Planojević, *Održavanje stambenih zgrada: koncept, ciljevi i objekat (I deo),* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2011, 491-506; N. Planojević, *Subjekti i sadržina usluge održavanja stambenih zgrada (II deo),* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 2, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2011, 179 - 194; N. Planojević, *Raspodela troškova održavanja stambenih zgrada (III deo),* u: Pravo i usluge (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2012, 923-935; N. Planojević, *Sankcionisanje neodržavanja stambenih zgrada (IV deo),* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 3, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2012, 233-248.

the Preliminary Draft is still pending we see present time as appropriate to deal with this matter.

2. NOTION OF CONDOMINIUM

Condominium[17] is defined by article 1868 of the Preliminary Draft, but the Commission for Drafting of the Civil Code had a dilemma about the way how to define it; therefore, definition of the notion of this institute has four variants.

1. Variant presented by the Commission as first and the basic one says: „Two or more persons can have (ownership) right over a building as follows: each of the owners have exclusive right of ownership over individual part of the building and they all together have right of co-ownership over collective parts of the building and land (condominium).» Second version of the definition is identical to the first one in its content but only has different language formulation[18].

Common feature of these two variants of condominium definition (and at the same time feature which makes them different from following two versions) is that both discuss *ownership of the building held by two or more persons*, explaining further that this ownership is regulated in a way that each of them individually (again) owns separate part and they have co-ownership of other building parts and land. It stems from this formulation that within the ownership which several persons have over the building «there are» ownership of individual parts belonging to each of them and co-ownership of all owners on collective parts – this is impossible construction. Ownership consists of rights of possession, use and disposal of the property and cannot have different content; in particular it cannot include another exclusive ownership of different object (individual part) and co-ownership.

Secondly, thesis used as base for both versions of the definition - that building as a whole is the property of two or more persons - is not correct. Reading of the rest of the text in the Preliminary Draft regulating condominium related issues shows that all owners in the condominium or any of them individually or any other third person have no ownership or co-ownership right on the building as a whole. This does not mean that

[17] More in regard to terminology in: N. Planojević, *Terminološke dileme u vezi instituta etažne svojine,* Glasnik Pravnog fakulteta u Kragujevcu, 5/1996, 109-116.

[18] It reads: «Property of two or more person on building can be stipulated in a way that each of them has exclusive right of ownership on individual part of the building, and all together have co-ownership of collective parts of the building and land.»

condominium cannot also be organised as a unit with co-ownership of all owners in the condominium – as it is the case in Austria or Switzerland. But this is not the concept of condominium adopted in the Preliminary Draft and this is going to be discussed in the next part of our paper which will deal with condominium concepts in our and other countries of the world.

Condominium is regulated in the Preliminary Draft as a complex legal institute based on the assumption of ownership of individual (real) part of the building which each individual owner in condominium has and co-ownership of collective parts of building and land where building exists. We would add to this that condominium is not a simple sum of these two rights but new complex. As such it is, above all, complex of mentioned rights of *one person* which intrinsically bring new quality, and cannot be a form of ownership of several persons over one item, i.e. building[19]. Powers of (these) several subjects can be only discussed under provisional terms – in regard to collective parts of the building and land, but this is still not a central element of this institute in spite of its relevance which is not a matter of dispute at all. A *building as a whole* is not subject of any right of any entity both in our positive law and in the Preliminary Draft; therefore, community of condominium owners have no special rights on the building as a whole[20]. Descriptively saying, building is an object of a sum of all individual condominium ownerships having structures as earlier presented. Consequently, first two variants of condominium definition in the Preliminary Draft are not acceptable. These are not only based on incorrect thesis of ownership of two or more persons over the building, but are also entirely out of the context of the manner in which Preliminary Draft regulates condominium related issues[21].

2. Third and fourth variants of the definition do not contain shortcomings we have identified and pointed out with the other two versions, i.e. do not define condominium through any right over the building as a whole. These two definitions precisely pinpoint essence of the condominium, and the last version, i.e. fourth variant of the definition seems to be also the most

[19] See: N. Planojević, *Stvarno pravo u praksi,* Kragujevac, 2012, 154.

[20] On building as a whole in: M. K. Oguzman, *La propriete par etages en Torquie,* Annales de la Faculte de droit d´Istanbul, No 23-24-25, T. XVI, Istanbul, 1966, 145; K. Muller, *Sachenrecht,* Koln-Berlin-Bonn-Munchen, 1988, 574-575.

[21] In this case, article 1875 of the Preliminary Draft is explicitly unambiguous and reads: «Owner in the condominium can freely dispose of his individual part, jointly and inseparably with co-owned share in collective parts in the building and co-owned share in land (condominium unit / condominium share).»

acceptable one, saying: "*Condominium include exclusive ownership right over individual parts of the building and co-ownership right on common parts of the building as well co-ownership of the land on which building was constructed and land which serves to its regular use.*» In fact, this variant is ill-formulated (from linguistic point of view) endlessly repeating term «building» and superfluously using term «right» overwhelming the text and making it difficult to remember; but in essence it is the most adequate one. Everyone will agree that it is unacceptable to use the same word (building) so many times in one long sentence, plus use several times each of three more words: land, right and co-ownership – as if there are no pronouns or other terms to amalgamate the point. Precise (detailed) definition and proper language style are not necessarily mutually exclusive.

That's why we would suggest slight corrections in language and style of the definition; in our opinion, definition of condominium should read as follows: *Condominium for each owner individually includes ownership of individual part of the building and co-ownership of collective building parts and land where it stands.* Presented definition clearly marks structure of property in the condominium and its subject and content (in basic terms), but also clearly marks what each owner in it gains – at the same time, this is most important and most difficult for laymen to understand.

We believe it is not necessary to deal with further precise formulations of condominium subject already in the first article of its definition[22] and explain that it is a „...land where building is constructed and land serving to its regular use» (as it is the case with fourth variant of the definition). This explanation will follow in subsequent articles regulating subject of property in a condominium. Plus, in a way, it is assumed that it does not refer solely and strictly to the land under the building but also land needed for its access from the street and to use building at all. Another fact supporting position that definition should not be any further «extended» with so many words pertaining to land is that land is only one of elements making (threefold) subject of condominium property; and, it is senseless to define element related to land with precision and not do the same with other two elements of the subject of this right – individual and collective parts of the building. If we would do so definition would become too extensive and confusing. The definition[23] is a statement first to read when learning about regulations of

[22] On elements which need to be contained in the definition of condominium property more in: N. Planojević, *Etažna svojina,* Kragujevac, 1997, 174 – 182.

[23] Various definitions of condominium can be found in papers of domestic and foreign writers. In this context we refer to: G. Flattet, *op.cit.,* 117; H. P. Friedrich, *Zur rechtlichen*

certain institute, no matter if reader is layman or expert, and therefore it should be concise and well written – as nevertheless should be the case with any article in a law. Although it is correct – opposite to the first two versions of the definition, the fourth variant is everything but properly linguistically formulated and concise – unfortunately this seems to be the case with the style of the entire Preliminary Draft.

3. However, we find it's relevant to add another article - following the definition and before further regulation of condominium subject - which will give complete explanation to the reader what exactly condominium is and what it is not. The article would read:

The condominium building

(1) The condominium building consists of individual and collective parts.

(2) Legal regime in the condominium foreseen by this Law is applicable to buildings consisting of minimum two individual parts owned by two different persons.

(3) No individual is entitled to ownership of condominium building in its entirety.

Namely, two conditions which need to be cumulatively fulfilled in order to apply regime of condominium in one building are: to have *at least two* physically separated parts and these need to be owned by *different individuals*. This needs to be pointed out after the definition of condominium because it is not a generally known and understood matter. If one building is not divided into several separate units, or it is divided but these units are all owned by one and the same person – this is still individual property. This must be clear, as well as the fact that domestic concept of condominium does not mean anyone's ownership over the building in its entirety[24]. Since this was also a dilemma of the Preliminary Draft creators (as it is obvious from mistaken formulation of the first and second variant of the definition), we rightly assume similar omission might also be made by addressee of these regulations – especially if layman. We believe it is necessary to add article as proposed in order to prevent such situation.

Konstruktion des Stockwerkeigentums, Festgabe zur seibzigsten geburstag vom Max Gerwig, h. 55, Basel, 1960, 26; J. von Gierke, *Das Sachenrecht des Bugerrlichen Rechts,* Berlin-Frankfurt a.m., 1959, 131; A. Ionasco, *op.cit.,* 14-16; B. Vizner, *Građansko pravo u teoriji i praksi,* knj. III, Rijeka, 1969, 151; S. Aranđelović, *Enciklopedija imovinskog prava i prava udruženog rada (odrednica "Etažna svojina"),* Beograd, 1978, 341; A. Finžgar, *Komentar Zakona o svojini na delovima zgrada,* Beograd, 1960, 261, etc.

[24] On this topic more in: Z. Stefanović, *Etažna svojina,* magistarska teza odbranjena na Pravnom fakultetu u Beogradu 1992.

3. CONDOMINIUM CONCEPT

Hereinafter we will briefly at the beginning present concepts dealing with condominium related issues which exist in the world, and then we will identify which one is followed by the Preliminary Draft and comment on this determination.

1. There are several condominium concepts in comparative law[25] which can be narrowed down to two basic: unitary and dualistic.

According to the *unitary* concept, condominium is an single not complex right and this concept has two variants: *ownership* which is now an old-fashion phenomenon[26]; and *co-ownership*[27] which purports co-ownership of all owners in the building as a whole with certain shares in this ownership while keeping the exclusive individual rights to use solely one real part of the building. This right to use one part of the building (flat, office...) is (real) property right, similar to easements, but it is not ownership right (co-ownership in a building cannot include also ownership of individual parts of the building). This concept of condominium nowadays exists in Switzerland, Austria, etc.

Dualistic concept treats condominium as complex legal institute which for each individual owner in a condominium is a sum of two rights: ownership over individual parts and co-ownership of collective parts of the building and land. Dualistic concept further has two variants: Roman and German - depending on which of these two rights is considered primary and which is secondary.

According to the *Roman* variant[28], main right is ownership of individual part and it is present in most of the countries of the world including our

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[25] On legal nature of condominium as property more in: N. Planojević, *Pravna priroda etažne svojine*, Pravni život, 10/1995, 309-327.

[26] According to this version of unitary concept which originates in primary forms of condominiums in medieval times, building in a form of condominiums is about "harmony" of different individual properties just like vertically one storey is placed over another. On this concept more in: G. Marty, *Copropriete par etages et horizontale (droit Francais),* Session de droit compare, Pescara, 1968, 3; H. P. Friedrich, *op.cit.,* 14.

[27] On this concept more in: E. H. Kaden, *Das Wohnungseigentum im deutschen, schweizerischen und franzosischen Recht,* Zeitschrift fur Rechtsvergleichung, h. 4, Wien, 1969, 266; R. Sacco, *Copropriete par appartements et copropriete horizontale,* Congresso di Diritto Comparato, Relazione Nazionale Italiana, Pescara, 1970, 8-11.

[28] On this concept more in: S. Krneta, *Pravna priroda etažnog vlasništva,* otisak iz Godišnjaka Pravnog fakulteta u Sarajevu, Sarajevo, 1991, 58-60; M. Vedriš, *Vlasništvo stana,* Zbornik Pravnog fakulteta u Zagrebu, 3-4/55, Zagreb, 195-196.

positive law. According to *German* variant[29], principle right is co-ownership of collective parts of the building and ownership of individual part(s) is accessory. This is condominium concept present in Germany, Republic of Srpska etc.

Some countries with *common law tradition* recognize condominium as combination of property and law of obligations, i.e. combination of ownership of individual part and long-term leasehold of common parts of the building which are property of one individual – one of the owners in a condominium or a third person (as for example in the UK); or concept where owner of the building is shareholders group and shareholders are solely users of certain individual parts based on the right which is not ownership right (USA)[30].

2. Based on the definition of condominium (especially its third and fourth variant), as well on the basis of the entire part of the text regulating this institute in the Preliminary Draft, we can draw a conclusion that condominium is not treated as single right but as a complex legal instrument which has two elements pertaining to each individual owner in the condominium: ownership of individual part and co-ownership of collective part(s) and land, i.e. the Commission decided to follow dualistic condominium concept dominating in the world and in line with domestic legal tradition as this is the concept already existing in our positive law.

However, since it is not yet known which of four variants of condominium definitions will be accepted, adoption of the first two might create certain problems as these two definitions, as we have already explained, leave impression that there is even certain right of ownership on the building as a whole. This further leads to a conclusion that Preliminary Draft text follows unitary concept and this is not in line with remaining part of the text. Therefore, adoption of first two options of condominium definition should be avoided in order to avoid confusion.

Since dualistic concept (as we have already explained) has two variants – depending on which of two rights, i.e. its constitutive elements, is taken as the principal and which is accessory right – question to follow is: does the Preliminary Draft reflects Roman or German version. As this is important question, usually it needs to be regulated by the legislator in a separate provision or sometimes even within the definition of condominium itself; this

[29] On this concept more in: F. Baur, *Lehrbuch des Sachenrechts,* Munchen, 1977, 268-269; H. Eichler, *Institutionen des Sachenrechts,* 1. band, Berlin, 163-164.

[30] On this concept more in: J. Hazard, *Copropriete par etages et horizontale (droit des Etats-Unis),* Assotiation Internationale de Droit compare, Pescara, 1968, 4.

was not done in the Preliminary Draft. Based on the entire text of the Preliminary Draft and especially based on the article 1875 under the title «Disposal of Condominium», we can't yet certainly conclude that Preliminary Draft recognizes Roman variant of dualistic concept where ownership of individual parts is principle and co-ownership of collective is accessory right. Article 1875 of the Preliminary Draft reads: «Owner in the condominium can freely dispose of his individual part, jointly and inseparably with co-ownership share in collective parts of the building and co-ownership share in land (condominium unit, condominium part).» Conclusion that property is the principal right stems primarily from the fact that it is a principle object of disposal and disposal of co-owned part comes in addition to it – although, strictly interpreting, terms «commonly and inseparably» still do not indicate primacy of any of the two rights.

Therefore, new article should be added in the text of the Preliminary Draft to unambiguously give framework to condominium concept followed by the Preliminary Draft. This article could read:

Relation between rights on individual and collective parts of the building

Co-ownership of collective parts of the building and land is accessory right and it is inseparably linked to ownership of individual building part (principle right) treatment of which it shares (accessory relation).

3. Finally, we find it proper to follow Roman type of dualistic concept in the Preliminary Draft since it reflects real state of facts: an individual buys flat or other individual part for his personal cause – not to be able to use staircase, roof or other collective parts of the building; therefore, it is logical that this (ownership) right needs to be the principal while right to use collective parts and land needs to have accessory feature. Collective parts of the building are just necessities in their nature - an „infrastructure" required to use individual parts. German type of dualistic concept or co-ownership variant unitary concept perhaps can be acceptable in countries where is its origin, i.e. where condominium was spontaneously and since ever organised in such manner and where it is a part of the tradition – in Germany, Switzerland or Austria. But, in our opinion, these concepts should not be followed in countries where these did not exist earlier, like it is the case with our country, and especially because these do not reflect the reality: no one buys a flat to gain rights like easements or to become co-owner of the building. For this reason it is positive that the Commission did not follow the tendency which is popular

in some of former Yugoslavia countries: in entity of the Republic of Srpska[31] where German type dualistic concept was adopted.

4. CONDOMINIUM SUBJECT

Complex structure of condominium is consequence of the complexity of its subject. It is threefold, if we may say so, and linked to each owner in the condominium individually: 1) individual/physically separated part of the building; 2) collective parts of the building; and 3) land beneath the building and around it which is needed for its regular use. Presented reasoning of the subject of condominium ownership is not a matter of dispute both in domestic and foreign legislation and legal theory, but there are differences in regulations pertaining to the number and sorts of building parts which can be individual and what distinguishes them from collective parts. Further in the text we will firstly present regulations of these issues in other countries and Serbian positive law, and then we will identify which of these concepts are followed in the Preliminary Draft and comment on this determination.

4.1. Condominium Subject in Comparative Law

Based on analysis of legal documents of different countries there are at least four identified ways used to distinguish individual from collective parts of the building.

First method of separation is basically exhaustive list of building parts which are individual, and this consequently reflects introduction of the principle *numerus clausus*. List of collective parts is further negatively determined, i.e. collective part is the part which is not in the exhaustive inventory of individual building parts. This method of separation is applied in Serbia where individual parts are: flat, business premise (office), garage and parking lot in the garage; this was also (till recently) concept applied in Montenegrin law[32]. Its positive side is precision and simplicity of application, and negative side is that principle *numerus clausus* does not allow to extend

[31] More on this in: N. Planojević, *Koncept etažne svojine iz nacrta Zakona o stvarnim pravima Federeacije BIH i RS i koncepti drugih država,* Pravna riječ, 8/2006, 195-213; N. Planojević, *Karakteristike privatizacije stambenog fonda u Republici Srpskoj, sa osvrtom na rezultate ovog procesa u SRJ,* Pravni život, 5-6/2001, 131-149.

[32] More on this in: M. Lazić, N. Planojević, *Svojina i fiducijarna svojina u novom stvarnom pravu Crne Gore,* Pravni život, 10/2011, 511-528.

list of individual parts as needed due to modernisation of living which changes habits of people.

Second group of legislators solves this problem starting from the point which is contrary to the previously presented: they exhaustively determine list of parts which cannot be individual but always, *ex lege*, are collective parts. Other parts can be collective or individual and owners in the condominium define this list individually for each building. This is the method used, for example, by German and Swiss legislators. It eliminates static which is a fundamental shortcoming of above described system. A shortcoming of this system is that building parts which are not in a group of *ex lege* collective parts are separated based on the rules set by owners in the condominium - these rules are rarely complete and there's always a building part left «unallocated». Solution was found in introduction of presumption which in Germany says that these parts will be treated as collective, and in Switzerland as separate[33]. Shortcoming of this solution is that legal presumptions do not match real situation.

Third, the most numerous group are countries which regulate subject of condominium by creation of lists of, for example, typical individual and collective parts with no pretension to formulate criteria for its separation – like Belgium, Italy[34] and some other states. Having in mind (optional) guidelines given in the law, owners in a condominium (in their own rulebooks) further define parts which are collective and individual. It seems, however, that such guidelines are insufficient and that possibility of dispute is highest in these countries due to lack of separation criteria and as consequence of imperfection of regulations in the rulebook.

Fourth method of separation between collective building parts is presented in the French law. Separation criteria[35] are simple and efficient: it is *purpose* of certain part of the building (on what legal grounds part is used) to serve to all or to individual condominium owners; and/or nature of its *current use*. If it is a part of the building in question which by legal grounds is intended to individual use of an owner in the condominium – it is then individual part no matter if it is flat or elevator or something else. The same principle is applied for collective parts. When it comes to type of the item

[33] See: art. 712b, p.3 of the Swiss Civil Code and par. 1 and 5 of German WEG.

[34] See: par. 11 of Belgian Law on Condominiums from 1924 and art. 1117 of Italian Civil Code from 1942.

[35] This criteria was elaborated in: G. Marty, *Copropriete par etages et horizontale (droit Francais),* Session de droit compare, Pescara, 1968, 7-9; A. Ionasco, *op.cit.,* 68; A. Meier-Hayoz, *op.cit., etc.*

which can be separate or collective part, the law does not contain any limitations or suggestions. Only in the case of lack or opposition of legal grounds, the law sets a rule what obligatory needs to be treated as collective part (other parts can be individual as well) – until lack of legal grounds is fixed: this again «revives» will of owners in a condominium. French criteria of purpose and/or use is simple, precise, elastic and respects will of owners in the condominium; therefore, it is considered to be one of the most successful division criteria[36].

4.2. Condominium Subject within the Preliminary Draft

1. Arrangement. The Preliminary Draft gives two variants of regulations pertaining to condominium subject. First variant has three articles and first of them is titled «Individual part of the building», second is «Garage» and third one «Collective parts of the building and land». Second variant proposed by the Commission is to substitute these three articles with one containing more paragraphs under one title «Subject».

In our opinion, first proposed variant is more descriptive and, therefore, more adequate. However, we would merge article under the title «Garage» with article under the title «Individual part of the building». Namely, as the Preliminary Draft categorises garages as individual building parts it is not clear why this type of individual part needs to be regulated in a separate article since it is under the same legal regime as flats or offices for which rules are defined under the title «Individual parts of the building».

2. Notion of the individual part. Article 1869 of the Preliminary Draft says two terms need to be fulfilled in order to treat one part of the building as individual: 1) it must be independent functional unit, and 2) it must have separate entry. Our positive law defines flat in almost identical manner, but not other individual parts – this means that at the moment in Serbia it is not know what terms individual part needs to fulfil in order to be treated as business premise (office), garage or parking lot in a garage and these are *numerus clausus* separate parts' according to the article 19 of the ZOSPO. Therefore, it is good that the Preliminary Draft, first of all, defines notion of individual part in general, and then continues to determine types of these building parts. We would, however, add another element to two already foreseen elements in the Preliminary Draft: that it is part of the building which is suitable for *use in line with its purpose.* Namely, the sole fact that certain space has separate entry and that it represents the unit which is

[36] More on this in: N. Planojević, *Predmet etažne svojine,* Pravni život, 10/1996, 49-70.

functional is insufficient, and this unit necessarily needs to be suitable for the purpose it was bought for: living, vehicle keeping etc.

3. Types of individual parts. Method which the Preliminary Draft uses to distinguish individual parts from common is combination of third and fourth methods presented as classification in the paper above: third method defines individual and fourth defines collective parts of the building. Although we believe that such combination of regulation methods – where one is applicable on individual and the other on collective parts of the building – is not an ideal solution, the combination used in the Preliminary Draft is not inacceptable although it is clear from our earlier text that fourth method of regulation is perhaps the most successful one and as such might be the best to apply: not only to define collective but also individual parts of the building.

As we have explained, use of third method means that most usual types of building parts will be given in the text only as examples and they don't necessarily need to be individual parts. This is the way in which individual parts were defined both in article 1869 and article 1870 of the Preliminary Draft. The Commission proposed two variants to regulate types of individual parts of the building.

First variant, in article 1869 gives flat and business premise (office) as typical individual parts, and in the following article 1870 also adds garage, clearly marked garage lot, basement, terrace, atelier, warehouse, shelter (if not in public ownership) and other premises which have functional connection with the building.

Second variant given in article 1869 uses flat and office as examples of typical individual building parts and includes examples of some other independent premises. Article 1870 adds that individual part can also be self-contained premise or clearly marked area on the land and as an illustration for this it lists the same parts as in the first variant (garage, garage lot, basement, warehouse and shelter), with an exception of atelier and terrace which are left out.

First conclusion out the presented is that the Preliminary Draft entirely abandoned fairly criticized[37] method of exhaustive enumeration of individual parts applied in our positive law and does not limit parts which could have feature of individual part in number and type. In comparison with the comparative law, the Preliminary Draft contains one of the most

[37] See in: N. Planojević, *Model etažne svojine za budući građanski zakonik,* u: Građanska kodifikacija - Civil Codification (ur. R. Kovačević Kuštrimović), sv. 2, Pravni fakultet Univerziteta u Nišu, Centar za publikacije, Niš, 2003, 199-226.

comprehensive lists of building parts which can be individual including in the category almost each part of the building someone could think of as part in individual use of one condominium owner and not harming others or building as a whole. Since flat, office, garage and garage lot are individual parts which are not matter of dispute both in our and other countries, we will analyse in more details only the list of remaining parts given in the Preliminary Draft as potentially individual.

First observation we need to make is that each part of the building defined in the Preliminary Draft as part which could be individual is actually suitable for individual use of one owner in the condominium, and usually in practice this requires to allow exclusive ownership of such part to the owner; therefore, solution we can find in our positive law - where these parts are by the rule collective parts - is inadequate. However, all individual parts mentioned in the Preliminary Draft do not have same features and nature or do not have same level of independency, if it would be more proper to formulate it this way. Consequently, we would divide them in two categories which need to have different legal treatment. The first category would be ateliers and warehouses, while basement, terrace and shelter are the second group.

When it comes to *ateliers and warehouses*, these are premises which are in its nature very close to business premises (office). Atelier (or studio) is usually used as reference to a space where painters, fashion designers or architects work, while warehouse is mostly used by vendors or producers of some goods suitable to be stored within the area of condominium, i.e. building in condominium legal regime. These parts are really suitable not only to individual and sole use of certain individual, but also to be units which can be independently sold/purchased since they have independent function and purpose and can (but not necessarily) be connected to other individual part such as flat or office. The only question left open is their separation from business premise and determination of elements which will distinguish them as individual parts (if this is of any relevance in this context).

Basement, terrace and shelter within the building have different features then atelier and warehouse and, in our opinion, they need to be treated under different regime. *Common* feature for basement, terrace and shelter on one side and atelier and warehouse on the other side is that both can be individually used by one owner while other owners suffer no harm from that – which is not the case with staircase or elevator, for example. Namely, the fact is that there is no reason for single, separate basement unit solely used by one owner of certain flat within the condominium (which is commonly seen

practice in basements in our buildings) not to be in the property of that owner but to be collective property of all owners in the condominium as it is the current solution. The same case is with the terrace which is not integral part of a flat or shelter: if these are parts of the building which due to the position can be used only by one or several owners in the condominium (each uses certain part of it).

There is, however, *difference* between atelier and warehouse on one and basement, terrace and shelter on the other side: basement, terrace or shelter can be suitable for individual and exclusive use of one owner, but in our opinion are not suitable to be independently sold. While purchase of an atelier as individual building part is reasonable, it is not clear what sense it makes to buy basement, terrace or shelter separately from a flat or office used by their owners? These parts have functional connection with the flat and serve to facilitate its use and add quality to it, so it is senseless to treat them as individual parts only because they can be subjects of sole use by one owner – since this automatically means that it can be independently in use like any other individual part, i.e. flat or garage. These parts of a flat are in relation with it which is very similar to relation between main item and accessory where leading principle is «Accessorium sequitur principale"; therefore, exclusive ownership should be allowed to owners of flat or other individual part but should not be allowed to trade in these parts separately, as this would not make sense. Namely, it is difficult to find reasoning for someone to buy a terrace in a building (or separate basement or shelter) which is individually used by an owner in a condominium who also uses flat connected to these parts (although not necessarily its integral parts) and not to buy the entire flat.

The problem with different nature of building parts which are named as individual parts in the Preliminary Draft could be solved by introduction of another element in the notion of individual part. Any part which represents (1) independent functional unit, (2) has separate entry (already foreseen by the Preliminary Draft) and (3) is suitable for use in line with its purpose (addition we have earlier suggested), and has another feature: (4) it is *suitable for independent sale*, i.e. has no status similar to accessory to another individual part, can be treated as individual part. This would allow two types of separate building parts to be exclusive ownership in the condominium: a) those parts which have feature of individual part because they can be in independently sold, like flat, office, garage, garage lot, atelier, warehouse or similar premise; and b) those which have features similar to accessory to one of above mentioned individual parts but have no feature of individual part since they cannot be independently sold, i.e. separately to the part to purpose

of which they serve – like terrace, basement, shelter and similar premises. In this context, we need to have in mind that comparative law does not always discuss individual and collective parts of the building, but parts which can be subject of exclusive ownership and those which are subject of co-ownership regime.

It is of particular relevance to stress that second category of building parts with features similar to accessory does not belong to group of integral flat parts[38], i.e. parts which are exclusive property of flat owner exactly for that reason and cannot be in other ownership regime. We could use terrace as an example for such division: it can be integral part of a flat as individual part (kitchen balcony), but it can also be integral part of collective building parts (rooftop terrace) with the position which allows only one or several owners in the condominium to use it – for example, owners of flats on the top storey. Both described terraces can belong to a single owner but the first mentioned is always integral part of a flat, and second can but does not necessarily need to be exclusive ownership of a single person, according to the Preliminary Draft, and this depends on the agreement between owners in the condominium. Second describer terrace, according to regulations in force in Serbia, belongs always to group of collective building parts. According to the Preliminary Draft, it is not only exclusive property of one owner but also treated as individual part – this we find inacceptable since this would allow its potential independent sale and it would not be reasonable. Therefore, such terrace – no matter it is not integral part of a flat – must share same destiny of the flat in legal treatment; this is subject of agreement between owners within the condominium but terrace must not have status of an individual building part.

Finally, we would like to propose following regulation pertaining to individual parts of the building in the Preliminary Draft:

Individual building parts

(1) Individual part of the building is constructively and functionally separate unit composed of one or more premises, which has separate entry and which is suitable for independent use in line with its purpose and which is suitable for independent sale.

(2) Following belongs to a group of individual building parts: flat, business premise (office), garage, parking lot in a garage, atelier, warehouse, etc.

[38] More on difference between accessory and integral part of a complex item: O. Stanković, M. Orlić, *Stvarno pravo,* Beograd, 1994, 9 – 12.

(3) Devices and installations which serve solely to that individual part also belong to it, in spite the fact they are incorporated into collective parts of the building.

Parts of the building intended to use of individual part(s) can also belong to it as accessory, especially if subject parts are: separate terraces and balconies, separate basement, attic and similar premises, and if those are clearly separated from other parts of the building, and if those are accessible from the subject individual or collective parts of the building. Regulations of this Law applicable to accessory shall be applicable on described parts as well.

We believe regulation given in the Preliminary Draft in relation to individual parts of the building would be acceptable with suggested correction. Positive side of the regulation is that it is flexible and follows practical requirements, so parts in question can but do not necessarily have to be individual – this will depend on the will of owners in each condominium individually.

4. Notion and types of collective parts. Collective parts of a building were determined in the Preliminary Draft in line with the fourth method of classification presented in the previous part of the paper, i.e. there is no exhaustive list of collective parts in the Preliminary Draft and they are not even given as examples (unlike individual parts). Similar to the French legislator, the Preliminary Draft defines collective parts in line with their purpose: these are parts of a building which serve to collective use of owners in the condominium (article 1871). This manner of regulation and separation of individual from collective parts is clear and efficient because way of their use determines with no mistake to which part of the building it belong. Since collective parts are numerous, perhaps it is not necessary to present them as examples although it is possible that this would be more understandable for laymen in such a complex area. We'd add following text to regulations in this area:

(1) Part of the building which for its position is at the same time both individual and collective, i.e. serves to the building as a whole but also to certain individual part (for example: bearing wall of the building which is also wall in a flat, flat roof of the building which is also roof of a flat, etc.) shall be treated also as collective part.

(2) In the case of vagueness, part will be treated as collective not as an individual.

(3) Collective parts which are not needed in use of all or some individual parts of the building can be transformed into individual parts under terms prescribed by this Law.

5. Finally, the Preliminary Draft states that subject of condominium property is also land on which the building was constructed as well land needed for its daily use – which is correct definition of the third element of condominium subject.

5. CONCLUSION

Based on the above presented we can conclude that notion, concept and subject of condominium are in general well regulated in the Preliminary Draft. Yet, many solutions may be subjects of certain remarks and, therefore, their corrections as we presented in the paper are necessary. This means following:

1. In regard to the *notion* of condominium, we believe that the fourth definition variant should be chosen among four offered, with some corrections in language and style as it was discussed. Initial two variants are entirely inacceptable because they create wrong impression that anyone can have right of ownership on the entire building and this does not correspond with the concept of the Preliminary Draft.

2. The Preliminary Draft adopts Roman type dualistic *concept* of condominium which already exists in our positive law and which is predominantly accepted in the world – this we find an adequate determination. Introduction of a new article is, however, necessary to more directly highlight accessory character of the right on collective parts of the building and land in comparison to the right of owner in the condominium on individual part(s) of the building.

3. *Subject* of condominium is adequately determined as threefold. In our opinion it is positive that the Preliminary Draft abandons *numerus clausus* principle for individual parts. The only necessary correction refers to the notion of individual part - it needs addition of two more elements: that it is a unit suitable for use in line with its purpose; and which is suitable to be independently sold. This could further reflect on types of building parts which can be individual, i.e. it could not be any part which is solely owned by an owner in the condominium but only the part which is not considered accessory of another part offered for sale.

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FINDING OF TREASURE TROVE IN COMPARATIVE LAW AND IN FUTURE SERBIAN LAW

Abstract

The subject of this work is comparative analysis and assessment of legal effects and legal nature of the finding of treasure trove in nine European regulations and in the Draft of Uniform Serbian Civil Code that impersonates the future Serbian law. Assessing the public or private property acquisition by finding the treasure trove, both relatively equally argumented, by observing this specific originary kind of finding, the author may come to the conclusion that the notice of the Draft is, in principle, pursuant to notices of neighbouring countries, aimed at harmonizing regulations on subregional level. Concurrently, the author accentuates how important it is that the bounty height and the cost of finding are properly determined for more optimal regulation de lege ferenda. Author also asks for the introduction of possibility of acquiring private ownership subsidiary, in the case when the state uses its abandon right.

Key words: *treasure trove; acquisition of property by finding; a bounty; legal nature of finding.*

1. INTRODUCTION

A way the property is acquired must be standardized in all legislations, representing the important issue that reflects the legislator`s assessment of acquisition`s justifiability in the given case and the legal conscience of how crucial it is that all real right effects of factual acts done by legal personalities are comprehensively regulated. The issue seems crucial in the case of originary property acquisition where the legislator prescribes the sequence of statutory facts whose set leads up to establishing the new law of property. Due to the characteristic of exclusiveness, new property displaces the former, if there was any; if an item had no owner, the new property right functions as

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a keeper of the item that can not be included in legal transactions as it lacks the subject of appropriation.

Finding of treasure trove is just such a way of acquisition where the item[1], hitherto hidden, is found by factual act and then newly introduced in the sphere of legal interest for the need of establishing its new owner[2]. Acquisition of property by this item is even more attractive in terms of economy, as we speak of valuables and precious chattels, so the legislator has to set a standard and make a balance between conflicting interests of parties participating in this legal relationship. The named interests include: interest of the finder, interest of the owner of the item in which the treasure trove was found and interest of the state.[3]

Complexity of these issues implies the importance of comparative law methods application in the study of legal effects and legal nature of the finding of treasure trove as a specific way of property acquisition. In substantive law of the Republic of Serbia the finding of treasure trove is not regulated, so domestic regulation system can not be our sample.[4] However, due to the fact that in Serbia the finding of treasure trove is standardized as the way of property acquisition in the Draft of Uniform Serbian Civil Code[5] which are the proposition for the future Serbian law[6], this text will be the subject of our study.

The subject of this work will be the analysis and comparison of legal effects of this kind of finding in 9 foreign significant European regulations: French, Austrian, German, Swiss, Slovenian, Croatian, Macedonian, the

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[1] I. Babić *et al., Komentar Zakona o stvarnim pravima Republike Srpske*, Sarajevo, Privredna štampa, 2011., 125; B. Eisner, M. Horvat, *Rimsko pravo*, Zagreb, 1967, 248.

[2] J. L. Bergel, M. Bruschi, S. Cimamonti, *Traité de droit civil,* Les biens, Paris, 2000, 249.

[3] More about problems about legal concequences of finding a treasure trove in Serbian positive law see in: A. Pavićević, *Pravne posledice nalaza skrivenog blaga u srpskom pravu,* Nova pravna revija, god. 5, br. 1-2/2015., 86-93.

[4] I. Babić, *Nalaz skrivenog blaga,* Zbornik radova Pravnog fakulteta u Nišu, br. 56/2010, 45; R. Kovačević - Kuštrimović, M. Lazić, *Stvarno pravo,* Niš, 2004, 151; D. Stojanović, *Stvarno pravo,* Kragujevac, 1998, 146; Ž. Perić, *Specijalni deo Građanskog prava i Stvarno pravo,* Beograd, 1920, 38; Z. Rašović, *Stvarno pravo,* Podgorica, 2010, 182; M. Bartoš, L. Marković, *Građansko pravo – prvi deo – Stvarno pravo,* Beograd, 1936, 47.

[5] The legal proposal for future serbian regulation of finding a treasure trove is contained in art. 1792 – 1797 Draft of Uniform Serbian Civil Code (Nacrt građanskog zakonika Srbije). See: The third book – Real rights, The first part, The second chapter – acquisition of property, Section VII. http://www.mpravde.gov.rs/files/NACRT.pdf, july 2016. In the following text: Draft. Currently, there are two different alternatives for this article (art. 1795).

[6] Alternative solutions proposed in other Drafts see in: A. Pavićević, *op. cit.*, 91-92.

Republic of Srpska and Montenegrian. The sample is consisted of regulation`s notices, either selected by a criterion of civil-law tradition`s relevance and duration, or by a criterion of fomer common legal tradition with ex- Yugoslavian countries that had set new real right laws.

Our first goal is to place the Draft in a particular group of regulations related to legal effects of the finding of treasure trove; define similarities and differences among regulations within the same group; determine and axiologically estimate the prevailing model in Eurocontinental legal systems based on 10 representative regulations. The second goal is to determine what is the legal nature of property acquisition by the finding of treasure trove, considering several existing concepts in legislations and legal theory.[7]

All these conclusions will be useful for: overviewing contemporary tendencies in regulating the finding of treasure trove in European law[8], and potentially more useful for harmonizing various solutions. The finding of treasure trove is not only archeologically, historically and culturally siginficant, but above all legally important not only for professional public, but also for each individual who could be found in a situation that is not frequent, but launches numerous legal issues[9]. The most important of them is undoubtedly the following: whose is the treasure now?

2. MODELS OF LEGAL EFFECTS OF THE FINDING

By summary analysis of ten notices of the named regulations, there are two basic models of legal effects of the finding of treasure trove, derived on the basis of a criterion - *possessory form* that arises from this kind of finding. The first group consists of regulations that standardize found treasure as a form of *private ownership* acquisition, found in the law of: France[10], Austria[11], Germany[12], Switzerland[13] and Slovenia.[14]

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[7] Especially important is to distinguish legal nature of finding treasure trove frome acquiring property by finding someone else's lost movables. More about these differences in: A. Pavićević, *Pojam izgubljene stvari,* Pravni život, 5-6/2014, 103-116.

[8] X. Henry *et al., Code Civil,* Paris, 2010, 931; N.E. Palmer, *Treasure trove and the protection of antiquities,* The modern Law Review, 1981, vol. 44, Issue 2, 1981, 178-187.

[9] In French legal theory the importance of incidental finding is particularly emphasized versus the criterion of value of treasure trove, which, according to these authors, is not crucial for the institute. X. Henry *et al., op. cit.,* 931. Contrary to this, treasure hunting in technical (institutionally unorganized) sense is allowed in angloamerican literature. More about phenomenon „treasure hunting" see in: N.E. Palmer, *op. cit.,* 178.

[10] Art. 716 of French civil code - CC (Code civil des Français).
Web address: http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf, jun 2016.

The second group consists of systems that regulate the finding of treasure trove as a form of *state ownership* acquisition[15], found in the law of: Croatia, Macedonia, the Republic of Srpska, Montenegro and in the notice of Serbian Draft. By the fact of finding the treasure trove, the finder gets primary *legal duty* to keep the item for the state, whereby it later becomes the state ownership [16] (i.e. ownership of the local authority unit where the treasure trove is found).[17]

Conscientious finder and the owner of the estate[18] where the treasure is found, have only the obligation right to "appropriate bounty", which they share among themselves. The bounty is not less than anticipated for finding

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[11] § 398 Austrian civil code – ACC (Allgemeines Bürgerliches Gesetzbuch - ABGB). Web address: http://www.ibiblio.org/ais/abgb1.htm, may 2016.

[12] § 984 German civil code – GCC (Bürgerliches Gesetzbuch - BGB). Web address: http://www.gesetze-im-internet.de/englisch_bgb/, july 2016.

[13] Art. 723 Swiss civil code – SCC (Schweizerisches Zivilgesetzbuch). Web address: http://www.admin.ch/ch/e/rs/2/210.en.pdf, july 2016.

[14] Art. 53 Real right code of Slovenia, hereinafter: RRC. (Stvarnopravni zakonik Republike Slovenije, „Uradni list Republike Slovenije" 87/2002).

[15] More about one similar kind of „finding" see in: A. Pavićević, *Pravne posledice nalaza izgubljene stvari u srpskom pravu de lege lata i de lege ferenda,* Glasnik prava, god., V, br. 1/2014., 35-51.

[16] See: art. 140 par. 2 Law of property and other real rights of the Republic of Croatia, hereinafter: LPRR (Zakon o vlasništvu i drugim stvarnim pravima Republike Hrvatske), Official Gazette of the Republic of Croatia (Narodne novine Službeni list Republike Hrvatske), No. 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 143/2012. Also, see: art. 125 Law of real rights of the republic of Srpska, hereinafter: LRR (Zakon o stvarnim pravima Republike Srpske), Official Gazette of the Republic of Srpska (Sl.glasnik Republike Srpske, No. 124/2008, 58/09). See: art. 142 and 143 Law of property and other real rights of the Republic of Macedonia, hereinafter: LPRR (Zakon za sopstvenost i drugi stvarni prava), Official Gazette of the Republic of Macedonia (Sl. vesnik na Republika Makedonija), No. 18/2001. See: art. 103 Law of property relations of the Republic of Montenegro, hereinafter: LPRR (Zakon o svojinsko–pravnim odnosima Republike Crne Gore), Official Gazette of the Republic of Montenegro (Sl. list Crne Gore), No. 19/09. See: art. 184 Draft of law of property and other real rights of Serbia, Towards new real law of Serbia, Belgrade, 2007 (Nacrt zakonika o svojini i drugim stvarnim pravima Srbije), hereinafter: Draft.

[17] Art. 125 LRR

[18] Some authors consider that the treasure is only the one found in immovables. N. Gavella *et al., Stvarno pravo*, Zagreb, 1998, 376. Cf. Ž. Perić, *op. cit.*., 38; D. Stojanović, *op. cit.,* 147; A. Đorđević, *Nalazak izgubljenih stvari i blaga*, Arhiv za pravne i društvene nauke, 1-2/2006, 266.

of another`s lost property[19]: 10% (in Croatian and in law of the Republic of Srpska); 15% (in Macedonian law), 25% (in the law of Montenegro and in Serbian Draft). The bounty can not be *higher than the value of the found treasure (each gets ½)* in Croatian, in the Republic of Srpska and in Macedonian law.

Although the bounty, provided by the Draft and regulation of Montenegro is nominally higher than that provided by other laws, failure to envisage the option of full compensation in the draft is due. At first sight the higher bounty seems to be useful and theoretically justified, especially in the case when cultural property is found, when the public interest might justify giving counter compensation to the finder, so to stimulate reporting, i.e. prevent abstraction and black market selling. However, what seems to be an issue in real life practice is a potentially enormous value of the found treasure that has characteristics of cultural property, meaning that the obliged payment would be too high.[20]

What is common for all countries that emerged after disintegration of Republic of Yugoslavia, except Slovenia, is that they gave priority to the interest of the state upon determining whose interest is more important[21] (the one of the finder or that of the state), considering the interest of the finder is satisfied by receiving guaranteed bounty in the given amount and possible costs like a stimulation for reporting of the finding. This notice seems to be the consequence of the assessment of national budget`s needs, given the potentially high value of the found treasure and rationally overviewed possibility that the state`s budget is in a better position than the finder as there is a possibility for more adequate treasure care.

With regard to the last two basic regulation models, further division could be made within the group by applying the criterion of subject as the property acquiror. In such a way the first model - the model of private property could be divided in two subgroups, with the first one dominant: a) Acquisition of co-ownership by treasure trove, half of which goes to each (to the finder and to the owner of the item in which the treasure trove is found), i.e. individual property by the finder, in the hypothesis of the finder and in

[19] This is one more usual paralele with another kind of finding – by finding and taking possession into lost objects (properties). A. Pavićević, *Pravne posledice nalaza izgubljene stvari u srpskom pravu de lege lata i de lege ferenda*, 35-51.

[20] Thus, its amount would be disproportionately high compared to the real possibilities of the state`s budget. Moreover, it seems to be unfair to get rich at the expense of the state, even when the full compensation is not at least close to the amount possibly achieved by selling on black market.

[21] The exception is a solution of Draft which contains an alternative proposal, which means acquisition of private property by finding a treasure trove. Art. 1795 of Draft.

the role of the owner of the estate where the finding took place. This comprises all regulations of the first model, except SCC; b) Individual property aquisition by the owner of the item in which the treasure trove is found, where the finder is entitled to an appropriate bounty not higher than half of the treasure trove`s highest value. This notice of Swiss law is a lonely example in comparative law, atypical, and, in our view, inadequate to be a model for the future Serbian regulation, since it refutes the finder`s contribution, unduly favouring the owner of the item in which the treasure trove is found.

The second model - the model of state property acquisition by the treasure, can be divided in two subgroups, given the *possibility to acquire private property in a subsidiary way*. The first subgroup includes regulations of: Croatia, the Republic of Srpska and Macedonia. In the named countries, the law prescribes *the abandon right* for the sake of state – the possibility of disclaiming proprietory right, by which the state is free of paying the bounty and charges to the finder and estate owner. This regulation is seen as justified, since the state is not dutiful by its own will, but by force of law (*ipso iure*). The treasure is then handed over to these people like an *independent comprise*, with the purpose of acquiring property. Since there is a possibility of acquiring property by the treasure - subsidiary, this model can be defined as mixed (depending on the ownership form generated by the finding). Such notice, according to which the state may grant exemption from paying the bounty and charges to the finder (by renunciation of property) is very useful for poor countries, since the property is not imposed but offered – being just the right, but not the obligation when it is not in the interest of the state.

The second group includes regulations of: the Republic of Montenegro and notice of the Draft, in which this possibility is not even foreseen as a subsidiary one, so this model of state ownership can be called - *pure.*

2.1. Dominant model of legal effects of the finding

Dominant model of legal effects of the finding in comparative law is very difficult to determine, as in our research sample the result is uniform. In principle, a half of the analyzed regulations standardize the treasure as a state property, while the other half as a private property. FCC, ACC, GCC, SCC and Slovenian law standardize private property acquisition in a manner of: co-ownership or individual property.[22]

[22] All of them, except Slovenian, fall into older regulations, keeping up with the same tendency in determining the ownership form by the finding of treasure trove.

The second group of notices is found in the legislation systems of the former Yugoslavian countries, except Slovenian. They all have similar legal traditions, specific legal history, lower national state`s budget. Notices of most of Balkan countries take the other course with an emphasized protective attitude toward antiques and antiquities of all kinds, not only toward cultural property.

By comparing legal effects of the finding in the aforementioned regulations, we can notice that, with regard to the ownership form, there are two different factual sets resulting in the property acquisition by the finding. Based on the legal formulations analyses, we conclude that 2 elements are a condition *sine qua non* of factual set leading to property acquisition by this finding – in the systems that regulate the finding of treasure trove as a way of *state property acquisition*.

Those are: 1) factual discovering (finding) of treasure trove and 2) establishing the finder`s possession – by taking into possession.[23] Facts whose qualification is disputable include: reporting of the finding, treasure`s handing over by the finder, and determining whether the treasure is cultural property. They can be explained in two ways: 1) like facts also figuring in the factual set where the state acquires property by the finding; or 2) like facts legally irrelevant for state property acquisition, but legally relevant only for the action of the finder since it is a precondition to get the bounty.

In legal systems where the way of private property acquisition by the treasure trove is foreseen as a general rule, and that of the state as an exception (in case the treasure trove has characteristics of cultural property), there are extra conditions that have to be fulfilled, except the already named ones.

For the property acquisition by this kind of finding, these systems require cumulative fulfillment of the following facts: 1) the finding of treasure trove; 2) establishing the finder`s possession; 3) reporting of the finding; 4) handing over the thing to the competent authority for the purpose of determining if it is cultural property; 5) for private property acquisition when the treasure – *is not,* and for state property acquisition when the treasure - *is cultural property*.[24] These differences that legal effect have are considered as important ones, as they initiate the issue of legal nature of this property acquisition mode,

[23] Art. 140 par. 2 LPRR.

[24] H. Koziol, R. Welser, *Gründriss des bürgerlichen Rechts,* Wien, 1988, 61. More about cultural property see in: A., Pavićević, *Pravne posledice nalaza skrivenog blaga u srpskom pravu,* 88.

particularly considering possible differences in the legal nature, depending on its acquirer (titular of private or state property).

3. THE LEGAL NATURE OF PROPERTY ACQUISITION BY FINDING THE TREASURE TROVE

The legal nature of this kind of property acquisition is disputable in theory, and due to that variously qualified in certain legislations. Legislators of different states treat the property acquired by the treasure like originary property acquisition, but *not always as the same form of originary acquisition,* which is confirmed by certain statements in legal theory.

Undoubtedly, the property is not derivatized from the former owner (since he is unknown and can not be identified). However, it is acquired on the basis of special legal facts stipulated by law. All regulations, analyzed in this study can be divided in three groups, according to the *kind of the originary acquisition* by this finding: 1) by positive prescription; 2) by occupation; 3) by specific kind of finding.

1. Positive prescription, as a way of property acquisition by the found treasure is explicitly provided for in regulations of Croatia, Macedonia and the Republic of Srpska. For the legislators of the named regulations the way of property acquisition by the treasure trove is the same as the way of property acquisition by the lost item. Legal nature is regulated in the same way in both cases, neglecting the fact that those are two different kinds of finding as they fall into different categories of movables.

Besides, the positive prescription, as the way of property acquisition by this kind of finding is impossible to be adequately legally explained for many reasons. The named legal solution foresee that in case the state uses its right to renounce the property acquired by the treasure (abandon right), the treasure is handed over to the finder and to the owner of the thing where the treasure is found, in the form of *independent co - possession*, so that the property can be acquired by positive prescription.[25] This possession`s qualities are: 1) *legal*, whereby the law itself (in narrower sense) is the lawful cause for getting possession by the finding; 2) *bona fide* (the law itself assigns that feature); 3*) real* as it is not based on force, fraud, or trust abuse. The quality of possession in own right is assigned to the finder`s possession by law, so to enable property acquisition on the basis of possession of these qualities, by time passing.[26] From the moment of reporting of the finding to

[25] Art. 140 par. 2-8 LPRR

[26] Art. 139 par. 1 and 140 par. 7 LPRR

the state, persons get special legal status, and in order to get subjective civil right, they only wait for the time to pass as it is the last fact prescribed by law.

Chosen way of originary property acquisition by the found treasure trove is a «setting product» of possession`s quality and time passing conditions that have to comply with the legal construction of positive prescription institute. The finder is actually unscrupulous, illegal, real holder whose possession under general rules couldn`t lead to property acquisition by positive prescription. Hence, all legislators opted for conceiving required qualities of the finder`s possession independently, so that such a way of property acquisition can «be compared with» positive prescription institute.This is the reason why positive prescription is not considered as an adequate way to acquire property by the found treasure.

2. Occupation was considered as the way to acquire property by the treasure trove in one developing stage of Roman law, and in a section of foreign legal theory, too.[27] The finding of treasure trove in Roman law has surely represented one of the originary methods of property acquisition. Different opinions that legal writers have are reduced to their understanding of the acquisition`s legal nature. Some romanists see the treasure trove as abandoned item, over which the proprietory right is acquired by occupation.[28] Therefore, it is obvious that qualification of legal nature of the finding both in Roman and contemporay law, depends on whether the treasure trove is seen as abandoned item, or as a special category of items, whose finding also causes the special way of property acquisition.

Different opinions that legal writers have are reduced to their understanding of the acquisition`s legal nature. Concluding that the treasure trove is acquired by occupation is, today, based only on the attitudes of some legal writers claiming that the treasure trove is legally similar to dereliction – so the principle of occupation by analogy can be applied to its finding. According to that logic, the property by hidden, and then by found treasure is acquired on the principle of „immediate appropriation" of the treasure, the same as dereliction is acquired by occupation.

However, treasure trove is neither the same as abandoned item (despite some similarities), nor the same legal facts are prescribed by law for its appropriation. Those facts are not even the same for occupation of derelicted

[27] Stubenrauch, I, 493, Wachter, Pand. II, § 134 Beil, II. Cit.to: A. Đorđević, *op. cit.*, 270.
[28] D. Stojčević, *Rimsko privatno pravo*, Beograd, Naučna knjiga, 1981; O. Stanojević, *Rimsko pravo,* Beograd, Dosije, 2007, 257.

items[29]. Essentialy, in both cases appropriation of the found treasure is present, but under different legal requirements. So, regardless of similarities and differences between the concept of treasure trove and dereliction, what definately separates the legal regime of property acquisition by treasure trove from the occupation are *different legal facts prescribed by law*.

These facts make such method of property acquisition *special.* Hence dereliction between two mentioned categories, even important, is not yet essential for defining the legal nature of these two acquisition models. Set of facts prescribed by law is essential, but different for these two acquisition models. The most convincing argument, in this regard, is the fact that the precondition for private property acquisition by the treasure trove is: 1) *the report of finding* to the competent authority, so the acquiring is not immediate and unconditional, unlike the occupation; 2) handing over the treasure to the competent authority; 3) determining if the treasure trove has characteristics of cultural property. These three facts are additional in relation to the set of facts recquired for the acquisition by occupation.

3. *The third position* on the legal nature of property acquisition by the finding of treasure trove, and in our opinion the most appropriate, is the acquisition by the *specific originary method.*[30] In contemporary legal theory such acquisition method is differently designated, most frequently as: *direct acquisition ex lege, by law in narrow sense* (meaning direct law predictability of this acquisition method).

Yet, some authors name this method as: specific acquisition by «f*act of finding*»[31] or acquisition by «*direct discovery*».[32] However, these names make confusion in terms of legal nature, and especially in terms of the timing of acquisition. The last two formulations make the impression that reporting of the finding is not necessary but that: 1) acquisition by «finding fact» means the property is acquired by appropriation (occupation); and even more: 2) acquisition by «direct discovery» means the appropriation is not even necessary, enough is the fact that the treasure is discovered without apprehension establishment.[33]

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[29] D. Popov, *Sticanje prava svojine okupacijom stvari*, Zbornik radova Pravnog fakulteta u Novom Sadu, 1-2/2008, 368.

[30] For Roman law see: M. Horvat, *Rimsko pravo,* Zagreb, 1967, 137.

[31] M. Juhart, M. Tratnik, R. Vrenčur, *Stvarnopravni zakonik s komentarjem*, Ljubljana, 2004, 293 – 294.

[32] P. Tuor, B. Schnyder, *Das Schweizerische Zivilgesetzbuch*, Zürich, 1979, 624.

[33] More about condition of "objective concealment of goods" see in: A. Pavićević, *Pojam izgubljene stvari*, 329.

We think such a conclusion would be wrong, because these authors also insist on establishing possession by the found treasure and reporting of the treasure trove as a precondition for property acquisition. Even though the treasure is objectively present all the time, only by the fact of finding, we become aware of its existence and of the state of its former concealment. In this moment the need to determine its legal nature by assigning to the new titular arises, thus ending the state of threat. Therefore, the treasure trove starts to be legally significant only from the moment of discovering. This is the way we should interpret the legal writers attitude, that in the eyes of law „*discovery of treasure trove is legally decisive*".[34] Its submission to the human power is than enabled via „*direct discovery*".[35]

Concerning that each way of originary acquisition of property *sui generis* means it is established when all cumulative legal facts are fulfilled, it would imply that both ownership forms (private and state property) can be acquired when the last legally prescribed condition is fullfilled. However, what creates confusion in interpretation are formulations of particular legal texts leading us to the conclusion that the moment of state property acquisition by the treasure is – prior with regard to the moment of private property acquisition by the finding (the second group of regulations).

Formulation of the Draft suggests state property acquisition automatically by «discovering of treasure trove».[36] Croatian law text indicates that the moment when the finder takes the treasure into his possession, is the actual moment of state property acquisition.[37] It is interesting to mention, for the sake of comparison, that the formulation of the Draft on cultural property of the Republic of Serbia related to property acquisition is the following: «a cultural property with prior protection, located in the ground or water, or lifted from the ground or water is owned by the state».[38] Therefore, in the situation like this the cultural property is the property of the state and is not established as a possession of the finder (before removing from the ground or water).

It is obvious that different moments could be possibly described as legally relevant: 1) the moment of discovery; 2) the establishment of the

[34] H. Westermann, *Sachenrecht,* Mueller, 1960, 298; J. L. Bergel, M. Bruschi, S. Cimamonti, *op. cit.,* 249.

[35] P. Tuor, B. Schnyder, *op.cit,* 624.

[36] Art. 184 of the Draft.

[37] Art. 140 par. 2 LPRR of Croatia.

[38] Art. 12 Law of cultural property Republic of Serbia (Zakon o kulturnim dobrima Republike Srbije, Sl. glasnik RS, br. 71/94, 52/2011, 99/2011 - dr. zakon).

finder`s physical possession; 3) reporting of the finding to the competent authority; 4) the moment of confirming that the found treasure does not have characteristics of cultural property. We get the impression that elements of factual set are different in two basic situations: when the state acquires public property and the finder acquires the private. However, with regard to the provision of the Law of property,[39] whereby the only difference between the private and public property is the subject, but not the conditions of acquisition, we consider that even the legal nature of acquisition should not be changed according to the ownership form.

In view of the arguments set forth, we believe that the originary way of property acquisition can be possible when all cumulative legal facts, envisaged by the legislator of a state are fulfilled, as they are necessary for the property acquisition by the finding of treasure trove, including both ownership forms. We consider that the moment of final determination if the found treasure has characteristics of cultural property is legally relevant: cultural property then becomes the state property, and the found treasure trove without that characteristic – private property. Thus, we consider that the important missing element in some positive regulations is explicit legal quoting of *the timing of property acquisition by the finding of treasure trove* that will resolve the existing dilemma and set equal interpretations in theory.

4. CONCLUSION

Treasure trove is an independent valuable movable item, such as money, jewellery and other items made of precious metals, being hidden for such a long time in real property or in a movable item – so that in the moment of finding, whether by accident or by (technical, institutionally unorganized) searching, the identity of the treasure owner, or his successors is not possible to determine.[40] In substantive law of the Republic of Serbia the finding of treasure trove is not regulated, so that the existing legal gap is estimated as an important deficiency contributing to legal uncertainty, due to which this institute has to be regulated as soon as possible. The lack of common rules in a situation like this causes inconsistent decision of judges when applying

[39] Zakon o javnoj svojini RS (Law of public property of the Republic of Serbia, Official Gazette RS, 72/2011, 88/2013). See: art. 4.

[40] A., Pavićević, *Pojam skrivenog blaga*, u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Knj. 2. Kragujevac: Pravni fakultet, Institut za pravne i društvene nauke, 2014, 323-338.

different legal regimes, with different legal outcomes, thereby violating individual interest of the interested persons, and general interest as well.

In the Draft, impersonating the proposition for the future Serbian law, this institute is standardized as a special kind of finding. This fact can contribute to the legal certainty in the future, and that we consider as an important upturn[41].

We consider that the acquisition of public or private property by the finding of treasure trove is a consequence of the concrete legislator`s assessment about outweighing the need to protect private or common interest in the given case. The concrete ownership form is a result of many factors that each legislator took into account, varying from country to country. In our opinion, the acquirer can be: the finder and the state, with various arguments supporting this division. The finder has put effort, time, money and satisfied common interest by obligatory reporting of the finding. With the assessment made by the competent authority that the treasure is not cultural property, he is justifiable to be rewarded with property.

On the other hand, the state will protect valuables better, by keeping and maintaining them more adequately. Besides, a great deal of valuables will certainly become cultural property after a couple of centuries, making this notice more economical. In this way the procedure of determining whether the treasure trove is cultural property would be time-effective, as the state becomes the owner in any case.

Essentially, we consider that more important legal effect of the finding of the treasure trove is – issuing the adequate height of the bounty to stimulate the reporting of the finding. Regarding the *height of the bounty* prescribed by the Draft, we consider that the possibility to correct the determined height by percentage is adequate, based on court assessment, in accordance with special circumstances of the case. It is important to take into account that the amount of the bounty is adequate, stimulative enough for the reporting of the finding, i.e. prevention of evasion and black market sale.

At the same time, the state would not be at loss, even by paying, «somewhat higher» bounty (in justifiable cases), as it would, for the price certainly lower than the market price, «ransom» the value of common interest, not only economic, but scientific, cultural, and historical. The Draft`s substantial failure is *irregularity of the charges* of the finding, its keeping, storage and reporting of the finding possessed by the finder or a third person. The bounty prescribed by the Draft is an obligation right that the

[41] About the way to „fill" the legal the gap in positive serbian law see: A. Pavićević, *Pravne posledice nalaza skrivenog blaga u srpskom pravu*, 92.

finder acquires on this basis, while paying the charges is another matter and should be regulated in that way, like in Croatia, Macedonia and the Republic of Srpska.

The legal nature of property acquisition by the found treasure is differently determined in comparative law. The originary way of acquisition is indisputable, but in regulations and legal theory there are also: positive prescription, occupation and the finding of treasure trove – as the way of acquisition *sui generis*. We consider that positive prescription and occupation are inadequate, from all the reasons stated above, so the only reasonable we believe is: acquisition by special originary way – by the finding of treasure trove. In order to avoid terminological misunderstanding we consider this way of acquisition is neither adequate to be called the acquisition by «finding fact» nor by «immediate discovery», as we talk about specific way of originary acquisition that should be designated as: *acquisition by the finding of treasure trove*.

The legal nature of property acquisition by the found treasure is differently determined in comparative law. In our opinion, this is a specific way of originary acquisition that should be designated as: *acquisition by the finding of treasure trove*. The moment of property acquisition is the moment when all the facts from the set prescribed by law are cumulatively fulfilled. This is different in systems where the establishment of private or state property is the result of the finding.

The way of state property establishment by the finding of treasure trove, stipulated in the Draft, requires the following factual set prescribed by law: 1) factual discovery (finding) of treasure trove; 2) establishing the finder`s possession – by taking into possession. For *private property establishment by the finding,* in systems predicting such ownership form, the last missing element of this factual set is: confirmation by the competent authority that the treasure trove does not have characteristics of cultural property. Otherwise, if the treasure has such characteristics – this element is the last in the range required for state property establishment, at the time procedure is completed.

We consider that comprehensive regulation of the institute of the finding of treasure trove, with poroposed quality content and certain corrections in the Draft, would be the most adequate model for Serbian law *de lege ferenda,* for the purpose of legal certainty protection. It would imply accepting values of the named newer legal notices of the neighbouring countries, which is extremely impotant for the tendency of regional real right harmonization.

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MUTUAL WILL AS A SPECIFIC FORM OF *MORTIS CAUSA* DISPOSITION

Abstract

Transactions on the bases of inheritance involve the transmission of goods in case of death. Depending on the legal system, there are different instruments of mortis causa disposal: testament, contract of inheritance, contract on future succession, agreement on waving from future inheritance etc. German law recognizes a specific form of mortis causa bequests – the joint will that is by legal nature between standard testament and inheritance contract. The aim of this paper is to draw attention to the specific features of this legal instrument that is not recognised in our legal system, and through a comparative analysis with other related institutes (classic testament, contract of inheritance) to point out its advantages and disadvantages, in the context of the current reform of the modern inheritance law.

Key words: *freedom of mortis causa disposition, testament, joint will, inheritance agreement, binding effect of mortis causa disposal.*

1. INTRODUCTION

Instruments of *mortis causa* disposition are various. Apart from testament as general accepted in all legal systems, there are some other instruments of *mortis causa* disposition recognized in most of european laws, such as inheritance agreement, contract on future inheritance, contract of waving his/her inheritance right etc. In countries of German legal tradition specific testamentary form are present, such as joint will.

Joint will, as well as other legal instruments mentioned, contributes to the extension of *mortis causa* liberty, at the same time limiting testamentary freedom due to its specific binding effects. Unlike some other restrictions imposed into some legal systems, particularly those of continental orientation (eg. the right to a compulsory share), this is about voluntary restriction that an individual imposes himself.

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Joint will, as well as inheritance contract, has its roots in family law, and it is directed towards achieving the same goal, which is to maintain property within a family. The reason for their introduction into modern inheritance law is a reflection of the need of a spouse as a testator to secure economic position of his/her surviving spouse or his or her children. For that purpose, spouses are able to make unilateral disposition based on their common decision on the method of property disposal, associating complied statements of last will in the same document – joint will.[1]

2. TERM AND TYPES OF JOINT WILL

Legal systems that recognize joint will do not give precise definition of this legal disposition. It is a legal business that, actually, combines two individual and independent statements of last will. Its key attribute is association of the last wills declared. The creation of joint will implies the pre-existence of the intention of both of testators to dispose in common manner in the case of death. Therefore, it can be conditionally considered as "common last will".

Legal nature of joint will is complex, because it is a legal business that contains some elements of classic testament and inheritance agreement, as well. As it is the case with any legal business, the purpose of joint will is to achieve specific legal purpose that represents a *causa* of that legal disposal. The legal objective to be achieved by making a joint will is the same as with other testamentary forms – a distribution of assets in case of death. Since the will of testator is based on the initiative to make some person a heir, motive for this disposition approaches to the *causa,* as it is a case with all lucrative dispositions.

The communion, as a main feature of joint will, reflects in the association of the last wills, ie. in the identical manner of inheritance distribution. Therefore, if the joint testament wasn't made in a single document, mutual effect of testators' dispositions may not be assumed, but explicitly or tacitly expressed within testament.

Joint will appears in different modalities in legal systems that recognize it and it is mainly reserved for a limited number of persons. Due to a nature of disposition, i.e. its content, there are three types of joint will (*testamentum mere simultaneum*), (*testamentum reciprocum) (testamentum corespectivum)*.[2]

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[1] J. Hochmuth, G. Ubert, *Erbrecht,* Leitfadenverlag Sudholt, 2003, 184.

[2] H. Brox, *Erbrecht,* Carl Heymanns Verlag, Köln-Berlin-München, 2004, 115.

As far as *testamentum mere simultaneum* is concerned, it consists of two independent wills that are formally attached, being incorporated in the same document, which implies the community of testament creation.[3],[4] In this type of a joint will, dispositions of testators are completely independent from each other, i.e. each of them is determined by his successor independently. This form of bequests is often used because of some formal privileges, as it is the case with handwritten testament (specific for German law).

As far as *testamentum reciprocum* is concerned, the bequests of both testators areclosely connected, although they are not mutualy dependant. The purpose of this type of testament is that testators appoint each other to be a heir, thus their final legal position depends on the fact who lives longer. Reciprocical relation between dispositions has to be provided clearly in testament, whether in explicit or tacit way.[5]

The main characteristic of *corespective testament* is a mutual conditionality of the testators' bequests. Invalidity or revocation of a disposition of one of the testator implies invalidity of the other testator's bequest, as well as the invalidity of the whole testament.[6] Dependence between testators' bequests is based on the assumption that none of the testators will not have made his disposition without a proper disposition of the other. Corespective (conditional) provisions may refer only to the appointing of a heir, determining legacy and other burdens. Provision on appointing the will executor or on inheritance deprivation may not be mutually dependent.

Unless explicitly stated which kind of disposition has been made, it will be defined through interpretation of the last will, in order to determine the true intention of the testator. If the interpretation may not help to determine the actual will of the testator, than, the legal assumptions that are precisely defined by the law shall apply.[7] The main disadvantage of these legal approach is that the surviving spouse might be attached to the bequest after the death of his/her spouse, although it was not their real intention. [8]

Depending on the manner of inheritance distribution among cotestators, there are two common models of testamentary disposition: a model of unity

[3] *Ibid.*, 115.

[4] M. Povlakić, D. Softić-Kadenić, *Da li je potrebno uvesti nove forme raspolaganja morts causa u nasljedno pravo u Bosni i Hercegovini?*, Zbornik radova Sveučilišta u Splitu, Neum, 197.

[5] S. Branković, *Zajednički testament*, Glasnik Advokatske komore Vojvodine, br. 4 (1953), 4.

[6] Art. 2270(1) of German Civil Code, http://www.gesetze-im-internet.de/englisch_bgb/, august, 2016.

[7] Art. 2270(2) of German Civil Code.

[8] M. Povlakić, D. Softić-Kadenić, *op.cit.*, 299.

and separation mode (Einheitsprinzip-Berliner Testament und Trrenungsprinzip).[9]

As far as the model of unity is concerned, the property can be divided among the testators (that are usually spouses) in various ways. The testators may agree that the property that makes the legacy of the first deceased belongs to the surviving partner after his death and assimilates with his own property, while after the death of surviving spouse, this property belongs to the heirs determined in the joint will by both testators (most often that final heirs are children).[10] In that case, the surviving spouse appears as a full successor of the deceased spouse, without any limitation due to acquired rights (Vollerbe). As direct successors of the survivng spouse appear to be their common children who have the status of a final successor (Schlusserben). [11]

By disposing of the legacy in fore mentioned way, one coherent property unit has being made, of which a surviving testator may freely dispose. The communion of joint testament is reflected in the fact that the persons who would in the event of his death acquire inherited property are pre-determined.

Another possibility of disposition by joint will is i.e. *separation model*. It is reflected in the constitution of the limited rights of surviving testator, relating to the estate of the deceased partner. His legacy is treated as a separate property in relation to the property of the surviving spouse, for whose benefit lifelong usufruct on the property that makes the legacy, or a limited right of ownership might be established.

In the case of constitution of a lifelong usufruct in favor of surviving spouse, he or she is entitled to all the rights and obligations that implies the position of usufructuary, and after his death, the property will be inherited by heirs appointed (who acquire the ownership over it). Thus will contribute to economic certainty of the surviving spouse who will retain the same economic position, as it was at the time of the death of his spouse.

Fideicomissary provisions are very present in this separation model of joint will, where the assets of the deceased and the surviving testator have been treated separately, as far as testamentary disposition is concerned.[12] The union of these depositions is not reflected in the unity (integration) of the

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[9] D. Leipold, *Erbrecht –mit Fällen und Kotrollfragen*, Mohr Siebeck, Tübingen, 2002, 163, 164.
[10] Art. 2269. of German civil code.
[11] J. Hochmuth, G. Ubert, *op.cit.*, 187.
[12] T. Đurđić-Milošević, *Fideikomisorna substitucija i sloboda zaveštajnog raspoalaganja*, Pravni život, 10/2012, 719-732.

assets of both testators, but in the common intention of the testators to dispose with their own property in the same, in joint will defined manner. Since it is about successive inheriting, the surviving spouse has a position of previous successor (vorerbe) during the first succession and inherits the estate of the deceased as a separate assets. He can freely dispose of this property, within legal frame that are implied by the legal position of previous heir. At the same time, he has autonomy to dispose of his own property, since it is independent in a relation to the inherited one. When it comes to the death of a surviving spouse, another succession occurs and the third person who had been previously appointed by joint will, inherits as a final heir. Successors are usually common children who inherit on two grounds: first, they acquire the legacy of the first deceased as the latter heirs (vorerbe), while the property of the surviving spouse they inherit as his direct heirs.

If we compare these two different manners of testamentary dispositions, it appears that the advantage of so called Berliner testament, as a model of unity, from the perspective of the surviving spouse' interest, reflects in the fact that the surviving spouse may freely and unlimited manage and dispose of the legacy inherited from a deceased partner. The successive inheriting, on the other hand, implies a restriction of property rights. Apart from the advantage mentioned, separation model may result in jeopardizing the property interests of the children as a final successors, since there is a possibility that one of the spouses spends the entire inheritance. In this case, the children could exercise their right to a forced share, claiming it against the surviving spouse (Phlichtteilsforderung).

3. THE MAIN CHARACTERISTICS OF JOINT WILL

3.1. Form of joint will

Joint will can be made by two or more persons as testators, and their common last will is usually contained in the same testament, as a single document. Although the form of joint will is of constitutive importance, statements of last wills of both testators may be contained in the different documents. This is often the case with handwritten testament that may be created through two independent acts of testators (as is the case in German law). In fact, one of the testator makes a last will and sign it while the other

testator agrees to its content by signing it, when joint will is finally formed.[13] However, it is important while making bequests, that testamentary bequests of both testators are substantively attached, and that each of them is familiar with the content of the disposal of his partner.

When creating a joint will, each of the testators has the right to choose the form of his testamentary disposition, and selected forms of both testators may be different. In jurisdictions where a joint will may take a form of extraordinary testament, if the prerequisites for this form are met on the side of one testator, the other testator may opt to express his last will in a regular testamentary form. [14]

In the case of doubt which testamentary form is concerned, the will of the testator shall be determined by interpretation of his last will. In the case that it cannot be defined by interpretation which form of testament has been chosen by testator, than legal presumption of so called Berliner testament applies.[15]

When it comes to the formal requirements, they are quite flexible, as far as joint will is concerned. Namely, in German law the joint will can take one of the forms prescribed for classic testament, which means it can be made as a private and public testament, regular and extraordinary, as well.[16]

3.2. The content of joint will

When it comes to the content of joint will, general rules as for a classic testament apply. If joint will consists of only unilaterally binding provisions, then it would not be much different from standard testament. The peculiarity of the joint will are reciprocal and conditional provisions by which unilateral but dependent dispositions are provided.

In a joint will are often present clauses on remarrying (Wiederheiratungklauzeln), no matter if it is about model of unity or model of separation. This clause should ensure that descendants receive their part of inheritance from surviving parent during his/her life, in the case he re-marriages.[17]

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[174] P. Breitschmid, *Testament und Erbvertrag-Formprobleme*, in: Testament und Erbvertrag-Praktische Probleme im Lichte aktuellen rechtsentwiklung, Verlag Paul Haupt ,Bern und Stütgart, 1991, 44-57.

[14] Art. 2266 of German Civil Code.

[15] Art. 2269 of German Civil Code.

[16] H. Bartholomeyczik, W. Schlüter, *Erbrecht,* C.H.Beck´sche Verlagsbuchhandlung, München, 1975,165; H. Lange, K. Kuchinke, *op.cit.*, 427-431.

[17] H. Lange, K. Kuchinke, *op. cit.*, 425, 426.

In the separation model surviving spouse has a legal position of previous successor (Vorerbe), while children have the position of a latter successor (Nacherbe). It can be provided that in case of remarriage latter successor enters into the legal position of the heir, not in the moment of death of first died spouse, but at the time of remarriage of surviving spouse. [18]

In the model of unity or, so called, Berliner testament, in the case of remarriage, surviving spouse would share his inheritance with children, under the rules of intestate succession. Entering into marriage represents subsequent condition for previous and latter testamentary succession. Children become latter heirs and inherit to the amount of their intestate share , and surviving spouse becomes the later successor with the proper intestate share. If the surviving spouse doesn't enter into marriage again, he remains in that case a complete successor.

Such provisions are often immoral, because they condition the acquisition or loss of inheritance to certain facts that might occur or not (e.g. if the spouse remarries loses inherited property). Since they are not in compliance the moral principles, generally they do not produce any effects, no matter if they are part of the contents of classic or joint bequest or inheritance contracts.

3.3. The circle of persons entitled to make joint will

In German law a joint will is reserved for spouses and registered partners[19], and the termination of a marriage between the testators shall provide invalidity of joint will.[20] Spouses usually appoint each other as a heir, and after the death of a surviving partner the legacy usually belongs to their common children, or to other close person who they have appointed together. In addition, in Austrian law joint will can be made by fiancé, if it comes to marriage. Since joint will is usually made between spouses, it is often noted as a spouses last will (Ehegattentestament).[21]

The limitation of the circle of persons who are entitled to make a joint will is prescribed in order to prevent a successor's influence over the will of the testator by third persons. [22] It is interesting to note that joint will has been

[18] F. Reiner, *Erbrecht,* München, Beck, 2000, 159.
[19] Art. 2265 of German Civil Code.
[20] Art. 2268, 2077 of German Civil Code.
[21] H. Bartholomeyczik, W. Schlüter, *op.cit.,* 163, 164.
[22] S. Ferrari, *Erbrecht-Ein Handbuch für die Praxis,* Manzshe Verlags – und Universitätsbuchhandlung, Wien, 2007, 177.

allowed in Serbian Civil Code from 1844. and was regulated within provisions governing marital relations, allowing its formation only between spouses.

3.4. The communion as a main characteristic of joint will

An essential feature of joint will is not the unity of documents in the formal sense, but association of statements of the last wills of both testators which results in binding effect of this testamentary form.

This communion is reflected, primarily, in the attachment of declared wills by which they are obliged to dispose with his/her inheritance in advanced agreed manner. As it is a case with any legal work a disposal by joint will is made in order to achieve a particular legal objective, which is the *cause* of the legal transaction. The legal objective to be achieved by making the common will is the same as with other testamentary forms - a disposal of assets in the event of death. Since the will of the testator is based precisely on the initiative to make certain person a successors, the motive for disposition by joint will approaches the *causa.*

However, a distinction between testamentary forms is not always easy to make. Hence the question of the legal nature of two or more testaments formally attached within the same document, where the testament bequests are independent and autonomous between each other, the communion has only a formal meaning. There is dilemma whether this is joint will in its full meaning, or two independent classic testaments?

It is considered in theory that this type of *mortis causa* disposition constitutes so-called. simultaneous joint will, which is not a joint will in the real sense, but a community of making testament, in its formal sense. Therefore, in some legal systems that do not allow joint bequests, a possibility of conversion of simultaneous joint will in to two classic testaments is permitted, if the formal legal requirements for their formation are fulfilled.[23]

As it is about two independent testamentary dispositions that are just formally bonded, one question arises: would this modality of joint will be allowed in our legal system?

Testament as legal businessess in our law, as well as in most of the legal systems of the continental law family, is considered to be a unilateral legal act produced by a declaration of one will-will of the testator. Therefore, any impact on will of a testator (unless those of consultative nature) leads to the voidances of the whole testament. By prohibiting of common testamentary

[23] M. Povlakić, D. Softić –Kadenić, *op.cit.*, 197.

disposition, unilateral character, as a key feature of testament, is emphasized, as it is the case in our law. [24] In legal theory it is considered that there are no obstacles for two classical testaments to be formally attached in the same document, since no substantive connection between these dispositions has been made. Both testaments are independent declarations of last will that produce legal effect completely independent.

In the opposite situation, when the statements of last will of both testators are not incorporated in the joint will, arises a question how would the communion of the last wills be proven? For valid creation of joint will it is necessary that joint character of wills is explicitly emphasized in the testament itself. This is particularly the case by mutual (reciprocal) disposals where the last wills of testators are structurally attached, and it is even more emphasized in the corespective testamentary disposals that are mutually conditioned. [25]

Binding effect of joint will relates to the possibility to revoke the testament. In that sense, irrevocability of inheritance agreement is a rule, while joint will is generally revocable, with some exceptions.

3.5. Right to revoke joint will

Binding effect of joint bequest results in a limited ability to revoke the bequest. The realization of this right as well as its scope are determined by the nature of testamentary disposals (it depends on whether it is about unilateral, reciprocal or corespective provisions, and whether they become effective during the lifetime of both testators, or after the death of one of them).

For the life of the testator, a joint will may be revoked at any time, by consent of the testators or unilaterally (without even informing the other testator) if the content of the bequests is composed by non-binding provisions (nicht wechselbezüglicher Verfügung), which are actually unilateral and reciprocal provisions. [26]

When it is about corespective (conditional) provisions, they could be for the life of the testators revoked jointly by both testators, for example, by making a new joint will. The possibility of unilateral revocation of these

[24] See O. Antić, Z. Balinovac, *Komentar Zakona o nasledjivanju*, Nomos, Beograd, 1996, 306; Serbian Civil Code from 1844 was created according to the Austrian Civil Code, allowing the joint will between spouses (Art. 779 of Serbian Civil Code).
[25] M. Povlakić, D. Softić – Kadenić, *op.cit.*, 197.
[26] Art. 2253. of German Civil Code; H. Bartholomeyczik, W. Schlüter, *op.cit.*, 172.

provisions exists only if the statutory form is fulfilled. This means that the statement of revocation has to be certified by a notary and submitted by the second testator. In this way, the other partner is informed about revocation, which is very important concerning conditional character of dispositions, since a revocation of one disposal implies invalidity of the other[27]. Such a formal way of revocation of the last will, prevents from secret revocation, thus preventing misuse of this entitlement, as well.

To revocation of the joint will the provisions governing the revocation of the contract of inheritance apply. Therefore, we come to the conclusion that in the domain of revocation these legal instruments correspond to each other.

The above mentioned rules on revocation apply only during the lifetime of both testators of joint will. The right of revocation ceases in the moment of death of one of them, which means that with the death of first diseased, the surviving spouse loses the right to revoke the testament or to edit its content, and becomes permanently bound by joint will.[28] Thus follows that the testator may not be limited in their right to freely dispose of their own property *inter vivos*, even if he had previously disposed with his property by joint will.[29] [30]

Thus, the binding effect of joint will is linked to the moment of death of the testator who dies first. Such a provision is of discretionary nature, and it can be excluded by mutual agreement of testators, which brings to a question justification and usefulness of joint will in comparison to a classic testament. Also, the attachment of the surviving spouses to joint will may cease to exist if he waive his right to inherit on the bases of the joint will. [31]

Subsequent disposal of the surviving spouse will be void if it is made with the intention to make difficult the position of a heir appointed by joint will. For example, if the surviving spouse makes a gift to a third party with the intention to aggravate the legal position of the heir, after acquisition of inheritance, this heir would be entitled to require return of the gifts from a beneficiary, in accordance with the rule of unjust enrichment. However, this subsequent disposal would not always be invalid, for example, if they improve legal position of a heir, or in case of neutral or meaningless

[27] Art. 2271(1) of German Civil Code.
[28] Art. 2271 (2) of German Civil Code; H. Bartholomeyczik, W. Schlüter, *op.cit.,* 172; D. Leipold, *op. cit.,* 166, 167.
[29] J. Hochmuth, G.Ubert, *op. cit.,* 203.
[30] Art. 2286. of German Civil Code.
[31] Art. 2271 (2) of German Civil Code.

dispositions (eg. the successor dies before the surviving spouse) they will be effective.[32]

Joint will ceased to exist with the termination of marriage (no matter if there has been a divorce, or annulment of marriage) unless the intention of the testators was different. On termination of the joint will due to the termination of marriage the provisions governing the termination of the classic testament apply. [33]

It is important to draw attention to the fact in specific circumstances, even after the death of one spouse, surviving spouse may be released from binding effect of joint will and gain full freedom of disposition. This can be achieved contracting the exculpatory clause (Freistellungsklausel). Specifically, parents commonly appoint their children to be heirs. As the future behavior of children is unpredictable, arranging these clause parents often retain the right to change or to revoke subsequently their *mortis causa* disposal. The right of revocation in this case can be achieved only by making a new will, but not by annulment of the will. [34]

4. JOINT WILL IN COMPARATIVE LAW

German law allows variety of possibilities to become bounded by mortis causa dispositions. In Austrian law critical approach towards binding effect of mortis causa disposition is taken, while in Swiss law this concept is not explicitly regulated.[35] There is a presumption in German law that the dispositions made by spouses through joint will are mutually dependent, i.e. a disposition of one spouse would not have been made without the disposition of the other.[36] In Austrian law, any assumption of mutual dependence is not permitted, even in the case of mutual appointment as a heir between testators, and mutuality of dispositions have to be explicit agreed.[37] The conditional bequest may be revoked at any time, even after the death of first deceased, when proper mutual disposition losses its effect.[38] In Swiss law, for example, joint testament is not legally prescribed, but not

[32] J. Hochmuth, G.Ubert, *op. cit.,* 198.
[33] Art. 2268. of German Civil Code.
[34] J.Hochmuth, G.Ubert, *op.cit.,* 203.
[35] H. Bartholomeyczik, W. Schlüter, *Erbrecht,* C.H.Beck´sche Verlagsbuchhandlung, München, 1975, 161.
[36] Art. 2270 (1) of German Civil Code.
[37] Art. 1248 of Austrian civil code http://www.ris.bka.gv.at/, august, 2016.
[38] *Ibid.*

explicitly prohibited. However, in judiciary practice there is a dominant view that testament represents unilateral act and it can only be a manifestation of one last will. Therefore, it is not possible for more than one persons to be engaged with testament creation.

5. JOINT WILL AND OTHER LEGAL BEQUESTS

5.1. Joint will and standard testament

Prerequisites proscribed for classic testament have to be met by joint will as well, such as testamentary capacity, free will of the testator manifested in statutory form and declared with the intention of making bequests (*animus testandi*).

Beside free and exact will of the testator for making a valid joint will, the testator's will has to be unilateral and personal. Unilateral character is one of the key characteristics of classic testament, and any impact on the will of the testator by third parties leads to its voidances. This feature is particularly emphasized in the domestic succession law in which is prohibited to attach a testamentary disposition of one person with the last will of the other, which has been particularly manifested through the prohibition of making the joint will.[39]

In contrast to standard will, joint will is characterized by mutuality and sometime by interdependence between dispositions, thus derogating from the unilateral character of testamentary disposition.

The last will of the testator has to be personally presented, regardless of the form concerned. Thus, a joint bequest can't be made by a legal representative nor an attorney, but only personally by the testator. Personal character of testamentary disposal is manifested through a revocation of legacies since the testator is able only personally, with freely expressed will to revoke bequests.

Unlike the standard testament that is revocable legal business and therefore does not bind the testator, the joint will is, generally speaking, also revocable legal instrument which, in some cases, constitutes a obligations for testators. Binding effect of the joint will is, at the same time, the point of distinction from standard testament and the key argument for justification of their separate regulation. [40]

[39] O. Antić, Z. Balinovac, *op. cit.*, 306.

[40] W. Zimmenrman, *Ebrecht,* Erich Shcmidt Verlag, Berlin, 2010, 91.

Joint will matches classic testament until the moment of death of the first deceased testator. Until that moment the joint will is revocable, as a classic testament. From the moment of death of one of the spouses, it becomes irrevocable bequest, thus limiting the autonomy of surviving testator concerning further property disposals. At the same time, it secures the realization of the last will of the deceased whose dispositions in the case of death remains unchanged.

The right of revocation is the manifestation of freedom of testamentary disposition, and waiver of this right in the classic testament has no legal effect. By a joint will, waiver of the right of revocation is possible, but entails specific consequences, since in this case joint will shall take effect as a inheritance contract, if it meets legal requirements for the validity of this contract.[41]

5.2. Joint will and contract of inheritance

It is indisputable that the inheritance agreement and a joint will are closely related institutes, because they have roots in the family law. Their common characteristic is reflected in the legal aim achieved through their standardization, and it is to maintain the assets of the decedent within family. Common points between joint will and inheritance contracts are those in which the joint will differs from classic testament as unilateral business, i.e. those that make a difference between inheritance contract and classic obligatory agreement.[42]

The basic common feature of the contract of inheritance and joint will is their *mortis causa* effect and binding nature. Both legal transaction are made with the same goal, to appoint the partner as a heir.[43]

Joint testament can be made by a limited group of people (usually between spouses and registered partners), while there is no such a restriction for inheritance agreement.

While testamentary ability is prerequest for the creation of valid testament, for the conclusion of valid inheritance agreement contractual capacity is a precondition. If the agreement is concluded between the spouses or fiancé, then it may also be concluded by persons of limited contractual capacity. Both, contract on inheritance and a joint will are specially adapted

[41] S. Branković, *op.cit.*, 6.

[42] T. Đurđić-Milošević, *Razgraničenje ugovora o nasleđivanju od drugih pravnih poslova,* Pravni život, 10/2014, 513-526.

[43] H. Lange, K. Kuchinke, *Erbrecht,* C.H. Beck, München, 2001, 421, 422.

to the marital community, and historically, they were most often concluded between the spouses.

Joint bequest can be made in any form prescribed for classic testament, while for the contract of inheritance only notary form is provided.[44] The reason for greater presence of joint will in practice is the privilege of form that is particularly specific for handwritten testament, since iy doesn't involve strict formal requirements.[45]

The difference between the inheritance contract and a joint will is reflected in the nature of their binding effect. The binding effect of the agreement on succession is linked to the moment of conclusion of the contract, while the binding effect of the joint will is linked to the moment of death of the other spouse.[46] Before the moment of death, a joint will is unilaterally revocable if a revocation was made in the form of a notary certified document, but from the moment of death, the right of revocation ceases.[47]

Since a contract of inheritance is formed by making an agreement between contracting parties on the subject matter, for the validity of the joint will prior consent of its participants to create such a testament is required.[48] It is about two unilateral declarations of will in case of death that are integrated in the same legal business, but do not have a contractual character. Statements of the last will might be mutually dependent, so that joint disposals of the testators depend on each other (nullity of one testator declaration implies the nullity of the statement of the other, implying the nullity of the whole testament as well), which reminds on the contractual provisions.

Although reciprocity is one of the main features of the contractual disposals, joint will does not provide contractual effect. Testamentary dispositions do not produce binding effect for the life of the spouses, but their binding effect is attached to the moment of death of the first deceased testator.[49] In this regard, a joint will represents a legal transaction *mortis causa*, as opposed to contract of inheritance. It is of double legal nature - a contract and disposition in the case of death (for example, some of the

[44] Art. 2276 of German Civil Code.
[45] Art. 2267 of German Civil Code.
[46] H. Bartholomeyczik, W. Schlüter, *op.cit.*, 162.
[47] H. Borx, *Erbrecht,* Carl Hezmanns Verlag, Köln-Berlin-München, 2004, 112.
[48] D. Živojinović, T. Đurđić-Milošević, *Inheritance Contracts and its Substitutes in European and Srebian law,* Revija za Evropsko pravo, br. 2/3, 2015, 75-76.
[49] H. Borx, Erbrecht, *op.cit.*, 110.

obligations exist during the lifetime of the contracting parties e.g the obligation of maintenance and some are being realized only after the death of first deceased e.g acquiring ownership over the assets).

It is important to note that the binding effect of the joint will doesn't arise from the agreement of the testator to dispose together, but is based on the law. The obligation arising from a joint will is justified by the objective to be achieved by its constitution, which is to secure that the last will of the testator who has die first, is going to be realized.

6. CONCLUSION

From the previous analyze we can come to the conclusion that the joint will is a specific form of associate testamentary dispositions that has significant similarities with standard testament, but with the inheritance agreement as well. Its specific binding effect is a key point of distinction between all these institutes. While the classic testament has no binding effect, in contract of inheritance the binding effect has the primary character, and in joint will secondary. Binding effect of these legal affairs is aimed to protect the interests of the deceased spouse, ensuring the realization of his last will, since the surviving spouse is disabled to change testamentary disposition of his death partner.

Recently, in the German legal doctrine a growing criticism of the binding effects of private joint will is dominant. As the biggest disadvantage it is pointed out that in most cases the testator is not aware of the effect that joint will might produce. Since notaries are not involved in the creation process, testators are not introduced in all legal effects of making the will, as is the case with the agreement on inheritance. Therefore, there are suggestions to limit the binding effect of private joint will, or to allow its creation only in the public form. However, there are some opposite views in comparative legal doctrine that private form of joint will should not be completely abolished. An argument in favor of this attitude some formal benefits are mentioned, as it is the case with the handwritten bequest *mere simultaneum*.

If only public form of joint will would be permitted, its legal purpose would be disputable, since the contract of inheritance is concluded only in the public form, and it is possible to achieve the same purpose as it is with the joint will (mutual appointment of a heir). In the legal systems that are not familiar with these two forms of binding disposal in case of death (as is the case with our law), it is clear that the joint will is not in compliance with the fundamental principles of testamentary disposition. The issue of contractual

disposal in case of death remained open, since it should be considered from the broaden perspective – autonomy of *mortis causa* disposition.

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PART SIX
FAMILY LAW
Family Law Issues in the Globalized World

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GLOBALISATION AND FAMILY LAW

Abstract

The concept of globalisation is mostly discussed as an economic, political and cultural process and the manifestations of them. Only recently in legal academic literature a judicial globalisation process or a globalisation in the legal sphere is pointed out. The concept of globalisation is connected with the law, particularly with family and family law. In this paper, the author considers some important changes in family law caused by globalisation, which occurred under the influence of American law and the practice of European Court of Human Rights. As example of the first, the author considers trends of the introduction the divorce out of court, while the changed approach to same-sex couples is offered as an instance of the influence, mainly, of the European practice.

Key words: *globalisation, family, family law, divorce out of court, same-sex couples.*

1. INTRODUCTION

The concept of globalisation is mostly discussed as an economic, political and cultural process and their manifestations.[1] The connection of the globalisation and law was established, in the beginning, in international law, and it was mostly not analysed in the context of domestic family law.[2] As the

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[1] A common feature of all discussions of globalisation is a strong tendency of reducing globalisation to a purely economic dimension. Without denying the importance of the economy, Santos emphasizes the need to pay the same attention to the social, political and cultural dimensions of globalisation. (B. de S. Santos, Procesi globalizacije, (s engleskog prevela Slobodanka Glišić), Reč no 68/14, decembar 2002, 6-7, http://www.womenngo.org.rs/feministicka/tekstovi/boaventura-de-soza-santos.pdf, accessed 4.6.2016).
Pečujlić defines globalisation as a world-wide phenomenon of economic, technological, political and ideological - cultural unification of the world. (M. Pečujlić, *Globalizacija – dva lika sveta,* u: Aspekti globalizacije, Beogradska otvorena škola, Beograd, http://www.bos.rs/materijali/aspekti.pdf, accessed 25.6.2016).

[2] As an exception to this, in theory the debate on the relationships between globalisation, poverty and inequality was marginalized (B. Sherif Trask, *Globalization and Families:*

reasons to why globalisation did not have a significant impact on law, the following are stated in the theory: 1. globalisation is generally accepted as the new paradigm of society, but it has remained a markedly vague concept; 2. In the legal theory globalisation has not been considered as "a true paradigm shift", but as an unhandy attempt "to adapt the methodological nationalism; 3. globalisation sets interdisciplinary challenges, and internationalization and globalisation are lacking in the law; in fact law is not considered as an important factor of globalisation, except in international law.[3]

However, in recent time legal scholars point out a judicial globalisation process or a globalisation in the legal sphere. The first of them is defined as "the interaction between the judges from different jurisdictions around the word".[4] A globalisation in the legal sphere is defined as "the convergence among national constitutional systems in their structures and in their protection of fundamental human rights"[5] or as "the trend toward world domination of specific regimes."[6]

Namely, the process of globalisation is accompanied by the orientation of numerous subjects towards the happenings in the other countries, in the foreign law. The study of comparative law allows to the scholars and the legislators to interchange legal ideas, comprehend the methods of reasoning and approaches of foreign legislators to solve the same or similar problems and matters as well as to choose the best solution. The judges of the highest courts also want to find out the decision-making of their foreign colleagues in some cases, especially in the field of international law: the application of the

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Accelerated Systemic Social Change, Springer Science+Business Media, LLC 2010, V, http://globalizationandfamilies.com/excerpt.html, accessed 14. 7. 2016)

[3] R. Michaels, *Globalization and Law: Law Beyond the State*, Duke University School of Law March 15, 2013. Law and Social Theory, Banakar & Travers eds., Oxford, Hart Publishing, 2013, 1, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5540&context=faculty_scholarship, accessed 14.7.2016.

[4] In the cases with international or foreign elements, the national courts, especially the highest courts, are obligated to "develop expertise concerning the application of legal sources elaborated outside of their national legal system." (E. Mak, *Globalisation of the National Judiciary and the Dutch Constitution,* Utrecht Law Review Volume 9 Issue 2, 2013, 36, https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.224/accessed 14.7.2016).

[5] M. Tushnet, *The Inevitable Globalisation of Constitutional Law*, in Muller & Richards, cited in: E. Mak, op.cit., 36.

[6] H. P. Glenn, *Legal Traditions of the World,* 2007, 49, cited in: E. Mak, *op. cit.,* 36.

rules of international law, legal reasoning within the legal system and others.[7]

Therefore, the present situation is different, the interrelationship between globalisation and law can no longer be denied. Of the four elements characterizing globalisation[8] - extensity, intensity, velocity and impact of the global on the local and vice versa, the last is reflected in the law. The sources of law are multiple, numerous fields of the law are regulated not only by domestic, but also by European and international law. The state is not the only legislator, but also the supranational institutions, global or regional. Because of that, national and international law are not always strictly separated, although they are formally distinct.[9]

2. GLOBALISATION AND FAMILY

Although in the approaches to globalisation its connection with the family has not been sufficiently explored, the impacts of globalisation on family life are obvious and indisputable. Family and family life have been fundamentally altered by globalisation, especially by global changes like migration, poverty,[10] aging populations.[11] The family is in dynamic and complex relationship with economy, national and transnational institutions, so the process of the free movement of capital, goods, people and services, the restructuring of economy, the altering role of states and cited global changes have transformed basic concepts in family law. The most important changes caused by globalisation concern marriage and divorce (later marriages and births, increasing number of divorces and single parents), increasing alternative family forms (cohabitation, same sex partnerships,

[7] A. Hol, *Highest Courts and Transnational Interaction: Introductory and Concluding Remarks,* Utrecht Law Review 8(2), 2012, 1.

[8] D Held *et.al, Global Transformations: Politics, Economics, and Culture,* Stanford, Stanford University Press, 1999, 14-28, cited in: R. Michaels, *op. cit.,* 3.

[9] See more: R. Michaels, *op. cit.,* 15.

[10] On the poverty as the global problem see more in S. Bubić, *Siromaštvo djece – uzroci i sredstva za njegovo smanjenje,* u: Dani porodičnog prava Pravna sredstva za smanjenje siromaštva djece (ur. S. Bubić), Pravni fakultet Univerziteta "Džemal Bijedić" u Mostaru, Mostar, 2015, 11-13.

[11] On the phenomenon of aging see more: S. Bubić, *Novi pristup uređenju statusa odraslih osoba s duševnim smetnjama*, u: Dani porodičnog prava „Pravna zaštita odraslih osoba", (ur. S. Bubić), Pravni fakultet Univerziteta "Džemal Bijedić" u Mostaru, Mostar, 2016, 85 - 86.

single-parent families, stepfamilies[12]), roles and relationships within the family, especially the children (childhood, parenthood, singlehood) and women (declining fertility, limitation of family size in the West[13], aging and intergenerational relationships), gender norms and domestic violence[14]

In parallel with the impact of globalisation on the family, the reverse process is also taking place - decisions made in the family impact economic and nation-state programs and policies, contributing to their success or failure.[15]

The impact of globalisation on the family is directly related to its internationalization. There are numerous examples for that, and only some of them are stated here: migrations from one state to other, from one part of the world to the other; lead to marriage between citizens of different countries, who during the marriage or at the time of their divorce change their place of residence; the residence of a child with one of the parents after the divorce and maintaining contact with the other parent living in another state as well as the exercise of other parental responsibilities and the abduction of the children; when citizens of different states, whose national legislation does not

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[12] In the national legislation it begins to expressly regulate the stepfamily as a form of the alternative family. So Catalan Civil Code (Ley 25/2010, de 29 de julio, del libro segundo del Código Civil de Cataluña, relativo a la persona y la familia, https://www.boe.es/buscar/act.php?id=BOE-A-2010-13312, accessed 3.8.2016) regulates the reconstituted family composed of the child, child's mother or father who has the custody of the child and their spouse or partner in stable cohabitation.The status of the spouse or partner is strengthened by recognizing to her/him the right to participate in decision-making on their daily matters and the possibility to take the necessary measures for the welfare of the child (article 234-14/1, 3), and by authorizing the court to exceptionally attribute custody and other parental responsibilities to her/him in the case of the death of the parent (article 236-15/ 1, 2). See more: C.M. Lázaro Palau, *Reflexiones sobre la situación jurídica del tercero en las familias,* Actualidad civil n.º 6, junio 2016, Nº 6, 1 de jun. de 2016, Editorial LA LEY, 1-11.
Dutch Civil Code regulates a jointly exercise authority over the child by child's parent and this parent's spouse or registered partner (article 1:253sa, Code at: http://www.dutchcivillaw. com/civilcodebook01.htm, accessed 3.8.2016).

[13] In addition to the dominating nuclear family there is still large (extended) family changing under the impact of contemporary factors, such as the modern communication and information technologies facilitating regular interactions between family members living in different parts of the country or the world (linkage and contacts through Skype, e-mail, satellite links (supra note 2, 33, http://globalizationandfamilies.com/pdf/Globalization-Families-Chapter2.pdf, accessed 14.7.2016.

[14] *Ibid.*, 31 - 38.

[15] *Ibid.*, V.

recognize same-sex marriage or registered partnership, conclude it in a state whose law recognizes them and go to live in a country where they are not recognized; the recognition of the measure of protection provided in one state to a child without parental care which is not regulated in the other state, in which she/he will live.

Globalisation does not mean only uniformisation:[16] the states retain their laws, which can be different, or their application, even when they are almost the same, can be distinguished crucially.[17] The states retain sovereignty in regards to the content of family law, i.e. substantial law.[18] However, the sovereignty is limited in this context, as result of the influence of international documents on human rights[19] and the decision of the European Court of Human Rights (further: Court), that are binding for member states of the Council of Europe.[20] The states are obligated to, acting on a decision of this Court, amend law that violate some of the rights from the European Convention on Human Rights (further: Convention), and to improve the existing juncture in case of violations committed by the state body. Because of these binding effects of the judgements, its jurisprudence constitutes the transnational right and the Court appears as a supranational institution. In

[16] Ralf Michaels cites this as one of the errors about globalisation (*op. cit.*, 4).

[17] Unification of the law is found mainly in international private family law.

[18] Scholars write on the beginning of breaking the idea of absolute state sovereignty (R. Michaels, *op. cit.*, 15).

[19] As an example of the obligation to comply with the requirements of these documents the right to marry can be noted. Under article 9 of the EU Charter on fundamental rights, national laws have "a crucial role and the national legislature is offered broad latitude in the elaboration of the domestic rules on marriage in accordance with the respective social and cultural concepts. On the other hand, the fact that the right to marry is included in the central human rights instruments supports the idea that the exercise of the right cannot be wholly governed by national law. The relevant international provisions, thus, guarantee a certain minimum of human rights standards irrespective of the domestic regulations". (The Commentary of the Charter of Fundamental Rights of the Union, EU Network of Independent Experts on Fundamental Rights, Réseau UE d'experts indépendants en matière de droits fondamentaux, june 2006, 99)
http://cridho.uclouvain.be/documents/Download.Rep/NetworkCommentaryFinal.pdf, accessed 15.7.2016).

[20] In this paper it will not be considered the role of the European Court of justice, whose decisions must be respected by the EU countries. Here we just point out that its practice is under the great influence of the European Court of human rights. (see more: S. Bubić, *Evropski propisi i praksa u oblasti porodičnog prava*, u: Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, (ur. S. Petrić), Pravni fakultet Sveučilišta u Mostaru i Pravni fakultet Sveučilišta u Splitu, Mostar, 2009, 97).

that way it contributes to the harmonisation and globalisation of family law and the acceptance of contemporary solutions in national laws. Modern tendencies and attitudes of the Court are the consequence of the application of teleological, evolutionary methods to the interpretation of law. Since the 1978 (the case Tyrer v. the United Kingdom, 25 April 1978, § 31, Series A no. 26) the Court reiterates that the Convention is a "living instrument" and has" to be interpreted in present-day conditions".[21] Furthermore, according to the Articles 31 - 33 of Vienna Convention on the law of treaties (concluded 23 May 1969)[22], the Court interprets the Convention in the light of other international instruments. In many judgments, for example in the case of Witold Litwa v. Poland[23], it reiterates that, under the general rule of interpretation contained in Article 31 of the Vienna Convention, "the process of discovering and ascertaining the true meaning of the terms of the treaty is a unity, a single combined operation. This general rule, closely integrated, places the various elements enumerated in the four paragraphs of that Article on the same footing. In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided in Articles 31 to 33 of the Vienna Convention" (§58). The process of interpretation has to follow the sequences from article 31: it „must start from ascertaining the ordinary meaning of the terms of a treaty – in their context and in the light of its object and purpose" noted in paragraph 1 of Article 31 (§59).

Some of the previously mentioned important changes in family law caused by globalisation, occurring under the influence of American law or the European Court of Human Rights, will be considered further in this paper.

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[21] See: S. Bubić, *The family in European law and practice,* Review for Law & Economics, (ed .S. Bubić), Pravni fakultet Univerziteta "Džemal Bijedić" u Mostaru, god. 3, br. 1. Mostar, 2002, 6.

[22] Available on: http://crossborder.ie/site2015/wp-content/uploads/2015/11/1969-Vienna-Convention-on-the-Law-of-Treaties.pdf, accessed 15.7.2016.

[23] Application no. 26629/95 Judgment 4 April 2000. http://www.google.ba/url?url=http://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%26id%3D001-58537%26filename%3D001-58537.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwj_nuu4-afOAhXGuhQKHcDzCf4QFggXMAE&usg=AFQjCNGlV7wpmUWwDUjB1ym6GGjQuRTjcg, accessed 3.8.2016.

3. CONSENSUAL DIVORCE OUT OF COURT

The divorce is one of the institutions in connection to the manifestation of harmonisation and globalisation. It is allowed in all countries of the world, except Vatican and the Philippines, with diversities in the legislation concerning the divorce grounds and the proceedings. In the legislations of most European states the divorce is in the jurisdiction of the court, and only in some of them, like Portuguese, Russian, Danish (in few specific circumstances in Norwegian) consensual divorce (divorce by mutual consent) are granted by administrative proceedings.[24] The judicial proceedings may be initiated, in the majority of laws, either by a petition of one spouse or by request of both spouses for consensual divorce. In addition to this ways of divorce, it is beginning to accept a new solution. Namely, under the influence of American law and practice, in order to simplify, speed up and reduce the cost of divorce proceedings, in some European states divorce out of court, so-called private divorce is introduced. This way of

[24] The powers of the administrative authority are different. In the Scandinavian model it has quasi-judicial discretionary power to scrutinize divorce grounds and agreements on ancillary matters (see: M. Antokolskaia, *Divorce law in a European perspectiv*e, in: European Family Law, Volume III Family Law in a European perpective, (ed. J.M. Scherpe), Cheltenham, UK – Northampton, MA, USA, 2016, 41-82, https://books.google.hr/books?id=qIxeCwAAQBAJ&pg=PA66&lpg=PA66&dq=PRINCIPLES+OF+EUROPEAN+FAMILY+LAW+REGARDING+DIVORCE+AND+MAINTENANCE+BETWEEN+FORMER+SPOUSES+with+comentar&source=bl&ots=Foc4HrJtnd&sig=feVQUdSmre0hL0b8WXmiyI26LHY&hl=hr&sa=X#v=onepage&q=PRINCIPLES%20OF%20EUROPEAN%20FAMILY%20LAW%20REGARDING%20DIVORCE%20AND%20MAINTENANCE%20BETWEEN%20FORMER%20SPOUSES%20with%20comentar&f=false, accessed 29.7.2016).

In Portugal the civil registrar scrutinizes only agreements on ancillary matters (article 1775 of Lei n.º 61/2008, de 31 de Outubro, http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1028&tabela=leis&ficha=1&pagina=1&so_miolo=, accessed 24.7.2016).

The Russian model is applied in Russia, Estonia, Moldova and Ukraine (see: M. Antokolskaia,.op.cit). The Russian legislator does not regulate any activities as the obligations of the civil registrar, competent for the divorce. (art. 19. "Semeĭnyĭ kodeks Rossiĭskoĭ Federacii" ot 29.12.1995 N 223-FZ (red. ot 30.12.2015), http://www.consultant.ru/document/cons_doc_LAW_8982/9e43cedf0f660aa107b296ec91b196dbe5836c68/, accessed 24.7.2016).

divorce is recognized in Italian and Spanish law, and in the practice in UK, Switzerland and Ireland. [25]

In **Italian law**, Legislative Decree 132/ 2014, amended by Law 162/2014,[26] created two non-judicial proceedings that may be used to achieve divorce.[27] One of them is lawyer assisted agreement ("negoziazione assistita"/ article 6), and the second is agreement before the civil registrar (Article 12).

An agreement negotiated by at least one lawyer for each party may be concluded between spouses in order to achieve a consensual solution for divorce (article 6 paragraph 1). If an agreement is reached, it is sent to the

[25] In American law it is called "collaborative divorce". In connection with divorce proceedings it has been created a new concept - "collaborative law", for the first time described in the early 90s of the 20th century. Collaborative law or collaborative practice exists in several European countries, like the UK, Swiss, Ireland, where the associations of collaborative practitioners operate. (see at:
http://www.collaborativefamilylaw.org.uk/collaborative-law,
https://www.hg.org/law-firms/collaborative-law/switzerland.html,
http://www.mcsolicitors.ie/collaborative-law)
Collaborative law is defined in the USA by Uniform Collaborative Law Rules and Uniform Collaborative Law Act (Last Revised or Amended in 2010, 2010) as „a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers ("collaborative lawyers") during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements (http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf, accessed 24.7.2016).
From this definition it may derive the notion of collaborative divorce as a way of divorce in which parties, with the assistance of attorneys, negotiate and come to a consensus on divorce and divorce issues. In addition to attorneys, in collaborated divorce financial and child experts are frequently involved.

[26] Legge 10 novembre 2014 n. 162, Conversione in legge, con modificazioni, del decreto-lege 12 settembre 2014, n. 132, recante misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell' arretrato in materia di processo civile, Supplemento ordinario n. 84/l alla Gazzeta Ufficiale, http://www.gazzettaufficiale.it/eli/id/2014/11/10/14A08730/sg,accessed 24.7.2016.

[27] In November 2014, it was the fifth or sixth time in the past four years that the Italian Parliament had tried to approve this law. The adoption of this Law is marked by the practitioners as "the long march, and victorious, of collaborative law in Italy" (Marco Calabrese /Attorney/, http://www.familylawitaly.com/the-long-march-and-victorious-of-collaborative-law-in-italy/, accessed 24.7.2016).

Prosecutor of Republic to obtain authorization. Depending on whether or not there are minor children, or adult children who are legally incapable, severely handicapped or not economically self-sufficient, an authorization is given by the Prosecutor or the President of the court. In both of the situations the Prosecutor is competent, but if he finds that an agreement is not in the interests of the children, he sends the agreement to the president of the court in order for him to give authorization. The president calls the parties without delay, and their appearance before him is mandatory (paragraph 2). The agreement produces the same effects as a court decision. A lawyer of the party is obliged to send the certified copy of the agreement to the civil registrar of the municipality in which the marriage was registered, in order to note the divorce. (paragraph 3)[28].

The spouses may conclude agreement on the divorce before a civil registrar with the optional assistance of a lawyer (article 12 paragraph 1). This option is not open to spouses with minor children, or adult children who are legally incapable, severely handicapped or not economically self-sufficient (paragraph 2). Each party personally makes (with the optional assistance of a lawyer) a statement to the civil registrar that she/he want to divorce. A concluded agreement may not contain a transfer agreement on assets, and it produces the effects of a court decision (paragraph 3).

The possibility of a consensual divorce out court proceedings was introduced in **Spanish law** by the Voluntary Jurisdiction Act of 2015,[29] one year after it was introduced in Italy. As it is noted in the Preamble, the adoption of this Act is a part of the overall process of modernization of the positive system of protection of private law. The intention of the legislator, using the experience of other countries and also of domestic legal subjects and doctrine emanating from the courts, was to provide the citizens an effective, simple and less expensive means and facilitate the obtaining of certain legal effects promptly and respecting all involved rights, interests, guarantees and legal certainty. It is stated that, while the maximum guarantee of the rights of citizenship is given by the intervention of a judge, the dominating elements of an administrative nature in voluntary jurisdiction do not jeopardize essential guarantees of protection of rights and interests. The new provision allows the concentration of the Administration of Justice to the fundamental role that the Constitution assigns to the court to

[28] The whole process takes a maximum of fifty-five days.

[29] Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria, Boletin oficial del estado, Num. 158, 3. 7. 2015, https://www.boe.es/boe/dias/2015/07/03/pdfs/BOE-A-2015-7391.pdf, accessed 25.7.2016.

judge and execute. The consensual divorce of spouses without minor children takes place out of court, and the functions are transferred from the court to the court clerk and notary. However, the issues affecting the rights of minors or persons whose legal capable is judicial modified are in the jurisdiction of the court.[30]

Spanish Civil Code, amended by the Voluntary Jurisdiction Act, regulates that the spouses may agree on consensual divorce by formulating a regulatory agreement ("convenio regulador") before the clerk or in the notary public document, in the form and with the content, conditions and requirements regulated in art. 82[31](article 87).

According to the provisions of Civil code, regulatory agreement shall contain agreements on the consequences of the divorce – on all issues concerning children and alimony and property relations of spouses (the article 90 paragraph 1). The agreements concerning the spouses, presented before the judicial body, shall be approved by the court unless they are harmful for the children or seriously damaging to one of the spouses. When the clerk or notary deem that any of the agreements formalized before them, in his opinion, could be harmful or seriously damaging to one spouse or affecting older or emancipated minors, they will warn the spouses and terminate the record. In this case, the spouses may appeal to the court only for approval of the proposed regulatory agreement (paragraph 2).

Unlike Italian and Spanish, the **French legislator** did not accept the divorce out of court. Namely, the Senate refused, on 22 June 2016, an introduction and approving this way of consensual divorce,[32] proposed in the Draft Law on the modernization of the judiciary of the 21st century.[33] According to the proposed new Article 17 ter, with which would be amended and modified Article 229 CC, the spouses may mutually agree to divorce by private act countersigned by lawyer, filed in the minutes of a notary. If the spouses agree on the breakdown of marriage and its effects,

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[30] In accordance to UN Convention on the Rights of Persons with Disabilities (2006), this Act uses new terminology: the terms of unable or incapacitation are abandoned and replaced by the reference to persons whose capacity is judicial modified.

[31] In article 82 it is prescribed that the provisions of this article shall not apply when the spouses do not have emancipated minor children or persons whose legal capacity is judicial modified, depending on them.

[32] See more at: http://www.la-croix.com/Famille/Couple/Le-Senat-refuse-d-enteriner-le-divorce-sans-juge-2016-06-21-1200770396, accessed 25.7.2016.

[33] Le projet de Loi de modernisation de la justice du XXI[ème] siècle, Texte adopté n 738, L'Assemblée nationale, Session ordinaire de 2015-2016, 24 mai 2016. (http://www.assemblee-nationale.fr/14/ta/ta0738.asp, accessed 25.7.2016).

they may, each assisted by a lawyer, find their accord in an agreement in the form of private act countersigned by their lawyers and under the conditions established in Civil Code (article 1374). This accord is filed in the minutes of a notary, which notes divorce and gives its effects to the agreement by imparting him certain date and enforceable. This way of divorce is not allowed when the spouses' minor child, informed by them of the right to be heard before the judge, requests this hearing and when one of the spouses is under judicial supervision. A draft of agreement may not be signed before the expiry of a period of reflection - fifteen days of the receipt from lawyer. In article 247 it would be regulated that the spouses, at any moment of the divorce proceedings, may divorce in this way. In the cases in which it is not allowed, they may ask the judge to note their accord in order to divorce consensually by presenting him an agreement on its consequences.

As the reasons for the inadmissibility and rejection of this amendment as well as the alternatives for it, the following were presented in the Senate: because of a threat to the child's interest, a new option would be to define this way of divorce to the couples without minor children;[34] instead of the limitation of the notary's powers (unlike the judge, he can only register the contract, without being able to control it and protect the interests of minor children and spouses) it is proposed to register the agreement in court, under control of the judge.[35] In addition, without the intervention of the court it is impossible to divorce the marriage if the child requires to be heard.

One of the elements of a common and long since accepted definition of divorce is that it is a way of terminating marriage by a court decision following the court proceedings. By regulating this form of consensual divorce it derogates from this definition, which seems unacceptable. This especially applies to divorcing spouses who have minor children, because their interests might be left unprotected with such divorce.

4. SAME-SEX COUPLES

The trend of introducing same-sex marriages and registered partnerships and recognizing their consequences is manifested in the whole world. Since 2001, when same-sex marriage was introduced in Dutch law, it has been

[34] Supra note 32.

[35] This proposal of the Institute of family and inheritance law would to enable that "the act become enforceable by giving the judge the opportunity to invite the parties, if he considers the acts unbalanced, unrealistic or problematic" (ibid.).

recognized by the law of thirteen European states.[36] The conditions for the conclusion and effects of this marriage, as well as its termination are regulated in a similar way in comparative law. The differences concern the possibility/impossibility of the adoption of children by same-sex partners[37] and the use of methods of medically assisted conception. Registered partnership (union civil) is legalized in twenty-one European states, somewhere as homo -, and somewhere as heterosexual partnership.[38] The differences between national legislation regard the same issues as for same-sex marriage.

Legalization of both these forms of same-sex unions is a result of the development of awareness of human rights and of the need for equalizing homosexual with heterosexual couples, of an increased tolerance of privacy (including gender) as well as the acceptance of homosexuality in national laws and EU law. [39]

Significant role in the process of their legalization also belongs to the European Court of Human Rights. Namely, under an impact of evolution of social attitudes towards same-sex couples in many member States and provisions of EU law, in the case *Schalk & Kopf v. Austria,*[40] the Court has also encompassed stable homosexual cohabitations with the notion of family life, considering that "it is artificial to maintain the view that (…) a same-sex couple cannot enjoy 'family life' for the purposes of Article 8" (§ 94). With regard to Art. 9 of EU Charter for Fundamental rights[41], the Court holds that it

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[36] These are Dutch (2001), Belgian (2003), Spanish (2005), Norwegian (2008), Swedish (2009), Portuguese and Icelandic (2010), Danish (2012) and French law (2013); in the law of UK (England, Wales and Scotland in 2013/2014) except Northern Ireland, and in Luxemburg (2015), Ireland and Finland (effective 2017).

[37] See more: S, Bubić, *Opšti trendovi u promovisanju najboljeg interesa djeteta – usvojenika,* u: Prava djeteta i ravnopravnost polova – između normativnog i stvarnog, Međunarodni naučni skup na Palama 2012 (ur. M. Tomić), Pravni fakultet Univerziteta u Istočnom Sarajevu 2012, 86-88.

[38] In addition to the law of states which legalize same-sex marriage, it is accepted in the law of Andorra, Austria, Czech Republic, Estonia, Croatia, Greece, Italy, Liechtenstein, Malta, Hungary, Germany, Northern Ireland, Slovenia and Switzerland.

[39] S. Bubić, *Istospolna zajednica u pozitivnom pravu i perspective*, in: Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse (ed. S. Petrić), Pravni fakultet Sveučilišta u Mostaru i Pravni fakultet Sveučilišta u Splitu, Mostar, 2005, 200.

[40] Application no. 30141/04, Judgment 24 June 2010, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":["870457"],"itemid":["001-99605"]}, accessed 5.3.2012.

[41] Before the adopting of EU Charter for Fundamental rights, the right to marry was reserved for heterosexual partners. The provision on this right of the Charter is gender

no longer considers that the right to marry, contained in Art. 12 of European Convention on Human Rights, must be limited to marriage between two persons of the opposite sex. Despite this, it concluded "that Art. 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants' access to marriage" (§63), "that the state is still free (…) to restrict access to marriage to different-sex couples" (§108) and that the lack of regulation of **the same-sex marriage** is not violation of Article 14 of Convention in conjunction with Article 12 (§110). Thus, the Court deems that the national legislator, by not recognizing the right to marry to persons of the same sex and not legalizing same-sex marriage, does not violate this right and that it is not obliged to amend the Law.[42]

However, the attitude of the Court is different in cases related to **same-sex partnership**. The Court found that the legislators of the considered states violated Articles 8 and 14 of the Convention and thus discriminated same-sex partners by not recognizing same-sex unions. This practice has influenced the national legislators: in order to comply to these decisions, they reformed the legislation by recognizing same-sex unions.

So, in the case of *Vallianatos and Others v. Greece*[43], the Court reiterates that same-sex couples, like different-sex couples, are capable to enter into stable relationships and considers that they are in a situation similar to different-sex couples regarding their need for legal recognition and protection of their relationship (§78). The Law no. 3719/2008 (entitled "Reforms concerning the

neutral, omitting the reference to men and women as its holders and leaving to national legislator the possibility to recognize same-sex marriage (article 9) (S. Bubić, *The human rights and freedoms in the European Convention for Human Rights and EU Charter for Fundamental rights in the field of family law, with special reference to family law in Bosnia and Hercegovina,* in: Promotion of Scientific Research and Education in European Integration and Policy, SEELS, Skopje, 2014, 52).

In the Commentary of this Charter it is stated that in it is no explicitly required "that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples ..." (The Commentary of the Charter of Fundamental Rights of the Union, 103, supra note 19).

[42] See more: S. Bubić, *Uticaj evropskog prava na porodično pravo u Bosni i Hercegovini,* u: Razvoj porodičnog prava od nacionalnog do evropskog (ur. O. Pajić), Pravni fakultet Univerziteta "Džemal Bijedić" u Mostaru, Mostar 2013, 30-31.

[43] Applications nos. 29381/09 and 32684/09, Judgment 7 November 2013, http://www.google.ba/url?url=http://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%26id%3D001-128294%26filename%3D001-128294.pdf%26TID%3Duynnlohkyr&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjo-8GV46DOAhXDPxQKHWMzDa8QFggSMAA&usg=AFQjCNFLb3Hq4nqt_8XsYGK0IDI230yj2A, accessed 16.10.2015.

family, children and society") tacitly excludes same-sex couples from its scope and thus introduces a difference in their treatment in relation to different-sex couples, based on their sexual orientation (§79). The Court emphasizes that the State's margin of appreciation is narrow in situations of such difference, which is unacceptable under the Convention (§77). When the margin of appreciation is narrow, "the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions in issue (…). It is therefore for the Greek Government to show in the instant case that it was necessary, in pursuit of the legitimate aims which they invoked, to bar same-sex couples from entering into the civil unions provided for by Law no. 3719/2008" (§85). The Court notes that it is not convinced by the Government's argument (§89) and that same-sex couples are particularly interested in entering a civil union because it would be the only basis in Greek law for legal recognition of their relationship (§90).

Furthermore, the Court points to the fact that Greece is one of two Council of Europe members states that exclude same-sex couples from the scope of the newly introduced system of registered partnership as an alternative to marriage for unmarried couples, as opposed to the trend reflected in the relevant documents of Council of Europe (§91).[44] In the choice of means for the protection of the family and ensuring respect for family life the State is obliged to "take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life" (§84). The Court finds that, because "the Government have not offered convincing and weighty reasons for justifying the exclusion of same-sex couples from the scope of considered Law", in this case has been a violation of Article 14 of the Convention taken in conjunction with Article 8 (§92).

By complying to this judgment, two years after its adoption, Greece has recognized same-sex unions by the Cohabitation Agreement Law by extending the cohabitation agreements to same-sex couples (December 2015).

[44] Of the (in this moment- author's note) nineteen Council of Europe member States which approve some form of registered partnership other than marriage, Greece and Lithuania are the only ones reserving it exclusively to different-sex couples (§91).

In the case *Oliari and Others v. Italy*[45] the Court reiterates that same-sex couples must have the possibility, like different-sex couples, "to enter into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship" (§165). It found that "the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions. To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective" (§§185,186). It held that there has been a violation of Article 8 of the Convention (§187).

In accordance with this judgment, the Italian Senate passed, despite numerous controversies, protests and counteractions[46] (on May 20th, 2016), the Law no 76 "Rules on the civil unions between people of the same sex and regulation of cohabitation.[47] Under this Law, a civil union may be established between two adult persons of the same-sex by their declaration before a civil registrar, in the presence of two witnesses (art.1. paragrapf 2), and the facto cohabitation is consisted by two adult persons (art. 36).

5. CONCLUDING REMARKS

A globalisation in law does not means only uniformisation, but rather the harmonisation of the national laws. Despite the current process of globalisation, the states retain sovereignty in the field of substantial family law. Admittedly, the regulation of this field is not only in the competence of national legislators, and the national authorities do not only apply domestic

[45] Application no. 18766/11 and 36030/11, Judgment 21 July 2015 Final 21/10/2015, http://hudoc.echr.coe.int/eng?i=001-156265&sa=X&ved=0CDUQ9QEwD2oVChMIwICr1bn2xgIVI75yCh186Qh-#{"itemid":["001-156265"]}

[46] See, for example: U Italiji masovna bdijenja, http://zdravstveniodgoj.com/page/o-istospolnim-zajednicama; Convivenza di fatto: cosa cambia con la nuova legge Cirinnà? 5 cose fondamentali da sapere, http://it.ibtimes.com/convivenza-di-fatto-cosa-cambia-con-la-nuova-legge-cirinna-5-cose-fondamentali-da-sapere-1440891 (accessed 30.4.2016.).

[47] Legge 20 maggio 2016, n. 76 Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, published in Gazzeta Ufficiale n.118 del 21.5.2016., http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazione Gazzetta=2016-05-21&atto.codiceRedazionale=16G00082&tipoSerie=serie_generale&tipoVigenza=originario, accessed 21.7.2016.

sources of law in practice, but also the international instruments on human rights, global or regional. The decrease of sovereignty in this context is also the consequence of the influence of the practice of the European Court of Human Rights, whose decisions are binding for Council of Europe member states. This Court applies evolutionary method to the interpretation of the provisions of the European Convention on Human Rights, by respecting the solutions adopted in modern comparative law, in European law and other international instruments. On the base of the comparative analysis the Court determines the existence or the lack of the consensus among the member states and, depending on that, it tolerates or refuses a margin of appreciation. As a result, its decisions, although not always, reflect the recent trends in the comparative and European law and international documents, generally acceptable for the national legislators. As the instance for such impact of European practice, in this paper has noted the regulation of same-sex union. A possibility introduced by Protocol No. 16 to the Convention (Strasbourg, 2. 10. 2013)[48] may contribute to the harmonisation: it has created a procedure for giving advisory opinions in the context of a case pending before national court. The procedure is optional for the highest courts and tribunals of member states, but in fact influential, allowing them to consult the Court on news and issues that may affect many requests (article 1).

The legislation of one state is also under direct impact on the legislation of other, so that some trends manifested in one part of Europe or the world are transfered to others. In this sense, the americanisation of some institutions of family law, among others, can be discussed. The beginning of the introduction of divorce out of court in some European states is a good example. Until recently it was unknown and did not follow the principle 1:2 of the Principles of European Family Law Regarding Divorce, which excludes a possibility of such divorce[49]. Namely, according to paragraph 2 divorce should be granted by the competent authority which can be a judicial or an administrative body. The aim of this provision is to prevent the treatment of divorce as a spouses' private matter and emphasize the need of

[48] Available on: http://www.google.hr/url?url=http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwiI3YqPs83OAhWCSxoKHTRXCwIQFggSMAA&usg=AFQjCNHiEs8_hQIRi2wgRiTKU_nz-JnHiQ, accessed 17.7.2016.

[49] According to paragraph 2, divorce should be granted by the competent authority which can be a judicial or an administrative body". The aim of this provision is to prevent the treatment of divorce as the spouses' private matter and emphasize the need of control by the competent authorities regarding the consequences of divorce, and primarily the respect for children's interests.

control by the competent authorities regarding the consequences of divorce, primarily the respect of children's interests. This attitude is in accordance with the solutions of national European legislations in the time of the preparation of the Principles by the Commission on the European Family Law (2004). The transfer of competences onto administrative bodies is mostly incompatible with national family law. This is particularly true for the introduction of private divorce, without the participation of any court or administrative authority.

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THE CHILD-FRIENDLY JUSTICE – THE APPLICATION OF THE INTERNATIONAL STANDARDS IN THE CIVIL COURT CASES

Abstract

The paper analyses the international standards concerning the child`s process rights, the referent comparable legal solutions and the legal system of the Republic of Serbia, especially the possibility for children to take part in the court cases in different process roles. The problems have been recognized which in practice are conditioned by the circumstance that our Family Law does not allow, by its general norm, for the child to be a party in all the process which refer to his / her rights and interests. Although there is a number of situations in which children are explicitly acknowledged the process legitimation, and those where this right can be indirectly concluded, it does not mean that, starting from the international standards, the children`s process rights are accepted and recognized at the highest level. As especially serious, the problem of independent undertaking of process activities by children of certain age and equal understanding capability / capacity, which is particularly analyzed in this paper. In the context of so called evolving children`s capacity to recognize the participation rights as the prerequisite of participation in the case in any role. Thus the specificity of these rights and standards which are established for them on the international level (by obligating but also referring acts) are given the necessary attention. The analysis outcome of the abovementioned problems are the suggestions of changes or amendments to the Family Law by which the court procedures, especially civil ones, were to a great extent adapted for children, and the children`s rights protection has reached a higher level.

Key words: *international standards, child`s process rights, the process position of a child, the lawsuit capacity of children, the participation rights.*

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1. INTORDUCTORY NOTE

The demand for ``child-friendly justice`` surely includes ``the child-friendly legislation``, i.e. the justice system inclined towards children[1] as one of the most important consequences of formulating children`s rights and the expansion which this field of human rights has been experiencing in the past thirty or so years. The notion, according to the definition from The Guidelines of the Committee of the Ministers of the European Council[2] refers to the necessity to guarantee and provide the effective implementation of children`s rights on the highest possible level, in accordance with the basic principles (the participation,[3] child`s best interest,[4] the dignity, the participation in the procedures and the protection from discrimination)[5] as well as the level of maturity and understanding, i.e. in accordance with the

[1] Term "chid-friendly justice" can mean "the right", "justice" or "jurisdiction / justice" which is friendly, inclined towards children, to their specific needs and capacities. It is used by the Guidelines of the Council of Europe Committee of Ministers in reference to the legal system / jurisdiction which is child-friendly (Guidelines), from 2010., Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/GuidelinesChild-FriendlyJusticeE.pdf, the date of the visit: 15.06.2016. The guiding idea are the words by Albert Camus: ``Do not go in front of me, I will not be able to follow you. Do not go behind me, I will not be able to guide you. Walk next to and be my friend,`` which best describes the making of the programme ``Let`s build Europe for children and with children``, under the scope of which the Guide came about.

[2] Guidelines, II Definitions (c).

[3] The participation rights are the ``developmental process`` and mean ``the exchange of information and the dialogue between children and adults based on the mutual respect``, A. Korać Graovac, *Pravo djeteta da bude saslušano - Opći komentar br. 12 Odbora za prava djeteta (2009),* u: Dijete u pravosudnom postupku - primjena Europske konvencije o ostvarivanju dječijih prava (ur. G. Filipović, D. Osmak Franjić), Zagreb, 2012, 119, http://www.dijete.hr/joomdocs/Dijete%20u%20pravosudnom%20postupku.pdf, the date of the visit: 20.06.2016.

[4] The discovery and the realization of the best interest of the child is the ultimate aim of all the activities, thus the court too, D. Palačković, *Postupak u sporu za zaštitu prava deteta,* u: Novo porodično zakonodavstvo (ur. Z. Ponjavić), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2006, 539. This ``duty`` of the bodies in charge is in compliance with the inquisition authorities of the court in the procedures which concern children, D. Palačković, *Istražno načelo u porodičnim sporovima kao izraz najboljeg interesa deteta,* u: Najbolji interes djeteta u zakonodavstvu i praksi (ur. S. Bubić), Univerzitet "Džemal Bijedić", Pravni fakultet, Mostar, 2014, 146.

[5] Guidelines, III Fundamental principles.

development of their capacities.[6] It is the legal system which is accessible and adequate, in which you act swiftly (efficiently) and with the necessary attention, adapted and focused on all the needs and rights of children, which respects children`s rights and those who refer to the acts, i.e. the participation in the procedure, respecting the private and family life and child integrity. Although it is not an obligatory document The Guidelines were adopted exactly for the purpose of formulating the national policies in this field, in order to encourage the states to adjust their legal systems to the very needs and eliminate the differences between the internationally accepted principles and standards and reality.[7] The principles and rules which are mentioned and for which the Guidelines contain the propositions in line of operationalization are a part of the most important documents among which, are above all the UN Convention on the Rights of the Child and the European Convention (henceforth UN Convention) on the Exercise of Children´s Rights (henceforth European Convention).[8] Although they differ with respect to liability, all the three documents have an undoubted significance in adapting the court and out of court system to the rights, interests and needs of children.

The protection of the substantial rights of children requires that they are understood, respected and their differences to be taken into account within

[6] We are talking about the concept "evolving capacity of the child" from the UN Convention on the Rights of the Child, 1989, see The Law on ratification of UN Convention on the Rights of the child (Zakon o ratifikaciji Konvencije UN o pravima deteta), Official Gazette of the Socialist Federal Republic of Yugoslavia – International Conventions (Službeni list SFRJ – Međunarodni ugovori), No. 15/90 and Official Gazette of the Federal Republic of Yugoslavia – International Conventions (Službeni list SRJ – Međunarodni ugovori), No. 4/96 and 2/97. About this particular concept see G. Lansdown, The Evolving Capasities of the Child, Florence, 2005, https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf, the date of the visit: 15.06.2015.; L. Cunninham, A Question of Capacity: Towords a Comrehensive and Consistent Vision of Children and Their Status under Law, US Davis Journal of Juvenile Law and Policy, Summer 2006, Vol. 10:2, http://jjlp.law.ucdavis.edu/archives/vol-10-no-2/cunningham.pdf, the date of the visit: 20.06.2016.

[7] S. Bubić, *Usklađivanje domaćeg zakonodavstva sa acquis-em radi jačanja procesnog položaja deteta,* 60, 61, http://eprints.ibu.edu.ba/3164/2/01%20Prof.%20dr.%20Suzana%20Bubic.pdf, the date of the visit: 21.07.2016.

[8] European Convention on the Exercise of Children´s Rights, ETC No. 160, 25/01/1996, which came to force 01.07.2000., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160, the date of the visit: 26.06.2016. The term "exercise" can be translated as the doing or the application.

the justice system too, which includes the adoption of the mechanism and the guarantee of the process character. All the rights, and for all children, are designed as human rights starting from the child`s autonomy as the legal subject and their independence as the bearer of the human freedoms and rights,[9] from his uniqueness and values as a human being.[10] However, concerning the age, maturity and developmental needs we should dominantly take care in order to provide protection to this vulnerable category and procure the satisfactory level of freedom of personality and self-determination,[11] even when the process rights of the child are in question.[12]

The UN Convention establishes the obligation for the member states to provide the child capable of forming his opinion with the possibility to express it freely concerning all the matters which concern him/ her, and thus also in the court case, to enable the opinion of the child to be given an adequate importance, and especially to make it possible for the child to be interrogated in all the court and administrative procedures which concern him / her directly, through a representative or the corresponding organ, and the means of realization is in the domain of the national procedure law (article 12). We are talking about the fundamental right which is considered to be the measure of human dignity- to make it possible for everyone to be involved in the decision-making which concerns them, in compliance with their level (of development) and the competencies and the general right to express their opinion about all the things that concern a certain person in compliance with the mentioned factors.[13] Apart from Art. 12, the Article 13 is

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[9] N. Petrušić, *Austrijski model pomoći i podrške detetu u postupku za uređivanje roditeljskog staranja i ličnog kontakta,* Zbornik radova PF u Nišu, br. 65, 2013, 163.

[10] United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (ECOSOC RES 2005/20, 22. July 2005), III.8.a " Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected", http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf, the date of the visit: 24.07.2016.

[11] N. Petrušić, *Austrijski model,* 163.

[12] This approach contains also the document by the Center for Children`s rights "The Child-Friendly Justice in the Republic of Serbia", The Centre for the rights of children, Belgrade, 2013, 3, which was established with the support of the organization Save the children Sweden.

[13] S. Aras Kramar *et al., Vodič za ostvarivanje prava djeteta na informacije, izražavanje mišljenja, zastupnika i prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi,* Hrvatski pravni centar, Zagreb, 2015, 17, http://www.hpc.hr/dokumenti/Razno/Vodiczaostvarivanjepravadjetetarazvodbrakaroditeljskaskrb-27-11-15.pdf, the date of the visit: 05.07.2015.

also important, by which the right of the child to ask for, receive and give information is constituted, even those important for the court procedures which is the prerequisite for expressing the opinion.

The European Convention, although it is not a mandatory act in the Republic of Serbia, i.e. it guarantees the procedural rights of children which it contains, are undoubtedly the guiding ones in the process of adapting our judicial system *acquis comunitar*. By the provision of the Article 1/3 its application area is limited to the procedural rights of children in family matters, especially those which refer to the exercise of parental rights, residence and the access to children. We could talk about two types of procedural rights guaranteed by this Convention – mandatory and recommended ones for the member states.[14] The mandatory ones are, based on the provisions of articles 3 and 4, the right to information, to be consulted and to express one`s opinion, to be informed about the possible consequences of the stated opinion and of any decision made, as well as the right to have a special representative appointed (in person or through another person or body) in case of the clash of interests with other representatives.[15]

When we talk about the general right of child participation, the connection with the provision of Article 6 of the European Convention on Human Rights can be established,[16] i.e. thus established right to the just trial. This provision most directly recognizes the right of ``all``, but in the context of its application it is referred to the need for flexibility and child adjusted procedure.[17]

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[14] About this see D. Palačković, *Procesna prava deteta prema Evropskoj konvenciji o ostvarivanju dečijih prava,* Pravni život, 9/2000, 541, 542.

[15] ``A representative`` is defined by Art 2 c (Definitions) – „a person, such as a lawyer, or a body appointed to act before a judicial authority on behalf of a child".

[16] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI 1950, see The Law on the confirmation of the European Convention of the Protection of Human Rights and Fundamental Freedoms, Official Gazette of the Republic of Serbia and Montenegro – International Conventions (Službeni list SCG – Međunarodni ugovori), No. 9/2003, 5/2005, 7/2005 - corrected, and Official Gazette of the Republic of Serbia – International Conventions (Službeni glasnik RS – Međunarodni ugovori), No. 1/2010).

[17] See for example the decision of the Court for Human Rights in the case of Hokkanen v Finland, 23. 09. 1994., lawsuit 41, http://www.c-g.org.uk/camp/hr/hokkanen.htm, the date of the visit: 26.07.2016., that the wishes of the child are always, as much as possible, respected in the legal procedures. Numerous guarantees of the just trial to the minors are the consequence of the application of Art. 6 and the practice of the Court, e.g. in Australia, Victoria, Charter of Human Rights and Responsibilities Act, 2006,

2. THE CHILD POSITION IN CIVIL PROCEEDINGS IN THE REPUBLIC OF SERBIA

For the position of a child in the civil proceedings the provisions of the Family Law Act[18] and Civil Procedure Act[19] are important. The Family Law Act, which in the case of the substantial rights of children accepts the international standards, when we talk about their procedural rights, is, it seems, has a flaws. The general attitude (Art. 6/1), that ``everyone`` has an obligation ``in all the activities`` to be guided by the child`s best interests and the obligation of the state ``to respect, protect and improve the child`s rights`` (Art.6/3) the Family Law Act operationalizes by a number of provisions. The provision of article 65 is extremely important, by which the child`s right ``to freely form (his/her) opinion is guaranteed" to be freely expressed,[20] but also

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http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/, the date of the visit: 26.07.2016: that the court must explain each activity, decision or procedure, as well as their effects, in an understandable and simple manner, that it must allow the full participation during the procedure, that it must respect the culture(al) identity and minimize the stigma towards the children and their family, the discluding of the public and acting in compliance with their age. As an example of the precise approach of the Court for human rights the decisions in the case of T v United Kingdom and V v United Kingdom are stated, in which the breech of the right for just trial was established thus the children were not, in reference to the legal representatives, at distance in the Court House which does not allow ``whispering ("whispering distance"), A. Burnnard, *The Right to a Feir Trial: Young Offenders and the Victorian Charter of Human Rights and Resposibilities,* http://www.austlii.edu.au/au/journals/CICrimJust/2008/24.html, the date of the visit: 26.07.2016.

[18] Family Law Act (Porodični zakon), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 18/2005, 72/2011 – other Law and 6/2015.

[19] Civil Procedure Act (Zakon o parničnom postupku), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 72/2011, 49/2013 – decision of the Constitutional Court, 74/2013 – decision of the Constitutional court and 55/2014 and Non-litigious Procedure Act (Zakon o vanparničnom postupku), Official Gazette of the Socialist Republic of Serbia (Sužbeni glasnik SRS), No. 25/82 i 48/88 and the Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 46/95 – other law, 18/2005 – other law, 85/2012, 45/2013 – other law, 55/2014, 6/2015 and 106/2015 – other law.

[20] The practice of the Auditory Court in our country confirms that the Court of First instance has the problem of acknowledging the right from Art. For example, The High Court Council Audit, 2393/07, dated 12. 09. 2007., where it is stated in the explanation that the court must not be guided by the positive motivation of the parents to take care of children but is obliged to determine and ``obtain`` the opinion of a child which is capable of giving one, and thus make the decision in accordance with his / her best interests.

to timely get all the "information" which is necessary for forming the opinion. The right to directly express an opinion in each proceeding in which it is decided about his/her right is applied to the child who is at least 10 years old, as well as for him/her to address the court (or other administration body), in person or through another person or institution and ask for help in achieving his rights. The court (or administration body) ``establishes``[21] the child`s opinion in cooperation with the school psychologist i.e. the organs of custody, family counselling service or any other institution specialized for mediating in family matters, and in the presence of the person which the child chooses himself/herself, and finally, a ``due attention`` must be devoted to this opinion ``in accordance with the age and maturity of the child``.

However, the Family Law Act does not determine the child's procedural position on the general level in the procedures which refer to his/her rights and interest, and can be recognized also the specific problems - the real participation when his/her active (process) legitimation is recognized, guarantees that the statement represents the real will of the child, the way of informing and the type of information and similar. It is exactly because of this, in reference to the general problems of the child`s position, the current theoretical division on the situations when the rights of the child are directly protected and thus the child has a position of a client, and those when you do things indirectly, and the child is the ``hidden`` or ``concealed`` client, ``the object`` of dealing although it is his/her rights (or interests) it is decided about.[22] The Family Law Act enables the child to be the client, the prosecutor as a rule, in a number of court cases, recognizing his/her process legitimation.[23] But in the situations when the child is the necessary and unique co-litigant (the procedures in the cases with the aim of establishing or

[21] Vrhovni sud Srbije, Rev. 2393/07, using the formulation ''to obtain an opinion'' it makes an association with the inadequate application of the provision, and thus the court is obliged to ''determine'' the child`s very opinion, and not to turn to other for that aim. ``Others`` are only in the role of the deputy organ of the court.

[22] G. Stanković, *Dete kao stranka u parničnom postupku*, u: Prava djeteta i ravnopravnost polova - između normativnog i stvarnog (ur. G. Marković), Istočno Sarajevo, Pravni fakultet, 2012, 31 i 113, and more about the position of the child, N. Petrušić, *Pravo deteta na slobodno izražavanje mišljenja - materijalnopravni i procesni aspekt,* Bilten sudske prakse VSS, 2007, 512-531.

[23] The procedures for the determination of motherhood (Art. 249/1), to contest the maternity (art. 250/1, the paternity determination (art. 251/1, the contest of the paternity (art. 252/1), for the protection of children`s rights (art. 263/1) as well as in the procedure for exercising i.e. the deprivation of the parental right (art. 264/1, 2).

dispute the parental status), he/she according to the mandatory legal norm, has the position of a client (taking into consideration the process outcome of the lack in the form of dropping the accusations, Art. 256/6, 7 of the Family Law Act).[24] In all the other ones, irrespective of the legal legitimation, that position is acquired only if they initiate the proceedings. If this is done by someone from the group of other legitimized persons (or bodies), the child, thus, does not have the position of a client so it is justly pointed to the necessity of the application of the institute of the necessary co-litigation and in other situations, for example in the proceedings for the protection against the domestic violence, for depriving of or giving back the parental right and for the children rights`,[25] which is, still, a partial solution to the problem.

The provisions of the Family Law Act point to the conclusion that the child ``can`` have a position of a party in the proceedings in which it does not have the legal legitimation. Thus in the alimony proceedings (Art. 278/2), taking into consideration the stylization of the provision which allows the right for prosecution to the persons in the role of creditor or the debtor of the allowance, and the similar conclusion can be drawn for the annulment of the statement about the consent to the acknowledgement of paternity (Art.49), because the statement must be given by a child older than 16 who is capable of reasoning, and the right to initiate the proceedings has ``a person who has given the statement'' (Art.253/1). Also, the child as ``the member of the family towards whom the violence was committed`` can also initiate the proceedings for the protection against the domestic violence, as well as for the prolonging of the protection measures against the domestic violence (Art. 284/2). In these situations too, as well when irrespective of the active process legitimation the child did not initiate the proceedings, he/she ``can`` be the party, which makes it more problematic for the protection of his/her rights.

We can note, for example, that in matrimonial proceedings, according to the Family Law Act, the child, for obvious reasons, does not have the legitimation to initiate the proceedings, but does not have either any other procedural role[26] although it is undoubtedly interested in the ``destiny`` of

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[24] B. Poznić, V. Rakić-Vodinelić, *Građansko procesno pravo*, Beograd, 2015, 559.

[25] Vid. Analiza zakonodavstva RS s aspekta prava deteta (Analiza zakonodavstva), Centar za prava deteta i UNICEF, Beograd, decembar 2010 - januar 2011, godine, 16, http://www.unicef.rs/files/FINAL_Analiza%20zakonodavstva%20RS_9_2_11.pdf, the date of the visit 18.07.2016.

[26] Obiteljski zakon Republike Hrvatske, Narodne novine, br. 103/15, od 01.11.2015, http://www.zakon.hr/z/88/Obiteljski-zakon,, the date of the visit: 07.07.2016., e.g., Art. 325, in the procedure.

the marriage, which can have repercussions on the rights, legal and factual relations between parents. Apart from that, in the matrimonial proceedings it is necessary to make a decision of exercising the parental right (Art. 226/1 of the Family law), and this procedure, as the adhesion, is a part of the matrimonial proceedings, so the theory recognizes the unique situation in which someone who has a legal interest, the process legitimation was not recognized.[27] The consequences are very rigid for the child, among others the impossibility of opposing the decision. This conclusion cannot be influenced by the circumstance that in the matrimonial proceedings concerning the exercising the parental right it is decided based on the duty, and the application of the principle of the best interest of the child does not mean that the court has always, in the case of the decision of The Court of First Instance, taken all the necessary activities in order to establish it.[28] It could be even said that the child is the ``interested party`` in the biggest number of proceedings in the area of family relations, that they are important for the rights or interests of children, i.e. that these proceedings and their outcomes truly concern them.[29]

The Family Law Act does not contain the provisions about the capability of a child to act in the civil proceedings, but general rules of the Civil Procedure Act are applied (Art. 75, 76), i.e. the child is capable of participating in the civil proceedings within the limits of his/her capacity to act. The Civil Procedure Act does not have special rules by which it would be made possible, under the certain conditions and by the permission of the court, for the child to act independently in civil proceedings, according to the analogy to the capabilities of the ``participant`` of the non-litigious proceedings – the party who initiated the proceedings or the one ``about whose rights and interests it is decided on`` (Art. 7). The permission of the court refers to all the activities in the procedure which the law does not accredit them for if they are capable of understanding their meaning and the true consequences. In theory, however, this rule is interpreted in such a way

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of the mandatory counselling before the divorce, the child can be given the opportunity to express his / her opinion with the consent of parents.

[27] About that A. Uzelac, B. Rešetar, *Procesni položaj i zastupanje djeteta u sudskom postupku prema hrvatskom i komparativnom pravu - neka otvorena pitanja,* u: Dijete i pravo (ur. B. Rešetar), Pravni fakultet Sveučilišta "J.J.Štrosmajer", Osijek, 2009, 176, http://www.alanuzelac.from.hr/pubs/A24proc_pol_djeteta_Os.pdf, the date of the visit: 07.07.2016.

[28] About the best interest, factors for its determination and the difficulties in practice, D. Palačković, *Istražno načelo*, 145-154.

[29] Analiza zakonodavstva, 16.

that in litigious and non-litigous proceedings the incapable person must have a legal representative, and that the court will in the cases of non-litigious proceedings ``take into consideration`` only the abovementioned activities, whereas "these possibilities do not exist in litigious proceedings".[30]

3. THE NEED TO MAKE PRECISE THE POSITION OF A CHILD IN CIVIL PROCEEDINGS

The comparative analysis of a number of laws which regulate the area of the family relations point to the more modern approach than the one by the Serbian Family Law Act. Thus, the process position of the child in all proceedings which ``concern their rights and interests" are defined by the general formulation by the Family Law Act of Croatia (Art.538) – the child is the party in all proceedings. There isn`t a limitation by the phrasing ``legal`` interests, which implies the relevance of each interest of the child.[31] However, in this case (as in other cases of the legal activite legitimation) the child's capacity to act in civil proceedings is not recognized.[32] It is recognized in a limited manner and indirectly by the Article 359/1 –when the personal rights and interests of the child are decided on, the court is (generally) authorized to let the children older than 14 to ``present the facts, propose evidence, submit the legal remedy and undertake other activities in the proceedings`` if they are capable of understanding the meaning and the legal consequences of these activities. "The possibility" of children to act independently in the civil proceedings is included in the Family Law Act of the Federation of Bosnia and Herzegovina (Art. 271/1), but it is questionable if it refers to all or some individual activities (the wording refers to the general approach), and it was not explicitly prescribed who will make the estimation and give permission (we suppose it must be done by the court, the comment by the author of this paper). In the Austrian legislation, in non-litigious proceedings for

[30] B. Poznić, V.Rakić-Vodinelić, *op. cit.*, 685.

[31] See also Family Law Act (Porodični zakon), Official Gazette of Federation of Bosnia and Herzegowina (Narodne novine Federacije BiH), No. 35/05 and 31/14, https://advokat-prnjavorac.com/zakoni/porodicni_zakon_Federacije_BiH.pdf, Art. 125/2 establishes that ``the right of the child (is) to ask for the protection of all the rights before the organ in charge``, and the provision is precisely defined by the art. 271/1.

[32] A. Uzelac, B. Rešetar, *op. cit.*, 177, S. Triva, M. Dika, *Gradjansko parnično procesno pravo,* Zagreb, 2004, 314-315.

reugulation of the parental care and the maintenance of the personal relations the children have identical possibility.[33]

The acceptance, by the general norm, of the party role of a child in all the procedures which refer to his/her rights and interests is considered justified and necessary, also because in this way the legal representatives of a child are put into the position to undertake all actions in civil proceedings in the name of and in the interest of a child. The independence in undertaking the procedural actions deserves, however, the comment in the context of the general attitude towards the theory of the civil procedural law that the capacity to act in civil proceedings can only be complete, unlimited.[34] The principle of the legal certainty is directly opposed to the undertaking only some actions in civil proceedings – "the partial", "special" capacity to act in civil proceedings, so these legal solutions are criticized in the theory.[35] From this aspect the solution of the Family Law Act of Fedaration of Bosnia and Herzegovina is more acceptable, and is justified by the conditions connected with the age and capability to understand which are accepted in the international documents on chidlren`s rights in accordance with the attitude on the ``evolving`` capacity to act ,[36] and then also the capacity to act in civil proceedings, but the approach is definitely revolutionary.[37] The adoption of the possibility of undertaking the actions in civil proceedings by the permission would require the determination of the lower age limit of

[33] § 176/1 Allgemeines bürgerliches Gesetzbuch, and about the Austrian law see more in N. Petrušić, *Austrijski model*, 169-173.

[34] Thus, S. Triva, M. Dika, *op. cit.*, 308; B. Poznić, V. Rakić-Vodinelić, *op. cit.*, 199; A. Jakšić, *Građansko procesno pravo*, Beograd, 2012, 216; D. Palačković, *Parnično procesno pravo,* Kragujevac, 2004., 106,107.

[35] A. Uzelac, B. Rešetar, *op. cit.*, 172- 174.

[36] It is stated in the literature that the development of children in the psychological, cognitive and emotional sense is the most intensive in the period between the ages of 10 and 18, D. O. Brink, *Immaturity, Normative Competence and Juvenile Transfer: How (not) to Punish Minors for Major Crimes,* University of San Diego, School of Law, Legal Studies Research Paper Series, No. 07-01, September 2005, 1571, as well as the literature to which the the athor refers toin the remark no. 62, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=800692, the date of the visit: 28.07.2016.

[37] The darft of the Civil Codex of the Reblic os Serbia (Nacrt Građanskog zakonika), The General part, in art. 31, as an alternative solution for the partial business capability`` The older minor can independently do the legal dealings as determined by the law, those which correspond to his / her capabilities or those which are by nature in harmony with his / her intellectual and emotional maturity ``, which is the contemporary approach of the children rights, http://www.mpravde.gov.rs/files/NACRT.pdf, the date of the visit: 25.07.2016.

children which would presume the capability of rational judgment (a rebuttable presumption).[38] This, surely, could not be the age of ten, which the Family Law Act states, for example, as the direct expression of the opinion because for the understanding of the importance of the procedural actions and their consequences, and thus for the independent undertaking, a higher level of cognitive, intellectual capabilities is necessary, i.e. of the knowledge and education.

The complementation should, taking into consideration the necessity to protect children, include the solution to the problem of the participation of the child`s legal representative. The higher level of the legal certainty is of course provided by the solution accepted in the Federation of Bosnia and Herzegovina, that the legal representative undertakes the procedural actions only until the child states that he/she ``will undertake civil proceedings`` (Art. 271/3). However, from the aspect of child protection as the vulnerable category, it is more acceptable for the legal representative to keep the procedural rights, and in the case of the mutually opposing actions of the child and the legal representative, the court will make the estimate which action to undertake taking into consideration child`s best interest.[39] Apart from that, for the actions undertaken by the representative before initiating civil proceedings, the abovementioned estimation must be carried out.[40]

It could be stated that in respect to the child`s possibility to undertake the actions in civil proceedings independently there are arguments both for and against both stated solutions, taking the side is not easy not even in the sphere of the legal policy. Also, as an alternative, the normative approach should also be mentioned already accepted by the Family Law Act (Art. 64),[41] i.e. the recognition of the special capacity to act of children of certain age (fifteen), who can undertake legal actions also by which they manage and enjoy their income or assets acquired by personal work, which is a pre-requisite of the possibility to independently carry out the civil proceedings

[38] Family Law Act of Repbulic of Croatia, art. 360/3, thus, it adopts the relatively high limit of the age of 14 for the independent expression of the opinion.

[39] See art. 359/4, 5 of the Family Law Act of Repbulic of Croatia.

[40] In the Austrian law the legal representative, also, is not relieved of the right to represent irrespective of the process capability of the child older than 14, in N. Petrušić, *Austrijski model,* 170.

[41] Here the capability to have the judgment is suspected. Labour Law Act (Zakon o radu), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 24/2005, 61/2005, 54/2009, 32/2013 and 75/2014, Art. 25, as the condition for beginning the employment mentions ``the capability for doing the job``, which is not the same thing as the capability of judgment.

``stemming from the abovementioned actions``.[42] The assumption of the extensive application of this solution is, also, the acceptance of the attitude of the evolving capacity of children which provides maintaining the concept of the capacity to act in civil proceedings contained in Civil Procedure Act. However, the Draft of Serbian Civil Code does not contain the innovative solutions on child's position in civil proceedings in reference to the Family Law Act,[43] so it can be supposed that there is no intention to regulate this sphere in a different way.

A special pointing to the right of the child to present fact and offer evidence, in the cases of validity of the inquiry principle in the proceeding in family matters[44] does not have a special importance.[45]

Bearing in mind that the right to express an opinion (Art. 65 of the Family Law Act) does not determine the child's position in the proceedings, the circumstance that the child does not have the status of the party in all proceedings in family matters, i.e. when his/her rights are in question, a question is to be raised whether a child can take the role of the witness.[46] The witness is discussed in the theory as a person who provides the statement for the court about "his/her past observations which could be important for establishing the truthfulness of the statements which are the subject of

[42] B. Poznić, V. Rakić-Vodinelić, *op. cit.*, 200, as well as S. Triva, M. Dika, *op. cit,* 798, A. Jakšić, *op. cit.*, 217.

[43] The darft of Serbian Civil Code, Book four, The Family Relations, art. 2284- 2295 (the rights of the child), art. 2456-2462 (the common provisions about the procedures in the family matters).

[44] In the Croatian law these are the status, then the procedures about the parental care, personal relations and measures as well as the alimony for the protection of rights and the well-being of our child (art. 350, in connection with art. 349 of the Family Law Act of Republic of Croatia), and in the law of Serbia everyone (art. 205 Family Law Act of Republic of Serbia). About the significance of the prosecution principle in the family courts see D. Palačković, *Istražno načelo,* 143-144, 153.

[45] In the protection of the best interest of the child ex officio the court collects facts and evidence, and this behaviour is, among other things, also the barrier to all the party dispositive activities which are opposed to him, D. Palačković, *Procesni instrumenti u funkciji zaštite prava na zakonsko izdržavanje deteta,* u: Pravna sredstva za smanjenje siromaštva djece (ur. S. Bubić), Univerzitet "Džemal Bijedić", Pravni fakultet, Mostar, 2015, 144.

[46] It is excplicit about the fact that the child can have the position of the witness, Analiza zakonodavstva, 17.

argumentation".[47] The fact that the role of a child is not identical to the role of the witness can be supported by, above all, the fact that the court, taking care of the child`s best interest always, must not interrogate the child about the facts which harm him/her. The nature of the family relationship and special sensitivity of children due to, for example, emotional immaturity, special relations with parents and other members of the family, influence important restrictions in the procedure of finding out child`s opinion, even as the potential witness. Thus he/she is the source of information in a limited extent for the court, and the "interrogation", is much more often and rather consulting the child before decision making.[48] However, even for such a limited hearing the Civil Procedure Act does not have special rules, so the general rules are applied, as well as the provision of the Art. 65 of the Family Law Act, which actually does not associate the role of the witness because the court ``establishes the opinion`` in cooperation with the specialized organs. But, irrespective of the specific aspects of the ``hearing/interrogation`` of children, special rules are necessary. In this context a number of rules can be useful which are contained in Serbian Act on Juvenile Criminal Offenders and Criminal Protection of Juveniles,[49] as is the general obligation of eliminating the harmful consequences of the proceedings to the personality and health of the juvenile person who is the injured party, the interrogation with the help of the psychologist, pedagogue or other expert, the limitation as to the number of hearings,[50] the use of the technological assets for the transmission of sounds and images, the hearing without the presence of parties and other participants of the proceedings, the interrogation in the apartment, in some other room or in the authorized institution entitled for interrogating the juvenile persons, the prohibition to be faced with the injured party, if the injured party is due to the criminal act, the consequences

[47] S. Triva, M. Dika, *op. cit,* 518, and similar, as ``the person which gives the statement to the court about his / her observations about the facts in the past``, B. Poznić, V. Rakić-Vodinelić, *op. cit.*, 405.

[48] M.C.J. Koens, A.P. van der Linden, *Kind en Scheiding*, Den Haag: Sdu Uitgeveres bv 2010, cited according to I. Busschers, *Children's Participation Rights in Divorce Proceedings, A comparative legal research of divorce proceedings in Netherlands, Norwey and the United States,* 2012, master thesis, 23 http://dare.uva.nl/cgi/arno/ show.cgi? fid=442754, the date of the visit: 19.07.2016.

[49] Act on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 85/2005.

[50] In reference to the number, it is pointed that there is the inconsistency of the regulations and the need to explicitly, without the possible exceptions, limit the number of hearing to the greatest extent, Analiza zakonodavstva, 28.

and other circumstances, in a specially vulnerable and difficult mental state and similar,[51] as a guideline when other court and administrative proceedings are in question. New general rules about testifying from the Civil Procedure Act are also very useful, e.g. the possibility of the written statement (Art. 245/2), which is not inapplicable in the case of schoolchildren, although the need to verify the written statement is problematic taking into consideration the knowledge and the capabilities of children, but also the need to pay the verification fees. It is acceptable for the interrogation by the sound or optical recording (Art. 245/3), which implies friendly surroundings, but not the rules of punishment.

Concerning the participation of the child as an interfering party in the acts in which he or she is not a party, the family and procedural laws do not have clear statements and viewpoints, but there are points of view that this role is possible by the application of the general rules of civil proceedings.[52] However, as the participation of the third party is conditioned by the legal interest for one party to win the case, the court would, in the case of the child as a possible interfering party, be obliged to estimate whether the individual legal interest of the child for interfering would be his/her best interest. The estimation is specific here and complicated taking into consideration the circumstance that the civil proceedings can be interfered during the whole duration of the proceedings (Art. 215 Civil Procedure Act), and what is the best interest of the child is estimated by the court based on all the circumstances of the legal matter for which there isn`t enough process material in the longer period of the civil proceedings.

4. THE PARTICIPATION RIGHTS AS THE PRE-REQUISITE OF THE CHILD'S PARTICIPATION IN THE PROCEEDINGS

Above all, the standpoint of the international documents is that the age cannot be the reason for excluding from exercising the authority which the participation means that the approach must always be individualized,[53] so

[51] Art. 152, 153 Act on Juvenile Criminal Offenders and Criminal Protection of Juveniles.

[52] Explicitly, without further elaborating, we find this possibility with N. Petrušić, *Posebna poslovna i parnična sposobnost deteta;* Učešće deteta u sudskim postupcima u porodičnim stvarima, Pravosudni centar Beograd, 2006, the presentation available at: https://www.google.rs/, the date of the visit: 18.07.2016.

[53] G. Lansdown, *The realisation of children´s participation rights (The realisation),* A Handbook of Cchildren and Young People´s Participation - Perspectives from Theory and Practice, 2010, 12, http://nmd.bg/wp-content/uploads/2013/02/Routledge-A_Handbook_for_

the recognition of the participation rights is the general pre-condition of child`s participation in the proceedings irrespective of the process role. They aren`t all of the same rank – the right to be informed is the pre-requisite for the exercising the other ones. It entails the right to the ``adequate`` ``adapted`` information, the information which correspond with the age and the capability to understand (facts, circumstances),[54] but also which are relevant for the certain legal matter, which will enable the child to exercise the rights completely, unless it is against the child`s best interest.[55] And the decision to announce the information and the way of expressing information must be adapted to the age and capability of understanding.[56] The national laws can determine the age when the so called capability for understanding is acquired, thus the provision of art. 65 of the Family Law Act is not opposed to the international standards.[57] However, The Committee for the Children`s Rights pointed out in the General Comment no 7 that the children have the rights from the earliest age, and the research shows that `` the child is capable of shaping his/her opinion from the earliest age, even when he/she is not capable to express it verbally``, so according to that, the application of art. 12 requires both ``the recognition, and the respect of the non-verbal forms of communication which include games, speech, body language, facial expression, drawing and painting, by which even the smallest children show

Children_and_Young_Peoples_Participation.pdf, the date of the visit: 19. 07. 2016. In the theory four levels are recognized, out of which each one has certain difficulties, in the process of including children in the decision making about the things which concern them- informing, expressing their opinion based on the obtained information, then make sure that this opinion is taken into the consideration, and finally, for the decision to be made (individual or mutual), and according to theory approach of the art. 12 implies that all the children have the right with the respect to the first three named levels, but not in the reference to the fourth one, Alderson, J. Montgomery, *Health care Choices: Sharing decisions with children*, London, 1996, cited in G. Lansdown (The realisation), 13.

[54] EU Conventions, art. 2d.

[55] About the best interest, and in this context too, there does not need to exist the dispute between the parties-the contestation of the activities, behavior and measures from the aspect of the best interest, but irrespective of that, it has to be established / determined, D, Palačković, *Istražno načelo,* 146.

[56] In that sense also S. Aras Kramar *et al., op. cit,* 18.

[57] Convention on the Rights of the Child, General Comment No. 12 (2009), A. Legal analysis (Opšti komentar br. 12), 250,http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf, the date of the visit: 05.07.2016.

respect, choices and affinities``,[58] which associates the fact that any kind of restrictions according to age are not acceptable.

In order to answer the question who is obliged to provide information all the enumerations would be incomplete – these are all the organs which act as all the others which are in the direct contact with children – parents, caretaker, food provider, the legal guardian and other representatives if the national judicial system prescribes them.[59] The guidelines (item. 14, 15) provide the interdisciplinary education (training) of all the experts who work with children or for children – about the rights and needs of children, the way of communication and the proceeding which is adapted for them. This is especially important because the court must ask these people for help in taking a comprehensive look into the children`s capabilities to understand in order to make the decision about the right of the child to get information. The Article 6 of the European Convention especially emphasizes the obligation of the court to consider before making the decision whether the child has sufficient information, and when it is necessary, to obtain the necessary information, additional information, especially in the case of parental obligations. The personal contact of the court is not discluded, if it is necessary ``tete a tete``. The General comment of the Article 12 (item. 41) explains the obligation by the persons in charge or organs to inform the child about the right to be heard, i.e. to express his/her opinion about the impact which his/her opinion may have on the decision including the consequences of his/her decision not to express one`s opinion. Before the hearing the decision making person or body must prepare the child – inform him/her about the location and time of statement giving, to whom it will be given and who will be present. The information must be timely as well. The guidelines, for example entail that children, parents and representatives must obtain the information directly and informing parents must not be an alternative. Apart from the spoken information, it is expected for the special material to exist, which contain them, which they are accessible and are adapted for children; moreover, it is expected from the state to establish special bodies-associations, internet pages, and telephone.[60] By pointing out the immergency when informing, the contents of the information is thoroughly

[58] N. Vučković Šahović (ur.), *Prava deteta u međunarodnim dokumentima*, Beograd, 2011, 249.
[59] S. Aras Kramar *et al., op. cit.,* 19, and considering the obligations of the coalition caretaker and the temporary advocate, Art. 267 Family Law Act of Republic of Serbia.
[60] S. Aras Kramar *et al., op. cit.,* 19, 20.

listed.[61] The list cannot consist of the exhaustive items, thus the type and nature of the information is decided in cincreto. Thus, it would not have any effect if very young children were informed about the rebuttal of the decision to explain in detail the course of the court proceedings.[62]

The Family Law Act also talks about the timely information and points that the opinion of a child must be established both in the way and in the place which is in compliance with the age and maturity of a child (Art. 266/3), but it does not provide concrete evidence that the information must be ``adequate``; rather, it talks broadly about ``all the explanations which are necessary for the child`` (Art. 65/2, 266/3)[63] which does not have the same meaning. Also, the explicit duty of the court is to ask for ``the expert evidence and opinion`` only in the proceedings for the protection of children`s rights and the exercising and loosing parental right, [64] which is problematic.

From the point of view of the judge who carries out the proceedings, the first question is the age, which is indisputable, and then the general judgment capability,[65] for the establishment of which the help of an expert may be necessary (e.g. disabled children). If the child has this capability, the next phase is providing information about the right which is protected, the proceedings, the procedural rights and the consequences of the decision. Only the adapted information influence the decision by the child to express (or not to express) the point of view, and thus all the information about the legal matter are unnecessary, and very often are not useful either.[66] The selection is decided by the best interest of the child. The manner, place and time of providing the information, together with the friendly environment and the language which the child understands, mean that the provided information are objective and non-manipulative, even in the cases of specific ways of communication for the children with special needs, such as

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[61] Gudelines, Chapter A. The general elements of justice child friendly, 1. Information and advice, in reference to the children, parents and other representatives.

[62] S. Aras Kramar *et al., op. cit.,* 19, 20.

[63] Neither the Rulebook about the organization, normative and the standards of the social care center, Official Gazette of Republic of Serbia, No. 59/2008, 37/2010, 39/2011 and 1/2012 - oth. Rule book, and about that there are no provisions S. Aras Kramar *et al., op. cit.,* 23.

[64] See art. 270, and in the connection with the art. 268 of the Family law Act.

[65] It is ``the capability of the child to shape the independent opinion to the greatest extent``, The Rights of the Children in the International Documents, *op. cit.,* 250.

[66] Thus, S. Aras Kramar *et al., op. cit.,* 18 state that it is not in the best interest of the child to give him / her information about the unpleasant circumstances which lead to the divorce or the separation of the child from parents, i.e. family.

simplified information.[67] All is in favor of the standpoint that the court needs external help by experts, so the generalized and partial solutions of the Family Law Act are not the sufficient guarantee, i.e. must be defined more precisely.

Although two relevant conventions define differently the right to express one's opinion[68], and the theory notices that the term ``the right to have one's own point of view``, has a broader scope of reference – it refers not only to the court and the administrative proceedings, but also to all other (life) situations which refer to children`s rights, whereas the right to be heard refers only to the proceedings, so we can responsibly and without doubt conclude the, as per idea, the same rights are in question.[69]

The Family Law Act, furthermore, following the guarantees of the international documents, by the formulations of Art. 65/4,5 recognizes generally the right of the child to express his/her opinion, but the problem is in the practical application, especially for the children younger than ten for which the court does not have the obligation to provide the opportunity to express themselves directly, as it does not have a special rules in terms of the manner and place where the conversation will take place, nor in the accompanying regulations.[70] The guidelines (item 44), e.g., oblige the judges to provide the respect for this right, which entails the established mechanisms on the national level. Children must be given the opportunity to express their opinion about the manner of hearing as well. The general comment (item 22) insists on the ``free expression of one`s opinion'', i.e. without any pressure, so that the decision of the child not to express his/her opinion must not have negative consequences for the child and his/her rights and the child must not be exposed to ``excessive`` influence and pressure.[71] It is necessary to provide the safe environment at statement

[67] *Ibid.*, and more comprehensively about the contents and the right to inform those who will be informed by the child, A. Uzelac, B. Rešetar, *op. cit.*, 27, 28.

[68] Art. 12 of the UN Convention-the right to be heard (to be heard, the same expression is used by the Guidelines), art. 3 of the European convention- the right to express his / her opinion (right to expres his or her views).

[69] *Ibid.*, 30.

[70] About the obstacles in realizing the right in the Temporary representative of the child, The Right of the Child to be informed and express one`s opinion,7, http://www.djecaps.me/fajlovi/Publikacije/PRIVREMENI%20ZASTUPNIK%20DJETETA.pdf, date of visit: 18.07.2016.

[71] More about that G. Lansdown, Every Child´s Right to be Heard, A Resoursce Guide on the Un Committee on the Rights of the Child General Comment No.12, 2011, 52-76,

expressing the opinion, the respect and taking into consideration the individual and social circumstances of a child, who in every moment, can give up further expression of his/her opinion, i.e. the participation (General comment, item 23). If the direct hearing is not possible or the child decides to give the statement through the representative or intermediary, these persons (parent(s) - if there isn`t a clash of interests,[72] the lawyer or other individual or social worker) must correctly and accurately convey the point of view or the opinion of the child, so thus they must have the necessary knowledge, skills and experience and understand the course of the proceedings and the consequences of the decision. The conversation, rather than asking questions, and especially not strictly insisting on the answer is the adequate approach, and excluding the public in this process is self-understood (confidentiality, The Confidentiality, Guidelines, item. 42, 43), but if the child wants, the presence of a parent, caretaker or other individual must be provided according to the child`s choice, unless it is decided differently by the explained decision. The friendly environment entails also specially decorated space where the conversation with the child takes place (Guideline, item. 62-64).

The provision which is especially problematic is that the court or the temporary representative (coalition guardian) can deprive the child from the right to express his/her opinion (as well as the right to be informed) if they estimate that it is obviously against the child`s best interest (Art. 266 and 267, which are also applied in all proceedings which protect children`s interests). Namely, the mechanisms for the control of such decisions are missing, if the caretaker makes them, so it is pleaded for the explicit solution that the court exclusively makes the estimation and the decision concerning exercising the rights.[73]

Finally, adequate attention must be devoted to the opinion of the child, but that does not mean that his/her opinion will be automatically accepted and decisive for making the decision but that it is the court`s task to bring the opinion of the child into the interaction with all other factors of the very

http://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf, date of visit: 01.08.2016.

[72] About the clash of interests in representing children see, e.g., N. J. Moore, *Conflicts of Interests in the Representation of Children,* Fordham Law Review, Vol. 64, Issue 4, 1996, 1820-1856, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3250&context=flr, date of visit: 28.07.2016.

[73] Analiza zakonodavstva, 17.

situation, and especially and always bearing in mind child`s best interest.[74] The General comments (item 28) insists that the child know in what way his opinion will influence the course of the proceedings, as well as that the age is not enough to determine the importance of the opinion because the children of the same age do not have the same level of understanding, rather it depends on the level of information obtained, experience, the environment he/she lives in, the social and cultural expectations in that environment, as well as the level of support which the child has (item 29). Thus the approach must be individualized, and the maturity, in the context of respecting the opinion, entails, above all, that the child understands and accepts the consequences of possibly respected opinion. From the aspect of refutation of a decision by the child, it would be especially justifiable to explicitly predict that the explanation must state the circumstances which made the court not to admit the right to express one`s opinion and (or) not to give importance to the freely expressed opinion,[75] which would prevent the arbitrary acting of the judges.

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[74] D. Palačković, *Najbolji intetres deteta - "izjava težnje" ili dužnost?,* u: Usklađivanje pravnog sistema Srbije sa standardima EU (ur. B. Vlašković), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2013, 272.

[75] N. Petrušić, *Pravo deteta na slobodno izražavanje mišljenja u novom porodičnom pravu RS,* u: Novine u porodičnom zakonodavstvu (ur. G. Stanković), Pravni fakultet Univerziteta u Nišu, Niš, 2006, 113, 115.

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ABILITY OF PERSONS DEPRIVED OF LEGAL CAPACITY TO EXERCISE THEIR PERSONAL RIGHTS

Abstract

In spite of ratified international documents, the protection of persons with mental health problems, intellectual or physical disabilities in the legal system of the Republic of Serbia is still enforced by legal institutes such as deprivation of the legal capacity and a placing of these persons under guardianship. These legal solutions especially does not resolve a question of exercising personal rights that can be done by their holders exclusively in case they are capable of it. Since the guardian is not entitled to enforce them, it emerges that these rights do not exist for persons deprived of legal capacity. This paper endeavors to address an issue on abilities of these persons to make legally binding decisions concerning these rights. Possible solutions to the matter can be found in establishing natural capacity of these persons and through their participation in decision making to the extent that their mental and psychical condition allows. In case that these persons do not have even a minimum of capacity for decision making, the guardian must take a legally binding decision on behalf of a person deprived of legal capacity either on his own or upon the consent of a guardianship authority. Thereby certain criteria have to be taken into account so that the decision is in the best interest of the person represented.

***Key words**: Legal incapacity, personal rights, guardianship, natural capacity.*

1. INTRODUCTION

In law exists confusion between two legal terms: legal incapacity and personal rights. Each person gets them by birth, but certain part of the world population is deprived of ability to exercise them. This sort of inability is related to two categories of persons usually called legally incapable persons: minors under the age of 18 and adults that are deprived of legal capacity due to illness or disorders of psychophysical development. Generally, in such cases adults are equated with minors in terms of legal status.

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It is generally known that the second half of the last century and the begging of the new one are dedicated to affirmation of children`s rights. At the same time, in the last several years the interest in problems related to legal status of legally incapable persons has abruptly increased. An inspiration has also been found in strengthening children`s autonomy that has received its confirmation in the United Nations Convention on the Rights of the Child. At a certain point it became anachronistic to preclude adults deprived of legal capacity from using children`s achievement.

Adults deprived of legal capacity automatically lose human rights and any further ability to shape their own life.[1] Some of personal rights, like right to marry and to found a family become meaningless this way.[2] Legal doctrine, legislations, NGOs, encouraged by the idea of human rights established in international documents, endeavor to promote the legal status of these categories of people.

When one is deprived of legal capacity, his or her will is not legally binding any more. Decisions are now made on his behalf, usually by his guardian who is entitled to undertake legal actions.[3] Apart from the duty to represent the person deprived of legal capacity in the field of protection to the person's property, the guardian is also obliged to take care of the personality of the represented, which is not usually fulfilled by the representative in civil law. It is mostly done by undertaking legal actions that do not have any economic effect on the property and financial matters of the ward.[4] In this manner, legal representative's powers are also expanded to the field of representing a person for personal matters. Conceptually this goes far beyond his primarily duty of taking care of persons deprived of legal capacity.[5] However, legal representative is not entitled to undertake some legal actions concerning strictly personal rights. Only a person to whom the

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[1] This has also been pointed out in Issue Paper of the Commissioner for Human rights of Council of Europe (Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities), available at https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_serb.pdf, 13.03.2016.

[2] *Ibid.*, 12.

[3] See more, Z. Ponjavić, *Staralac kao zakonski zastupnik (Guardian as a legal representative)*, u: Reforma porodičnog zakonodavstva (ur. L. Todorović), Beograd, 1996, 312-331.

[4] See more, A. Gams, *Uvod u građansko pravo-opšti deo,* Beograd, 1974, 168. Due to this fact it is not possible to accept the definition of guardianship as undertaking legal actions on the behalf and for the account of someone else. It would be more suitable to talk about undertaking legal acts on someone else's behalf. See also, O. Stanković, *O pojmu i vrstama zastupništva,* Anali Pravnog fakulteta u Beogradu, 1-4/1983, 631.

[5] See more: Z. Ponjavić *op.cit.*, 314.

guardian is appointed can take this action, if capable of them. In today's system of representation and guardianship no one can undertake the aforementioned actions. Because of that it is necessary to answer the question whether and in what manner these persons can participate in making decision related to strictly private rights, to the extent that their condition allows.

The idea of minimum of personal rights for everyone, regardless of intellectual and other disabilities, is not something new.[6] If we accept the fact that exercising these rights implies the participation of the holder himself and excludes them being exercised by the guardian, there are two possible solutions. Either the person possesses enough of the natural capacity to exercise this minimum of personal rights in that particular case or he does not have one and these rights cannot be exercised at all. It has to be noted that in cases when other personal right are exercised, protection provided by the third person, the guardian, is not the negation of the autonomy of these persons. This stands under the condition, that representation also implies the participation of the persons represented to the extent that their condition allows. In the end, when the guardian has to make a decision, on his own or upon the consent of the guardianship authority due to health condition of the holder, it is necessary to establish criteria for making these decision in the best interest of the represented.

2. HISTORICAL DEVELOPMENT AND COMPARATIVE LAW

Deprivation of legal capacity due to adult's intellectual, mental or any other disabilities and his or her incapacity to take care of himself or herself, which requires the placing under guardianship, is a traditional approach to the matter that can be traced back in Roman law.[7] From the historical point of view, the institutes of guardianship and legal capacity were fatefully

[6] J. Hauser, *Incapables et/ou protégés? Sur le projet de réforme du droit des incapacités,* Informations sociales 2/2007 (n° 138), 6-19, www.cairn.info/revue-informations-sociales-2007-2-page-6.htm, 25. 01.2016.

[7] In Roman law adults incapable of taking care of themselves were appointed curatorship. There were three groups of people: persons with mental health problems, wastrels, property of absent persons.

connected¸ though some authors claim that an institute of legal capacity is older than guardianship.[8]

It is known that according to the Law of Twelve Tables persons with mental health problems and wastrels were placed under special kind of guardianship (*cura*). This sort of guardianship was prescribed as a form of protection for persons that exceeded the time limit foreseen for marital maturity. Mostly their close relatives were taking care of them. When there were no relatives, some other persons could be taken into consideration. However, this way only the property of an ill person was managed. Curators did not take any legal actions on behalf of the represented as tutors, but they would only give their consent to the legal action already taken by the person under the *cura*. Care about the personality was in the background and usually mother, wife or some of the closest male agnates would dedicate themselves to it.[9] Therefore the main aim of the guardianship in Roman law was the maintenance of the property and its inheritance by the new generations. Since no organized order of succession was established, very often it was the only way to secure the existence and family security of family members. Guardian was supposed to administer the property so that it remains in the possession of the family. Speaking in the terms of law, an attitude towards the protection of these persons has changed essentially over the time, especially at the international level. Besides, some of the circumstances beyond law related to the issue have also changed and these demanded to be taken into account when discussing this matter.

Firstly, development in scientific fields of psychiatry and psychology has considerably changed point of view on the persons with mental disabilities. Let us mention, among others, the theory in modern psychiatry according to which participation of these persons in decision making process can have therapeutic effect on them.[10] Moreover, structure of these persons has

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[8] M. Bajić, *Poslovna nesposobnost i počeci starateljstva u rimskom pravu,* Godišnjak PFS, 1, 1953, 21 - 39. This statement could be accepted only conditionally, as an attempt to better understand institutes of Roman law. This especially because the other authors claim that Roman law was not familiar with the notion of legal incapacity and that it was not developed not until the 1930s. See more, M. Mitić, *Fizičko lice,* Enciklopedija imovinskog prava I, 1978, 359, and M. Vedriš, *Čovjek u građanskom pravu, Civilno-pravni status i problemi zaštite psihijatrijskih bolesnika,* Zagreb, 1966, 9-18.

[9] On historical reason for separating taking care of the personaliy and taking care of property affairs, see more, M. Bajić, *op.cit.*, 22.

[10] J. Carbonnier, *Préface,* in: Massip J, Les incapacités. Paris : Répertoire Defrénois,1969, according to B. Eyraud, *Les protections de la personne à demi capable. Suivis ethnographiques*

changed tremendously. Back in the days only the persons with certain mental health problems and other disorders since their birth were listed. On the other hand, today a whole new category of these persons has been appeared and their mental and health state cannot be described just be using traditional categories of incapable persons. Primarily, due to life extension there are more and more old people with certain mental, intellectual and physical disorders.[11] Legal issues arising in both of these cases are not that similar. Last-mentioned elderly people have their own „legal past" to the effect that they were capable of having and maintaining their own property, which would not be the case with those handling mental and intellectual issues since their birth.

Main abetment to the new approach to rights of adults with intellectual or mental disorder or disability came from the Council of Europe documents, especially Recommendation R (99) of the 4th February 1999.[12] Its main principle is that in establishing or implementing a measure of protection for an incapable adult „the interests and welfare of that person should be the paramount consideration" and „the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect". And one of the most important principle is that a measure of protection should not result automatically in a complete removal of legal capacity (...) „or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so."

Most important document dedicated to this field of law is the UN Convention on the Rights of Persons with Disabilities.[13] Starting point of the Convention is individual autonomy and independence, including the

d'une autonomie scindée, https://tel.archives-ouvertes.fr/tel-00585538/document, 12.06.2016.

[11] See more J. Hauser, *op.cit.*, 6-19.

[12] Recommendation No. R (99) 4` of the Committee of Ministers to Member States of Principles Concerning the Legal Protection of Incapable Adults, adopted on 23 February 1999.

[13] The Convention on the Rights of Persons with Disabilities (UN CRPD); The Convention and its Optional Protocol were adopted by the General Assembly by its Resolution 61/106 of 13 December 2006. Both the Convention and the Protocol were ratified in the Republic of Serbia, Zakon o ratifikaciji konvencije o pravima osoba sa invaliditetom (Law on Ratification of the Convention the Rights of Persons with Disabilities), Official Gazette of the Republic of Serbia– International Agreements (Službeni glasnik RS – Međunarodni ugovori), No. 42/09. According to Art. 1, para. 2 of the UN CRPD: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

freedom to make own choices, by the promotion of ''the full enjoyment by persons with disabilities of their human rights and fundamental freedoms", with minimum of limitations in all matters relating to personal rights, e.g. right to marriage, parenthood, etc., and by promoting ''respect for their inherent dignity", ''full and effective participation and inclusion in society" and also by recognizing the legal capacity.[14]

The authors of the Convention have also taken into account the fact that mental disabilities and disorders are very different and evolutionary, that medical condition can change during the period of time, and therefore have foreseen that measures need to be individualized and appropriately adjusted in order to be effective. Protection appointed cannot be imposed as an undue and disproportional burden to a person. Especially an article 12 of the Convention is dedicated to legal capacity and equal recognition of a person deprived of it before the law. Paragraph 1 of this article declares right to everyone to be recognized everywhere before the law and paragraph 2 recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. The Convention insists on absolute respect for autonomy of persons with psychosocial and intellectual disabilities. Paragraph 4 of the same article obliges State Parties to ensure that all the adopted measures related to the exercise of legal capacity will provide

[14] See Art. 1, para. 1 and Art. 3 (a, c, e) UN CRPD. Due to the terms used in UN CRPD, a confusion occured while translating it to Serbian. UN CRPD uses the term „legal capacity" and Serbian legal systems recognizes two terms related to the capacity of natural persons: capacity to be right-holders and capacity to exercise rights. The first one literally translated to Serbian is called „legal capacity- pravna sposobnost", while the second one literally translated to Serbian is „business capacity-poslovna sposobnost". The confusion arouse since the term used in UN CRPD („legal capacity") when literally translated to Serbian sounded like pravni kapacitet or pravna sposobnost (the capacity to be right-holder), which was incorrect. The term from UN CRPD was meant to describe the notion of „business capacity-poslovna sposobnost" in Serbian legal system. According to Cambridge Dictionary (Online), legal capacity is the legal right of a person or a company to make particular decisions, have particular responsabilities, http://dictionary.cambridge.org/dictionary/english/legal-capacity?a=business-english. In Serbian literature it is considered that it is necessary to trasnslate the term from the UN CRPD (legal capacity) as poslovna sposobnost (buisness capacity), see more M. Draškić, Novi standardi za postupak lišenja poslovne sposobnosti: aktuelna praksa Evropskog suda za ljudska prava, Anali Pravnog fakulteta u Beogradu, 2/2010, 336-7. One should not also lose out of the sight that UN Committee on the Rights of Persons with Disabilities has also tried, but not succeeded, at their 8th session to take a unique stand on this matter, see http://www.noois.rs/vesti/162-izvestaj-sa-8-zasedanja-komiteta-un-za-prava-osi, 24.04.2016.

for appropriate and effective safeguards that will ''respect the rights, will and preferences" of a person. The presumption is that everyone owns legal capacity and those deprived of it will be offered appropriate forms of assistance and support as well as possibility to be involved in decision making process. Now the basic model introduced is a so-called ''supported decision-making" instead of the previous one, substituted decision-making (by guardian). The aim is to help these persons make their own decision related to their personal matter or at least to participate in it.[15] Common idea of all international documents in this field is focusing on personal rights of these persons and ensuring their participation in exercising them.

Ratification of the Convention led to adoption or to changes of national legislations, which was also indubitably inspired by the new concept of legal treatment of these persons. In the United Kingdom Mental Health Act was adopted, regulating also the presumption that persons with mental health issues have legal capacity. In the case of need, this person will be supported in making decision. Only if this fails, person will be considered as incapable of decision making in that particular case. In French law (Loi n° 2007□308) it is regulates the position of ''adult protected persons". This protection is based on full respect of personal freedoms, basic rights, dignity and autonomy of these persons.[16] German law ((Zweites Gesetz zur Änderung des Betreuungsrechts (2. BtÄndG) von 21. April 2005 (BGBl. I 1073)) insists on taking into consideration the will of an adult, while also respecting the principles of subsidiarity and proportionality when establishing measures of protection. Will of the protected has to be ascertained in each phase of placing a person under the guardianship and its duration.

Solutions from French and UK legislations accept the model of protection which aims to minimize all the limitations of one person`s capacity to take care of oneself. On the other hand, German system is based on complete elimination of deprivation of legal capacity and on acceptance of simple, but flexible model adjustable to each individual situation and circumstances. This model of the protection provided for persons with mental disorders, who due to ''psychic illness or physical, mental or emotional disorders" are not fully or partially capable of taking care of his or her own affairs, is less based on the notion of ''mental incapability" and is more focused on its causes and

[15] Basically it is the realization of idea from the Recommendation R (99) 4, Principle 3 stating: "Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative consent, to undertake specific acts or acts in specific area".

[16] Art. 414 of the French Civil Code.

different fields of acting that require protection. Lack of capability is differently defined depending on the sphere in matter. For example, if an adult is permanently or temporarily incapable of judging and it prevents him or her to take care of his or her own interests and affairs due to physical, mental or emotional disability, court can *ex officio* or on a request of a person appoint a tutor.[17] It is important to emphasize that an appointment of a tutor does not mean that a person is deprived of legal capacity and that he or she is not allowed to take other legal actions.

3. THE LEGISLATION OF THE REPUBLIC OF SERBIA

The protection of persons deprived of legal capacity in the Republic of Serbia is accomplished through the institute of guardianship, regulated in the Family Law Act.[18] Apart from the ''advance healthcare directives'' from the Act on Patients` Rights, no other models of protection can be found in Serbian legislation.[19] The foundation set for an institute of guardianship has not been changed for more than seven decades, even though there is an obvious need for a certain change. Various external and internal factors had a formative influence on this institute. External ones originate from a requirement to harmonize national system of the protection of these persons with adopted international standards and legislation, while the internal ones concern the deficiencies in their application in practice, incurred as a result of changes in the structure of these persons.

The fact that regulation has not been essentially changed for a long period of time can lead to two different conclusions: either the concept of guardianship established in Basic Law on Guardianship (1946) was very good and stood the test of time or no one has paid close attention to these rules. Lack of thorough analyzes and theoretical interpretation of this issue made it impossible to perceive all of its shortcomings (or advantages).[20] Over the period of time all the other institutes of family law have been developed and customized in accordance with the changes in the society and in the structure of the family. These changes and development had a great

[17] Para.1896 section 1 of the German Civil Code.

[18] Sixth Section of Family Law Act (Porodični zakon), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 18/05.

[19] Article 16. paragraph 5. of Act on Patients` Rights (Zakon o pravima pacijenata), Official Gazette of the Republic of Serbia (Službeni glasnik), No. 45/13.

[20] For example, only several papers relating to this issues can be found, which is far less compared to other fields of family law and which can be found in COBISS Database.

influence on legislation, which merely indicates that the sphere of guardianship was unduly neglected, and the voice of persons under guardianship, forgotten and neglected not only by the State but also by their own family, could not be heard, which *per se* says a lot about their legal status.

In Serbian legal system (Family Law Act from 2005) it is possible to place an adult under guardianship if the court reaches the decision to deprive this person of his or her legal capacity (either fully or partially). Legal capacity of an adult deprived of it is then equal to the legal capacity of a minor of a certain age. It is similar to the case when parental rights can be extended beyond the point that a child reaches the legal age of majority, when his status is equated to the legal status of a minor below or over the age of 14. However, guardianship should neither be anticipated as a renaissance of parental right after reaching the legal age of majority nor as an extension of guardianship over minors.[21] Therefore, there is no reason to understand deprivation of legal capacity as a sanction, but rather as a form of protection in overcoming natural incapability to exercise rights.[22] Full deprivation of legal capacity means that a person has no rights and no possibility to participate in decision making process, even when related to his own life. All decisions are made by the guardian himself or upon the consent of guardianship authority.

Scope and extent of the guardian`s authority does not depend on the health condition or on the preserved capabilities of the ward. It is exclusively determined by the importance of legal actions that have to be undertaken. When the legal capacity is deprived only partially, a person can still make certain decisions pursuant to the court`s decision, which means that the guardianship in this case only is adjusted to the needs and capabilities of the ward. More precisely, capacity of the person partially deprived of legal capacity is more defined by the reasons for guardianship and less by the nature and importance of the decision that has to be made. Apart from the legal actions determined by the court, a person partially deprived of legal capacity should also be able undertake some of the strictly personal acts that could not be undertaken by the guardian on behalf of the ward (conclusion of marriage, making a will, acknowledgment of paternity)[23] Capacity to

[21] C. Geffroy, *La protection tutélaire des majeurs en matière personnelle,* 209, http://www.persee.fr/doc/juro_0990-1027_1993_num_6_2_2064, 13.05.2016.
[22] J. - M. Plazy, *Droits de l'enfant et incapacité juridique de l'enfant*, https://www.cairn.info/revue-informations-sociales-2007-4-page-28.htm, 14. 05.2016.
[23] M. Popović, *Porodično pravo*, Belgrade, 1982, 433.

undertake them is determined in accordance with relevant provisions of legislation of the Republic of Serbia. For example, a male person can acknowledge paternity if he is over the age of 16 and capable of reasoning. Despite the fact that in practice the courts do not determine, in the decisions on partially deprivations, precise legal actions that can be taken by oneself or it is done in a general manner,[24] the main question to be set is how to individualize guardianship over persons fully deprived of legal capacity in accordance with their mental state, especially when it comes to personal legal actions. Besides, this approach, set in international documents, guides to abolishment of full deprivation of legal capacity.[25]

Even a superficial analysis of the legislation of the Republic Serbia demonstrates that the legal solutions in Serbia are outdated and that they contrast to a great deal with the principles from the analyzed international documents since the rights of the person under guardianship are not respected at all. Their consent or its refusal, autonomy in decision making, is far from being respected. What is crucially necessary is to reconcile contradictory demand of respecting freedom and rights of these persons, on one side, and the need to protect them, without setting any limitations to their rights.[26] It is possible only if the measures of protection are understood not as a limitation of the capacity of the person, but as a certain compensation of the existing disability. This approach also demands changes in the role and function of the guardian who is supposed to help in decision making and not to make decisions on the behalf of a ward. Wards are not deprived of their rights, but they just exercise them to the extent that their capacity permits them to do so. When the role of guardian is perceived this way, then there is

[24] Decree of the High Court in Požarevac, 2 Gž 1398/15 (2013) from 06.11.2015., Bulletin of High Court in Požarevac, No. 2/2015, and Decree High Court of Šabac, 5 Gž 525/2013 from 23. 09. 2013. Both decisions can be found in Intermex Database, Belgrade.

[25] For example, the Family Law Act of the Republic of Croatia has completely abolished full deprivation of legal capacity, Art. 234 of the Family Law Act (obiteljski zakon), Official Gazette of the Republic of Croatia (Narodne novine), No. 103/2015.

[26] T. Fossier, *L` objectif de la reforme du droit des incapacites: proteger sans jamais diminuer,* Def. 2005, No. 1, 3-34. According to: J. Hauser, J.-M. Plazy, *L'usager incapable*, Gérontologie et société 4/2005 (n° 115), 101-115, www.cairn.info/revue-gerontologie-et-societe1-2005-4-page-101.htm, 10.06.2016. General Comment no. 1 of the Committee on the Rights of Persons with Disabilities, related to Art. 12 of the Convention, warns of possible misunderstanding of the concept of disability based on human rights because it implies the transformation from a model of substituted decision-making for persons with intellectual and psycho-social disabilities to one in which supported decision-making is the default model. See more, General Comment, para. 16-22.

no contradiction between autonomy and protection. This approach demands the spread of technical help and assistance, with reference to existence of alternative methods of protection of incapable persons (Article 29 of the Convention) and better role allocation between the wards and their guardians. The assistance provided has to be tailored to the individual circumstances and has to evolve together with the ward.[27]

4. INCAPABLE, VULNERABLE OR PROTECTED PERSONS

Notions and terms used in Serbian Family Law Act are also outdated. It still refers to incapable persons, while this term in comparative law is not that widely used anymore due to its pejorative. In literature and national legislation terms ''vulnerable person" and ''protected person" can be detected.[28] Even though the usage of the term ''vulnerable person", defined as a person incapable of exercising his or her rights and freedoms correctly, eliminates the stigmatization of these persons, it can provoke certain general and specific difficulties related to the main subject of this paper. Firstly, these are two different types of persons. It can be even stated that in general anthropological sense, every human being is vulnerable. However, national legal systems acknowledge vulnerability only to certain categories of human population, to children and to adults with certain disabilities. This blurs the difference between adult deprived of legal capacity and other groups of adult vulnerable persons and support they require in order to satisfy their needs.[29] Vulnerable person is not always deprived of legal capacity.

Main legal presumption concerning children is that they are vulnerable, while the situation is completely opposite when it comes to adults. There are also groups of vulnerable adults deprived of legal capacity and of those still not deprived. First group is legally presumed to be incapable of reasoning, whilst the second group is considered capable of it. [30]

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[27] Recommendation R (99) in the Principle no. 5 prescribes that measures have to be based on the interference with the legal capacity of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention and on the least restrictive alternative.

[28] Art. 459 of the French Civil Code.

[29] B. Eyraud, *op.cit.*, (fn. 38).

[30] But this difference is not that easily determinable. According to professor Ozer "incapacity certainly seems more like termination of rights in order to provide protection, while modern protection of vulnerable persons consists of recognition of more rights, but with a very fluid borderline," J. Hauser, *op.cit.*, 10.

From the legal point of view, the second group of vulnerable adults is almost invisible, or better rephrased, established system of protection does not recognize their natural incapacity as a category.[31] Permanent increase of rates of mental disabilities brought by different causes, including wars and economical situation, emphasizes the problem additionally. Due to life extension number of older persons is constantly growing, while their age, social context, diseases, health condition and economical situation contribute to their vulnerability. Their protection is to be considered not only as a ''family issue'', but also as a duty of the State to establish an appropriate legal framework. Our legal system does not provide any special kind of protection for these persons. Moreover, there is no legal presumption that mental and physical weakness in correlation with certain age is the cause of incapacity to take care of oneself. Accepting this legal solution would provide an appropriate safeguard to prevent possible abuse of the persons concerned, especially when it comes to giving their consent to personal decisions on health, place of residence, etc. Older persons are somewhere in between those capable and those incapable of reasoning in civil law. They are not deprived of will, but it is weakened to a certain point. Their vulnerability is reflected in diminished decision-making autonomy. Since this condition differs from mental health problems and disorders, introducing special forms of protection would be justifiable, when the incapacity is based on an expert medical examination of a person's particular circumstances.

Difference between vulnerability of children and adults is not that slight by virtue of their different causes. Besides, they have different perspectives, or to be more precise, their perspectives are completely opposite.[32] Minors are each day closer to reaching full capacity, while the adults' capacity stagnates or it declines and demands more protection. Within the first category of vulnerable persons there are significant differences among newborns, children of school age and adolescents. Serbian legislation knows the difference between younger and older minors and also recognizes the capacity of children of certain age to express his or her personal view,[33]

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[31] Z. Ponjavić, *Autonomija punoletnih lica (ne)sposobnih za rasuđivanje u ostvarivanju prava na zaštitu zdravlja,* u: Pravna zaštita odraslih osoba (ur. Suzana Bubić), Pravni fakultet Univerziteta „Džemal Bijedić" u Mostaru, Mostar, 2016, paper received positive reviews and soon will be published.

[32] J. Hauser, *Le consentement aux soins des majeurs protégés*, *Les petites affiches*, 19 mars 2002, according to: S. Moracchini-Zeidenberg, *L`acte personnel de la personne vulnérable,* Revue trimestrielle de droit civil, 1, 2012, 22.

[33] Art. 65 of Family Law Act.

whilst there are no legal categorization of older person. Namely, differences between adults due to their vulnerability are also very serious and for that reason, legal status of persons whose vulnerability is increasing with aging cannot be equated with people, who were never capable of reasoning. However, Serbian Family Law Act does not take into account all the aforementioned facts and keeps a traditional approach to the matter. In accordance to this approach, each adult can be fully or partially deprived of legal capacity. Difference between them is based on quantity of the protection required. Causes of deprivation of legal capacity, personal past or predictable future are not paramount consideration. Protection of these persons, especially of those fully deprived of legal capacity, is not tailored to the individual circumstances and needs, which is one of main standards set in international legal documents. Bearing in mind everything aforesaid, particularly different situations and legal statuses of different persons, a term ''protected persons'' can be used to describe all these different categories.

5. ESTABLISHING NATURAL CAPACITY

According to the provisions of the Serbian Family Law Act, duties and responsibilities of the guardian are completely the same, whether it comes to administering property of the ward or to taking care of their personal matters. In both cases guardian is entitled to represent the ward. Guardian's competence to represent the person deprived of legal capacity in administering property is considered to be natural and welcome,[34] because it also protects financial and property assets of other family members. But when it comes to taking care of the personal interest of the ŧ ward, representation is less convenient for several reasons: first of all, no one has a better perception of himself or herself and of personal needs than the person concerned, if capable of expressing his or her own will. Also, protection of these rights can be accomplished only *ex ante* and not *a posteriori*, like other civil rights, which also makes a good reason to reconsider the concept of "capacity" of persons deprived of legal capacity for exercising it. In the sphere of personal rights wrong decision can neither be subsequently

[34] Z. Ponjavić, *Pravni značaj volje punoletnih poslovno nesposobnih lica*, u: Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru, (ur. P. Dimitrijević), knjiga 3, Pravni fakultet Univerziteta u Nišu, Niš, 2013, 223-241.

corrected nor the damage inflicted to that person or the third party, to whom he or she, for example, exercises parental rights, compensated.[35]

Besides, the Family Law Act does not provide autonomy of the person represented by extending his abilities to participate in decision-making. Furthermore, there are no legal provisions on ability of a ward to make his/her own decisions while exercising personal rights or to express his or her opinion on personal issues when his or her capacity permits him or her to do so.[36] It is a clear sign that our legal system pursues neither general ideas established in international legal acts nor the jurisprudence of the European Court of Human Rights.[37] Preliminary Draft Civil Code of the Republic of Serbia also did not make some strides in this field.[38] So Article 2375 regulates the duty of the guardian to ''obtain the opinion of the ward and to take into account his opinion, point of view and wishes'' before undertaking any ''measures of great significance'' concerning personal and property matters of the ward, if he or she is over the age of 10 and is capable of expressing them.[39] Thus no further distinction between different levels of taking into account the wishes of the ward is made.[40] This provision also does not

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[35] In civil rights this can be accomplished a posteriori by annulment of legal actions when sufficient evidence of incapacity of reasoning in the moment of undertaking these actions are assembled.

[36] Apart from the Art. 127 of the Draft Civil Code, that states: "Person represented that is over the age of 10 and capable of reasoning has the right to suggest a person who can be appointed as his or her guardian." Quoted provision should be interpreted in a way that this right to expressing opinion in the process of choosing a guardian belongs to all persons capable of reasoning, over the age of 10, both minors and adults. See more, Z. Ponjavić, *Pravni značaj volje punoletnih poslovno nesposobnih lica,* 232.

[37] For example, Decision of the Court in Strasbourg Krušković vs. Croatia (Application no. 46185/08, Judgment 21 of June 2011). The Court stated that, in principle, limitations on rights of persons deprived of personal capacity, even when related to their personal or private life, are not in collision with the Art. 8 of the European Convention on Human Rights. At the same time, Court pointed out that the applicant was not given any opportunity to make a statement on acknowledgment of paternity, which is an infringement of the Art. 8 of the Convention.

[38] http://www.propisi.com/assets/files/gradjanski_zakonik_RS-prednacrt.pdf

[39] Draft Civil Code offers two alternatives to this matter. Apart from the one given in the text above, there is also another one: words from the previous paragraph "over the age of 10 and is capable of expressing them" are replaced with the words "capable of understanding their significance and expressing them".

[40] As it is done in the Art. 458 and 459 of the French Civil Code. Personal legal actions can be undertaken by the person protected or by his guardian (tutor), depending on his

provide any kind of solution for the situations concerning exercising strictly personal rights, e.g. acknowledgment of paternity, which cannot be exercised by the guardian with the consent of the guardianship authority. In the final score it means that a ward will not have an opportunity to express personal views about an issue.

Therefore it seems inevitable to reconsider the concept of ''capacity'' of persons deprived of legal capacity to undertake personal legal actions directly and primarily related to physical or psychic intimacy. These rights are inherent to their holders and they exist irrespective of the state of their will. Their protection has to be provided by the affirmation of natural capacity of each person. Natural capacity is of great importance in the sphere of exercising personal rights, because neither one can be deprived of exercising them nor the guardian can exercise them on behalf of the represented. It can be defined as a capacity of a person to express his or her personal will in a certain situation irrespective of his or her legal status.[41] In this respect, giving certain statements and exercising certain rights are of great importance: e.g. consent to medical treatments, abortion, right of a woman to keep a child, consent to biomedical research, sterilization and in the sphere of family law: acknowledgment of paternity, consent to adoption, decisions from the area of exercising parental rights, giving and changing the name of the child. It seems imminent to enable at least taking into account the will of these persons, which would be in accordance with nature of undertaken legal actions and natural capacity of all persons, even of those deprived of capacity. Of course, taking someone`s will into account can take various forms, starting with regular preliminary hearing before guardian makes a final decision or requesting help and support and ending with full capacity of decision-making. The prevailing approach in our legal theory is that something similar should not be allowed due to principal of legal certainty and protection of the third parties` interests,[42] whilst this is widely spread in comparative law. For example, French Civil Code presumes that protected person can undertake personal legal actions to the extent that their condition permits him or her to do so, while the person in charge of the

consciousness. Strictly personal acts can be undertaken exclusively by the person represented.

[41] Z. Ponjavić, *Pravni značaj volje punoletnih poslovno nesposobnih lica,* 227.

[42] See more, D. Živojinović, *Sposobnost za davanje informisanog pristanka na učešće u medicinskom istraživanju,* Zbornik radova Pravnog fakulteta u Nišu, 67, 2014, 132.

protection of an adult will take necessary protection measures.[43] The powers of guardian are reaffirmed this way in such a manner that he can act contrary to the will of person represented but in his interest, which is characterized as a paradigm of paradox of protection and broad scope of guardian's powers.[44]

Finally, it can be concluded that, despite their vulnerability, ''natural capacity'' of persons has to be respected always when possible. Preserving autonomy in the sphere of exercising personal rights has to be a high-priority legal and political goal, because these persons in current legal system of protection do not have all the rights guaranteed by the Constitution. Affirmation of the principle of autonomy also includes defining more precisely guardian's role and powers, because he would be supposed to act on behalf of a ward only when a lack of natural capacity precludes him or her from doing it on his or her own. An idea to be pursued by our legislator is favoring of autonomy consisting of maintaining and increasing of natural capacity despite legal incapacity, as long as it is in compliance with the protection of the personality. Its basis can be found in constitutional protection of dignity. In this respect, the degrees of autonomy have to be a main criterion for tailoring measures of protection to the individual circumstances.[45]

6. TYPES OF PERSONAL ACTS

In the sphere of personality rights, two types of measures can be distinguished, ordinary ones and those that make significant impact on the life of a person, or so-called ''measures of great significance'' from the Preliminary Draft Civil Code. Apart from these types, acts can be divided into ordinary (daily) acts and more important act. An example of a more important act would be, e.g. undergoing medical treatments, such as invasive diagnostic and therapeutic method, which can be undertaken upon the consent of a patient or his legal representative due to possible, sever health

[43] Art. 459 al. 1: «La personne protégée prend seule les décisions relatives à sa personne dans la mesure où son état le permet».

[44] B. Eyraud, *op.cit.*, 52.

[45] M. Rebourg, *L'autonomie en matière personnelle à l'épreuve du grand âge. Analyse de pratiques judiciaires à l'aune de la loi du 5 mars 2007 réformant la protection juridique,* Retraite et société 2, 2014 (n° 68), 63-77, www.cairn.info/revue-retraite-et-societe-2014-2-page-63.htm, 12.06.2016.

consequences.[46] Finally, the division of personal acts into strictly personal and ordinary personal acts can be taken over from the comparative law.[47]

Strictly personal acts are those most intimately attached to the personality of a holder. Irrespective of the legal status of the adults, these rights are supposed to be undertaken exclusively by their holders, if they have natural capacity. Introducing this provision into Serbian legislation requires the following three preconditions:

1. Defining and determining what strictly personal acts are. In this regard, Act could enumerate several of them *exempli causa*, while the court would determine the rest of them by using analogy and intuition.

2. Capacity assessment of each person, *in concreto*, to undertake strictly personal act has to be based on the opinion of medical experts with suitable knowledge, skills and experience.

3. Determing the consequences of a person`s natural capacity to undertake strictly personal acts.

One of possible legal solutions for undertaking daily, ordinary personal acts would be *mutatis mutandis* provisions of Family Law Act concerning legal capacity of minors below the age of 14 that are entitled to untertake legal transactions aimed at the acquisitions of exclusive rights, legal actions where the child does not acquire either rights or obligations and legal actions of minor significance (Art. 64, para.1). In this case they would be independent in a manner consistent with their natural capacity.

7. GUARDIANSHIP DECISION-MAKING MODELS

Even though new possibilities for participation of protected persons in decision-making concerning their personal rights are introduced, need for guardian assisting or decision-making on behalf of them still remains. Primarily, it would occur when natural incapacity for decision-making is determined in a particular case. How will the guardian make decisions on behalf of a ward, while taking into account demands set in the Convention? Modern legal systems recognize legal guide norms related to this matter.

In this concern, there are two prevailing models: a) substituted decision-making model, b) model of determing best interests of a ward.

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[46] Art. 16 para. 2 of Act on Patients` Rights (Zakon o pravima pacijenata), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 45/13. See more Z. Ponjavić, *Pravo pacijenta da pristane na medicinsku meru ili da je odbije*, Teme, 1/2016, 15 and further.

[47] Art. 459 of the French Civil Code recognizes strictly personal and ordinary personal acts.

Substituted decision-making implies that guardian makes decision exactly the same way a ward himself or herself would do if he was not incapable of it or under the guardianship.[48] The aim of this model is that the guardian do in a way that the ward would do.

Model of determining best interests of a ward demands, that a guardian makes a decision that is most suitable for the ward. The aim of this model is that a guardian chooses a decision from which the ward would benefit most, without taking into consideration what the ward would do in that certain case.

Decision-making in accordance with ward's best interest is a prevailing model, though in some countries this model also includes some aspects of substituted decision-making model.[49] Substituted decision-making demands that a guardian predicts how the ward would act in a certain case, which is sometimes impossible. In such a situation some other source of information needs to be found in order to disclose ward's wishes. Examination of his previous decisions, for example, would provide a good guidance for the guardian. This particularly emphasizes a demand for establishing different categories of protected persons. Persons that used to have legal capacity cannot be equated with persons that never had legal capacity. In the first case, their legally relevant will could be determined, there used to be their ''personal pattern'' of behavior that makes it possible to make a decision on their behalf in similar situation. Main objection would be that this person in the meantime can change his or her opinion or attitude towards something. But, the same objection can be raised when a person has given consent for, e.g. organ donation or when he or she has appointed a representative with the future powers For that reason, this model is most applicable in the case of the decision making on the way of exercising parental rights.

When no clues of ward's wishes and will found, model of determining best interests of a ward should be applied, which has its origins in common law.[50] A case to be mentioned, *Strunk vs. Strunk*, comes from the USA, 1969, when court was demanded to give consent for kidney donation from a ward to his brother with kidney failure.[51] Substituted decision-making could not be applied because the ward had intellectual disability and was not able to express his opinion. Finally, the court based its decision to give the consent to

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[48] L. Frolik, *Standards for Decision Making*, in: Comparative Perspectives on Adult Guardianship (ed. A. Kimberley Dayton), Durham, 2014, 48.

[49] *Ibid.*

[50] *Ibid,* 49.

[51] http://www.lawandbioethics.com/demo/Main/Media/Resources/Strunk.htm.

transplantation on the assessment that the death of a brother would get the ward emotionally destroyed. For this reason, donation was in the best interest of the ward. Although applying model of determining best interests enables avoiding some of the obstacles inherent to substituted decision-making model, the guardian still has to deal with some issues and difficulties, especially when trying to define what the ward's best interest is.

These two approaches are usually combined. Decision whether to apply the first or the second model depends on the nature of the decision to be made. In many countries when the guardian has to make a decision on financial matters, the standard of best interest is to be applied, while decisions on personal matters, e.g. health issues, demand the substituted decision-making model.

8. CONCLUSION

Protection of adults with certain mental, intellectual or physical disabilites requests, on one side, tailoring measures in accordance with individual circumstances and health condition of a person, while, on the other side, it also demands establishing protective measures for persons not deprived of legal capacity if they do not have natural capacity to undertake certain legal actions.

Legal status of these persons is as unfavorable as the legal status of persons deprived of legal capacity, since their incapacity is legally invisible.[52] This leads to a conclusion that protection measures must be unified irrespective of the category of persons protected. When necessary, court would establish appropriate personalized measure *ex ante* and that would be a true sense and aim of protection of these persons, while respecting their rights at the same time.

In the sphere of exercising personal rights main principles are primacy of the consent of a person represented and subsidiarity of their incapacity. Emphasizing the primacy of a consent a person represented eliminates the presumption of the person`s incapacity contained in the decision on full deprivation of legal capacity. In this context, protection of these persons does not the only aim to limit exercising their rights. It also prevents extensive reduction of these rights, it actually limits the presumption of incapacity, which has a double consequence. First of all, regular medical examinations of the person`s health condition are required, which is supposed to alleviate the

[52] See more, Z. Ponjavić, *Autonomija punoletnih lica (ne)sposobnih za rasuđivanje u ostvarivanju prava na zaštitu zdravlja.*

termination of measures when possible. Secondly, consent can be required in those fields that do not exist at this moment. Of course, their autonomy can be never be complete but will always be under the supervision of a guardian or a guardianship authority. Achieving balance when possible, between autonomy and protection, especially in the sphere of personal rights, should be the core of the new approach to the protection of these persons. Certain inversion in the logic of protection occurs. Aim of the protection is not to compensate for the loss of capacity, but to limit the powers of the representative (guardian).

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PARENTHOOD AND PARENTAL RESPONSIBILITY OF THE UNDERAGE PARENTS IN THE ERA OF CHILDREN'S RIGHTS

Abstract

Legal status of the underage parent comprises conflicting roles of a parent and a child in the same person. It triggers many legal issues primarily revolved around underage parents' capability to exercise parental responsibility. Using their natural ability to bear the child, the underage parents actually step out of the boundaries of childhood moving into to world of adulthood despite of the fixed age limits accepted by the law in order to separate, somehow artificially, those two domains. Since life usually precedes the law, giving birth to a child by the underage parents creates a legal mess where the rights and interests of the various participants are at stake. However, the lawmakers are torn between two basic ideas to protect the rights of the newborn and to enable natural parents to acquire parental responsibility so they can perform their duties as parents. This has been shown to be quite complicated task involving the consideration of different concepts such as reproductive liberty, legal parenthood, active legal capacity and child's rights. Those issues have been considered by the author having in mind the complex picture of child's rights, comparative law and national substantive family law rules. The attention is also paid to the solutions proposed by the draftmakers of Serbian Civil Code which could be adopted in the near future.

***Key words**: underage parent, reproductive liberty, legal parenthood, active legal capacity, child's rights.*

1. INTRODUCTION

Childhood can hardly have clear and distinctive boundaries with all turbulences and continuous changes that are included in this phase of life. In that sense, the time of being a child involves psychological, biological, sociological, as well as legal aspects. However, it is important to stress that reaching the point of adulthood is highly individual feature of someone's life

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depending upon various elements of child's own characteristics and complex influence of her/his family surrounding, as well as the impact of broader social environment and cultural context. Furthermore, being an adult does not necessarily coincide with the sufficient level of maturity which leads to even more confusion in the efforts to determine the boundaries of childhood.[1] Thus, a general definition of childhood could figuratively speaking remind of the attempts to make the clothes suitable to every person.

Progressing to adulthood is followed by significant and various changes of the child's cognitive and intellectual abilities that should be depicted in law as far as possible. Since the lawmakers cannot address each and every child, they need to ascertain clear but flexible legal framework in order to determine childhood boundaries. Unfortunately, this has proved to be difficult task which has led to different outcomes in separate legal fields, e.g. penal law, tort law or law on contracts.[2] Such development demanded fragmentation of the legal concept of a child into various subcategories, such as infant, minor, adolescent or juvenile. However, since childhood is a precondition for enjoying children's rights, key definition of a child should be sought into the United Nations Convention on the Rights of the Child, as the most significant international legally-binding agreement in this area.[3]

According to the CRC, "…a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[4] The term "majority" refers to full active legal capacity.[5] Thus, creators of the CRC established legal presumption that a child attained majority at the age of 18 allowing the national legislators to make certain exceptions due to their appreciation.[6] These exceptions actually form the

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[1] See D. Archard, *Children: Rights and Childhood*, Routledge, London – New York, 2004, 44.

[2] For example, in Criminal Code of Serbia, the term „child" refers to a person up to 14 years of life. On the other hand, the expression „minor" involves adolescents between the ages of 14 and 18. The broadest term is „underage person" which encompasses category of persons under the age of 18. See: Par. 112 (8-10) of Criminal Code (CCSRB) (Krivični zakonik), The Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.

[3] The United Nations Convention on the Rights of the Child (CRC), United Nations, Treaty Series, Vol. 1577, 3. The CRC was adopted by the UN General Assembly resolution 44/25 of 20 November 1989.

[4] Art. 1. of the CRC.

[5] S. Detrick, *A Commentary on the United Nation Convention on the Rights of the Child,* Martinus Nijhoff Publishers, The Hague – Boston – London, 1999, 59.

[6] The main goal was that CRC should apply to as large group of children as possible. Ibid., 58. Some delegations were proposing the other solutions during the drafting process.

grounds for emancipation of minors in national legislations of state parties.[7] In other words, exceptions from general rule that majority is attained at the age of 18 enable space for assessment of individual childhood limit and distinct characteristics of each child if certain requirements are met. Those requirements usually concern underage person's mental or intellectual capacity and physical ability to perform duties that are commonly linked with adulthood, such as obligations that derive from marriage or parental responsibility.

Emancipation should not be mixed with growing autonomous decision-making space to underage persons created particularly by children rights in the personal sphere.[8] This process is sometimes called „progressive autonomy"in legal literature and it is flexible reflection of a child that gradually grows up and matures developing her/his own physical and intellectual abilities.[9] On the other hand, emancipation offers static legal approach where child maturity and capacity to reason is assessed in a single moment deciding in clear-cut fashion if the child is competent enough to acquire full active legal capacity before attaining majority.[10] Furthermore,

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They were of opinion that this age limit is too high and that it does not correspond to the relevant social and cultural conditions in many countries. In that context some were of the opinions that upper age limit for the legal status of a child should be set to 14 years which was the age when compulsory education ends or when marriage capacity is required in certain countries. On the other side, some legal scholars argue that minimum age limit for attaining majority by national law should have been explicitly included in the CRC text in order to prevent uneqal treatment of children. See *ibid*., 58–59.

[7] On the origin and meaning of emancipation in Roman law; see S. Vladetić, *Prijateljske usluge u rimskom porodičnom pravu*, XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2014, 265–266.

[8] J. Ferrer – Riba, *Parental responsibility in a European Perspective*, European Family Law III: Family Law in a European Perspective (ed. J. M. Scherpe), Edward Elgar Publishing, Cheltenham – Northampton, 2016, 301.

[9] See R. Martins, *Parental responsibilities versus the progressive autonomy of the child and the adolescent,* Perspectives for the Unification and Harmonisation of Family Law in Europe (ed. K. Boele-Woelki), Intersentia, Antwerpen – Oxford – New York, 2003, 371.

[10] This form of emancipation is known as public or court-order emancipation. Some countries also regulate so-called private emacipation of minors which is based on the consent or even decision of parental responsibility holders. See R. Oliphant, N. Ver Steegh, *Family Law,* Aspen Publishers, New York, 2007, 196; V. Vodinelić; *Građansko pravo: Uvod u građansko pravo i opšti deo građanskog prava,* Pravni fakultet Univerziteta Union u Beogradu – JP Službeni glasnik, Beograd, 2014, 367. Furthermore, certain authors argue that emancipation may also relate to fixed age when parental responsibility ceases. In other

after emancipation is done, an emancipated minor will generally be legally treated equally with adults concerning their legal status.[11] Contrary to emancipation, progressive autonomy makes a child more and more legally closer to adult as she/he grows up narrowing the gap between childhood and adulthood until it finally dissapears when a child reaches the age of 18.

However, emancipation sometimes could be a questionable legal exit from the boundaries of childhood. Such situation may occur when the interests of an underage person to attain full active legal capacity before majority are in the shadow of the rights and interests of another party. Those are the cases when minors have become parents using their natural ability to bear the child. On such occasion the best interests of the newborn will be taken as a primary consideration and the underage parents' interests should be assessed through the lens of the rights of their child.[12] The fundamental problem that arises from giving birth to a child by the underage parents is the issue of their parental fitness or their capacity to perform parental responsibility. As biological parents willing to rear the child, the underage persons need to be legally recognised as the child's parents. However, since the adolescents still have the legal status of children, they are not legally competent to exercise parental responsibility. This is a temporary legal vacuum, but it has to be overcome in order to prevent possible bad outcomes for underage parent's children, as well as negative effects on the adolescent parents themselves.

Problem with fulfillment of parental obligations lies at the heart of family law analysis concerning legal position of the underage parents. However, this hardship came as a result of adolescent reproductive liberty and necessity of establishing legal parenthood after the birth of a child. That is why those issues should be addressed first.

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words, they are of opinion that reaching majority at the age of 18 means at the same time that this person is being emancipated. See R. Oliphant, N. Ver Steegh, *op. cit.*, 196.

[11] Exceptions exist particularly in the area of informed consent to certain medical treatments when capacity to reason or sufficient mental capacity must be determined individually in each and every case, regardless of the existence of full active legal capacity at the patient's side. For example, in most of the countries emancipated minor cannot be living organ donor in spite of his intention and desire to help. See V. Vlašković, *Pravni i etički aspekti doniranja organa sa živih i punoletnih lica nesposobnih za rasuđivanje,* Uslužno pravo (ur. M. Mićović), Zbornik radova sa IX majskog savetovanja, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2013, 723.

[12] See Art. 3 (1) of the CRC, as well as para. 6 (a) of the UN Committee on the Rights of the Child, General comment, No. 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (CRC/C/GC/14).

2. REPRODUCTIVE LIBERTY OF MINORS AND ACQUIRING LEGAL PARENTHOOD

2.1. Reproductive liberty of an underage person to bear a child

Early parenthood is usually looked upon as an unwelcome event which does not fit within prevailing social and legal policy.[13] Some social scientists argue that adolescent parenting has harmful effects on underage parents through lost opportunities for education or work, as well as harmful consequences on their children, through an increased risk of their development, health and unstable living environment.[14] However, natural ability to conceive and bear a child does not depend directly on intellectual capacity or psychological maturity of a person. It has been rooted in distinctive biological characteristics of each and every individual which can hardly be shaped by law. Thus, state resources and capacities to impose wanted social and legal model regarding biological parents are highly limited.[15] The right to conceive a child by natural means does not require state interference, like most of other reproductive rights do, such as treatment of infertility, medically assisted reproduction or termination of pregnancy. Therefore, the right to conceive a child naturally is a negative liberty right not to be stopped from doing what one could.[16] It is essentially a negative concept which prevents the state from interfering in people's reproductive choices.[17]

Constitution of Serbia embraced this idea stating that everyone has the right to decide freely on giving birth to a child.[18] The term „everyone" also includes adolescents with natural ability to bear a child which means that

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[13] See K. Scheiwe, *Between autonomy and dependency: minor's rights to decide on matters of sexuality, reproduction, marriage, and parenthood. Problems and the state of debate – an introduction,* International Journal of Law, Policy and the Family, No. 3, 2004, 267–268.

[14] See E. Buss, *The Parental Rights of Minors,* Buffalo Law Review, No. 3, 2000, 789.

[15] See V. Vlašković, *Najbolji interes deteta u kontekstu porodičnopravnog aspekta usluge surogacije,* XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), knj. 6, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2015, 253–254.

[16] D. Archard, *op. cit.*, 138.

[17] J. Herring, *Medical Law and Ethics,* Oxford University Press, Oxford, 2008, 317. Reproductive liberty is narrower idea than reproductive autonomy which places also positive obligations on the state to provide adequate medical assistance for those couples who cannot have children by natural means. *Ibid.*

[18] Art. 63 (1) of the Constitution of the Republic of Serbia (CSRB) (Ustav Republike Srbije), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 98/2006.

state cannot interfere with their decisions to conceive and bear a child. Apparently, the right of an adolescent to conceive a child, as an expression of reproductive liberty, cannot be effectively limited since state cannot have control over someone's intimate sphere. However, early pregnancies could be influenced by preventive measures of sex education, social policy and in extreme cases criminal sanctions.[19] On the other hand, an important question may arise if a state should interfere with adolescent right to bear a child in some extreme cases. Such state interference would be highly intrusive and extremely paternalistic and it would concern the possibility to force an underage girl to undergo an abortion on the consent of her parents or with the authorisation of competent court or other state authority. The key dilemma that should be answered here is if the right of an adolescent to give birth to a child may be restricted by her right to life, survival and development, considering the age and capacity to reason of a minor. If the termination of pregnancy was life-saving treatment, then the choice of an adolescent girl to carry up pregnancy to the term could be perhaps overridden through the best interests of the child, determined by the right-based approach.[20] The reason for such drastic measure may be found in positive obligation of the state to protect the right to life of every human being including her right to survival and development.[21] However, there is not an easy answer here, because such practice would be against human dignity and it could violate many underage girls' human rights, such as: right to prohibition from torture, right to liberty and security, right to respect for private and family life, including also principle of non-discrimination.[22] The right to life has the highest rank among all human rights and it is

[19] Access to information about negative effects of the early pregnancies is of crucial importance. For example, in Germany each individual has a personal right to information and advice on sexuality, contraception and family planning regardless of her/his age. See K. Schiewe, *op. cit.*, 274.

[20] The right-based approach on assessment of the best interests of the child is advocated by the CRC/C/GC/14. Thus, the full application of the concept of the child's best interests requires the development of a righ-based approach, engaging all actors, to secure holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity. Para. 5. of the CRC/C/GC/14.

[21] See D. Hodgson, *The child's right to life, survival and development,* The International Journal of Children's Rights, No. 4, 1994, 380–383.

[22] See Art. 3, 5, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 005, Council of Europe, 4 November 1950. In that context see J. Fortin, *Children's Rights and the Developing Law,* Cambridge University Press, Cambridge, 2009, 159–160, 167.

precondition for enjoyment of all other human rights, but we may ask ourselves a question if it is legally possible to allow someone to give up her life or to jeopardize her own living so that another human being could come into existence. Off course, in such case threshold of adolescent competence and capacity to reason should be particularly high depending on her age and maturity.[23]

When a child is born, regardless of her/his parents' age, it is essential to determine who the child's legal parents are. Thus, parents could take the parental responsibility for the child from the moment of her/his birth.[24] Attribution of legal parenthood should include within it parental responsibility at the same time.[25] However, in case of underage parents,

[23] Under English law an adolescent patient needs a higher level of competence to refuse to undergo treatment than to consent it. In other words, the more dangerous the outcome, the higher is the competence required. See *Ibid.,* 153. Professor Fortin considers that the levels of legal competence should not be adjusted in such manner, and that it would be more honest to authorise the courts to override the minors' wishes, irrespective of their legal competence through the interest of society in protecting underage persons. See *Ibid.,* 155. Thus, in Serbian law the underage patients who has reached the age of 15 and with capacity to reason has the right to consent to medical treatment, but not the right to refuse it. Apparently, this is a paternalistic approach based upon interest theory of rights. However, such provision does not respect human dignity of a minor and it could be highly questionable in the context of adolescent reproductive rights and liberties, having in mind particularly the constitutional norm on the right to bear a child. We might say that Serbian legal solution insists upon transparency, while the English law offers flexibility. See Art. 19 (para. 4 – 5) of the Law on the rights of the patients (LRPSRB) (Zakon o pravima pacijenata), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 45/2013.

[24] Some authors support the idea of procreational responsibility which involves procreational responsibility before and after conception of a child. The latter concept is based on the idea that those parents, who are responsible for the conception of the child, should be responsible for the child during her/his life. M. Vonk, *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law,* Intersentia, Antwerpen – Oxford, 2007, 270.

[25] Distinction between the concepts of parenthood and parental responsibility is very significant in the context of underage parents. Parenthood is an on-going status in relation to the child, while parental responsibility is responsibility for raising a child. See A. Bainham, *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions,* in: What is a Parent? A Socio – Legal Analysis (eds. A. Bainham, S. Day Sclater, M. Richards), Hart Publishing, Oxford – Portland, 1999, 29. For example, parental responsibility ends with the child's majority, whereas parenthood lasts until death of a parent or a child.

allocating parental responsibility faces difficult problems concerning their legal status as minors. Furthermore, well known disproportion between establishment of maternity and paternity plays also significant role.

2.2. Attribution of legal parenthood to the underage mother

As professor Meulders-Klein vividly puts forward, women are imprisoned in magic circle of maternity which is not easy to break.[26] Therefore, according to ancient *mater semper certa est* principle, mother is the woman who gave birth to the child. The same rule applies to underage mother, irrespective of her age.

Law on parentage is generally based upon principles of procreational responsibility, child's best interests and legal certainty.[27] Procreational responsibility rests upon premise that both biological and intentional parents are responsible for the child they procreate.[28] In most of the countries, woman demonstrates her intention to rear the child by giving birth to her/him.[29] Thus, there is a presumption that woman who gave birth to a child intends to be legal and sociological mother of a child.[30] In this case,

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[26] See M. Meulders-Klein, *The Position of Father in European Legislation,* International Journal of Law and the Family, No. 2, 1990, 135.

[27] See W. Schrama, *Family function over family form in the law on parentage? The legal position of children born in informal relationships,* Debates in Family Law around the Globe at the Dawn of the 21st Century (ed. K. Boele-Woelki), Intersentia, Antwerpen-Oxford-Portland, 2009, 129.

[28] M. Vonk, *op. cit.,* 270.

[29] Exceptions are the countries that support the idea of the right to anonymous birth, such as France where this practice has been existing at least since the French Revolution. See N. Lefaucheur, *The French 'tradition' of anonymous birth: the lines of argument,* International Journal of Law, Policy and the Family, No. 3, 2004, 319. Furthermore, some rare European states, such as Greece, allow and regulate practice of surrogacy. This is also an exception from presumption that woman who gave birth to a child intends to raise her/him. See K. Rokas, *National Reports on Surrogacy: Greece, in: International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings, P. Beuamont), Hart Publishing, Oxford-Portland, 2013, 144–145.

[30] The intention of a mother to rear the child follows from her decision not to use her right to abortion as a reproductive right. On legal nature of the right to abortion see: V. Vlašković, *Lekarska i farmaceutska usluga prekida trudnoće i načelo najboljeg interesa deteta*, XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Zbornik referata sa VII majskog savetovanja, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke Pravnog fakulteta u Kragujevcu, Kragujevac, 2011, 735–738. Women achieve autonomy by choosing not to be immersed in their biology, including not to become pregnant, not to

attribution of legal parenthood also includes parental responsibility or capacity to exercise parental obligations. However, this presumption refers to an adult mother with full active legal capacity. In case of legally incompetent or underage mother, the fact of giving birth to a child will generally not be enough for acquiring parental responsibility. On the one hand, principle of legal certainty, the right of the child to know for her/his parents and the interest of birth mother imposes the outcome where the woman who gave birth to a child will be considered as the child's legal parent.[31] Nevertheless, child's right to development expressed as a paternalistic element of the best interests of the child makes an obstacle for awarding parental responsibility to an adolescent parent. Such situation separates the concept of parenthood from the idea of parental responsibility, which will be further discussed later.

As it has been shown, even the teenage mother with mental disability will be recognised as the child's legal mother by operation of law. This is not the case with determination of paternity where the age and capacity to reason of an underage biological father could play important role. Thus, unlike underage mothers, adolescent biological fathers could face the problem not only about awarding parental responsibility, but also on the establishment of paternity itself.

2.3. Establishing legal parenthood in case of underage father

If the underage biological father is married at the time of child's birth, the paternity will be established automatically through the legal presumption. This is, by far, the best situation for the adolescent father, since making of marriage is followed by his emancipation which means that he will acquire parental responsibility simultaneously with the establishment of legal parenthood.[32] However, when unmarried (underage) mother gives birth to

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have children and not to become mothers. J. Marshall, *Giving birth but refusing motherhood: inauthentic choice or self-determining identity?,* International Journal of Law in Context, No. 2, 2008, 176.

[31] See Art. 7 (2) of the CRC.

[32] For example, emancipation may occur by reason of the underage person's marriage in Germany, The Netherlands, Belgium, Russia, Serbia, although some countries, such as Germany, do not allow emancipation when both of the partners are minors. See Art. 1303 (3) of the German Civil Code; Art. 1:253ha (1) of the Dutch Civil Code; Art. 476. of the Belgium Civil Code; Art. 13 (2) of Family Code of the Russian Federation; Art. 11 (2) of Family Law Act of Serbia (FLSRB) (Porodični zakon), Official Gazette of the Republic of Serbia (Sližbeni glasnik RS), No. 18/2005.

the child, determination of paternity could be difficult depending on mother's preference and teenage father's age and competence.

Unlike underage mothers, teenage biological father could face various obstacles in his intention to become child's legal parent depending on the circumstances of the case. Firstly, it should be stressed that national legislations heavily vary regarding their rules on parentage concerning the establishment of unmarried father's parenthood. Generally speaking, unmarried putative father could become legal parent of the child through voluntary acknowledgement, registration on the birth certificate or by the court's order.[33] The first two solutions rest upon mother's consent providing more desirable outcome from the aspect of the child's best interests. Situation is even more complex in case of underage putative fathers when it can eventually lead to legal impossibility to establish paternity voluntarily after the child's birth. Good example of it may be found in Serbian Family Law.

Thus, according to Family Law Act of Serbia, parenthood may be established by voluntary acknowledgement of the underage man who has reached the age of 16 having sufficient mental capacity.[34] The additional requirement is the consent of competent mother of the child.[35] Therefore, Serbian Family Law does not provide the possibility of establishment paternity through acknowledgement if the putative father is under the age of 16 or if he lacks sufficient mental capacity. Actually, there is a non-rebuttable legal presumption in Serbian law that putative father under the age of 16 does not have sufficient mental capacity to make the acknowledgment of paternity. This could lead to violation of the principle of non-discrimination simultaneously preventing the child to have both legal parents after her/his birth.[36] Therefore, Serbian lawmakers avoid enabling biological father under

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[33] In England unmarried father can be registered on the birth certificate with the mother's consent. See J. Herring, *op. cit.*, 311–312.

[34] Art. 46. of FLSRB.

[35] See: Art. 48 (1) of FLSRB.

[36] Legal parenthood of the teenage biological father under the age of 16 could eventually be established by the court's order on the request of his legal representative (competent parent or a guardian). Serbian Family Law is not quite clear on the possibility of judicial determination of paternity when putative father does not have sufficient mental capacity to make the acknowledgement. Thus, according to the FLSRB, the man who claims that he is the father of the child may initiate the proceedings for judicial determination of paternity within one year from the day when he found out that child's mother or guardian did not consent to his acknowledgement. Art. 251 (3) of FLSRB. Literally interpretation of this rule would imply that it is impossible to determine paternity by the court's order if a putative father does not possess sufficient mental capacity to make valid

the age of 16 the opportunity to become child's legal parent by voluntary acknowledgement, as the most practical way to establish paternity, which was unnecessary since he would not be able to acquire parental responsibility anyway. It is also the case when the underage putative father does not have sufficient mental capacity to make the acknowledgement of paternity. More adequate solutions can be found in Greek or Croatian Family Law where such problem may be overcome.[37]

Serbian family legislation treats acknowledgement of paternity as strictly personal statement. However, such concept apparently shows some drawbacks regarding the establishment of paternity in case of adolescent putative fathers. It is important to stress that attribution of legal parenthood to the underage parents does not mean that parental responsibility will be awarded to them at the same time. That is why it was not necessary to bind acknowledgment of paternity solely to the putative fathers' age and mental capacity.

3. OVERCOMING THE LEGAL STATUS OF MINORITY IN CASE OF UNDERAGE PARENTS

In most cases, when legal parenthood is attributed, the child's legal parents automatically acquire parental responsibility necessary for fulfillment of their parental obligations. However, underage parents lack full active legal capacity needed for exercise of parental duties. In other words, one cannot well meet certain obligations unless she/he has the right to perform those obligations at all.[38] Metaphorically speaking, adolescent parents receive the key to the door they are not allowed to open.

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acknowledgement since parentage proceedings may be initiated only after the unsuccessful attempt to establish paternity through acknowledgement. The exception would be the case when the proceedings are initiated upon request of the child since she/he is not bound by time limits.

[37] Under Greek law the acknowledgement of paternity is not strictly personal statement. Thus, if the father lacks active legal capacity, the acknowledgement can be effected by the grandfather or the grandmother on the father's side. I. Androulidakis-Dimitriadis, *Family Law in Greece,* Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010, 92. According to the Family Law Act of Croatia, the underage person who has not reached the age of 16 may acknowledge paternity with the consent of his legal representative. See Art. 63. of the Croatian Family Law Act from 2015.

[38] See H. Willekens, *Rights and Duties of Underage Parents: A Comparative Approach,* International Journal of Law, Policy and the Family, No. 3, 2004, 356.

Such legal contradiction or anomaly cannot easily be eliminated, since full active legal capacity is precondition for exercise of many parental obligations deriving from parental responsibility, particularly those regarding child's property and representation in legal proceedings.[39] Right-based approach to this problem suggests that national lawmakers must find legal mechanisms to enable underage parents fulfilling parental obligations, or at least to provide some level of inclusion in decision-making process regarding their children.[40] The underlying principle which should be followed here is that the child should not be separated physically from her/his underage parents.[41]

Generally speaking, there are two ways or models of overcoming the absence of full active legal capacity at the side of underage parents. The first approach is based upon the idea of splitting or fragmenting parental responsibility in a way that underage parent is allowed to exercise parental responsibility only with respect to the personal care of the child.[42] Therefore, the adolescent parent retains personal rights to rear and raise the child keeping the child with them in the same household.[43] Such approach is adopted, for example, by German, Russian and Croatian legislators.[44] Under this model, exercise of parental responsibility is suspended with regard to the parental obligations that underage parents cannot fulfill because the absence of active legal capacity. Suspension lasts until underage parents come to full age or conclude marriage.[45] While the suspension of parental responsibility lasts, underage parent cannot act as legal representative of the child, nor can she/he administer child's property. However, underage parent has the right

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[39] *Ibid.*

[40] The child has the right to be cared for by her/his parents which purpose is to ensure the psychological stability of the child. See S. Detrick, '*Family Rights Under the United Nations Convention on the Rights of the Child*', Families Across Frontiers (eds. N. Lowe, G. Douglas), Kluwer Academic Publishers, The Netherlands, 1996, 99. Furthermore, depriving the underage parents of the opportunity to exercise parental responsibility would probably violate their right to private and family life from the ECHR. See H. Willekens, *op. cit.*, 358.

[41] See H. Willekens, *op. cit.*, 358.

[42] *Ibid.*, 363.

[43] *Ibid.*

[44] See Art. 1673 of the German Civil Code; Art. 62 (2-3) of the Family Code of the Russian Federation; Art. 114 of the Family Law Act of the Republic of Croatia.

[45] Under Russian law, underage parents have only strictly personal rights to live with the child and to take part in her/his upbringing up to the age of 16. From that moment they acquire the right to exercise parental responsibility on their own. See Art. 62 (1-2) of the Russian Family Code.

to decide together with the other adult parent, or together with other underage parent and/or child's guardian, on the issues that significantly affect the child.[46] In case of their disagreement, the court will make the order who will act as the child legal representative concerning decisions that highly affects the child's life.[47]

Apparently, such approach offers flexible legal framework which includes protection of underage parents' rights, as well as respect for the best interests of the child. It is an attempt to reconcile the interests of underage parents to take responsibility for the child with the child's right to development. Essentially, the model of splitting parental responsibility offers nuanced and balanced approach allowing the underage parents to exercise parental responsibility in the personal sphere and providing them support or assistance in the domain of property relations. At this point, it is interesting to make comparison between the model of fragmenting underage parents' parental responsibility and the principle of supported decision-making applied to the rights of persons with disabilities. Thus, Convention on the Rights of Persons with disabilities introduced the right to active legal capacity trying to make a paradigm shift in disability policy from the withdrawal of active legal capacity to the right to support for exercising it.[48] The CRPD approach to active legal capacity is therefore inherently different from the guardianship practice where persons with disabilities instead of being empowered to formulate their choices, are deprived of active legal capacity and given a guardian to take decisions on their behalf.[49] Off course, underage parents cannot be considered as persons with disabilities, since their incapacity is generally of temporary nature concerning primarily their psychological immaturity. However, if the persons with mental disabilities should be helped to make their choices, then absence of full active legal capacity could hardly be taken as an argument to deny underage parents exercise of parental responsibility. Although, in that case the principle of

[46] See, for example, Art. 1628 of the German Civil Code or Art. 114 (2, 4) of the Family Law Act of Croatia.

[47] See Art. 1628. of the German Civil Code or Art. 114 (2) of the Family Law Act of Croatia.

[48] See Art. 12 (2-3) of the Convention on the Rights of Persons with Disabilities (CRPD), United Nations, A/RES/61/106. The CRPD was adopted by the UN General Assembly on 24 January 2007. See also A. Nillson *(The Issue Paper published by the Council of Europe, the Office of the Commissioner for Human Rights), Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities,* https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_GBR.pdf, accessed 17 August 2016, 17.

[49] *Ibid.*, 22. See also Z. Ponjavić, *Porodično pravo*, JP Službeni glasnik, Beograd, 2014, 347–348.

supported decision-making must be adjusted to the best interests of the underage parents' child. It is apparently done under the model of splitting parental responsibility since the state interference is channeled through the power of the court or other state authority to decide who will be legal representative of the child when differences arise between the underage parents and child's guardian regarding the issues of substantial importance for the child.

Unlike this approach, the second model includes clear-cut solution which keeps full active legal capacity and parental responsibility together.[50] In other words, active legal capacity is considered as necessary precondition for exercise of parental responsibility. Thus, establishment of parenthood should serve as the ground for emancipation of minors enabling them to acquire full active legal capacity before majority. Such approach to problem where parental responsibility of the underage parents is bound to their full active legal capacity has, for example, the Netherlands and Serbia.[51] Comparing to the Dutch legislation, Serbian law has better solution since it enables both of the underage parents to be emancipated if their parental responsibility have been established.[52] Thus, according to Serbian Family Law Act, the court may enable acquiring full active legal capacity to underage person who reached the age of 16 and became parent developing physical and psychological maturity necessary for taking care of herself/himself and her/his own rights and interests.[53] It is a non-contentious proceedings that may be instituted only by the petition of the underage legal parent or underage legal parents if both of them are minors.[54] The competent court will hear their parents or guardians in the proceedings, but they need not to agree with the intention of the teenage legal parents to be emancipated.[55]

The clear-cut approach to the problem of adolescent parental responsibility has some advantages, as well as disadvantages. First of all, tying the parental responsibility to active legal capacity of the underage

[50] See H. Willekens, *op. cit.*, 365.

[51] See ibid.; Art. 11 (3) of the FLSRB.

[52] Dutch law allows only emancipation of the underage mother of the child on the ground that she became child's legal parent. See H. Willekens, *op. cit.*, 366.

[53] Art. 11 (3) of the FLSRB.

[54] See Art. 360 of the FLSRB in connection with the Art. 80 (1) of the Law on Non-contentious procedure of the Republic of Serbia (LNPSRB), Official Gazette of the Republic of Serbia, No. 25/82, 48/88, 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015 and 106/2015.

[55] See O. Cvejić Jančić, *Porodično pravo,* Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2009, 93.

parent corresponds to the principle of legal certainty. Unlike the model of splitting parental responsibility, under this approach there is no need of making distinction between personal care of the child and other aspects of parental responsibility.[56] The clear-cut approach rejects the possibility of intermediate or transitional status of underage parents regarding their ability to fulfill parental obligations. In other words, they can perform it all, or they can do nothing depending on the court's decision in emancipation proceedings. However, underage parents will not be able to take parental responsibility for the child until they obtain adequate decision of the court concerning their emancipation. Therefore, it is necessary to appoint the guardian of their child in accordance with the rule that such form of protection is necessary when natural parents cannot fulfill their parental obligations. The Serbian Family Law Act explicitly enumerates cases when it will be considered that the child is "without parental custody" involving the situation of giving birth to the child by the underage parents.[57] That is why the Serbian legislator should have enabled guardianship authority to initiate the emancipation proceedings, like the Dutch family legislation does.[58] Otherwise there could be significant gap between establishment of legal parenthood and acquiring parental responsibility.

Furthermore, the court's deciding on emancipation of minors involves the assessment of their psychological maturity. In the context of underage legal parents who want to take parental responsibility, such proceedings may be understood as so-called licensing of parents.[59] Explained in simple words, the matter is about power of certain state authority to decide if someone is fit to be a parent. Such practice is not unknown in family law since competent state authorities assess parental fitness of the persons who apply for adoption of the child.[60] However, adoptive family is a subsidiary family form which is

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[56] H. Willekens, *op. cit.*, 368.

[57] See Art. 113 (3) of the FLSRB.

[58] See H. Willekens, *op. cit.*, 366. This drawback is a consequence of analogous applying of the rules concerning emancipation of minors based on marriage to the emancipation of the underage persons who have become parents. Serbian legislators were aware that latter proceedings has its own characteristics, so they predicted that special, separate and distinctive proceedings of the emancipation of the underage parents should be regulated by the rules of Law on non-contentious procedures, which has not happened yet. See Art. 360 of the FLSRB.

[59] Licensing presupposes that the mere fact of procreation is not enough to demonstrate fitness to parent. Therefore, individuals must show that they can rear their own children. D. Archard, *op. cit.*, 185.

[60] *Ibid.*

founded in cases where natural parents cannot perform their parental obligations from legal or factual reasons. Therefore, the child eligible for adoption is generally in more vulnerable state than the children who have natural parents willing to rear them. In that context, the state has positive obligation to interfere with family relations trying to provide the best possible family environment for the child. Furthermore, licensing of the underage parents could violate the principle of non-discrimination since there is a legal presumption that the adult biological parents are eligible to rear the child.

We may come to conclusion that the approach of splitting parental responsibility has more advantages than the clear-cut model of teenage parents' emancipation providing the better legal framework for the child of the underage parents. Solutions on fragmenting parental responsibility are not unknown to Serbian legislation. Good example of such practice is situation when the child under parental responsibility is placed to foster care. On that occasion, the obligations of foster carer are very similar to the obligations that belong to underage parents in the system of splitting parental responsibility.[61] However, there is an interesting difference in terms used by Serbian lawmakers which is not just semantical. Thus, under Serbian Family Law Act the child will be placed to foster care only if it is in the best interests of the child.[62] Thus, the principle of the child's best interests is at the epicenter of foster care service. On the other hand, according to Serbian law, the court's decision on emancipation of the underage parent will be based on assessment of the adolescent physical and psychological maturity, while the principle of the child's best interests is not mentioned.[63]

There were some hints that Serbian Family Law could turn to the model of splitting parental responsibility regarding the attempts to overcome the problem of underage parents' legal status. However, the Working Text of the Serbian Civil Code with Alternative Suggestions Prepared for Public Discussion offers rather unclear and controversial ideas concerning this

[61] In that context see V. Vlašković, *Usluga hraniteljstva u kontekstu principa najboljeg interesa deteta,* Uslužni poslovi (ur. M. Mićović), Zbornik radova sa X majskog savetovanja, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2014, 734; V. Vlašković, *Usluga hraniteljstva i pravni položaj roditelja deteta,* Pravo i usluge (ur. M. Mićović), Zbornik radova sa VIII majskog savetovanja, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2012, 723.

[62] See Art. 111 of the FLSRB.

[63] See Art. 11 (3) of the FLSRB. See fn. 58.

issue.[64] Thus, the draftmakers have left out the child born from the underage parents from the list of children without parental custody which may lead us to conclusion that adolescent parents would acquire their parental responsibility simultaneously with the establishment of legal parenthood.[65] Apparently, draftmakers did not have such solution in mind since the Working Text, in its General Part, preserves the old approach of acquiring parental responsibility through emancipation of underage parents.[66] Thus, two different parts of the Working Text are in contradiction which makes confusion. Furthermore, one of the alternatives suggests that the child of the underage parents should not be placed to foster care without her/his parents' consent.[67] Therefore, the draftmakers included the elements of model of splitting parental responsibility in their approach causing their suggestions to look even more unclear. Apparently, the choice should be made between two distinctive models for overcoming the problem of underage parents' inability to exercise parental responsibility, although the approach of fragmenting parental responsibility corresponds more to the best interests of the underage parent's child.

4. THE BEST INTERESTS OF THE UNDERAGE PARENTS' CHILD

The best interests of the teenage parents' child should be given a primary consideration embodied in the rules on the underage parents' parental responsibility. However, legislations must also create the space for respecting the adolescent parents' right and interests. Both of these values could be incorporated in legal system through the principle of the best interests of the underage parents' child.

The principle of the child's best interests is determined by various elements concerning individual circumstances, the factors regarding family environment, as well as broader social surroundings that the child belongs

[64] Serbian goverment made the decision on the apointment of the special comission for Civil Law codification and making the Civil Code in 2006. See Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 104/06, 110/06 and 85/09. After two texts of Preliminary Drafts of the Serbian Civil Code, the comission has published the Working text of the Serbian Civil Code with Alternative Suggestions in 2015 (the Working Text)

[65] Compare Art. 113 (3) with Art. 2352 (3) of the Working Text.

[66] See Art. 29 (4) of the Working Text.

[67] See Alternative to Art. 2353 (3) of the Working Text.

to.[68] The UN Committee on the Rights of the Child suggests that children's rights should be used as elements for determination of the best interests of the child.[69] On the other hand, the approach based upon the ECHR and the European Court of Human Rights practice in the context of the right to family life, offers more nuanced approach where the fair balance should be struck between the welfare of the child and the rights and interests of her/his underage parents.[70] However, interference with the underage parent's right to family life may be justified by the necessity to protect the child's best interests and distinctive rights of the child.[71]

When it comes to the problem of underage parents' competence to exercise parental responsibility, their interests will in most cases correspond to the rights of their child. Therefore, the child has the right to be cared for by her/his natural parents willing to rear the child, regardless of their age.[72] Simultaneously, the intention of the adolescent parents to rear their child may increase the level of their psychological maturity encouraging their decision-making capacity.[73] Teenage parenthood may have adverse effects on education and economic status of the underage parents, but their intention to take responsibility for the child should be given preference.

The child cannot be separated from her/his parents, unless such separation is in the best interests of the child.[74] However, legal status of adolescent parents can hardly serve as the ground for separation of the child from their natural intentional parents in the light of the child's best interests. Thus, Serbian Family Law Act prescribes that the court may decide to separate the child from her/his parents if there are reasons for fully or partially deprivation of parental responsibility or in the case of domestic violence.[75] Apparently, parents need to be liable for the acts of intentional harm or gross negligence that infringe the child's right to life, survival and

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[68] See V. Vlašković, *Problem određivanja sadržine najboljeg interesa deteta,* Anali Pravnog fakulteta u Beogradu, Beograd, 1/2012, 355–356.

[69] See Para. 51 of CRC/C/GC/14.

[70] In that context see K. O'Donnell, *Parent-Child Relationships within European Convention,* Families Across Frontiers (eds. N. Lowe, G. Douglas), Kluwer Academic Publishers, the Netherlands, 1996, 136.

[71] On balancing children's rights and adults' rights in the context of the right to family life from the ECHR, see S. Choudhry, J. Herring, *European Human Rights and Family Law*, Hart Publishing, Oxford – Portland, 2010, 232–235.

[72] See Art. 7 of the CRC.

[73] See V. Vodinelić, *op. cit.,* 374 – 375.

[74] See Art. 9 (1) of the CRC and Art. 60 (2) of FLSRB.

[75] Art. 60 (3) of FLSRB.

development in order to be separated from their children.[76] If parents lack maturity or capacity to rear the child, they need to be assisted and not to be separated from their child. When parents cannot be held liable for the omissions committed during the exercise of parental responsibility, they should be separated from their children only after all other possibilities are exhausted.[77]

Immaturity and lack of life experience of the underage parents could be particularly problematic in the domain of legal representation of the child and within property relations involving administering child's property. That is the point where the interests of the adolescent parents could depart from the best interests of the child. For example, emancipated underage parent is not under supervision of the state authorities regarding administering the child's property. The acts of administering property could be too complex for the adolescent lacking psychological maturity and experience. Therefore, the child's best interests demands protection of the child's interests from the potentially reckless parental acts. This problem could be solved using the approach of splitting parental responsibility. Under the model of fragmenting parental responsibility the underage parents will be provided with assistance by the child's guardian allowing them to express their own views at the same time. Such solution would be the closest to the ideal of achieving fair balance between the interests of the underage parents and the principle of child's best interests.

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[76] For example, the acts of domestic violence in Serbian law involve only intentional harm caused by the perpetrator. See V. Vlašković, *Pravo na zaštitu od nasilja u porodici kao subjektivno građansko pravo,* Anali Pravnog fakulteta u Beogradu, 1/2009, 252–253.

[77] Thus, according to the Federal Constitutional Court of Germany, the separation of a young child from her/his parents on the grounds that they do not guarantee the child's socialisation within a changing system of standards as well as educational and professional demands is incompatible with Basic Law. BVerfGE 60, 79 of 17 February 1982–1 BvR 188/80. Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Vol. 5, Family-Related Decisions, Nomos, Karlsruhe, 2013, 201.

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PART SEVEN
COMPANY LAW AND CORPORATE GOVERNANCE

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MANAGERIAL REMUNERATION AND AGENCY PROBLEMS OF CORPORATE GOVERNANCE

Abstract

The author discusses the issue of remuneration for the company board members from the point of solving or mitigating the agency problems of corporate governance. Theoretical debates surrounding the eligibility of structures of managerial remuneration in companies have different starting positions. In a broader sense the issue of remuneration is seen as a way of transferring wealth within the company and can be accommodated within the traditional company management legislation. The ownership structure of the company, election of corporate bodies, as well as the delineation of their responsibilities cause agency problems of corporate governance. The model of dispersed ownership deals with the relationship between remuneration and the first agency problem (the relationship between shareholders and management), while the concentrated ownership model deals with remuneration and the second agency problem (relationship between majority and minority shareholders). This paper deals with the effect of the board structure on remuneration and gives an overall assessment of the link between remuneration and agency problems of corporate governance in Serbia.

***Key words**: managerial remuneration, dispersed ownership, concentrated ownership, agency problems of corporate governance, incentive remuneration.*

1. INTRODUCTION

The issue of remuneration for the company board members (board of directors, executive board and supervisory board) cannot be considered separately from the basic institutes of corporate governance. As part of the reform of corporate governance, especially with the convergence of corporate governance systems on both sides of the Atlantic, managerial remuneration remains a controversial and an insufficiently transparent issue.[1] Theoretical debates surrounding the eligibility of managerial remuneration structures in

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[1] N. Todorović, J. Labudović Stanković, *Dugoročni podsticaji kao deo kompenzacionih paketa direktora*, Pravni život, 11/2013, 193.

companies have different starting positions. Issues related to managerial remuneration can be accommodated within the traditional company management legislation. The company is seen as a single entity, according to which managers have a fiduciary duty, which means that they do the work in the interest of the company, or in the interest of shareholders, and are obliged to avoid any activities in their own interest or any secret profits.[2]

In a broader sense the question of remuneration can be considered as a way of transferring wealth within the company. Managerial remuneration, itself, is not the source of agency problems. It can be the result of a wider market failure in the corporate control market, and therefore it is necessary to build a comprehensive strategy for managerial remuneration packages. This means breaking the total remuneration structure into the constituent elements, identifying causal relationships between the elements that make up a multi-layered system which represents the remuneration package for the members of the board of directors, the executive board and supervisory boards.[3]

Economically speaking managerial remunerations are not the source of agency problems in corporate governance. Homo economicus who brings rational decisions and seeks to maximize the utility through their economic activity is in the center of economic considerations. This is how both shareholders and managers behave. Shareholders tend to maximize the profit and increase the wealth and managers tend to manage the company in the interests of the owners (shareholders), but in their own interest as well. Their legitimate economic interest is valorized through the amount of remuneration. Problems in corporate practices arise while determining the modalities of remuneration payments.

The ownership structure of the companies, election of corporate bodies and delineation of their responsibilities causes various agency problems, all of which reflect the structure and the amounts of managerial remuneration. Our initial view is that remuneration itself is not the source of agency problems, it can be a means to mitigate these problems, or a tool that will allow their existing effect to come to the fore.

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[2] G. Ferarini, N. Molney, C. Vespro, *Executive Remuneration in the EU: Comparative Law and Practice*, ECGI Working Series in Law, No. 09/2003, 5.

[3] N. Todorović, J. Labudović Stanković, *Dugoročni podsticaji...*, 193.

2. THE RELATIONSHIP BETWEEN REMUNERATION AND AGENCY PROBLEMS WITHIN THE MODEL OF DISPERSED OWNERSHIP

Dispersed ownership structure involves separation of ownership capital from the function capital and transformation of the company into a broader ownership structure with professional management.

In those companies in which the ownership is dispersed into many shareholders (natural persons), supervision of the board members is much more difficult, which leads to the conflict of interest between shareholders and managers, and generates the first agency problem. In this ownership model, remuneration can be seen through the principles of optimal contracting, as a way to mitigate the first agency problem (traditional approach) and as an agency cost (modern approach), which is based on the managers' accumulated power to negotiate excessive remunerations.[4]

The principle of optimal remuneration contracting enables alignment of interests of shareholders and board members. Companies are doing business in a particular macro-economic environment and their business is influenced by economic and noneconomic factors, which is why favorable and less favorable business cycles take turns. Shareholders and managers should be oriented towards the future of the company in order to pursue a long-term business strategy.[5] Optimal remuneration is the one that motivates managers to pursue a long-term business strategy, increases the wealth of shareholders and also attracts and encourages talented managers to stay in the company for a longer period of time. The incentive model, principal-agent, is, therefore the dominant model in the dispersed ownership. Managerial remuneration is seen as a remedy for agency costs arising from the conflict of interest between directors and shareholders in the model of dispersed ownership.[6]

In order to balance all these objectives in the optimal remuneration contracting, contracts on payment should be concluded based on performance and incentive remunerations should be paid. This would lead to a more coordinated approach to the division of profits in the company. A harmonized approach to the division of the company's profits between shareholders and directors is achieved through payments of incentive (stimulative) remunerations which represent a variable component of the total remuneration package for the company board members. Incentive

[4] V. Radović, *Naknade članovima uprave akcionarskog društva*, Beograd, 2011, 31-36.
[5] N. Todorović, J. Labudović Stanković, *Dugoročni podsticaji...*, 194.
[6] G. Ferarini, N. Moloney, C. Vespro, *op. cit.*, 5.

remunerations may be related to the increase of shareholder's wealth directly (remuneration in shares or share options), or indirectly through bonuses according to performance.

From an economic standpoint the payment of these remunerations is an additional cost for the company and it reduces the wealth of shareholders (owners), but as long as this cost leads to increased company profits, strengthening its competitive position in the market and price growth of its shares on the stock exchange, it is justified because the marginal benefit for shareholders is greater than the marginal cost. In addition to increased marginal costs, lowering total costs of the company business can also be the economic result of the managerial incentive remunerations payment. All this raises the question of remuneration structures, the relationship between fixed and the variable components and especially the issue of long-term incentives as an integral part of the remuneration package for the board members.

Options are a type of long-term incentives and an important element of the total managerial remuneration structure, especially in the model of dispersed ownership. Options attract investors due to asymmetric payments.[7] The difference between the unlimited profits of the call option buyers, when the share prices in the market rise, and the amount of optional premium, which is the maximum loss when the share prices fall, is the source of asymmetric payment. This is the basic economic logic, which should be followed by the call option buyers, while buyers of put options follow the same logic, but in reverse. The buyer of the put option has interest in the share price falling in order to make asymmetric payment through exercising the put option. Asymmetric payments indicate that buyers and sellers have contrary expectations regarding the movement of prices of basic financial assets. The buyer of a call option expects the share prices to rise, and the put option buyer expects them to fall. Sellers of call options expect the price to remain unchanged or to fall, while sellers of put options expect the prices to remain unchanged or to rise.[8]

Creating options favors the interests and expectations of both shareholders and managers and they are an integral part of the long-term incentive program. Shareholders' expectations from the managers' use of options are the following: increase of company profits through higher share prices on the stock market, reduction of agency costs, attracting and retaining talented managers for whom there is an increasing demand in the market,

[7] L.S. Ritter, W.L. Silber, G. F. Udell, *Principles of money, banking and Financial markets,* 2004, 171.

[8] Lj. Nikolić, *Berzansko pravo i poslovanje*, Niš, 2008, 125.

orientation of managers towards long-term business strategy of the company. In practice such corporate expectations of shareholders may be discouraged by the managers.

Managers who receive options as a form of compensation must be familiar with optional strategies that are available to them. Managers have great expectations from the purchasing call options, and this is why they are so attractive and popular. The manager of the company who owns a three-month call option on the 50 shares of the XY company at a price of $ 100 per share has several options depending on the movement of prices on the market. He may decide not to exercise the option nor to buy 50 shares of the XY company at a price of $ 100 per share during the holding period of the option. This would happen if the company share prices fell. Then the managers would not exercise the call option and they would not buy 50 shares of the XY company,because of the fall of the share prices,from $ 100 to $ 95,and it would not be in their best interest to exercise the call option. The option will be exercised if the manager can make a profit out of the option. In case the share prices of the XY company rise on the market,the manager owning a three-month call option will exercise it at the price of $ 100 per share and will become the owner of 50 shares which he will be able to sell at the price of $ 105 and make the profit of $ 5 per share. Options are one of the long-term incentives, or bonuses based on increasing value (appreciation) and they bring profits to the manager when the market price exceeds the exercise price (the strike price of the option). Managers achieve their economic goals through options, because they make sums of money equal to the difference between the strike price and the market price of the shares on the date of execution.[9] This raises the question of option pricing models according to international accounting standards and the issue of the tax treatment of the profit made by managers. If this income was treated as capital gain and was subject to taxation, then managers would not be motivated to use this type of long-term incentives. This difference is taxed as ordinary income so that the managers would be motivated and retained in the company.[10]

[9] M. D. Graham, T.A. Roth, D. Dugan, *Effective Executive Compensation*, AMACOM, 2008, 314.

[10] According to International Accounting Standards, the most famous options pricing model is the Black-Scholes options pricing model in which options are shown in the form of expenses for compensation in the income statement and include the award period or period of execution.

Managers can use the options as long-term incentives in a way that threatens the interests of the owners of capital and in such case the options are subject to abuse. These long-term incentives are created and assigned to managers so that they would be motivated and retained in the company and in order to align their interests with the interests of shareholders, which would ensure long-term business success.

Options have been expanding since the nineties because of the tax and accounting benefits.Companies did not report them as expenditure and they did not affect the income statement of the company. A large amount of assigned options diminished the value of existing shares, and potentially threatened the formed corporate culture and led to long-term instability in companies. The managers were motivated only in the short term. They sought to ensure the growth of share prices only on a quarterly basis and wanted to achieve greater profits from shares through exercising the options. The capital of the company watered down through the issuance of options and interests of shareholders were threatened.

Companies have significantly reduced the issuance of options lately, because of the stricter international accounting standards, as well as the investors' caution and suspicion towards those companies that use options as long-term incentives. The options as long-term incentives are more prevalent in the US than in Europe. Boards of directors in the US have often reduced the costs of options presented to managers which caused emergence of some corporate scandals. After certain changes in the accounting regulations, an obligation was established for the board of directors to report the full cost of the options, as well as to inform shareholders about the full costs of options and plans related to compensation packages. Managerial remunerations in Europe are mainly based on a fixed amount, and long-term incentives (options)[11] are less present in compensation packages. Requirements on disclosure of managerial pay have been tightened recently.This has lead to the increase of managerial remuneration and reviewing the structure of compensation packages.

European managerial labour markets were not too attractive for American managers because managers in Europe had lower salaries, partly due to the more coherent accounting and tax systems in terms of economic costs of options. Requests for disclosure of information about managerial pay are becoming louder, and European managers are trying to make their compensation packages more similar to the US packages. Thus, in some

[11] A. Melis, *Corporate Governance in Italy*, in: European Corporate Governance (ed. T. Clarke and J.F. Chanlat), 2009, 89.

European countries there was an increase of managerial pay from 40% to 70%. Switzerland is a good example, since the chief executive's salary in 2001 was $405.000 while in 2003 it rose to $1.1 million. In Germany, $455,000 rose to $ 955,000. However, the average value of the compensation package in the United States is almost twice the size of the largest managerial pay in Europe. The average is about $2.25 million.[12]

The essence of all abuse related to the allocation of options boils down to the fact that the allocation and exercising of options ensures that managers receive a high income based on unethical behavior and breaches of accounting and tax regulations. This income stems from cash transactions of the company and the shareholders pay the price for it. The behavior of the members of the board of directors, executive directors and supervisory boards may be legal but contrary to the principles of financial ethics. So the directors use very flexible ways to increase their salaries ("backdating and finagling") that are not in conflict with the law.[13]

There is greater alignment of shareholders' interests with the interests of managers in case of using bonuses based on increase in value instead of options. These rights to bonuses are equal to the company's share appreciation rights over a certain period of time. This type of long-term incentives is similar to options, and shareholders are less suspicious of these bonuses than of options. In addition to the great similarities, there is a line of demarcation between bonuses and options and it comes down to the fact that managers who get bonuses do not become shareholders, they make profit based only on the increase in the share prices and the strike price is not paid.[14] The difference between the market share price on the bonus award day and the share price is paid in cash. Shareholders agree that managers should receive these bonuses based on the increase of the value of shares (appreciation) because they believe it would give fewer opportunities for abuse compared to the allocation of options. Managers are motivated to advocate the increase of share prices of companies, because it guarantees the benefits for them. Both bonuses based on increase in value (appreciation) and the options are connected to the share prices and the increase in those prices,the only difference being in the fact that bonuses are based solely on appreciation.

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[12] See K. J. Murphy, *On Executive Compensation*: *Is Europe Cathing Up with the US, and Should It Do So*? in: Corporate Governance in the US and Europe, Where Are We Now (ed. G. Owen, T. Kirchmaier and J. Grant), Palgrave Macmillan, New York, 2006, 61-64.

[13] N. Todorović, J. Labudović Stanković, *Dugoročni podsticaji...*, 198.

[14] M. D. Graham, T.A. Roth, D. Dugan, *op. cit.*, 320.

3. THE RELATIONSHIP BETWEEN REMUNERATION PROBLEMS WITHIN THE CONCETRATED OWNERSHIP MODEL

Concentrated ownership is based on pyramidal ownership structure. Pyramidal groups are groups of companies among which control is established with minimal costs. Company owners are powerful families, family associations or banks. Concentrated ownership has certain advantages in the economic sense. Practice shows that capital invested in companies owned by families is more efficiently used and increased than the capital owned by a large number of shareholders.[15] In the concentrated ownership models the majority owners also manage the company, so the interests of shareholders and the management are more in alignment than in the dispersed ownership model. The second agency problem comes into play here, and this is the clash between the controlling-majority shareholders and the minority shareholders. Managing the company within this concentrated ownership model has certain shortcoming, such as self-dealing or tunnelling.

Self-dealing is the transfer of values from the companies where the majority shareholder owns a small fraction of cash- flow rights (lower position in the pyramidal structure), to those companies in which the majority shareholder owns a larger fraction of cash-flow rights.[16] The way to realize this is to perform transaction between the partners.

In the family-controlled corporations members of the management board are appointed by the majority shareholder and they provide them with private benefits of control. This is manifested through block premiums and voting premiums. A block premium is the difference between the share price paid in the block transaction and the share price on the market. A voting premium is the difference between the market share price with the voting right and the preferential price without the voting right. Both of these premiums are large in family companies and the difference in the premium prices is the private benefit of control for the majority shareholder. One of the best examples is the collapse of the Parmalat company in Italy. Parmalat was a typical family-controlled corporation with the Tanzi family as the major shareholder. The company used corporate resources through self-dealing. The company gave false reports on their losses, costs and debts while the

[15] N. Todorović, *Porodični kapitalizam i korporativno upravljanje*, Pravni život, 11/2011, 160.

[16] L. Enriques, P. Volpin, *Corporate Governance Reforms in Continental Europe*, European Corporate Governance (ed. T. Clarke and J.F. Chanlat), Routledge, London and New York, 2009, 256.

money was funnelled into the Tanzi family. From March 1990 to December 2003 the Parmalat group used up around 18.2 billion of funds, and 3 billion of these funds were spent by the family for the unknown purposes.[17] These problems gained importance with the beginning of the globalization process, when powerful multinational companies started spreading their business all over the world. They tend to conquer new markets, new products, new technologies and reduce the costs through various forms of associations and concentration of capital.

Agency problems between majority and minority shareholders are caused by ownership structure of the companies. Remuneration structure and the regulations related to determination of that structure, especially remuneration transparency, more or less accelerate this problem.

In the concentrated ownership model remuneration structure should be directed towards creating a long-term incentive program. This means that managerial remuneration should be connected to the managerial performance. Results of the company business allow for the possibility of high managerial remunerations with the total revenue, company profits and the rising of share prices being the economic indicators of successful business. Rising of company share prices on the stock market is favoured by both majority and minority shareholders. This is why connecting remunerations to shares based on performances will be in their mutual interest as well. The use of bonuses at full value of restricted shares, shares based on performance and cash bonuses as long-term incentives for harmonizing the interests of shareholders and directors has limited effect and causes various consequences in corporate practice, especially in the EU.

The European model of corporate governance, which is usually bicameral, is based mainly on fixed managerial remuneration. The reason for this lies in one part of the theory which states that concentrated ownership harmonizes the interests of majority shareholders and the management and therefore there is no need for introducing the variable component of remuneration, i.e. long-term incentives. The variable component of remuneration based on long-term incentives can also have some disadvantages. It can cause some excessive remunerations which threaten the interests of minority shareholders and the interests of the company itself. Managers whose remunerations are linked to higher share prices can be manipulative towards the employees and the minority shareholders. They can lower salaries of the employees and manipulate disclosure of information, all for the purpose of short-term increase in shares.

[17] *Ibid*, 257.

Remunerations based on performance can cause wide ranges in the amounts of remunerations that are the result of movements in the stock market. The movement of share prices is unpredictable, capricious and the only thing that is certain in relation to the movement of share prices is that they will fluctuate, and that their movements are affected by economic and noneconomic factors. When the stock market grows rapidly, it carries the danger of giving inappropriately high managerial remunerations to those managers who manage the company during the period of market growth and much lower remunerations for those managers who manage companies in the period of the rapid market decline. Thus, the stock exchange breaks in the stock market amplify the disparities in determining the level of remunerations when the remuneration structure is dominated by long-term incentives.

Therefore EU legislation, both imperative and dispositive, and the Committee on Remunerations are directed towards stricter requirements for disclosure of the amounts of remunerations and also towards limiting the amounts of variable remunerations. This is why variable remunerations awarded to managers of the majority of EU banks have been limited to 100% of the fixed remuneration, since January 1 2014. The Dutch government was particularly restrictive concerning this matter because it suggested limiting the variable remuneration to 20% of the fixed remuneration,[18] starting from January 1 2015. Corporate practice in the EU is going towards stricter requirements for disclosure of remunerations, shareholders' approval of variable remunerations and limitations of variable remunerations. Imperative legal norms for protecting minority shareholders and the renaissance of the shareholders assembly as the highest authority in the company should be added to these basic trends in the corporate control market. The final decision on the amount of remuneration must be made by the shareholder assembly, and the elements of the special contractual arrangement with managers must be transparent for shareholders.[19] Shareholders may seek judicial protection through filing derivative suits[20] for the damage suffered due to payment of excessive remunerations.

[18] Executive Remuneration – Europe, Corporate Governance Developments (June 2013), Tower Watson, https://www.towerswatson.com/en/Insights/IC-Types/Technical-Regulatory/2013/Executive-Remuneration-European-Corporate-Governance-Developments, 9.9.2016.

[19] M. Vasiljević, *Korporativno upravljanje: pravni aspekti,* Beograd, 2007, 190.

[20] Art. 79 of the Law on Companies (Zakon o privrednim društvima), *Official Gazette of the Republic of Serbia (Službeni glasnik RS)*, No. 36/2011, 99/2011, 83/2014 and 5/2015.

Economically speaking, the derivative lawsuit is a risk for minority shareholders, because in case of losing the dispute they bear all the costs, which usually keeps them from filing the suit in the first place.

4. THE EFFECT OF THE BOARD STRUCTURE ON REMUNERATION

The reform of corporate governance is moving towards convergence of existing models of corporate governance (American unicameral and European bicameral) and strengthening of internal and external mechanisms of corporate governance. Concentrated ownership in the bicameral model of corporate governance (Europe) decreased the strength of internal mechanisms of corporate governance, i.e. the board of directors, undermined the protection of minority shareholders and caused inefficiency of external corporate governance mechanisms (such as a hostile takeover, the activity of investors).[21] On the other hand, unicameral model of corporate governance (US, UK) has its drawbacks, such as strong boards of directors, weak shareholders, short-term business strategy focused on the enrichment of shareholders and managers.

Boards of directors are different in their structure in unicameral and bicameral models of corporate governance. American boards of directors are strong, independent, more operational, while the European boards are connected to the majority shareholder and are more numerous due to the participation of their employees. Economic parameters that affect the remuneration of board members are the company revenue, its size, number of employees, shareholders returns on invested capital. Empirical studies in the US show that the structure of the board has an impact on remuneration of chief executive officers. The analysis of the committee structure was performed on S8P 500 companies, searching for the connection between the title (function) of the board members and their salaries. Special attention was given to finding out whether combining (merging) of various corporate roles has any effect on the amount and structure of remuneration.

The chief executive officer (CEO) is responsible for the operational management of affairs and chairman of the board supervises the management and the operational management of the company. Combining

[21] N. Todorović, J. Labudović Stanković, *Korporativno upravljanje – potreba za efikasnijim i kvalitetnijim upravljanjem i društveno odgovornim ponašanjem*, u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2014, 642.

these roles leads to the situation in which the chief executive officer is also chairman of the board and this role is crucial in practice when determining remuneration.Some recent trends in the United States show that the number of companies that combine these two corporate roles has slightly declined because it causes difficulty in determining the level of remuneration. Thus, in 2014 about 54% S8P companies combined the role of chairman of the board and the chief executive officer, while in 2015 about 51% S6P companies had such a solution in the structure of the board of directors.[22]

Research on committee structure for companies S8500 f,or the last three fiscal years (FY2012-FY2014 and FY2013-FY2015), showed that the roles of chairman of the board of directors can be different. The chairman may appear in a combined role (one person is also the CEO and the chairman) or may be an insider,i.e. someone who is employed by the company or holds more than 50% of the voting power of the company.The chairman could also be the 'connected' outsider, former chief executive officer, non-executive director or an independent outsider, when the chairman has no material connection to the company.

Results of the research showed that the chief executive officer's average annual remuneration varied depending on their corporate roles. Chief executive officers in boards of directors with an insider made the highest remuneration of $15.6 million a year during a three-year period, followed by chief executive officers with a combined role in the company, $13.8 million. 'Connected' outside directors made $ 11.3 million and an independent outside directors made $ 11 million on average.[23] Studies have shown that the company's revenue and the structure of the management of the board are correlated with the levels of chief executive officers' salaries.

5. AGENCY PROBLEMS AND MANAGERIAL REMUNERATION IN SERBIA

Development of shareholding in Serbia was slow and this is why corporate control market is underdeveloped. A large number of joint stock companies that exist today have been created through the process of privatization, so concentrated ownership is the dominant structure here. The prevailing organizational form of the companies in Serbia are companies with limited liabilities and solely owned joint stock companies, while public

[22] C. Bowie, *Bord Leadership structure:Impact on CEO Pay*, http://corpgov.law.harvard.edu//2016/03/board-leadership-structure-impact-on-ceo-pay/, visited: 9.9.2016.
[23] *Ibid.*

joint stock companies are rare because the existing joint stock companies cannot meet the strict regulations and procedures required for public joint stock companies (scope of capital, scope of sales, number of employees, public issues).[24] After the process of privatization the majority shareholder who controls the management became dominant in joint stock companies in Serbia, which is why concentrated ownership prevails here. This causes agency problems between majority and minority shareholders. Fixed remunerations[25] became dominant in remuneration structures,but the arrival of multinational companies in the Serbian market brings managerial remuneration based on corporate performance (revenue, company profit).

Managerial remunerations are now viewed from the aspect of solving agency problems of managing the companies and they serve to align the interests of managers and shareholders.[26] For the economic theory the issue of managerial remuneration is a business cost, a type of necessary initial investment which will ultimately result in appropriation of higher profits. Necessary preconditions to resolve the issue of remuneration in the interests of managers and shareholders are adequate legislation and transparency.

At EU level, the issue of managerial remuneration has found its place in the Report on the Reform of High Level Group of Company Law Experts, the Recommendations of the European Union Commission on remuneration of directors of listed companies and in the Green Paper published by the European Commission in 2011 on the corporate governance framework,[27] and is further developed in national legislation by the Law on Companies and Corporate Governance Codes.

The Republic of Serbia adopted the Law on Companies in 2011 and the Corporate Governance Code in 2012. The key provision in the Law on Companies concerning remuneration is the one that puts the issue of remuneration under the jurisdiction of the Assembly.[28] The Law on Companies provides that remuneration may be fixed and variable in its structure. The director is entitled to remuneration for their work, but may also be entitled to stimulation through allocation of shares. The level of

[24] B. Begović, M. Bisić, B. Živković, B. Mijatović, A. Jolović, K. Đulić, *Korporativno upravljanje pet godina kasnije*, Beograd, 2008, 54 and further.
[25] *Ibid*., 45.
[26] M. Vasiljević, *op. cit.*, 199.
[27] European Commision, *Green paper: The EU corporate governance framework*, COM (2011) 164 final, Brusells, 2011.
[28] Art. 393 of the Law on Companies.

remuneration is determined by the Statute, the decision of the Assembly or the supervisory board, if the company management is bicameral.

The Law on Companies provides for the establishment of a commission for remuneration within the board of directors of a public joint stock company which gives the proposal on the amount and structure of remuneration for directors and prepares a draft decision on remuneration policy for executive directors.[29] The formation of this commission is in line with recommendations and regulations of the EU because it does not have the function of the Committee on Remuneration.

Serbia adopted the Corporate Governance Code in 2012 in which the existing legislation was expanded at the level of principles and recommendations. One part of the Code is dedicated to managerial remuneration. The aim of determining remuneration for the members of the board of directors, executive board and the supervisory board is to encourage them to stay in the company and to stimulate them to do their work in the interest of the company as well. The Code states the difference between remuneration structure for executive directors, which consists of a fixed and a variable component, and remuneration for non-executive directors, which only has a fixed component.[30] Limitation of variable components, provided for in the Code, should enable the interconnection between the interests of executive directors and interest of the company.

Remuneration policy in joint stock companies is particularly developed through additional principles and recommendations for joint stock companies and within those, long-term incentives have been particularly considered. Joint stock company assembly must approve all remuneration plans related to long-term incentives, based on shares, options and other rights to acquire shares. The assembly gives prior consent to the assignment of options, determines conditions for acquiring options and conditions for exercising the options. This way, the joint stock company assembly, as the owner of the capital body and as the highest authority, prevents possible abuse of options (such as back-dating and finagling).

Corporate Governance Code particularly emphasizes the need for transparency and it has issued a disclosure obligation according to which the company needs to disclose all information on remuneration for the members of the board of directors, executive boards and supervisory boards, so that the investors can request them and conduct a proper evaluation of their

[29] Art. 409 of the Law on Companies.

[30] Principle 9 of Codex of Corporate Governance (Kodeks korporativnog upravljanja), *Official Gazette of the Republic of Serbia (Službeni glasnik RS)*, No. 99/2012.

adequacy.[31] In practice, although there are appropriate legal and autonomous regulations, information on remuneration of directors are not sufficiently transparent. Especially small shareholders who have not been educated to use all of their rights at the assembly meeting and are not informed on all matters concerning the company's business, including issues of remunerations.

The issue of remuneration in the public sector is of particular importance. The owner of public corporations is the state and it has to motivate the management to efficiently manage the business performance of public corporations. One of the ways to do this is to pay remunerations to the members of supervisory boards and directors who need to monitor developments of the market in the private sector managerial markets. This remuneration issue is actually the one that could cause agency problems between the state and the supervisory board on one side and directors and executive directors on the other. The new Public Corporation Law has completely linked executive directors to the directors of public corporations, so that the act on remuneration payment for executive directors is proposed by the director of the public corporation. It is understandable that the aim of this legal solution is professionalisation of management, but it's realistic to expect that in their professional behavior executive directors will give the advantage to the interests of directors they depend on, over the interests of the owner (state).[32] The role of the supervisory board is to articulate and align all these interests and to prevent the conflict. Fixed remuneration is the dominant one in the remuneration structure of public corporations, which is why introduction of incentive remunerations would motivate directors of public corporations to turn towards creating values in the public sector on behalf of the owner (state) and in the interest of citizens. Caution is necessary when introducing incentive remunerations for directors of public corporations, because engaged resources (costs) of the state, and managerial pay is considered as an expense, must not exceed the benefits from public corporations' business to the whole society.

6. CONCLUSION

The starting point of the author is that remuneration itself is not the source of agency problems. It only reflects economic behaviour of the board

[31] Codex of Corporate Governance, principle 36.

[32] N. Todorović, J. Labudović Stanković, *Novi korporativni okvir za javna preduzeća,* Pravo i privreda, 4-6/2016, 95.

members. Agency problems of corporate governance are caused by the ownership structure in companies, election of corporate bodies as well as delineation of their responsibilities. Remuneration can be the means to mitigate these problems or it can also be the means to make their existing effects come to the fore. In the dispersed ownership model, remuneration should reduce the effect of the first agency problem (shareholders and board members), through the optimal contracting principles (traditional approach).

In the concentrated ownership model remuneration should reduce the effect of the second agency problem (majority and minority shareholders). This can be achieved through a balanced relationship between fixed and variable remuneration and limitation of variable components of remuneration, which has been a trend in the EU in recent years. Variable components of remuneration are, to a certain extent, desirable and stimulating for directors, but if they lead to accumulation of powers of the board members in the dispersed ownership model, and to accumulation of powers of majority shareholders in the concentrated ownership model, they generate agency problems.

Results of empirical studies show that the structure of the board is in correlation with the levels of salaries of executive directors. Concentrated ownership is dominant in Serbia, and fixed remuneration is dominant in the remuneration structure and its aim is to align the interests of shareholders and managers, which is difficult to achieve in practice.

Remuneration structure should be balanced so that they represent superior corporate performance. In the future, strategy in the formation of remuneration must be focused on the portfolio approach, because this is the way to unify the interests of shareholders and directors.

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THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIES IN COMPANY LAW

Abstract

Fiduciary duties are a widely recognized legal institution, and they present one of the most important attempts in law to solve the first agency problem and to constrain broad management powers. The subject of this paper is the issue of the justification for the existence of fiduciary duties, which has been present almost since the inception of this institution. At the beginning, the author presents a short overview of the emergence of fiduciary duties in the Anglo-Saxon law and the legal transplant of these duties to continental Europe. In the next part of the paper the author considers the first aspect of the main issue of the paper that is the justification for the existence of fiduciary duties. The first aspect deals with the various theories dedicated to reason, purpose, and rationale for the existence of fiduciary duties in company law. The second aspect of the issue deals with the modern views, which strive to determine whether the fiduciary duties' existence in company law is justified at all. Finally – in the conclusion – the author tries to determine the relevance of the questions raised in this paper for Serbian company law.

***Key words**: fiduciary duties, justification, company law, duty of care, duty of loyalty.*

1. INTRODUCTION

Fiduciary duties towards the company (and/or members/shareholders) are an essential part of the company law regulations all around the world. It is widely recognized that fiduciary duties represent perhaps the most significant part of American corporate law. The same applies, to a somewhat lesser extent, to European countries as well. The principle of loyalty and the principle of the interest of the company are considered now as the basic company law principles.[1] In the most general terms, fiduciary duties present one of the most important attempts in law to solve the first agency problem

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[1] M. Vasiljević, *Kompanijsko pravo – pravo privrednih društava*, Beograd, 2013, 29.

and to constrain broad management powers.[2] Fiduciary duties are distinct legal obligations aiming to regulate the enforcement of entrusted powers.[3]

The issue of the justification for the existence of fiduciary duties (generally and particularly in company law) has been present almost since the inception of this institution. In contemporary company law this issue has two meanings and both of these meanings will be the subject of this paper. The ordinary, traditional meaning of the issue of the justification for the existence of fiduciary duties deals with the reason, purpose, and rationale for the existence of fiduciary duties in company law. This inquiry for the justification of fiduciary duties does not question the necessity of the fiduciary duties' existence, but only strives to determine the specificities of fiduciary duties and their legal nature. A recent meaning of this issue does not stem from an irrefutable presumption on the fiduciary duties' existence. Instead it strives to determine whether the fiduciary duties' existence is justified in company law at all or if their purpose may be determined in another, simplified, and more efficient way.

2. A SHORT OVERVIEW OF THE EMERGENCE OF FIDUCIARY DUTIES AND OF THE TWO REGULATORY APPROACHES TO FIDUCIARY DUTIES IN COMPANY LAW

Fiduciary duties towards the company ensued in the countries of Anglo-Saxon legal origin[4] as a part of fiduciary law. In these legal systems, fiduciary duties may be even today considered as part of the branch of law that forms a response to the existence of a special sort of legal relationships – fiduciary relationships. The emergence and development of fiduciary duties must be contemplated in the context of a differentiation between common law rules and equity rules, which existed, and somewhere still exist, in Anglo-Saxon legal systems. The purpose of equity rules (and special equity courts) was to supplement common law rules, especially in situations when the consequence of applying general legal rules and principles was essentially injustice. Equity rules never directly change common law rules but in certain

[2] V. Radović, *Uticaj agencijskih problema na pravo akcionarskih društava i korporativno upravljanje*, u: Korporativno upravljanje, Pravni fakultet, Univerzitet u Beogradu, Beograd, 2008, 244-245.

[3] On the notion of fiduciary duties in more detail: J. Lepetić, *Kompanijsko pravni režim sukoba interesa – dužnost lojalnosti*, Beograd, 2015, 96-98.

[4] Fiduciary duties ensued primarily in English law.

types of situations they render additional legal remedies.[5] One of the equity rules developed by the equity courts was the sanction for breach of trust and confidence.[6] The breach of trust and confidence included all relationships that we know today as fiduciary relationships. The judgments and opinions of the equity courts were arranged and systematized in the 19th century in the same way the common law precedents were systematized. As part of the systematization the breach of trust and confidence was developed to the legal institution of trust.[7] However, many relationships, which before were subject to the principle of breach of trust and confidence remained beyond the institution of trust (for instance, the relationship between principal and agent, director and company, and so on). These relationships were initially called "relationships similar to trust" or "quasi-trust", and during the 19th century the term "fiduciary relationships" became common for all these relationships.

Seemingly, few general definitions of fiduciary relationships aim to comprehensively define these relationships. There are several reasons for that. Fiduciary relationships touch upon many situations in life and, more or less, influence them. Therefore the reason for the lack of a universal definition may be that it is impossible to cover all these situations with one definition. Circumstances of life and social relationships relevant for fiduciary relationships are not only diverse and numerous, but also complicated and dynamic. Some authors, however, made attempts to cover all fiduciary relationships with one definition. According to Miller, a fiduciary relationship is one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary).[8] According to Shepherd, a fiduciary relationship exists whenever a person acquires a power of any type on the condition that he also receives with it a duty to utilize that power in the best interests of another, and the recipient of the power uses that power. The essence of this theory of fiduciary relationships is that powers are a species of property, which can be beneficially owned by one person while being exercised by another person, who may be referred to as the legal owner of the power.[9]

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[5] B. Kasolowsky, *Fiduciary Duties in Company Law – Theory and Practice,* Baden-Baden, 2002, 36.

[6] L. S. Sealy, *Fiduciary Relationships*, Cambridge Law Yournal, No. 1/1962, 69.

[7] B. Kasolowsky, *op. cit.*, 37.

[8] P. Miller, *A Theory of Fiduciary Liability*, Mc Gill Law Yournal, No. 2/2011, 262.

[9] J.C. Shepherd, *The Law of Fiduciaries*, Toronto, 1981, 93.

Several elements, common for many different definitions, are considered decisive for determination of the nature and essence of fiduciary relationships: the entrustment of property or powers, the beneficiary's trust to the fiduciary and his/her risk stemming from that trust, the existence of a certain level discretion the fiduciary holds during the enforcement of entrusted powers or management of entrusted property,[10] the impossibility of strict determination of the fiduciary's obligations, the beneficiary's special vulnerability, his/her dependence on the fiduciary,[11] and, related to the latter aspect, the possibility of exercising undue influence on the beneficiary.[12]

There are different classifications of fiduciary relationships.[13] These classifications give us an answer to the question which legal relationships are usually considered as fiduciary, respectively, which legal relationships have such characteristics, the existence of which is followed by the emergence of fiduciary relationships and by the subjecting of one party in the relationship to the fiduciary duties. The answer on this question is pretty clear in company law. The existence of the fiduciary relationship between company and director is undisputable and it is established by statute or court precedent (in common law countries). There are certainly some dilemmas regarding the necessity of the existence of such a relationship in different factual situations, for example: Is there a fiduciary duty of a majority shareholder toward a minority shareholder and what are the duties of the director toward creditors when the company is in the "vicinity" of insolvency, etc.).

Therefore, fiduciary duties ensued in the Anglo-Saxon law as the most important consequence of the existence of fiduciary relationships. Two basic fiduciary duties, recognized also in company law, are the duty of care and the duty of loyalty.

Regarding the emergence of fiduciary duties in the countries of continental legal tradition, the most common assertion is that they were conveyed by the method of legal transplantation from the Anglo-Saxon

[10] For example, the Supreme Court of Canada repeated several times that the essential characteristic of fiduciary relationships is discretionary powers owned by a fiduciary (a court confirmed this statement in the *Galambos* case).

[11] This element would, however, significantly expand the scope of application of the rules on fiduciary relationships.

[12] T. Frankel, *Fiduciary Law*, New York, 2011, 4; P. Miller, *A Theory of Fiduciary Liability*, 243-245.

[13] For example, Sealy differenciated between four types of fiduciary relatioships. More: L. Sealy, *Fiduciary Relationships*, 74-79.

law.[14] This assertion comes from the assumption that fiduciary duties are an original creation of the Anglo-Saxon law. However, we cannot claim that fiduciary duties are entirely a creature of American and English law. Fiduciary duties are not unknown in the continental law, considering that their relation with numerous general legal principles and institutions is obvious. Based on this fact, we may claim that in the countries of Continental-European legal tradition fiduciary duties ensued from those related general legal principles and institutions. This relatedness exists, primarily, with respect to the general principals of contract law, particularly with the good faith principle, then, with respect to the fiduciary principles recognized by some European countries and ,somewhat, with respect to the general rules on tort liability.[15] The above mentioned relatedness between fiduciary principles and general legal principles is significant not only for historical considerations but also for contemporary legal considerations since mentioned legal principles and rules from different fields of law supplement special company law rules on fiduciary duties or have relevance for the interpretation of these special legal rules.

The institution of fiduciary duties toward the company shows certain conceptual differences between the United States and the countries of Continental-European legal tradition. The position, importance, and ,partially, meaning of the two basic fiduciary duties, as well as the relation between the duty of care and the duty of loyalty are different in the countries of Anglo-Saxon legal origin (primarily the United States) and countries whose tradition is based on attainments of Roman law. In the United States the most important fiduciary duty is the duty of loyalty, and it has a central position not only in the system of fiduciary duties, but also in the entire American corporate law. The primary and generally accepted meaning of the duty of loyalty in the United States is that the fiduciaries' actions must be undertaken in the honest belief that they are in the best interest of the corporation and/or its shareholders.[16] In the European countries the duty of loyalty does not have as much a lofty position as in the United States. Although actions prohibited by this duty are as well recognized in most of the European jurisdictions, the general and broadest conception of the duty

[14] H. Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, European Company & Financial Law Review, No. 3/2005, 380.

[15] C. G. Beuerle, E. P. Schuster, *The Evolving Structure of Directors' Duties in Europe*, European Business Organization Law Review, No. 2/2014, 196.

[16] L. E. Strine, Jr., L. A. Hamermesh, R. F. Balloti, J. M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, Georgetown Law Journal, No. 3/2010, 640.

of loyalty in European countries is that it deals with conflicts of interest between company and director.[17] In the European legislations the duty of loyalty is often not defined by statute as a special duty or a special legal principle but rules which regulate this duty may be recognized in different statutory provisions aiming to prohibit conflict of interest, use of corporate opportunities, unfair competition, etc. Therefore, those rules are not necessarily based on the prescribed duty of loyalty, but represent a compilation of legal instruments functionally comparable to the duty of loyalty in American law. [18] For instance, in German and French law, the duty of loyalty is not codified but developed in case law. There is no a dilemma that in these countries, although not prescribed by the legislator, the general duty of loyalty toward company applies to company directors (as well as to some other subjects). In terms of the content of the notion of the "duty of loyalty", we may conclude that in American law the notions "fiduciary duty" and "duty of loyalty" are virtually equal and present synonyms while for the Continental-European approach we may say that equation exists between the notions "duty of loyalty" and "conflict of interest". Therefore, the content of the notion "duty of loyalty" is broader in American law. The duty of care has a central position in the countries of Continental-European legal tradition[19] and it is usually defined as a duty to act in the best interest of the company (hence, it has the same meaning as the duty of loyalty in the United States).

Regardless of the mentioned differences and the expectation that these differences, similar to all other systematic differences between the two main legal systems, lead to the essential variations in the approaches to regulate fiduciary duties, those variations sometimes do not exist at all, and even if they exist, they are minimal.[20]

3. AN OVERVIEW OF THE MAIN THEORIES ON THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIES

The issue of rationale and theoretical justification for the existence of fiduciary duties is one of the most disputable issues in the legal theory of

[17] C. G. Beuerle, P. Paech, E. P. Schuster, *Study on Directors' Duties and Liabilities*, London, 2013, 118.
[18] *Ibid.*
[19] S. Grundmann, *European Company Law*, Cambridge, Antwerp, Portland, 2012, 265.
[20] C. G. Beuerle, E.P. Schuster, *op. cit.*, 198.

fiduciary duties. Every company law theory relies more or less on fiduciary relationships theories, which deals with a broader spectrum of social relationships, but which inevitably present a point of departure or at least a guidepost for theoretical determination of fiduciary duties toward company. Miller classifies all theories on the emergence of fiduciary duties as reductivist or instrumentalist.[21] According to reductivist concepts, fiduciary duties do not have a special legal basis and legal justification but stem from different bases of private law liability. Contrary to those theories, instrumentalist views are based on the assumption that fiduciary duties have their own peculiarities and contemplate their justification in the existence of an independent, usually socially significant goal.[22] Both concepts are expressed through several different theories on the emergence and rationale for the existence of fiduciary duties.

The most important theory, which comes from reductivist views, is the contractual theory. It is based on the assumption that all fiduciary relationships have a contractual nature. It is the offspring of deliberations of the adherents to the law and economics school of thought. In accordance with the principles of this school of thought, which are the basis of the theory, the objectives, which are supposed to be attained, are formed. The importance of maximization of the company value is emphasized and it has primacy in comparison with the achievement of adequate distribution of value between purported contracting parties (directors and shareholders/members).[23] Classical fiduciary duties and limitations imposed by them to a fiduciary are considered as important obstacles to the achievement of mentioned maximization of the company value. For that reason, this theory advocates for reduction of these limitations and a mechanism to achieve this is "transformation" of fiduciary obligations to mere contractual obligations.[24] Advocates of contractual views emphasize need and importance of reduction of the fiduciaries' costs, which are a consequence of the fiduciary duties' existence.

The contractual theories have two variants. According to the first one, fiduciary duties represent a contractual provision between the company, i.e. its shareholders/members, and directors or other persons who are subject to fiduciary duties. According to another variant, fiduciary duties have a

[21] P. Miller, *Justifying fiduciary duties*, McGill Law Yournal, No. 4/2013, 973.
[22] *Ibid.*
[23] V. Brudney, *Contract and Fiduciary Duty in Corporate Law*, Boston College Law Review, Vol. 38, 1997, 637-638.
[24] *Ibid.*

contractual rationale because they are based on the consent of will of a fiduciary and a beneficiary to establish a fiduciary relationship. Regarding the first variant of the contractual theory, the best-known view is the one, which comes from the assumption that fiduciary duties are actually default rules. Legal regulation of fiduciary duties is, according to these approaches, necessary only because of the impossibility to cover all contracting parties' rights and obligations by any contract.[25] This is particularly expressed with regard to the agreement on mutual rights, obligations, and responsibilities between director and company. Why? The director's obligations are complex. The objective is clear (achieving profits as high as possible) but means and ways to attain the objective may be different due to market unpredictability.[26] Therefore, these means and ways cannot be entirely prescribed in advance or foreseen by a contract. For these reasons, and in case of occurrence of any disputable situation (conflict of interest, breach of prescribed standards of behaving with the "care of a good businessman", etc.), the legislator "helps" and prescribes norms based on a supposed negotiation. The legislator evaluates interests of both contracting parties in a supposed negotiation on the disputable situation and establishes norms, which they assess as a result of the supposed negotiation.[27] According to some insights, fiduciary duties present incomplete default rules. Those rules are incomplete because there is a gap between the standard of fiduciary conduct agreed upon by contracting parties or reasonably expected by them and relatively limited duties of loyalty and care, which the courts are willing to enforce.[28]

Contractual theory is subject to different critiques. Shepherd deems that this theory is basically unrealistic. The fiduciary principle is more and more being used to provide recovery to plaintiffs in situations when they would not be contractually protected.[29] The essence of fiduciary duties is to overcome manifestly unjust contractual provisions. In terms of the content of the duties, critique is that if fiduciary duties are really default rules, they would depend on the material facts of each concrete case. That is not the case in reality because the content of duties is fixed. Besides that, there are

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[25] F. Easterbrook, D. Fischel, *Contract and Fiduciary Duty*, The Journal of Law & Economics, No. 1/1993, 426.

[26] B. Mihajlović, *Posebne dužnosti direktora prema društvu sa ograničenom odgovornošću i načelo slobode ugovaranja,* Harmonius, br. 1/2015, 163.

[27] F. Easterbrook, D. Fischel, *op. cit.*, 427.

[28] K. A. Alces, *The Fiduciary Gap*, Journal of Corporation Law, Vol. 40, 2015, 367.

[29] J. C. Shepherd, *op. cit.*, 66.

significant differences between contractual and fiduciary relationships. The essential difference is that in a contractual relationship both parties act in their own interest, while in a fiduciary relationship one party acts in the interest of another party (there is no relation of reciprocity). Fiduciary rules are not neutral rules but rules aiming to protect the beneficiary, not the fiduciary.[30] Regardless of the changes present in positive legal regulation, which facilitate the conclusion of transactions or undertaking of businesses with a personal (self) interest, the limitations of self-interested actions must be stricter in fiduciary law than in contract law, even in comparison with the more flexible contractual doctrines whose objective is the protection of a weaker contractual party.[31] Contractual rules generally allow contracting parties to act in self-interest. Finally, the legal theory recognized the problem of a fiduciaries' consent since one cannot always characterize a fiduciary as having consented.[32]

Another theory based on reductivist assumptions is the property theory. According to this theory, a fiduciary relationship exists where one person has a legal title and/or control over property or any other advantage and the other is the beneficial owner thereof.[33] This theory is established on the hypothesis that fiduciary duties are a kind of private property right or necessarily incidental to private property rights.[34] Understood in this way, fiduciary duties enhance ownership by facilitating delegation of power over property and protect ownership interests by dettering misappropriation or misapplication of that property.[35] The justification for fiduciary duties derives from that for ownership and private property rights. This theory has o different variants as well. The most famous definition is the one brought by Ribstein who claims that all fiduciary relationships involve the contractual delegation of broad power over one' property.[36] A significant one is also the critical resource theory, brought by Smith, who defines fiduciary relationship in the following manner: "fiduciary relationships form when one party (the fiduciary) acts on behalf of another party (the beneficiary) while exercising discretion with respect to a critical resource[37] belonging to the beneficiary".[38]

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[30] V. Brudney, *op.* cit., 627.

[31] *Ibid*, 631.

[32] B. Kasolowsky, *op. cit.*, 87.

[33] J. C. Shepherd, *op. cit.*, 52.

[34] P. Miller, *Justifying fiduciary duties*, 987.

[35] *Ibid*.

[36] L. Ribstein, *Are Partners Fiduciaries?,* University of Illinois Law Review, 2005, 212.

[37] The concept of critical resource serves to avoid theoretical problems, which are a consequence of different views of the concept of property and the impossibility to

Smith's theory is established on the hypothesis that the purpose of existence of fiduciary duties is a reduction of the possibility of opportunistic conduct, which is possible considering the nature and structure of fiduciary relationships. Whether something represents a critical resource and, respectively, justifies the imposition of fiduciary duties depends on whether that "thing" enables the fiduciary to act opportunistically.[39]

Many theories are based on instrumentalist views. The most important result of these views are theories conceived on the moral basis of fiduciary duties. Fiduciary law should provide the fiduciaries' moral conduct, and fiduciary duties should require altruistic behaviour from beneficiaries.[40] It is also said that fiduciary duties have a moral justification because they provide a secure basis for interpersonal trust. They promote trust either directly or by securing conditions of trustworthiness that make it appear rational to place trust in fiduciaries.[41] The basis of reliance theory implies that a fiduciary relationship exists where one person reposes trust, confidence or reliance in another.[42] It is not regular, ordinary trust, but a higher level of trust since there is an addition in the relationship, a characteristic beyond reliance, such as confidentiality, and there is also knowledge of one party that another party relies on him/her.[43] The consequence of the mentioned trust and reliance, according to this theory, is dominance or influence of the fiduciary over the beneficiary and the emergence of fiduciary relationship between them. There is relatedness between the reliance theory, the ideas of the beneficiaries' vulnerability and the contracting parties' (fiduciary and beneficiary) unequal bargaining powers. For that reason, the unequal relationship theory supplements the reliance theory. Boundaries between the two are not entirely clear and sometimes perhaps they do not exist at all. Similar to the reliance theory, the unequal relationship theory has a moral basis and reminds us of the relation between fiduciary duties and morals. According to the unequal relationship theory, a fiduciary relationship exists wherever there is an established inequality of footing between two parties.

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subsume subjects of all fiduciary relationships under the legal concept of property (this problem is particularly expressed with respect to confidential information, business secrets, etc.).

[38] G. Smith, *The Critical Resource Theory of Fiduciary Duty*, Vanderbilt Law Review, Vol. 55, 2002, 1402.

[39] *Ibid*, 1441-1442.

[40] P. Miller, *Justifying fiduciary duties,* 995.

[41] *Ibid*.

[42] J.C. Shepherd, *op. cit*., 56.

[43] *Ibid*.

This inequality of footing can be of two types: *de jure*, i.e. as a result of particular defined relationships, such as trustee and beneficiary; or *de facto*, i.e. as a result of one person's dominance over another.[44] Although fiduciary relationships often arise because of the natural domination of one party over another this domination does not have to be natural and may originate simply because of the roles the parties have within the relationship.[45] The problem of factual inequality between fiduciary and beneficiary remind us of the principle of protection of a weaker party from consumer law.[46] However, it must be clear that persons who conduct a business operation professionally do not have much in common with consumers and therefore, the mentioned potential inequality in fiduciary law is not equivalent to the inequality in consumer contracts (between consumer and trader).

Beyond reductivist and instrumentalist views – significant due to its originality – stands the commercial utility theory as another product of the law and economics school of thought. According to this theory, a fiduciary relationship will be found by the court in every situation in which the court deems it necessary to hold a person or a certain class of persons to a higher than average standard of ethics or good faith for the sake of protecting the integrity of commercial enterprise.[47] The commercial utility theory stems from an assumption that a certain amount of trust and confidence is necessary in business in order to ensure economic efficiency.[48] For that reason, when solving concrete cases, courts are expected to strive to find the answer on the question whether a person's conduct, which is a subject of dispute (for example, abuse of a position in a company), has the potential to impede effective economic interchange and development. In doing that, the court is supposed to find a right balance, a right approach to the intervention of the state (through a court) in economic relations. A free market implies the existence of instruments for maintaining the integrity of the market place but these instruments must not be too rigid since in that case they would have the opposite – preventing – effect on the free market.[49]

[44] *Ibid*, 61.
[45] *Ibid*, 62.
[46] B. Mihajlović, *op. cit.*, 170.
[47] J.C. Shepherd, *op. cit.*, 78.
[48] *Ibid*.
[49] *Ibid*, 79.

4. MODERN VIEWS ON THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIES IN COMPANY LAW

In recent years the issue of the justification for the existence of fiduciary duties in company law receives entirely different connotation. Perhaps it is too early to say that there is a dilemma or a lively scholarly debate but definitely more attention has been paid to modern views, which express doubt towards the necessity of the existence of fiduciary duties in company law.[50] The grounds of these modern views can be found in the conceptions of the free market and the contractual nature of the company (corporation). These views are a continuation of the contractual theories on fiduciary duties but they cannot be subsumed by these theories since the adherents to the new views argue for the absence of fiduciary duties and their removal from the company law. If the duties are to disappear, company's directors (and other persons subject to fiduciary duties according to current solutions in comparative law) should only respect provisions of the articles of association, by-laws, and the agreement on mutual rights, obligations, and liabilities of directors. Hence, ways and forms of protection of the members'/shareholders' interests from the management's opportunistic behaviour would be entirely left to the contracting parties' will and their negotiations during the establishment of their contractual (or labor) relation. The only external mandatory obligation imposed to management members would concern the obligation of conduct in accordance with the good faith principle.

There are several reasons, which serve as a justification for these views. First, the differences in the legal position of members/shareholders and creditors (and generally between debt and equity) are reducing.[51] Considering that creditors have access only to the contractual means of protection and that they use these means successfully in practice, the same contractual principle of protection should apply to members/shareholders. Second, the relationship between director and company – in contemporary conditions – does not fulfill anymore the basic prerequisites, which are necessary to consider a legal relationship to be a fiduciary relationship. As it has been emphasized in this paper and elsewhere, trust, flexibility and open-ended fiduciary's obligation are some of the key elements of any concept of the fiduciary relationship. Therefore, the same applies to the relationship between a company and a person who is subject to fiduciary duties (most

[50] D. G. Baird, M. T. Henderson, *Other People's Money*, Stanford Law Review. No. 5/2008, 1315.
[51] *Ibid*, 1311.

commonly director). Adherents to modern views assert that the relationship between company and director does not have this kind of characteristics anymore.[52] The concept of trust does not exist anymore and markets, creditors, shareholders, investors and legislators assume that they should not impose trust on directors. Today they do not expect directors to put the company's interests above their self-interests.[53] The system of the directors' remuneration obtains more importance as a mechanism of incentives for their labor and for the equalization of theirs interests with the company's interests. The consequence of a general lack of confidence is a stronger scrutiny over directors' work by the creditors, institutional creditors, and market analysts.[54] Besides that, the government's requirements with respect to reporting as well as the state's supervision over the markets and directors' conduct in general have become more extensive.[55] From all these circumstances resulted the fact that open-endness and unlimitedness of directors' powers do not exist anymore. Flexibility is not a characteristic of fiduciary duties in the contemporary company law either. The scope of application of fiduciary duties is very narrow. Even in Delaware whose Supreme Court had a crucial role in the development of this institution in the company law fiduciary duties have been narrowed down to the point of "irrelevance and obsolescence".[56] It has been noted in the legal theory that the Delaware Supreme Court uses a strong moral rhetoric when describing fiduciary duties, most probably striving to create a stronger social and market conscience about the importance of conduct in accordance with fiduciary duties.[57] However, this rhetoric is entirely in disharmony with the court's willingness to concretely apply fiduciary duties on the basis of determining the breach of duty, and the imposition of legal remedies, which are supposed to be a consequence of a determined breach.[58] The courts avoid finding new cases of liability due to breach of fiduciary duties and for that reason duties lose their basic purpose – sanctioning the conduct which could

[52] K. A. Alces, *Debunking the Corporate Fiduciary Myth*, Journal of Corporation Law, No. 2/2009, 240.
[53] *Ibid*.
[54] *Ibid*, 267.
[55] *Ibid*.
[56] *Ibid*, 243.
[57] L. A. Stout, *On the Export of U.S. – Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, University of California, Los Angeles, Research Paper Series, Research Paper No. 02-11, 31.
[58] K. Alces, *The Fiduciary Gap*, 367.

not have been foreseen in advance.[59] Finally, the authors willing to eliminate fiduciary duties from company law regulations conclude that the doctrine of corporate fiduciary obligation is today little more than fiction.[60]

5. INSTEAD OF A CONCLUSION: IS THERE A NEED TO DEBATE THE ISSUE OF THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIExS IN SERBIAN COMPANY LAW?

Fiduciary duties were introduced in Serbian law by the method of legal transplant. This statement, however, does not mean that the previous Yugoslavian and Serbian law did not recognize any elements of the institution nowadays widely recognized as "fiduciary duties toward the company", i.e. "special duties toward the company", in terms of the Serbian law.[61] The Companies Act of the Republic of Serbia from 2011[62] (hereinafter: CAS) recognizes five special duties toward the company: the duty of care, the duty to report acts and businesses in which personal interest exists (self-dealing), the duty to avoid conflicts of interest, the duty to refrain from disclosing trade secrets and the duty to refrain from competing with the company.[63]

Do the above-mentioned conceptions of the justification for the existence of fiduciary duties have any relevance in the Serbian company law, and, if so, what is that relevance? Currently special duties in Serbian law are merely another product of legal transplant, which has not been applied in the right manner in the Serbian legal system. In terms of the traditional meaning of the issue of the justification for the existence of fiduciary duties different theories on the emergence of fiduciary duties have a definite relevance for current domestic law. Considering that we are dealing with a legal transplant, various theoretical conceptions, which originate from the "countries' exporters" of this legal institution always present significant support and guidepost to the legal systems of the countries, which "import" foreign legal solutions. But what is the answer to the second – far more difficult and

[59] K. Alces, *Debunking the Corporate Fiduciary Myth*, 255.
[60] *Ibid*, 240.
[61] In this sense, it is worth to mention provisions of the Yugoslavian Commercial Act 1937 (for example, article 300(1), 303, 304, and so on).
[62] Law on Companies (Zakon o privrednim društvima), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 36/2011, 99/2011, 83/2014 – dr. zakon, and 5/2015).
[63] CAS, article 63, 65, 69, 72, 75.

provocative – question? Considering the mentioned failure to apply special duties in Serbian law, one can justifiably raise the question whether we need the duties at all. However, we should have in mind that the mentioned problem is typical for various other European countries as well. Among these countries are some that possess a way higher level of social and legal development. The problem can, to a certain measure, even be found in some American jurisdictions. Special duties should exist in the Serbian company law as a legal institution, which proclaims importance of company directors' moral conduct, and as a principle which at least reminds and cautions directors regarding what conduct is expected from them. Although, having in mind the limitations of the application and the enforcement of this institution, the significance of other protective measures against directors' opportunistic conduct and methods for solving the first agency problem must be understood. We may find these measures in some other fields of law (contract law, criminal law, etc.) Sometimes, however, law would not be the proper instrument for solving the problem. The market and social and moral sanctions – properly understood and applied – could often be sufficient measures for the adoption of standards of conduct for company directors.

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LEGAL STATUS OF THE INDEPENDENT DIRECTORS

Abstract

In the modern business environment characterized by processes of globalization, integration and transition, the independence of governing bodies becomes a key instrument for the implementation of reforms in the area of corporate law. The immense consequences which corporate scandals have caused influenced the adoption of the whole set of regulatory rules whose main goal is to improve the corporate governance framework, to set clear criteria for the selection of board members in companies and work on the independence of management entities themselves. For this purpose, one of the most important results of the reform of corporate governance becomes strengthening the independence of the board of directors, with controlled authorization over the work of executive directors. The author of the paper is focused on determining the legal status of independent directors in companies, as well as the analysis of the legal and economic institutes strengthening the position of independent directors, as well as the factors that in some cases may point to their ineffectiveness. Thought framework of the research includes the analysis of legal regulations in the legal system of the Republic of Serbia, as well as the most important European legal acts. The aim of the paper is to point to the existence of space and opportunities for creating new mechanisms for strengthening the position of independent directors, which helps prevent potential abuse by companies.

***Key words**: corporate governance, the board of directors, executive director, non-executive director, independent director.*

1. INTRODUCTORY CONSIDERATIONS

Corporate scandals, flexible forms of management companies, the conditions of continuous advancement of information technology and the increasing complexity of business transactions, came up with the need to establish adequate corporate governance framework. In such business environment, the requirements for increased responsibility of individuals operating company are strengthening, and the need for disclosure of

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information on the financial position and operating performance of the company, is becoming more emphasized. With the aim of adapting to the specific economic conditions and increasing the efficiency of the existing models of corporate governance, there is a reform in the area of company law through which it is supposed to find ways for improving corporate governance. Globalization, integration and transition as contemporary economic processes have resulted in changing the status of board members in companies and opened the question of efficiency of the existing model of corporate governance, their convergence and adaptability to legal and economic environment. The changes go in the direction of efforts to define the legal and economic institutes on the corporate control market, which would reconcile the interests of owners and management of the company. The most important direction of reform is going towards the establishment of an optimal structure of membership in the management bodies and strengthening the position of independent board members.

The safest way to adapt corporate governance framework prevailing economic, political and social environment is through strengthening the legal and regulatory framework, and the improvement of existing regulations in the field of company law. The amended regulation should be based on the strengthening of corporate governance mechanisms through the modification of the structure of the board, as well as maintaining confidence in the capital market and protection of investors' positions. The most important result of the reform of corporate governance is linked to the strengthening of the independence of the board, which is achieved by introducing the membership of independent directors. Due to the growing interest and public concern about corporate social responsibility activities, the independence of the members of the board of directors becomes a key mechanism for solving the problem of monitoring the management of the joint stock company. Members of the board of directors of the companies are responsible for good corporate governance, and their responsibility in particular stands out in public joint stock companies.

Independent directors are considered one of the key mechanisms for effective corporate governance of the companies. By the inability of shareholders to oversee the executive directors, there is a request to the membership structure of the administrative board finds at least one director with the power and influence like the managing director of the company, who will not have operational authority. The main objective of the independent directors is to protect shareholders and board members from arbitrary and illegal operations of the executive board. The main task of independent directors is to make a tool of control over members of the

executive board, acting objectively, impartially, guided by exclusively professional criteria. The primary objective of the reform of company law becomes a search for mechanisms of corporate governance that can solve agency problems and provide effective instruments whose active use provides company's growth and development in the market.

2. THE PROBLEMS OF CORPORATE GOVERNANCE AND THE INDEPENDENCE OF THE BOARD OF DIRECTORS

Since the current models of corporate governance have not shown the expected efficiency, a modern business conditions characterized by privatization processes and frequent connecting companies have created an atmosphere that has not itself lead to the effective management of companies, need to change corporate rules becomes explicit. Insecure environment in which very fast, and it seems easy, the emergence of new economic actors occurs, but in which, up to that point, world's leading companies quickly disappear, initiated the improvement of corporate governance through reform of company law. Securing stricter, but also rational and efficient form of company management, indirectly should have strengthened the legal security of investors, as well as ensured trust in the financial markets. Successful reform could have become a guarantor of gradual economic development, but also the incentive mechanism to attract new investors, increase employment and productivity growth.

Historically, inadequate corporate governance is one of the most common and most important cause of serious crises both in developing and developed countries.[1] The reform began in the years after the collapse of giant companies, like Enron, which caused tremendous adverse consequences not only in the countries where the headquarters of the company were, but also in other parts of the world due to the fact that those were the multinational companies, which in the years before deterioration employed the huge number of people and exercised the profits in the amount of over hundreds of millions of dollars. Therefore, the beginning of the 21st century was marked by reforms in different jurisdictions, with the intention of establishing a system of good corporate governance.[2] Changes in corporate governance are related principally to legal regulation and the basic

[1] A. Trifunović, *Principi korporativnog upravljanja u bankama u svetlu pravno-regulatornog okvira u Srbiji,* Bankarstvo, br. 1-2/2009, 88.

[2] D. Danilović, *Nezavisni direktori u realnom i bankarskom sektoru*, Pravo i privreda, 4-6/2016, 201.

principles of business to the organization and competence of corporate governance.[3] Since the environment continuously imposes additional requirements and creates some new problems, and since the existing problems are not completely eradicated, and the corporate scandals continue to occur, it seems that in the years after the collapse of Enron the concept of permanent improvement of corporate governance was introduced and continuous finding new solutions as well.

Certainly, one of the key moments in the company law reform was the restructuring of the administrative boards in companies and the introduction of independent directors. Until recently, the dominant principle that the regulation on the management of the companies must be based on self-regulation among the participants, and that because of the differences between legal areas and traditions should be dominated by secondary, subordinate legislation, embodied in the so-called "soft law" (codes, principles, reports and recommendations good corporate governance practices), underwent some changes.[4] In fact, such a regulation was similar to manipulation and abuse by the executive directors, and this tendency is noted to turn into "hard law".[5] The main problem and the cause of the outbreak of corporate scandals was inadequate structure of the administrative boards. The management board should exercise substantial control over their operations and make strategic decisions.[6] Poor administration, which is not able to realize the objectives of the company, is counterproductive and threatens not only a particular company, but also the overall economic development.[7] Bearing in mind the importance of work that is performed by the management board, the question of the composition of the administrative board becomes the most important and most complex question of formal and substantial reform of company law, whose addressing could also help reducing the problem of insider information. New business conditions, the constant effort to be one step ahead, the development of financial markets, which restricts the ever-growing greed in humans, lead to a situation that at the core of the execution of the largest

[3] I. Grubešić, *Razvoj nadzornih organa dioničkih društava – divergencija ili konvergencija entitetskih propisa?,* Anali Pravnog fakulteta Univerziteta u Zenici, 6/2010, 38.
[4] D. Radonjić, *Nezavisni direktori*, Pravo i privreda, 5-8/2005, 60.
[5] *Ibid.*
[6] M. Čupić, *Analiza stanja i mogućnosti za unapređenje korporativnog upravljanja u Srbiji,* Ekonomika preduzeća, 58 (3-4), 2010, 180.
[7] A. Trifunović, *op. cit.*, 87.

number of jobs in the market is insider information.[8] In order to prevent the abuses that can lead to making decisions based on insider information, the basic goal becomes the formation of strong board of directors that can control the work of the executive directors of the company and work on solving the agency problem. Through privileged information, which gives them privileges in the market in the first place, these individuals obtain benefit for themself or a person with whom they are linked.[9] Therefore, in the board of directors firstly non-executive directors were introduced, who are supposed to supervise the executive directors, and then in an effort to comply with the requirements for higher standards of independence in order to achieve the function, institute of independent directors is created. Independent directors are taking control over the work of the executive boards and becoming an instrument of management control by shareholders.[10]

The complex legal nature of joint-stock company requires the existence of more entities in the company responsible for adequate corporate governance.[11] Shareholders, as owners of the company, are often dispersed, poorly informed, without the will and knowledge for the management of the company, hence they engage competent and professional teams of experts composed of individuals elected on the basis of objectively determined criteria, capable and willing to manage the company taking into account the long-term success of the company and protect the legitimate interests of its owners.[12] Organized in supervisory, administrative and executive board, engaged directors are required to be in the conduct of operating the company managed by standard care of a good businessman, acting in the best interests of shareholders. As the executive directors have the opportunity to get the privileged information, often the realization of their goals is put in front of the goals of the company. Trying to act preventively and to prevent the occurrence of such a situation and the emergence of information asymmetry, for members of the administrative board the independent directors are chosen. The essential role of independent directors, and therefore the board

[8] J. Brašić, *Zloupotreba i protivpravno širenje insajderskih informacija*, in: Zbornik radova, sa međunarodnog naučnog skupa „Pravna država i stručnost procesnih subjekata kao instrument suprotstavljanja kriminalitetu“, Kragujevac, 2015, 599, http://www.jura.kg.ac.rs/ index.php/sr/naslovi.htm, date of visit: 15. Jun 2016.

[9] *Ibid*, 597.

[10] P. Steven, "*Do outside independent directors strengthen corporate boards?*", Corporate Governance: The international journal of business in society, Vol. 5, Issue 1, 2005, 59.

[11] S. Đorđević, *Značaj i uloga mehanizama korportaivnog upravljanja u podizanju nivoa efikasnosti menadžmenta*, Škola biznisa, br. 1/2012, 51.

[12] A. Trifunović, *op. cit.*, 85.

of directors, becomes overseeing the work of executive directors which improves standards of impartiality in the management of other people, not its capital, and until then a single governing board is divided into two sub-boards, the executive board and board of directors. The aim is to be able to limit its administration and control, which is the indispensable factor of the institute of independent directors.[13]

In order to have the efficient corporate governance, it is necessary to incorporate the company's strategic elements, such as exemplary administration, constructive and open corporate culture, effective governance structure and clear performance standards in the business.[14] Through the structure of the body the independence affects the business reputation of the company affecting therefore its profitable performance and working not only to preserve a good reputation and business of the company, but also the integrity of the capital market. This confirms the fact that an independent administrative boards in terms of the global movement of capital ensure profitable business. Guided by these findings we come to the view that the performance of the functions of independent directors is a privilege and prestige, and if they do not lead to legal and ethical standards in their act, they would risk their reputation, ruin their professional reputation that they enjoyed until the moment of choice the function. With successful performance of their duties, the independent directors acquire a reputation that recommends them for other functions. The only thing left is for practice to confirm the theory, given the fact that the introduction of independent directors in the structure of administrative bodies opened some new problems regarding the efficiency of the functions of the independent directors in the company.

2.1. The independence of the members of the board of directors

The primary objective of the reform of corporate governance is to determine the optimal number of members of the board of directors in companies, as well as the introduction of innovation in terms of the structure of membership. The result of such needs that through the process of globalization have expanded from the Anglo-Saxon law area to the other parts of the world, is twofold status of board members. Namely, the tasks are

[13] D. Danilović, *op. cit.*, 201.

[14] D. Sredić, T. Serdar, *Model savremenog korporativnog upravljanja sa aspekta finansijskog upravljanja,* Naučni časopis za ekonomiju, br. 03/12, 35.

carried out by two corporate governance boards, an executive board and board of directors, which further developed division of the members of the executive and non-executive directors.

Executive directors are members of the board of directors hired to perform tasks of daily company management.[15] The purpose of their function is to implement collective decisions passed by the board of directors and management of current operations of the company. Executive directors are people who have the greatest power in the company because they bring the most important decisions of interest to a joint stock company.[16] The second category of members are non-executive directors, whose main function is the control of executive directors. Non-executive member of the board of directors or the supervisory board does not perform their job in an employed relationship, hence their work does not require a full professional engagement.[17] Non-executive directors supervise the work of the executive directors, suggest company's business strategy and monitor its implementation.[18] A special category of non-executive directors is independent directors. Independence and objectivity of the members of the supervisory or the non-executive directors are important elements for the field tests and determination of financial and non-financial statements, the review of related party transactions, appointment and dismissal of board members, definition of the salaries, benefits and awards to executive directors and other members of the management board of joint stock company.[19] Independent member of the board of directors may offer the board breath of fresh air and experience, which executive directors don't have.[20]

Since the company's greatest strength is concentrated in the hands of the executive board, and since general director as the first director and legal representative of the company is chosen from the members of the executive board, can often lead to abuses by the executive directors and the excessive use of allocated powers, as well as violations of fiduciary duties to the company. Therefore, of particular importance is the control function of the

[15] V. Radović, *Put ka nezavisom upravnom odboru*, Pravni život, 12/2008, 74.
[16] *Ibid,* 75.
[17] H. Horak, K. Dumančić, *Neovisnost i nagrađivanje članova nadzornih odbora i neizvršnih direktora*, Zbornik radova Pravnog fakulteta u Splitu, 1/2011, 37.
[18] M. Mićović, *Privredno pravo*, Kragujevac, 2012, 94.
[19] H. Horak, K. Dumančić, *op. cit.*, 44.
[20] M. Žugalj, *Upravni odbori u tržišnom gospodarstvu*, u: Zbornik radova Fakulteta organizacije i informatike Varaždin, 1992, 241.

board of directors and that the board of directors set up is hierarchically superior to the executive board in order to control function implemented on the principle of seniority. These situations are easier to solve in a bicameral system of corporate governance in which the function control is done by the supervisory board itself, whose members cannot simultaneously be members of the board of directors.[21] In contrast to the bicameral system of corporate governance, in the unicameral system the ties between members of the board of directors and executive become are significantly tighter.[22] The main goal is, to the extent possible, to separate the executive directors responsible for the operational management of the daily operations of the company from those in charge of exercising the control over the results of operations of the executive board, as well as to impact on increasing the independence of the board and the prevention of abuse and the realization of personal interests in the company to the detriment of the interests of shareholders. The largest contribution to this entire attempt is the introduction of higher standards of directors' independence.

Independent directors were supposed to reduce the problem that arose between management, auditors and shareholders.[23] Namely, all the business decisions important for the financial position of the company are contained in the financial statements that the management board prepares for shareholders' meeting. Before it comes to the agenda and is accepted, a financial report is audited by independent external auditor. Given the numerous present illogicalities in the position of independent external auditors, and the fact that their own shareholders decide on the distribution of their own profits, often inadequate performance of the functions ensues, as well as the inability to spot the problems in the liquidity of the company or its neglect. Hence, the entire set of corporate scandals which appear almost successively contain in itself the problem of inefficient work performed by an independent external auditor, appointed and defined the compensation by shareholder board itself. Negative findings of the auditor affect the performance of the company whose audit is performed, which can have as a result the termination of the contract with the auditor.[24] Accordingly, the auditor has an interest in promoting positive financial reports of his client, which brings him into conflict with the duty of independence and third-party

[21] V. Radović, *op.cit*, 76.
[22] *Ibid.*
[23] M. Vasiljević, *Korporativno upravljanje:pravni aspekti*, Beograd, 2007, 91.
[24] *Ibid,* 261.

liability, because their function requires full commitment to public interest.[25] Since the bicameral systems of corporate governance exist as a distinct body of the supervisory board, whose essential task is to control the operation of the executive committee, it should have been worked on strengthening the functions of the administrative committee of the unicameral management systems. The main objective was to set up higher standards of independence, to the supervisory board, and the board of directors as well, and to secure specially division within the membership of the board of the unicameral model of corporate governance that would ensure the efficient execution of daily tasks and control over these transactions. The improvement of corporate governance is required to strengthen the supervisory and regulatory bodies eliminating potential conflicts of interest, which are believed to be the main cause of all problems in companies.

3. LEGAL AND ECONOMIC INSTITUTES TO STRENGTHEN THE POSITION OF INDEPENDENT DIRECTORS

The mechanisms of corporate governance allow in terms of parliamentary relations between the management board of joint stock company and the company itself performing the adequate control over the work of the director in charge of managing the daily operations of the company. Board members are the holders of special interest in the company, which can often be different from the interests of employees, creditors and shareholders themselves. Since board members are in a special, fiduciary relationship with the company, their interests should not be opposed to the interests of others interested in business success of the company. In recognizing such, the new situation, which can be a source of problems in the company, crucial role is in hands of efficient boards of directors, who could through carefully monitoring the members of the executive board act to fix the problem. In terms of the introduction of independent directors, as a special category of membership on boards of directors, the practice in different countries is significantly different. Regulation in some countries stipulates that independent directors must be members of the board of directors only in public companies, while in some countries there is an economic necessity for the presence of independent directors in any joint stock company. However, common to all countries is the requirement that there is appropriate involvement of independent directors in the work of the

[25] *Ibid.*

board of directors, as well as all other entities that have been established in the company and who are assigned specific responsibilities.

Defining the independence of member of the board of directors is not an easy task, because in trying to define the independence, there are numerous criteria, as well as the issue relating to which stakeholder the independency should be measured.[26] Independent membership should ensure objectivity and impartiality in their work in relation to the company in which they are engaged, to majority shareholders and board members.[27] The control function of independent directors should solve agency problems, prevent potential abuse of executive directors based on present informational asymmetry between executives and shareholders, and to get them to focus on strategic goals of the company. In determining independence, special attention is directed to the examination of the existence of personal interests of a member of the board of directors of the company, and then the possibility of harm or damage that may arise from the tight integration of non-executive director with a competitor company.[28]

An independent director is a person who is not connected to directors and who has not been in the past two years executive director of the company or employed in the company, owner of more than 20% of the share capital of the company or a person connected with the company, received from the company or the person connected with the company, or claim the amounts which total value was more than 20% of its annual revenues in that period or was engaged in performing audits of financial statements of the company.[29] Criteria used to assess the independence of directors adopted in the Law on Business Companies have been harmonised with the recommendations of the European Union [30]. Number of executive directors, due to the control of functions they perform, should be greater than the number of executive directors. Public shareholding company has at least one

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[26] V. Radović, *op.cit.*, 84.

[27] D. Jurić, *Nezavisnost članova nadzornog odbora i neizvršnih direktora upravnog odbora i wihove komisije u dioničkom društvu*, izlaganje na Međunarodnom znanstvenom skupu „Socijalno odgovorno gospodarenje", Pravni fakultet Sveučilišta u Rijeci, Rijeka 5-6. oktobra, 2007, 13.

[28] H. Horak, K. Dumančić, *op. cit.*, 34.

[29] Law on Companies (Zakon o privrednim društvima), *Official Gazette of the Republic of Serbia (Službeni glasnik RS),* No. 36/2011, 99/2011, 83/2014- i dr. zakon 5/2015, čl. 392.

[30] See: Commision Recommendation of 15 February 2005 on the role of non-executive or supervisionary directors of listed companies and on the committees of the (supervisory) board, Official Journal L 52/53 from 25.2.2005., http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005H0162, date of visit: 23 June 2016.

non-executive director who is also independent from the company.[31] However, the total number of directors, as well as their internal distribution depends on the size of the company. Companies are able to adapt the structure of its board of directors to their own needs.[32] Presence of independent directors should be sufficient, and they genuinely should be independent from operating the business and the company management. The number of non-executive and independent members of the board of directors depends on the actual independence of the board as a whole.[33] Especially significant role of independent directors is in addressing the issue of conflict of interest of executive directors, and prevention of problems which may result from conflict of interests. Independent directors are the individuals who will be able to speak, inside and outside the meeting rooms, about the abuses in the work of executive directors in order to protect the interests of shareholders.[34] In terms of the mandate for which independent director is called, it is important to take into account the need for continued work of board of directors, as well as the need to ensure innovation and motivation in the work. Therefore, it is necessary to establish a balance between the indefinite mandate, which allows directors to focus on the long-term interests of the company and the mandate for a limited time, which meets the need for periodic change of membership and faster achievement of good results.[35] In order to gain access to the exercise of control functions and evaluations of the work of the executive board, independent directors must be timely and duly informed of all the facts necessary for the fulfilment of their tasks, as well as to be introduced to the job appropriately. The monitoring function consists in monitoring the process of accounting, financial reporting, auditing and disclosure.[36]

The introduction of independent directors strengthens the position of non-executive directors. An independent director is always non-executive director, but non-executive director does not have to fulfil the conditions

[31] Art. 392 of the Law on Companies.

[32] V. Radović, *op. cit.*, 92.

[33] D. Danilović, *op. cit.*, 204.

[34] D. Clarke, *Three concept of the independent director,* Delaware Journal of Corporate Law Vol. 32, No.1, GWU Legal Studies Research Paper No. 256 , GWU Law School Public Law Research Paper No. 256 , 2007, 84, http://ssrn.com/abstract=975111, date of visit: 6 June 2016.

[35] Kodeks korporativnog upravljanja Privredne komore Srbije (Code of Corporate Governance of Serbian Chamber of Commerce), *Službeni glasnik RS*, br. 99/2012, principle 6, recommendation 8.

[36] F. Shu-Acquaye, *The Independent Board of Directors and Governance in the United States: Where is This Heading?,* Whittier Law Review, No. 27/2006, 732.

required for independent director.[37] An independent director is a non-executive director who can be expected to objectively and impartially judge when making decisions.[38] Therefore, individuals appointed as independent directors of the company must meet all the conditions required for the effective performance of the duties of non-executive directors, as well as some additional requirements, which will strengthen their independence. The function of independent directors in the long run should result in greater independence of the entire board of directors, as well as more regular and more effective supervision over their operations.[39]

Criteria for the selection of independent members must be clearly established and strictly defined, and in the selection of independent directors, individuals responsible for the appointment of the company shall be guided by them. Personal independence provides the members by prescribing clear criteria for the selection and dismissal, precisely delimited and established the authority of these persons.[40] It is especially important to choose people who have an objective and professional willingness to perform control functions. Improving functions of the independent directors and taking a leading role in the company is particularly important in order to preserve the confidence not only in the financial stability of the company, its reputation, but also in maintaining confidence in the financial markets, due to which abuse and frequent breakdowns company suffered major disruption in the market, which can have negative effect on attracting investors. Therefore, as a particularly important feature of independent directors the integrity of the work and independence from the influence of any organ of the company during the monitoring of the work of executive directors are emphasized. It is especially important that individuals appointed as independent directors have the willingness to carry out these tasks, the energy to devote to the performance of their duties in the company, as well as the understanding of the company's business. In performing their supervisory functions they should act with thorough examination and independently, and judge with the ability to offer new and different perspectives and constructive suggestions. Since there is dominant lack of suitably qualified human resources, the question is which individuals are potential candidates for independent directors, and from whose ranks to elect. The lack of objective

[37] M. Vasiljević, *op. cit.*, 96.
[38] V. Radović, *Put ka nezavisnom...*, 86.
[39] I. Grubešić, *op. cit.*, 50.
[40] J. Brašić, *Pravni položaj i pitanje samostalnosti Komisije za hartije od vrednosti RS,* Zbornik Pravnog fakulteta u Nišu, br. 72/2016, 350.

criteria pose new problems in the position of independent directors, and in particular must take into account the setting of clear criteria for the selection of independent members of the company. Each company is obliged to accept and comply with the criteria under the general legal acts, but it is free in prescribing additional criteria related to the selection of independent directors in them. For the position of independent director in the company it is important to organize training programs by the same company, as well as to enable the presence of continuous improvement programs organized by other bodies. In this way, they strengthen the position of independent directors, who are trained to follow trends in corporate law in order to respond properly and perform their function. Investing in professional training of independent directors, at the same time is investing in the development of the company in which they are engaged, due to the fact that professional criteria enhance their reputation, strengthen the company's reputation, and non-profit objectives are put in the function of profitable goals.

To the independence of members of the board of directors significantly contribute the amount, type and structure of fees which they are paid with respect to providing special services to the company and the exercise of supervisory powers. Also, in order to protect the interests of investors and shareholders, the important issue is the transparency of fees and rewards members of the management board receive. Publication of data on the structure and amount of compensation varies from country to country, and it is notable that the countries have adopted the minimum requirements in terms of transparency of fees. In situations where management of the company is not able to develop a system of fees itself, it is necessary to engage external consultants in order to avoid conflict of interest.[41] Namely, the compensation for executive directors consists of fixed and variable parts, while compensation for non-executive directors consists solely of a fixed part.[42] As the executive directors are involved in the company on the basis of an employment contract, since they are holders of the highest workload in the company for they lead current affairs of the company, their compensation is always greater than the compensation of company's non-executive directors. Compensation of executive directors in the variable part is linked to the business success of both the company and their individual contribution

[41] I. Vukasanović, V. Kuč, *Kako unaprediti korporativno upravljanje,* Tranzicija, god. 14, br. 29, 2012, 8.

[42] Kodeks korporativnog upravljanja Privredne komore Srbije, principle 9, recommendation 1, recommendation 2.

to the work, while non-executive directors do not receive stimulation because they are not carriers of the operational duties of the company. The difference in fees should be based on contributions to the work, and be proportional to the scale, complexity of tasks and responsibilities. Specific legal position of independent directors and specific objectives of corporate governance placed before them, impose the need to pay particular attention to their compensation, taking into account the fact that certain types and amounts of fees can have a negative effect on their independence.[43] On the one hand the fee can motivate independent directors in exercising their duties, or if they are not satisfied with it, it can open a whole range of problems, which are again returning to those issues whose resolution was the reason of introducing such a special group of members of independent directors. The appropriate fee for the work is the foundation for the independence with regard to the fact that individuals who are adequately rewarded for their work in this way achieve their independence, hence the adequate compensation guarantees the independence and objectivity of the work for the company.[44] Fee, above all, should be sufficient to attract and retain highly qualified individuals in positions of independent members of the board.[45]

With the growth of the company and its business success, business transaction become more complicated which requires a more complex corporate governance structure. As companies hire in individuals of various business and professional profiles and as they operate with different business partners, it was necessary for companies to form several different management entities. Those entities are commissions formed of individuals specialized in the field of their interest, where the nomination commission, remuneration commission and the audit and other commissions in accordance with the needs of the company are required, if it is permitted by statute.[46] The importance of these commissions for the legal position of independent directors is that in each of these commissions particularly there is significant presence of independent directors, with the same function they have in boards of directors.

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[43] V. Radović, *Naknada članovima uprave akcionarskog društva*, Beograd, 2011, 56.
[44] H. Horak, K. Dumančić, *op. cit.*, 48.
[45] V. Radović, *Naknada članovima...*, 245.
[46] M. Mićović, *op. cit.*, 96.

4. LIMITATIONS OF EFFICIENCY IN THE WORK OF INDEPENDENT DIRECTORS

The majority independent boards of directors are considered to be best practice of corporate governance. But despite that, independent directors themselves cannot guarantee a long-term business success of the company.[47] In addition to all the benefits that institute of independent directors brings, there is a certain number of limitations in their legal position, which is manifested through certain deficiencies in their work and performance of control functions in the company.

Too busy working schedule. The confidence given and the important role of independent directors require that they have sufficient time to fulfil their duties on the board.[48] However, most often, independent directors do not perform control function which they were hired for in the company as their sole task, but are also engaged in other companies with which they have an employment contract. Therefore, the activities of the independent directors are addition to the core business operations, which they do. It often happens even in the more companies that are not related to each other, they perform the function of independent directors, so they cannot always be present at meetings of the board of directors, which reduces the importance of the work of the organs of the company, preventing them from performing their basic duties. Overload of other duties makes them passive members of the board of directors.[49] In order to prevent too busy working schedule of independent directors a larger number of rules was developed, such as the drafting of the needed available time, limiting the number of membership, required information in the proposal for the appointment, signing a declaration on the existence of time available, as well as informing the board of directors of any subsequent amendments, notifying shareholders, compiling reports on attending the sessions, the assessment report of independent members, reports on completed tasks.[50] The work of independent directors should equally contribute to the company, regardless of whether they are members of other supervisory board, or the board of directors.[51]

Incompetence. Despite the clearly defined criteria for the selection of independent directors, it often happens that for the independent director of

[47] D. Clarke, *op. cit.*, 75.
[48] D. Radonjić, *op. cit.*, 67.
[49] V. Radović, *Tri razloga neefikasnosti nezavisnih direktora,* Pravni život, 11/2011, 102.
[50] *Ibid,* 102-108.
[51] H. Horak, K. Dumančić, *op. cit.*, 48.

the company is appointed an individual who does not have sufficient knowledge, expertise and experience necessary for efficient work. As they do not have enough knowledge about matter they need to decide, they are unable to critically examine the proposals of executive directors or to propose their own different content of decisions, so they vote mechanically for the proposals, by which all the benefits of their involvement in the company are lost.[52] For independent members are often appointed individuals from the world of politics, culture, show business, sports, education and other fields whose work does not necessarily have anything in common with the activities of the company, and they are not expected to exercise control functions, but to ensure the company's name and reputation, at the expense of professional quality. The problem is solved by prescribing competency requirements for the appointment of independent directors, pre and post publication of information on competence, introduction into the work program of independent directors, continuous professional development.[53]

Uninformed. To be able to make decisions during the operation, independent directors in the exercise of their functions must have full, timely and clear information necessary to perform their tasks. Independent directors have significantly less information from the executive directors, who are as operating the company's decision the most important information source. The problem of insider information arises because the source of information for independent directors are executive directors, whose work should be controlled, hence, it often leads to abuse and covering of information. It is therefore important to constantly work on reducing information asymmetry that exists on this relation, deepening the agency problems and hindering effective performance of the duties of independent directors.

The lack of adequate work compensation. The biggest incentives in the work of both the executive as well as non-executive, as well as independent directors in the company, are just compensations or incentives for their work. In performing everyday tasks the company's executive directors receive bonuses related to the profitability of the company itself which significantly affects their motivation to work. On the other hand, the independent directors of the company usually receive a fixed amount of charges proportionate to field of operations conducted in the company. Without incentives for work, it comes to the reduction of the effectiveness of their decision making, which is transmitted to the efficiency of the board of directors, and bearing in mind that the board of directors supervises the

[52] V. Radović, *Tri razloga...*, 108.
[53] *Ibid,* 109.

executive directors and that he is hierarchically higher authority than him, and therefore to reduction of the efficiency of the entire administration. Inconsistency of rewarding with the successfully done work stands out as the main problem of poor performance of independent directors.

Direct and indirect impact of executive directors. The process of selection and appointment of independent directors of the company must be based on professional and objective criteria in order to ensure their independence in the future work. A key feature of the legal position of independent directors is precisely their independence from any other body and individual of the company. However, in certain situations, even independent directors cannot be successful if they do not have the personal greatness or confidence to resist executives.[54] It is unacceptable that in the exercise of their supervisory duties over the work of the executive directors, independent directors of company to be subjected to impacts and abuses by the individual whom they shall supervise. It often happens that the executive directors abuse their position in the company preventing the independent directors in carrying out their duties, hiding information using numerous other instruments that could influence their independence. A special influence of executive directors on independent ones can be seen in a situation when they are left to determine the fees to independent directors of the company.

5. CONCLUSION

The agency problems inherent in constant conflict of interest between shareholders and the company's management, as well as in their different target functions, created the need for finding an instrument to ensure the reliability of the company's business, its reputation and social standard. The concept of permanent formation of the regulatory framework of corporate governance and coordination of the basic principles on which corporate governance is based, was imposed by corporate scandals, as well as by the processes of globalization and financial liberalization. Aiming at prevention and protection of shareholders and investors, the most important direction of the reform of corporate governance is going to strengthen the board of directors, ensuring effective management structures and setting clear standards for the selection of independent members of the board of directors, which become a key mechanism for evaluating the work of the management board. Therefore, the most important instrument of improving corporate governance and strengthening the independence of the administrative board

[54] D. Radonjić, *op. cit.*, 65.

becomes the institute of independent directors, which would through their supervisory powers, objective, independent and impartial work, ensure proper operation of the executive board.

Raising awareness about the importance of the company's management in recent years has resulted in dynamic changes in the legislation, which was reflected in the implementation of the reform of corporate governance even in the Republic of Serbia. Legal status of independent directors based on secure foundations in the Law on Business Companies and Code of Corporate Governance, which are taking into account the process of European integration are in comply with the OECD Principles of Corporate Governance, as well as the regulations of the European Union. The specific position of independent directors in the company is caused by the fact that they precisely represent a link between the board of directors and executive board, which defined them as irreplaceable entities of the effective implementation of protection of shareholders through a comprehensive monitoring of the legality of work of executive directors. In that way the company's internal business control mechanisms and risk management are strengthened. The Law on Business Companies and the Code of Corporate Governance clearly set out the criteria for the selection of independent members of the Board of Directors, determined by their competence, and detailed guidelines for the preservation of their independence were made. However, despite this, in practice certain deficiencies in their legal position, which may reduce their effectiveness, still occur. Such a situation indicates that independent directors still cannot be a guarantee of business success of the company, and although the steps to strengthen the independence of the administrative boards are determining mechanisms of corporate governance reform, the ideal solution is not found, and the trend of continuous adjustment of regulations in terms of corporate governance practices continues.

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PART EIGHT
LABOUR LAW

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SPECIFICS OF THE CIVIL SERVICE SYSTEM OF SERBIA TO THE CIVIL SERVICE SYSTEMS OF THE EUROPEAN UNION COUNTRIES

Abstract

In this paper, the author deals with the issues and challenges regarding the general state of civil service of Serbia, analysing it through the most important institutions – fulfillment of free job positions, assessment and promotion of civil servants, realisation and protection of rights of state civil servants, subordination as an element of civil service relation, conflict of interests, disciplinary responsibility, liability for damage etc. There is also a brief comparative presentation of civil service relations in Germany, Great Britain and Slovenia as other examples of civil service systems.

Key words: *Civil service relation, civil service law, civil service system of Serbia, civil servants.*

1. CONCEPT OF EMPLOYMENT WITHIN STATE INSTITUTIONS

The right to work is a complex right, and it is not a subjective right, but is, above all, a constitutional proclamation.[1] There are certain specific characteristics wihin particular areas of jobs, i.e. differences within employment relations. They are, primarily, based on the differences of ownership over instruments of labour and capital, scope and quality of responsibility of the different categories of employees, nature and significance of the jobs performed by the employees – individual or general significance. The employment within state institutions is specific because of the character of jobs and duties, as well as due to the broader significance and increased responsibility in performing functions of a state institution.

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[1] R. Brković, *Privatne agencije za zapošljavanje – (međunarodni, komunitarni i nacionalni pravni okviri)*, Teme, 4/2015, 1380.

The issue of employment within state institutions, as well as of the act which is establishing the civil servant relation[2] is very complex. Certainly, this is a case of so-called civil service i.e. office worker law[3], which includes a set of legal regulations on the legal position of employees within state administration organs and other state organs. The civil service relation is a key content of the civil service law[4]. Therefore, the concept of the civil service work relation is a particularly challenging topic of theoretical research. The objective legal link between the state institution and the civil servant is examined, where the issue of employment is the initial but also the permanent aspect, which should be elucidated, because it has or might have both theoretical and practical value. Also, for the position of civil servants activity of the International Labour Organisation is essential.[5]

Within the framework of the legal system of the Republic of Serbia there is a distinction between the general and special regime of labour relations, and consequently the conditions of employment in each of these modes.[6] The employment within state institutions, both from the practical and theoretical aspect, is incorporated and located in two possible employment models– integral employment model[7] and polarized employment model[8].

The integral employment model is based on the existence of the general, unified system of industrial law regulations. Here there is no visible difference between the employment of all employees, regardless of the

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[2] B. Šunderić, *Priroda akta kojim se uspostavlja službenički odnos*, Radno i socijalno pravo, 1-6/2005

[3] In the past, in the territory of ex-SFRY, this law was called „public service labour law", N. Tintić, *Radno i sociljalno ravo, First volume: Radni odnosi*, Zagreb, 1969, 538-539

[4] The Civil Servant Law has not been established yet as a separate branch of law, but still it can be concluded that it has alreadz acquired special legal and educational disciplines– M. Vlatković, R. Brković, B. Urdarević, *Službeničko pravo*, Beograd, 2013, 39.

[5] R. Brković, Z. Radulović, *Konvencije MOR-a u pravnom poretku Republike Srbije*, Pravni život, 11/2015, 353.

[6] R. Brković, B. Urdarević, A. Antić, *Praktikum za radno i socijalno pravo*, Kragujevac, 2016, 5.

[7] The generally accepted position within the theory of Industrial Law is that Industrial Law is an unique branch of legal system and that it includes „all the forms of employment, regardless where they exist". However, in regard to state employees, both in the past and todaz, „there are specific characteristics within almost all industrial law institutioins", P. Jovanović, *Radno pravo*, Novi Sad, 2015, 60-61; „for a certain period of time in the European continental legal system the regulation of state officials employment was a consisting part of administration law, i.e. civil servant law – separate or special industrial law"- B. Lubarda, *Radno pravo*, Beograd, 2012, 8.

[8] Z. Tomić, *Opšte upravno pravo- organizaciono, materijalno i procesno,* Beograd, 2012, 99.

realization, and the jobs. In this case the labour law position of a civil servant is not different from the labour status of other employed persons. This system might be called the monolithic labour relation system.

From the other hand, the polarized employment model is based on the principle of specific character of particular "segments" of labour relation, where the one within state institutions is remarkable for its characteristics and significance, as well as for its nature and contents. Unlike the general employment, which is established on the basis of work, the civil servant employment is established because of performance of authority and therefore, it has much bigger significance for the society as a whole. This is the reason why the rights, duties and responsibilities, as well as all other dimensions of the civil servant status, should be regulated in a specific, particular and different manner in comparison with other employees.

There was a special legal regime for the state employees in the country before the Second World War, which was essentially different in comparison with general employment systems in other parts. In the period from the end of the Second World War to the 1960s, local legislatures continued the practice of the specific labour position of the state employees in comparison with other workers. Such solutions are the content of the Law on State Officers from the year 1946 and Law on Civil servants from the year 1957.

In the later period, up to the 1990s, in accordance with the principle of equal legal position of all working people, regardless of their employment, the labour position of state officers became close to that of employees within economy. Their position have changed.[9]

The local legislature, during past 15 years, and particularly the positive regulations, again, in a different way, regulates the labor status of state employees in comparison with labor status of other employees. So, the classic distinction between general employment regime and special regime of civil servant employment is persistently established[10].

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[9] R. Brković, *Radni odnos državnih službenika Srbije i komparativni radnopravni standardi*, u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope (ur. S. Bejatović), knjiga 1, Kragujevac, 2006, 333.

[10] The general regime of employment in Republic of Serbia is regulated by the Law on Employment, *Official Gazette of the Republic of Serbia,* No. 24/2005 and 61/2005, 54/2009, 32/2013 i 75/2014. The civil service in Republic of Serbia is regulated by the Law on Civil Servants, *Official Gazette of RS*, No.. 79/2005, 81/2005 - correction., 83/2005 - correction, 64/2007, 67/2007 - correction, 116/2008, 104/2009 and 99/2014 – *general civil service system*, and by special laws in the particular fields of public administration due to the nature of jobs, which are performed in them: police – Law on Police, *Official Gazette of RS*, No. 6/2016, Army – Law on Army, *Official Gazette of RS*, No. 116/07,88/09, 101/10

The labour status of particular categories of civil servants (for instance, members of the police force, army, national security service, foreign affairs, inspections and similar) is primarily regulated by the system law on such state organs, secondary, i.e. subsidiary by the public service legislature and tertiary, i.e. residually, by the general industrial legislature.

2. THE CONCEPT OF CIVIL SERVICE SYSTEM

The civil service system represents an integral system of categories in which the civil servants are classified according to criteria established in advance, and which represents the basis for their advancement, awards and career mobility[11]. It is frequently pointed out that civil service system has three basic parts: 1) classification system, namely in the form of classification of job positions in which each class encompasses all the job positions with same or similar job duties, or classification of civil servants in which each class encompasses all the civil servants with same or similar particular personal name, 2) salary system, 3) the way (system) of advancement[12].

The goal of the civil service system is to provide maximum efficiency, i.e. functionality from the point of view of the organ or organization of public service, and justice and equality from the point of view of the individual – civil servant within it. Also, the civil service system must provide a high level of objectivity of criteria, independent from particular persons in public service to whom particular individual decisions are relating[13]. Also, such system must be, by its institutions and processes, ethically acceptable for the major number of employees. This is achieved mostly by its fairness i.e. the same procedure is applied on same situations and same cases. This is the way to achieve or at least get close to the goal that interest of civil servant, how he/she feels it in his/her daily functioning of public service, is harmonized with his/her obligations and duties. Also, civil servants must be loyal to the state as their employer, as it is believed that loyalty to the

10/2015 and 88/2015, foreign affairs – Law on Foreign Affairs, *Official Gazette of RS* No. 116/07,126/07 and 41/09 – *special civil service employment*. Unlike employment, which is primarily a contractual relation, civil service employment is a public law relation. Namely, the state is regulating such relation by itself, without participation of civil servants, as it can modify it without consent of civil servants - R. Marković, *Upravno pravo*, Beograd, 2002, 170-171; Ž. Mirjanić, *Radno pravo*, Banja Luka, 2004, 211,276.

[11] M. Vlatković, R. Brković and B. Urdarević, *op. cit.*, 45.

[12] M. Vlatković, *Javni službenik u vršenju javne službe,* Radno i socijalno pravo, 16/2005, Beograd, 2005, 211.

[13] *Ibid.*

employer constitutes an employer's legitimate interest arising from employment.[14]

3. LEGAL REGULATION OF CIVIL SERVICE IN THE REPUBLIC OF SERBIA

The Law on Civil Servants established an integral[15] civil service system with, as it is pointed out, solutions "based on standards which are accepted in modern comparative legal systems", and adoption of such law is "one of the key issues of the institutional transformation of the Republic of Serbia".

The Law on Civil Servants, together with the Law on State Administration, represents the system of complementary laws, which should lead to the transformation of the public sector in Serbia. It introduces the career semi-open civil service system, with characteristic that senior job positions are occupied by those who are already employed as civil servants, i.e. through the institution of advancement. This is a major difference in relation to the recent spoil system of system of political merits.

The Law on Civil Servants of Republic of Serbia created assumptions for establishment of a new civil service in Serbia, which, above all, shall be based on solutions, implemented in the modern comparative legal systems. By this, the European Union standards in the field of civil service in our country are completely fulfilled. Also, for the position of civil servants in Serbia are important and collective agreements that they conclude with the state as their employer.[16]

4. A BRIEF COMPARATIVE PRESENTATION OF LABOUR POSITIONS OF CIVIL SERVANTS

There is no unified regulation of labor position of civil servants in the national legislatures. It varies, depending on the period and particular needs of particular countries for an efficient civil service. The rights, duties and

[14] R. Brković, *Zabrana konkurencije poslodavcu i dostojanstvo radnika na radu*, Radno i socijalno pravo, 1/2008, 255.

[15] However, there is no constructed integral civil service system in Republic of Serbia yet", B. Davitkovski, A. Pavlovska-Daneva and Z. Lončar, *Nauka o upravi*, Podgorica, 2012, 143.

[16] R. Brković, *Kolektivno pregovaranje u aktima međunarodne organizacije rada koji su inkorporirani u legislativu Republike Srbije,* Radno i socijalno pravo, 1/2015.

responsibilities of civil servants, as well as the legal content of their position, are expressed in different forms from state to state[17].

Theoretically[18], there are two major legal systems, which are regulating the status of civil servants: 1. career (statutory) system and 2. contractual system. Some countries combine those two systems (combined systems).

Here we are going to state several key elements of distinction for the career and contractual system of the labour position of civil servants.

The career system has regulated the system of employment of civil servants from the initial position on the basis of public competition. However, the employment at the higher positions is performed by advancement (career development) or by distribution (mobility) within the state administration. The advantages of such form of employment are: stability and a guaranteed quality of service due to long working experience of higher civil servants in the public sector, as well as the possibility of advancement in the career (which is stimulating for the civil servants), legally defined requirements for retirement, special disciplinary procedure, legally established system of advancement etc. From the other hand, the employment at all position in the contractual system is performed on the basis of public competition, without giving priority to persons, already employed by the state. This form of employment is flexible, external competition is providing necessary changes and innovations in civil service as well as increased efficiency of work.

The professional education and training for work are classic characteristics of the career system. The unified education qualifications are established as the basis for employment of a person at the appropriate degree of the career structure. Due to the standardization of expertise, it is provided that civil servants can meet the most subtle requests of the civil service, as well as the possibility of the desired mobility in service. There is no special, compulsory education for work in civil service in the contractual system. There is only a formal criterion (for instance, University degree), as the requirement for employment at particular position. The professional qualification depends on varied jobs and tasks, which are within each job position, which is fulfilled. The good thing about this system is that it

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[17] See more: T. Verhijen, *Civil service Systems in Corporative Perspective*, Leiden, 1999; H. Bekke, J. Perry, T. Toonen, *Civil Service Systems in Corporative Perspective*, Bloomington, Indiana, 1995.

[18] "In relation to the organization of public services, the fulfillment of job positions within administration (particularly the state one), there are two systems: career system and job position system", B. Davitkovski, A. Pavlovska-Daneva and Z. Lončar, *op. cit.*, 165-166.

excludes the expenses of specialist education, and the diffuse educational structure is already provided, which may fulfill various concrete requirements of the civil service.

In the career system, the rules, which are regulating the requirements, standards and criteria for advancement, are established by civil service law. All the job positions, except the initial positions, are open only for the internal competition, which is providing the possibility of regular advancement. Unlike this, in the contractual system, each job position is subject to full competition and is available not only to the internal human resources but for all the interested parties out of the state administration.

The fully open and fully career systems do not exist in the practice. All the public civil service systems foresee to some extent a possibility of advancement or employment from the private sector, on the basis of public competition.

We shall present the comparative review on the position of civil servants through the presentation of some of their characteristic properties, on the basis of examples from legislatures of different civil service systems.

5. CIVIL SERVICE SYSTEM IN THE FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany has built the most typical career system model for civil service[19]. The German Constitution guarantees to each German the access to civil service according to his/her inclination, skills and qualification. The employment in civil service is possible only from the initial position, through a public competition at the one of four levels – highest, higher, office staff and the lowest. A special school and education are required – for the highest level, University degree and two years of internship, for the higher level – college, which entails education in the fields in which the civil service work shall be performed as well as internship, office staff level - secondary school and internship and the lowest level – work in the profession. The three years trial work is compulsory for all the levels at the beginning of the career.

In the procedure of decision making according to the public competition, the law did not foresee the way of testing of knowledge and skills of the candidates but this at the discretion of the head of the state organ, but in

[19] Federal Law on Civil Servants of FR Germany, 1953, (Federal Official Gazette for Laws IS. 551) in the version published on 31 March 1999 (Federal Official Gazette for Laws IS. 675, Federal Official Gazette for Laws III 2030-2).

practice there is examination by the commission, interview, written test and similar. The employment is for an unlimited period of time by rule, established by the unilateral act of special commission. The final decision may be reexamined by administrative tribunals.

The advancement of civil servants is based on the performance, so each career level has three degrees – the initial degree, promotion degree and the final degree. The advancement to the higher career level is possible through the further education and through the statutory procedure.

The voluntary mobility is possible both at the request and by the approval of the state official, while the compulsory mobility is linked exclusively within the state institution, and only temporarily in another organ.

The civil servants in FR Germany have the obligation of personal improvement because this is the basis for advancement. However, the organizational additional improvement is possible after the assessment and approval by the superior officer. The assessment of the working performance is usually done once in three years. The civil servants between 50 and 57 years of age, as well as the highest and lowest civil servants are exempt from the assessment.

The system of salaries and awards is established by the law, and there are special compensations for Christmas, vacations, for special working conditions, as well as the increase of salaries in accordance with the economic movements in the state. The possibility of payment by work performance is defined in the areas where this is sustainable, where the special level of efficiency is required, as well as inventiveness.

The disciplinary sanctions are set forth by the law and are undertaken in cases of violation of working duties. The procedure takes place before the competent body within the service, with the possibility of appeal before the disciplinary tribunal.

The civil servants are not entitled to strike, but they have the option that their representatives participate in decision making regarding employment, work, social conditions etc. The state organs are obliged to achieve an agreement with the union on realization of the basic rights, as well as on the social and working conditions. The special attention is dedicated to the gender equality issue. It is interesting to remark that there is an established obligation for each state organ with more than 200 employees, to have an official in charge of gender equality issue, and each lower organizational unit shall organize special programs in order to improve such equality.

The Federal Law on Civil Servants regulates the existence of the Federal Personnel Commission, consisting of seven regular members and seven

deputies. The Commission is an independent organ with basis function of an integral implementation of civil service regulations.

6. CIVIL SERVICE SYSTEM IN THE GREAT BRITAIN

The civil servants in Great Britain are formally in the service of the British Crown but de facto in the function of British Government. They are elected by the Civil Service Comission but are appointed and nominated by the Prime Minister at the order of the state organ or service[20]. The Commission members are appointed by the Crown at the proposal of the Government. Like the Central Commission for Civil Servants of U.S.A., the British Commission is competent for giving instructions and definition of the technique and procedure of examination of candidates, monitoring of fulfillment of requirements in all the domains of employment of the civil servants, arbitration of disputes, planning of human resource needs, calling and implementation of the contest procedure and providing impartiality in work.

The civil servants are directly responsible to the competent Minister.

The political neutrality is the supreme principle in the work and behavior of civil servants, so they are in the service of each Government. Therefore, there is dominance of merit system in the Great Britain, which means that selection and advancement of the administration personnel is based on their professional knowledge and skills, which are established through the various forms of checking like, for instance, competition procedure, public exam, trial work etc. However, this system does not exist in its pure form in this case as well, but it is combined with the so-called spoils system, so the certain smaller number of job positions is fulfilled by members of the political party, which has won the general elections and won the right to form the Government.

7. CIVIL SERVICE SYSTEM IN THE REPUBLIC OF SLOVENIA

The Republic of Slovenia has accepted the civil service system which includes elements of both career and the contractual system, so we can call this model the combined civil service system[21]. In order for a person to be employed by the state, it must fulfill the requirements in the view of

[20] See more: M. Davies, A. Doing, *Public Service ethic in the UK*, London, 1983.

[21] Law on Civil Servants, Official Gazette of Republic of Slovenia, No. 56/02.

particular degree and education, which are adequate to the career level. The trial work is compulsory in duration of ten months at the beginning of career, or six months if the service is begun from a higher positions. The Law has set forth the procedure of employment and a significant part of the procedure is dedicated to specialized methods for examining the working ability (interview, written test etc.), which are autonomously determined by the state organ in question. The employer, i.e. state body, has discretion to decide which one of the three procedures of employment shall be implemented: internal competition within the particular organ, internal competition within the entire administration or public advertisement for the free job position.

The key characteristic of the Slovenian model is that employment within the service is performed on the basis of employment contract but in fact there is no space for individual negotiations. The decision on employment is at discretion of the head of the state organ and reassessment at the court is possible.

The advancement in state service is based on the criteria of working results. The advancement to the higher degree at the same career level is possible, while the transfer to the higher career degree may be performed only on the basis of further education and adequate selection procedure.

The mobility of a civil servant is a factor of most rational use of available human resources potential, as well as strengthening and qualification of civil service to adapt to the various needs in the given period of time.

The awards for civil servants are set forth by a special law.

In the case of individual or collective labor disputes, the court is competent for their resolution, i.e. the specialized labour and social tribunal.

8. CONCLUSION

Beside the general regime of employment, which pertains to all employees regardless of organizational forms of work and property forms, there is also a special regime of employment within state organs for the persons employed within such organs, i.e. for the civil servants. The need for existence of such special regulation of employment of civil servants originates from the specific character of the state activity and the specific nature of jobs performed by civil servants. Such specific employment of civil servants can be conceptually viewed as civil service based on the legal relation between the state and the civil servant.

By a comparison of local positive legal civil service regulations with the applicable solutions in the world, we can make the conclusion that our civil service system only started to develop and is merely facing its

comprehensive and full harmonization with the requirements of an efficient, professional, unbiased and depoliticized performance of this significant social function. For that purpose, there is an urgent need to harmonize the existing solutions in this field with the solutions, which are applicable in the EU countries. This is the basic precondition for the building of stable institutions, which shall be based on the internationally recognized standards and opening of more intensive reforms in all fields of society. Also, it is necessary to adequately regulate the labour law position of the province and local civil servants, concerning the unstoppable process of decentralization.

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THE CHANGING NATURE OF THE RIGHT TO STRIKE IN THE REPUBLIC OF SERBIA

Abstract

The right to strike is not an absolute right according to the Constitution of Serbia, however, its dimensions are determined by a constitutional provision, which perscribes it as a right of the employees regulated either in compliance with the provisions of the law dealing with the right to strike, or by a collective agreement. Although the right to strike today belongs to the corpus of basic human rights, under certain circumstances it can be prohibited or limited by an obligation to fulfill certain conditions. A general prohibition of strikes is not in compliance with the principles of the freedom of association. However, even the international labor standards allow the possibility to either prohibit or limit the right to strike for a certain type of employees. National legislations are obliged to adjust their internal needs to limit the right to strike so as to comply with the international norms. Any venture out of the framework of internationally recognized conditions for the limitation of strike can become its opposite, a restriction on the rights of employees to exercise and protect their socio-economic rights to organize a (lawful) strike.

The author reinvestigates the concepts of strikes, with a focus on Serbian legislation and most important Court decisions in this area. In addition, author analyzes most important international labour standards related to the right to strike and points out the state of the social dialogue in the republic of Serbia.

Key words: *Strike, International Labour Organization, trade union, collective agreement, social dialogue.*

1. INTRODUCTION

Strikes might have been among the most prominent objects of study in the field of industrial relations. The material costs of strikes are also well documented in economic research, focusing on losses and quality of

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production.[1] Yet, only small number of studies have drown attention to the social aftermath of strikes. This is surprising because the aftermath of strike can be a long lasting, and involve severe personal and relational costs, which leads to a significant interpersonal conflicts that can harm productivity – even longer then the strike itself.

Strikes come in many forms, depending on the country and the times. They are a freedom in some common law countries, but more often they are a right, and a means of action only trade unions or recognized individual workers are authorized to take.

In the Republic of Serbia, due to the gravity of the economic and social crisis, problems with new company owners and the negative effects of the global economic crisis, the employees frequently resort to radical steps aiming to protect their rights. Because of that, the new wave of strikes increasingly resembles a social rebellion[2]. When reviewing the actual situation and the perspectives of the industrial relations in the Republic of Serbia, we should take into account another common characteristic related to the connection between industrial relations and social environment – the fact that the industrial relations to a great extent mirror the overall political, economic and social state of the society. Many issues and phenomena in the political and economic sphere, which can be concealed or at least embellished in other areas of life, mainly politics, inevitably come to surface in the industrial relations.

2. THE CONCEPT OF THE RIGHT TO STRIKE

The term "štrajk" in Serbian language is derived from the English term "strike", which itself appeared (in the sense of ceasing work) near the end of the XVIII century and in the beginning was an illegal method for solving collective labor disputes, which resulted in criminal and civil liability for those who participated in the strike.[3] With the recognition of the right to form trade union rights and the right to collective bargaining, the first necessary step was the abolition of criminal, and later civil and pecuniary responsibility

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[1] A. Mas, *Labour Unrest and the Quality of Production: Evidence from the Construction Equipment Resale Market,* Review of Economic Studies, 75/2008, 232.

[2] B. Urdarević, Z. Radulović, *Globalizacija i koncept socijalnih prava*, Srpska politička misao, 1/2012, 169-186.

[3] For example, in France, The Le Chapelier Law of 1791 characterised the strike as a crime of conspiracy, which was rationalized by the individualist philosophy of liberalism. See more in: N. Communod, M. Feron, *Le nouveau droit de la législation sociale*, Paris, 1983, 248.

for participation in a strike.[4] After the freedom to strike comes the recognition of the right to strike, which was eventually elevated to the rank of a constitutional right, and today, in the international instruments on human rights, the right to strike is classified within the corpus of fundamental human rights.

Today, the right to strike is regarded as a basic social right of workers and their organizations in order to promote and defend their economic and social interests, and in this sense it has the same rank of a fundamental right as does the right to work, right to own property or the freedom of entrepreneurship. At the international level, it is explicitly or implicitly recognized in international treaties, both universal and regional, and in national legislations as an explicitly or implicitly recognized right at the constitutional level. Thus, their respective constitutions explicitly recognize the right to strike in France, Sweden, Spain, Serbia, Montenegro, and it is implicitly constitutionally recognized in Germany, Belgium and Luxembourg, while in the UK, Denmark and Austria one can speak of a freedom to strike, but not the right to strike.[5]

Different definitions of the strike are the result of differences in terms of the concept of the right to strike, as well as differences regarding the object and purpose of a strike which can be understood in a narrow or a broader sense.

In the labor law theory in Serbia, there are several definitions of the strike. Most often the term strike refers to a temporary collective termination of work by employees in order to exert pressure on the employer to comply with the requests of workers on matters that are the subject of the dispute.[6] In addition to this one, there are other, very similar definitions of a strike. So for example, a strike represents an industrial or an aggressive action to resolve a collective labor dispute or to protect social and economic rights,[7] or a strike represents a collective cease of work by employees in order to exercise economic pressure on the employer or the state, regarding the economic or social interests and rights of workers or the collective rights of a trade union;[8]

[4] Thus, for example, in Italy in 1889, after the abolition of criminal sanctions for strikes, strikes qualified as a breach of employment contract, i. e. obligation to perform at work, in terms of civil law. See: T. Treu, *Labour Law and Industrial Relations in Italy*, The Netherlands: Kluwer, 2007, 22.

[5] B. Bercusson, *European Labour Law,* Cambridge University Press, 2009, 328.

[6] A. Baltić, M. Despotović, *Osnovi radnog prava Jugoslavije*, Beograd, 1978, 323.

[7] P. Jovanović, *Radno pravo,* Novi Sad, 2012, 391.

[8] B. Lubarda, *Leksikon industrijskih odnosa,* Beograd, 1997, 190.

or strike represents an organized exercise of economic or other pressure on the employer, increased by a work stoppage, in order to increase the employer's tolerance towards the requirements of the strikers.[9] As a rule, a strike is a means of struggle for the workers in order to achieve their professional and economic goals.

Of all the methods of industrial action for resolving collective labor disputes, the state has devoted the most attention to the method of strike, and in some countries, conducted its comprehensive institutionalization, which means that it can be used only within established legal rules, regardless of whether they are set through laws, by-laws or court decisions. Only lawful strikes are permitted means of labor struggle that do not entail negative consequences for its organizers and participants.

3. THE RIGHT TO STRIKE IN INTERNATIONAL LABOUR LAW

Winston Churchill presented his vision of Europe in Zurich in 1946, and the first step towards this vision was the establishment of the Council of Europe. The Council of Europe was founded in 1949, and the preamble of the treaty establishing it refers to the proclamation of certain principles, and in particular the following: the quest for peace through international cooperation and the moral inheritance of the European citizens, political freedoms and the rule of law. Article 1 of the Treaty Establishing the Council of Europe states that the aim of the Council of Europe is consideration of issues of common interest and taking certain actions on the economic, social, cultural and administrative level, as well as preserving and exercising human rights as well as fundamental freedoms.[10]

The Council of Europe had the possibility to influence the European labor standards via two instruments. The first was the European Convention on Human Rights of 1950, and the second the European Social Charter of 1961, which explicitly recognizes the right to strike. Unlike the convention, the charter is little known and often ignored in practice.[11] Although the European Social Charter had proclaimed the right to strike, its provisions on control of this right were insufficient.[12] According to EU legislation, neither

[9] Ž. Kulić, *Kolektivni radni sporovi,* Beograd, 2001, 200.
[10] T. Novitz, *International and European Protection of the Right to Strike,* Oxford, 2003, 127.
[11] B. Hepple, *Labour Laws and Global Trade*, Hart Publishing, Oxford and Portland Oregon, 2005, 197.
[12] *Ibid.*

freedom of association, nor the right to strike are explicitly protected. In other words, this means that the European Court of Justice has neither a particular role in this area, nor the possibility to act similarly to the Committee for Trade Union Freedom of the International Labor Organization.[13] This leaves the right to strike for the most part in the competence of Member States to regulate its protection, respecting the principle of market integration. Therefore, one can only conclude that, predominantly due to economic reasons, especially due to the effects that a strike has on competition, an appropriate regulation of the right to strike has not been enacted in the European law.[14]

On the other hand, the International Labour Organization (ILO) has regulated the right to strike indirectly, through conventions which are collectively known as the Conventions on Freedom of Association.[15] Considering the fact that the provisions of these conventions are quite general, and that they do not explicitly recognize the right to strike, the claim of the implicit recognition of the right to strike, came about by a broader interpretation of international labor standards contained in these conventions.[16] Fear of restricting the freedom of relations between employers and workers organizations, and fear of restricting the possibility of direct action, would seem to be one of the main reasons why so few ILO standards have been adopted on the strike and settlement of industrial disputes in general.[17] However, the ILO`s supervisory bodies have always considered that the right to strike arose from the articles of Convention No. 87 entitling trade unions to formulate their programmes and organize their activities.

During the 1998, the ILO finally adopted the Declaration on Fundamental Principles and Rights at Work to uphold the "fundamental

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[13] B. Urdarević, *Međunarodni i evropski koncept prava na štrajk*, u: Slobode i prava čoveka i grđanina u konceptu novog zakonodavstva Republike Srbije (ur. S. Bejatović), knj. 2, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2003, 188.

[14] B. Lubarda, *Konkurencija u radnom pravu*, Pravo i privreda, 5-8/2002, 897-902.

[15] They include: Convention no. 87 on Freedom of Association and Protection of the Right to Organise (1948); Convention no. 98 on Right to Organise and Collective Bargaining (1949); Convention no. 151 on Freedom of Association and the procedures for determining conditions of work in the public sector (1978) and Convention no. 154 on Collective Bargaining (1981). See: D. Paravina, *Međusobna uslovljenost obaveza i prava iz radnog odnosa*, Časopis za radno i socijalno pravo, Beograd, 3-6/1998, 22.

[16] B. Lubarda, *Radno pravo - rasprava o dostojanstvu na radu i socijalnom dijalogu,* Beograd, 2012, 995.

[17] J. M. Servais, *International Labour Law*, Wolters Kluwer, 2011, 122.

principles at work" or the "basic rights at work" which include: freedom of association and the effective recognition of the right to collectively bargain, elimination of all forms of forced or compulsory labor, effective abolition of child labor and elimination of discrimination in terms of employment and occupation. The Declaration was unanimously adopted but the question whether this proves to be the beginning or the end of labor standards arises.[18] It is also debatable whether the Declaration has any positive effects on work and labor standards. Two basic problems with the Declaration seem to arise. Firstly, the preamble to the Declaration on Human Rights adopted by the United Nations in 1948 declares that all human beings are born with equal and inalienable rights and therefore the mere division and classification into fundamental or essential standards implies that standards which are "less fundamental" or "less essential" also exist. What is the logic behind the claim that the elimination of discrimination is more important than the right to have social insurance, safe working conditions, maternity leave, etc? What does the guarantee of the freedom of association represent without a range of socio-economic rights to put this freedom into practice?[19] Secondly, the Declaration on the Fundamental Principles and Rights at Work considerably neglects actual workers' economic and social rights and mainly deals with negative aspects of some rights, for instance, individuals, groups and states are requested to "prohibit" discrimination, "abolish" forced labor and "eliminate" child labor.

4. THE CONCEPT OF STRIKE AND SOCIAL DIALOGUE IN SERBIAN LEGISLATION

If the right to strike is viewed in terms of its role in collective bargaining it is often seen as a collective right to be exercised by trade unions.[20]This means that the presence of trade unions is generally considered a prerequisite for labour strikes, without organization people lack the ability for collective action to address their grievances.[21] Most empirical studies on this subject are based on observation at a national level. Over the last few decades, however,

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[18] B. Urdarević, *Definisanje prava na štrajk u međunarodnom i evropskom pravu*, Pravna riječ, Banja Luka, 2004, 554.

[19] B. Urdarević, *Creation and Development of International Labour Standards*, New Perspectives of South East European Private Law, Skopje, 2012, 139-150.

[20] T. Novitz, *op. cit*, 275.

[21] D. Snyder, *Institutional setting and industrial conflict: Comparative analyses of France, Italy and United States*, America Sociological Review, 40(3)/1975, 265.

collective bargaining has decentralized in many countries, and has shifted away from national bargaining toward the level of individual firms and multinational corporations.[22]

Union membership rate is sometimes considered a key indicator for the "capacity to strike".[23] That's why, usually, the decision to strike is predominantly made by unions, and that in principle only union members will strike. Therefore, the capacity to strike should increase as union membership among workers increases.[24]

As a consequence of an insufficient level of development of collective bargaining and the lack of a harmonized jurisprudence, laws constitute the principle way of regulating the right to strike and the main source of this right. The main legal document which regulates the right to strike in Serbia is the Law on Strike (1996). Article 1 of the Law on Strike defines strike as a "disruption of work process, organized by employees in order to protect their professional and economic interests based on employment". Such a definition has its consequences. Firstly, the types of professional interests of employees which can lead to a strike are not specified. Secondly, the extent of violation is determined in the broadest possible way, so that even a strike organized due to a one-day delay in payment of wages can be considered legal. Third and probably most the significant issue, based on the Constitution of Republic of Serbia, deals with the concept of strike as the right of employees. According to Art. 3 of the Law on Strike, the majority of employees and trade unions are entitled to strike or to organize warning strikes against the employer, whereas a strike within an industry or occupation, as well as the general strike, are exclusive rights of trade unions. Such law provisions allow ample rights to organize strike, placing Serbia in the group of countries which allow both employees and trade unions to organize strikes.[25]

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[22] B. Urdarević, *Međunarodni okvirni sporazumi kao oblik socijalnog dijaloga na globalnom nivou*, Pravni život, 10/2011, 491.

[23] B. Kaufman, *The determinants of strikes in the United States, 1900-1977*, Industrial and Labour relations Review, No. 35, 1982, 475.

[24] G. Jansen, *Effects of Union Organization on Strike Incidence in EU Companies*, International Labour Review, No. 67(1), 2014, 62.

[25] The latest draft of the Law on Strike, scheduled for parliamentary proceedings in late June 2014, contains no conceptual changes, defining strike more precisely. In fact, Art. 2 of the Draft Law on Strike, defines strike as employees' work stoppage aimed at exercising and protection of their economic and social interests, workers' rights and the rights based on employment.

Although such broad legal freedom of employees to organize a strike seems like a privilege of the employees, in practice it leads to a culmination of senseless strikes, with no likelihood of success. Because of that, it is essential to proceed with a certain amount of caution in this area. This may imply that trade unions and other collectivities of workers should not be able to call on strike at any moment, at least before the parties have given a chance to use means of conciliation to come to an agreement. In some European countries, a doctrine of ultimum remedium has been well developed, which implies that trade unions involved in collective bargaining, cannot call on strike, unless they are convinced that there I no way they can come to an agreement with the employer[26].

Unfortunately, there is no information on the number of strikes in Serbia, mainly because no state agency or ministry keeps such records. Some information is available on web sites of representative trade unions, keeping only data on strikes organized by them. Therefore, records on strikes organized by the majority of employees working for the same employer who are not members of the trade union indeed are a contentious issue.

The key question which is still very relevant, and solutions vary from state to state, is whether only trade unions, only employees or both have the right to strike.[27]

If we take a brief look at the revised European Social Charter, particularly Part II Article 6 Item 4, we will notice that both workers and employers have a guaranteed right to take collective action in case of a conflict of interests, including the right to strike, in compliance with the obligations which may arise from previously concluded collective contracts.[28] This further implies that the right to strike must be understood as an individual right of all workers, and not only of those who are members of a trade union. That is exactly why the European Committee for Social Rights has taken a clear standpoint in its conclusion that every state which limits the right to strike by allowing only trade unions to organize a strike is actually in breach of the European Social Charter.[29]

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[26] L. Betten, *International Labour Law*, Kluwer, 1993, 115.

[27] O. Kahn-Freund., *The Right to Strike: Its Scope and Limitations,* Strasbourg, Council of Europe, 1974, 5.

[28]http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/escrbooklet/SerbCyrillic.pdf, last visited 21.09.2014.

[29] ECSR, Conclusions I, 185; Conclusions II, 28-9; Conclusions IV, 48-51; Conclusions VIII, 96, Conclusions XIII-1, 155-6; Conclusions XIV-1, 301.

Despite the significant influence of the EU community acquis on the national legislation, it is still not possible to say that Serbian labor legislation is "harmonized" with the EU regulations, but rather that it is a case of a lesser or greater extent of initial harmonization.[30] The same goes for legislation governing the right to strike. Transition in Serbia is remarkably conflictive. The conflictive nature of the transition processes in Serbia is manifested, by the increased number of conflicts in the area of work, usually taking more radical forms – strikes, protests, demonstrations organized opposite state or local authorities' buildings, road and railroad blockades, self-injuries etc. At the same time, the level of effectiveness of industrial and social conflicts is obviously decreasing. Inefficiency in resolving disputes by the use of violence is a warning factor to all stakeholders – employers, trade unions and the political establishment, pointing to the very high price paid by everyone, reminding them that their relations can not be built on the increasing level of conflict, but rather on mechanisms of peaceful dispute settlement, based on the idea of social peace.[31]

The ability to exercise the right to strike within a legal system depends largely on the established level of social dialogue. A system with a developed and institutionalized social dialogue is a filter for resolving a large number of working conflicts which would otherwise lead to strike. On the other hand, countries with an unenviable level of social dialogue face the problem of a great number of strikes and other forms of workers' protests, largely inefficient and poorly organized, which more often further deepen the initial problems rather than resolve them, and very often create new ones. The low level of social dialogue increases the number of strikes, which further disavows social dialogue, thus creating a vicious circle of industrial conflicts which is difficult to get out of.

Social dialogue, as a principle, as a new and completely different method of regulating relations in the sphere of work, has become a vital characteristic of social conditions and relations on both global and national levels. It can be defined as a sum of social relations, socio-economic rights and institutional forms.[32] The fundamental goals of social dialogue are formulated and

[30] S. Jašarević, *Harmonizacija prava i prakse u oblasti participacije zaposlenih - Srbija i EU,* Zbornik radova Pravnog fakulteta Novi Sad, 3/2011, 380.

[31] B. Urdarević, *Osnovni principi mirnog rešavanja radnih sporova*, u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope (ur. S. Bejatović), knj. 3, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2008, 47.

[32] P. Jovanović, *Građa za kolektivno radno pravo*, Časopis za radno i socijalno pravo, 2009, 143.

concertized mainly through the process of collective bargaining, by harmonizing the standpoints of social partners and by concluding collective contracts. The purpose of collective bargaining is to provide protection of social partners' interests in a market economy environment and to consequently diminish the probability of occurrence of conflict situations with adverse effect on economic and social trends as a whole.

The transition process in Serbia was to a great extent different to the same process in other countries of the same social setup. It is well known that the transition in Serbia came rather late, especially in comparison with the achieved level of transition in other former socialist countries. The delay of the reform processes of almost one decade has inevitably influenced the profile, the pace and the results of transition in Serbia. Although Serbia had a better starting position because of a more flexible economy, higher living standard and a certain level of individual rights and freedoms, a number of factors has contributed to Serbia's present-day position behind other countries in transition.

Finally, we can conclude that social dialogue refers to all types of bargaining, consultations and information exchange among the representatives of employers, workers and the government on social or economic policy issues relating to their common interest.[33] The whole point of the social dialogue is to balance the effects of market economy and create an environment for citizens' life and work.[34] It is, therefore, a powerful tool which, if efficiently used, can enable a society to overcome countless problems and build social cohesion. During the periods of economic changes and uncertainties, the social dialogue can play a key role in preserving the existing and creating new work places, which is an economic and social priority.[35]

5. THE RIGHT TO STRIKE IN THE PRACTICE OF SERBIAN COURTS

The legal system developed in the Republic of Serbia belongs to the European continental category. Most of the legally relevant relations are

[33] R. Delarue, *Role of social partners in promoting sustainable development , inclusive growth an development,* ILO, Brussels, 2012, 5.

[34] D. Stajić, *Privatizacija u Srbiji između neoliberalizma i socijalne države*, Politička revija, br. 3, 2008, 971.

[35] A. Cardoso, *Industrial relations, social dialogue and employment in Argentina, Brazil and Mexico,* ILO Employment and Strategy Papers, No. 7, Geneva, 2004, 3.

regulated by the norms passed by legislative and executive bodies in form of laws and other general regulations. In line with the principle of division of powers established by the constitution, courts are obliged to consistently apply the general rules. Judges are expected to apply the law, and not to create it. In other words, case law is not considered a formal source of law. However, in reality, courts have always had a much more significant role in the process of shaping the legal system. It ranged from very broad interpretations of legal rules to creating individual rules which filled the gaps in the law, even to the point of creating the general legal rules.[36]

Regarding the exercise of the right to strike, the Constitutional Court of Serbia has the most significant role. This court has, inter alia, ruled on cases dealing with restricting the right to strike to certain professional groups. One such case was the Bylaw on Strike of Police Officers,[37] which envisaged the minimum of working process to be provided by at least 90% police officers employed in the organizational unit in which the work stoppage is organized, lasting 30 minutes at maximum. The request to appraise whether the Bylaw on Strike of Police Officers is in compliance with the Constitution and the law (constitutionality and legality) was brought forward to the Constitutional court by the Independent Police Trade Union from Belgrade, the Branch Trade Union of a Administration, Judiciary and Police Employees Nezavisnost and the Police Trade Union of Serbia. When evaluating the constitutionality and legality of the Bylaw, the Constitutional Court determined that the Government has transgressed its constitutional and legal powers by stipulating relations which are under the purview of legislative authority. The explanatory note of the Decision on the Bylaw's Noncompliance with the Constitution or the Law refers to the Art. 61 of the Constitution of Serbia, which reads that it „guarantees the employees the right to strike, in compliance with the law and collective contracts". The Constitution stipulates that the right to strike can be restricted only by law, depending on the nature and type of activity; therefore the bylaw, as a regulation governing the implementation of the law, can not regulate the conditions for exercising the right to strike. By the provision of Art. 135 of the Law on Police, which stipulates the possibility of exercising this right and its limitations, the Government is not permitted to further regulate the relations in this field. Considering these facts, the Constitutional Court found that the

[36] D. Nikolić, *Elementi sudskog prava u pravnom sistemu Srbije i EU*, Zbornik Matice srpske za društvene nauke, Novi Sad, br. 126, 2009, 7.

[37] Bylaw on Strike of Police Officers (Uredba o štrajku policijskih službenika), *Official Gazette of the Republic of Serbia* (*Službeni glasnik RS*), No. 71/07.

Government, by enacting the challenged Bylaw, had overstepped its constitutional and legal mandate by regulating the relations which are under the purview of the legislative authority. The Constitutional Court also based this standpoint on the provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which allows signatory states to legitimately restrict the right to freedom of gathering and association to certain categories of employees, such as army officers, police officers and civil servants. However, restrictions are legal only if certain conditions are met, the first one being that the restrictions are prescribed by law.

Nevertheless, the most significant decision of the Constitutional Court of Serbia is the allowance of civil servants' strike. The Constitutional Court evaluated the constitutionality of Article 18 Item 1 of the Law on Strike, according to which the civil servants, after being proved to have either organized a strike or participated in one, shall have their employment contract terminated. In the proceedings, the Constitutional Court has found that the Law on Strike was passed based on the then valid Constitution of the Federal Republic of Yugoslavia, which envisaged that: employees have the right to strike in order to protect their professional and economic interests, in compliance with federal laws; that the right to strike can be limited by provisions of federal law, in cases when the nature of activity or public interest so requests; that the employees in public administration have no right to strike. Since the effectiveness of the Constitutional Charter of Serbia and Montenegro State Union,[38] this law continued to be applied as a republic level law, based on Article 64 Item 2 of the Constitutional Charter. The Constitutional Court concluded that the Constitution of the Republic of Serbia (1990), upon which the assessment of constitutionality of formerly adopted federal laws which continued to be applied as the Republic laws was based, ceased to have effect as of 8th November 2006, when the new Constitution of the Republic of Serbia came into force. Due to the fact that the term to harmonize the Republic laws with the Constitution of the Republic of Serbia of 2006 has expired, the constitutionality of Article 18 Item 1 of the Law on Strike is being assessed based on the Constitution from 2006. The valid Constitution grants the right to strike to all employees, including police officers, civil servants and public appointees. This right can be restricted only by law. The Law on Civil Servants, the particular law which regulates rights

[38] Constitutional Charter of Serbia and Montenegro State Union (Ustavna povelja Državne zajednice Srbija i Crna Gora), *Official Gazette of the Republic of Serbia and Montenegro (Službeni list SCG*, No. 1/03 and 26/05.

and duties of civil servants as well as some rights of public appointees based on employment, contains no provisions on right to strike for these categories. However, according to the provisions of the Article 4 of the Law on Civil Servants, general regulations on labor and collective contracts for civil servants and appointees apply if this law or another particular law does not regulate rights and duties of civil servants, unless stipulated otherwise by the law. In relation to this, the Constitutional Court has found that the Law on Labor, as the general labor regulation, has no provisions on the employees' right to strike. Nevertheless, Article 35 Item 1 of the Special Collective Agreement for State Administration stipulates that civil servants may organize a strike or a warning strike, under the conditions and in the manner regulated by law. From the above, it can be concluded that civil servants and appointees have the right to go on a strike which must be organized in compliance with the Law on Strike. This example clearly shows how necessary it is to pass a new Law on Strike as soon as possible, since certain provisions of the still applicable law are not in compliance with either the Constitution of the Republic of Serbia or the ratified international treaties. Responsibility for this lies both with the state and with social partners, who have not succeeded in establishing guidelines for social dialogue in Serbia.

6. CONCLUSION

The current situation in the industrial relations in Serbia is characterized by inconsistency between the theoretical basis and the exercise of the right to strike in practice. Employees' and employers' associations can hardly take care of themselves, let alone their members' interests. The Socio-Economic Council exists only formally because in practice its meetings are rare, and the main decisions relevant for the status of employees (and employers) are made without the Council's influence. The Authority for Safety and Protection at Work, as well as the Republic Agency for Peaceful Settlement of Work Disputes are both in their initial phase of work and they operate without sufficient support from the state. The Labor Inspectorate is constantly struggling with the ever growing responsibilities on one hand and the decrease in staff and funding on the other. All this means that the right to strike in Serbia has no adequate base for further development.

The legal system of the Republic of Serbia falls into the category of legal systems with a particular law regulating the right to strike. This law has a number of weaknesses. The definition of a strike is imprecise, along with an insufficient number of legal guidelines regarding legal requests of strikers. There are also plenty of illogical decisions regarding the required conditions

to fulfill the right to strike – all leading to the conclusion that the Law on Strike should have been changed a long time ago.

Undoubtedly, the biggest deficiency of the current Law on Strike are considerable restrictions relating to the stipulated obligation to preserve the minimum working process. Firstly, the list of activities where this restriction applies is too long. Even less logical are the provisions pertaining to the manner of determining the minimum of working process since they give almost all power to the employer or the founder. All these provisions need to conform with the needs in Serbia, as well as the ILO principles on exercising the right to strike. For many years now, the process of drafting the new Law on Strike is underway in Serbia, which is a great opportunity to place Serbia, at least in terms of legal regulations, among the countries where the rights and interests of the working class can be efficiently protected by organizing a strike or by threat of strike. Of course, passing a new law with better solutions would be a great contribution to the perspective for the right to strike regulation in Serbia. However, without the strengthening of social dialogue, with strong and independent trade unions and employers' associations being a prerequisite, without a stronger Socio-Economic Council and collective bargaining practice, without improved judicial and alternative methods of work dispute resolution – which ought to be the final filter before a strike is organized, the right to strike in Serbia remains like a house without the foundations or the roof.

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PART NINE
PUBLIC FINANCE AND FOREIGN INVESTMENT

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CONTEMPORARY METHODS OF BUDGET PLANNING**

Abstract

The quality methods of budget planning are an essential part of contemporary concepts on which should be based budget process. The question of innovation of these methods is, therefore, quite actual and it is located in the focus of the author of the study. Improving the processes to increase efficiency and rationality of budgetary decisions is a permanent requirement that arising from the need to seriously address the problem in solving excessive public spending, as the main generator of crises. At the same time, the states should reduce the space for bringing short-term and isolated decisions on budgetary funds spending, without considering the real effects of their use. It is indisputable that the public sector should be more effective and in that regard, in most developed budgetary systems, is gradually improved a method of budget planning. Line-item (incremental) budgeting, as a simpler, more established and a routine method of allocation and use of budgetary funds is withheld in most budget systems. However, are visible shifts in the direction of the introduction of programme budgeting and performance budgeting, as advanced methods of budget planning.

Key words: *public finance, budget planning, line-item (incremental) budgeting, programme budgeting, performance budgeting.*

1. INTRODUCTION

The public finances in significant number of states, in the first decades of this century, are faced with numerous problems. Solving these issues inevitably requires taking a series of actions and measures, which should contribute to the conduct of a responsible fiscal policy, and improve fiscal discipline, or consolidation in the field of public spending. In this context, certain changes are taking part in the budgetary procedure relating to the budget planning. The methods of budget planning are gradually promoted

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in order to achieve the rationalisation of public expenditures, limiting the size of the public sector and the redefinition of relations in the consumption of this sector. The belief that the funds from the budget should be distributed (allocated) and use it adequately, in the current budgetary practice, is quite widespread. The public services (public goods) should provide in a cost effective manner while taking into account their quality. This is one of the fundamental prerequisites to achieve the planned targets of budgetary policies, prevent further reduction of social welfare, as well as the depletion of scarce economic resources.

The large public expenditures are the main indicator of "diseases" of public finances. Bringing public expenditures to a level that the economy can withstand it is necessary to make public finances went through its permanent healing. The sustainable public finances, low public debt and small budget deficit have a decisive influence on macroeconomic stability and thus and in the inflow of capital. Therefore, the development of budget planning and proper management of public expenditure is essential. Namely, to prevent excessive public expenditures and its inadequate structure should find one of the modalities of achieving a positive effect on the performance and dynamics of economic growth. Due to the existence of different social, cultural and geographical conditions, in each particular country, it is possible that the scope and intensity of this effect are not identical.

The changes in the area of the budget planning method are the subject of analysis in this paper. The objective is to show how much they, in today's states, actually (and not merely verbally) reflect a different approach to making decisions, which are concerning the direction and spending of public funds. The structure of the paper follows such a defined objective. After the introduction, it is pointing out to the line-item (incremental) budgeting as the classic method of budget planning. In continuation of this paper, the important aspects of programme budgeting and performance budgeting are considered. The expectation is that these advanced methods of budget planning are gradually replacing the line-item budgeting. Whether and to what extent these expectations are realistic? The indisputable answer to this question will unquestionably be able to provide only the years ahead.

2. LINE-ITEM (INCREMENTAL) BUDGETING

Line-item budgeting is a representative of traditional public budgeting. It is the lowest and least-developed method of budget planning and preparation of the budget in which specifies how much the funds will be directed to each individual item spending of the budget user. The

expenditures are classified based on specific categories (expenditures for employees, material expenditures, financial expenditures, etc.) and within each category of expenditures are further specified items of expenditures (expenditures for salaries, expenditures for business trips, expenditures for telephone services, etc.). Attention is focused on the total amount of funds respectively for expenditures directed towards the economic classification of public funds spending. It should be noted that the line-item incremental budgeting which means that each budget item changes to a pre-determined percentage, which is based on the expected growth of the economy. With an individual budget, the user is guaranteed to last year's allocation of funds, as well as an incremental boost to be added to last year's amount. In the line-item budget many benefits from the budget are destined legally, fixed and independent of the procedures through which the components of public spending are allocated. Such practice of routeing funds from the budget of certain entities is called by some theoretician non-decisions,[2] whereas, from the standpoint of the budget process, they were simply predetermined and strictly exogenous.[1] In fact, observing the budget process with incremental standpoint can be summed up in the best way by saying "the biggest factor that affects the size and content of this year's budget is the last year's budget."[2]

The advantage of line-item budgeting application is the simplicity of application. In line-item budget is known how the budget funds are spent, but that do not reveal much information about the actual provision of public goods and services (neither quantitative nor qualitative) by budget funds users, i.e. the public policy goals that will be achieved through public expenditures. Line-item budgeting distinguished preparations of the budget on the basis of inputs, i.e. passive management of public expenditures. As it pointed out, the process of mobilisation and allocation of funds from the budget is not based on the identification of performances and determining their relationship with the invested funds and engaged resources involved, but simply on the status quo of the past.[3] Results in the public sector are assumed and their realizations is not in question and, therefore, cannot measure. This creates a space for potentially irrational, non-priority and non-

[1] J. Von Hagen, *Budgeting Institutions for Better Fiscal Performance*, in: Budgeting and Budgetary Institutions (ed. A. Shah), The International Bank for Reconstruction and Development / The World Bank, Washington, 2007, 30.

[2] A. Wildavsky, *The Politics of the Budgetary Process*, Boston, 1964, 13.

[3] Lj. Madžar, *Mehanizmi za mobilizaciju i alternative alokacije javnih sredstava*, Studija br. 1, Beograd, 2008, 22.

transparent public budgeting. Monitoring the realizations of strategic activities, programmes and projects of public authorities, as well as progress in some parts of the public sector is quite difficult. Just a short time period of the budget duration does not allow for consideration of long-term effects of the spending of public money. Therefore, it is possible that the distribution of budget funds is not always based on real and justified needs of budget users.[4]

3. PROGRAMME BUDGETING

The transition from line-item to programme budgeting is necessary so that the public expenditures of contemporary states, to a considerable extent, put in the function of the adopted programme (priorities) of the Government. The introduction of programme structure creates the presumption that information about the activities of budget users are systematised in a uniform manner. In other words, by the disaggregation of the functional classification of public expenditures with individual programmes, a line-item budget becomes programming.

Programme budgeting as a method of budget planning allows active management of public expenditures, in order to achieve better effects and objectives of the programme, which are realized in the public sector. In this way, it pursues a ositive impact on increasing accountability of public sector entities, the legality and appropriateness of public expenditure, as well as the transparency of public budgeting. With successful management of public expenditures belong to the essence of the problem of public finances and adequately responds to the louder and more frequent requirements that public opinion modalities of spending the taxpayers' money should be clearly presented.[5]

Thus, the specific programmes that, with a certain amount of money, financed from the budget is an important feature of the programme budgeting. Between the budget, users creates a kind of competition for funds, which can serve as guarantees that, through quality programmes, find the most appropriate way to solve the problem manifested in different segments of the public sector. Therefore the budget requests of relevant ministries to

[4] M. Dimitrijević, *Kompleksnost promena u domenu upravljanja javnim rashodima,* Zbornik radova Pravnog fakulteta u Nišu, 72, 2016, 114.

[5] M. Dimitrijević, *Osnove programskog budžetiranja,* u: Uskladjivanje prava Srbije sa pravom EU (ur. M. Lazić), knjiga treća, Pravni fakultet Univerziteta u Nišu, Centar za publikacije, Niš, 2016, 137.

the Ministry of Finance accompanied by information on the effects of the programme of the ministry and, when possible, with the expected future performances.

Better quality prioritisation of expenditures is also an important characteristic of programme budgeting. Decision-makers on a budget are possible to perform comparisons of spending and benefits of alternative programmes, i.e. which reliably determined priorities in public spending. The aforementioned is especially true in times of economic crisis, characterised by a lack of funds and inability to complete answer to all the requests, which are presented by budget users. A prioritisation of spending works the best when it is made from a medium-term perspective. The medium-term budget framework covers the main issues relating to the determination of basic policies, planning recent policies and programmes, as well as linking the annual budget with the problems of multi-year budgeting. Prolongation of the budget horizon from one to the next few years it is intended to achieve greater stability and predictability of fiscal policies and more efficient spending of public funds in the medium term. Therefore, it is a great advantage if any, during deciding how to allocate budgetary funds among programmes, information on the spending of these programmes that can be expected not only in the next financial year but also in the next few years.[6]

The general requirement is that programme budgeting is credible, based on appropriate government policies, predictable, transparent, subject to control.[7] The literature emphasises the special need for good formulating the name of the programme. The name should be short and informative, and that clearly indicates what the programme does. The precise definition of the overall programme objective is also important for the reasons of clarity definitions of programmes and the creation of a framework for the performance of indicators and targets of programme intended performance. The programme objectives clarify the outcome of the programme as whole aims to achieve, as well as the other features of the programme (e.g. user's target group).[8]

The planning, programming and budgeting system (PPB system) is applied at the end of the 1960s, in several countries of the market economy; it

[6] *Ibid*., 142.

[7] PEFA Secretariat, Public Financial Management: Performance Measurement Framework, World Bank, Washington DC, 2005, 2.

[8] M. Robinson, *Performance-based Budgeting*, Clear Regional Centres for Learning on Evaluation and Results, 2011, 56.

is an early form of programme budgeting on the road to performance budgeting. Understood as an advanced instrument management in public administration, it integrates the objectives to be achieved, plans that these goals can be achieved and the procedure of control that should demonstrate the success of the planned objectives. In this sense, the system is designed to improve the quality of decision-making within the budget. In order of his superiors benefits should be stated a long-term planning, medium-term programming and short-term budgeting.[9] Aforementioned is achieved through three separate stages. In the planning stage is determined a list of needs and priorities and define the objectives to be achieved over a multi-year period. Defining activities and their grouping into programmes (projects) which should be implemented, it makes programming stage. Stage of budgeting is operative since it integrates the available financial funds with the objectives and activities in order to find the best solutions. In the stage of the budgeting, available financial funds are allocated in accordance with the defined programmes. In principle, the purpose of existence of PPB is reflected by undertaking the following activities: determining the true state objectives; adjustment of state activities to these goals by creating appropriate programmes; providing information on how to use the resources, whether and to what extent set goals to be achieved; development of alternative solutions and examination which of them may be the most effective (cost-benefit analysis); systematic examination of plans and programmes with regard to new developments, analysis and others.[10]

The successful implementation of programme budgeting, in contemporary countries, is possible under conditions of the highly developed budget system, the appropriate technical and administrative capacity of budget users, modernised information system, which is done in a quality way of monitoring, managing and reporting on performance. It is also necessary to improve the management and operation of the control units of the organisational structure of public authorities, organise continuous education of staff officers and their managers, and improve the methodology of strategic and operational planning, precisely defined responsibilities and accountability for the implementation of the programme.[11]

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[9] M. Matejić, *Šta se promenilo u budžetskom sistemu i budžetu*, Zbornik radova Pravnog fakulteta u Nišu, 16, 1976, 55.

[10] D. Brümmerhoff, *Javne financije,* Zagreb, 2000, 148.

[11] S. Kristić, *Programski budžet – napredni korak u razvoju budžetskog sistema Srbije,* Makroekonomske analize i trendovi, br. 215, 2015, 36.

Often, in practice, programme budgeting equates with performance budgeting.[12] This, however, is not quite true. Programme budgeting is a precursor, i.e. base for planning performance budgeting. More broadly, strengthening the budget process should be organized within the hierarchical logical sequence of activities – setting up an efficient budget process annually, and its respect in the course of a calendar year, a gradual transition to medium-term budgets in order to increase fiscal predictability, development of programme structure of the budget and, in the end, the establishment of performance budgeting. If any of the aforementioned activities is bypassed, there is a great risk that will be absent and the desired outcomes.[13]

The application of programme budgeting is possible when there is some uncertainty between applied budgeting (finance) and performance (the results) of specific programme. In other words, programme budgeting on a "looser" way in relation to the Performance Budgeting, linking funding with results, i.e. it does not have to be strictly based on performance. However, information on the past or anticipated future performance of individual programmes, in addition to other factors and data, take into account when deciding whether and how many funds (money) programmes will be funded.[14]

Overall, programme budgeting and performance budgeting is the manifestation of a different approach in the public expenditure management. This approach is directly formed under the influence of the ideas of New Public Management, which aim is to improve the promotion and performance of the public sector. The principle of value for money should be incorporated into the traditional system of public expenditures with the intention of achieving their reduction. This is especially true in times of crisis when the public sector should be as little tax pressure servicing the public needs. A constant target of public sector management and it is the invention of possibilities to limit public expenditures, respectively with spending allocated budget funds to achieve better performances.[15]

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[12] R. Allen, D. Tommasi, M*anaging Public Expenditure – A Reference Book for Transition Countries,* Paris, 2001, 132.

[13] Fiskalni savet, Budžetski proces u Republici Srbiji: Nedostaci i preporuke, Beograd, 2014, 2.

[14] M. Dimitrijević, *Osnove programskog budžetiranja*, 139.

[15] M. Dimitrijević, *Kompleksnost promena u domenu...*,110-111.

4. PERFORMANCE BUDGETING

Performance budgeting emphasis on establishing links between allocated funds to budget users and their results (outputs), i.e. the rationality of public spending. The main motive for developing this method in planning the budget shall be the strengthening of budget analysis and providing a kind of support that the allocation of funds between different departments take place in a way that makes it possible to achieve concrete results with as less use of public resources. Within the frame of performance, budgeting has estimated the efficiency, economy and effectiveness of taken actions (activities) beneficiaries of budget funds and, at the same time, narrowing the scope of discretionary political influences on the distribution of funds from the budget.[16]

Focus on performances, i.e. the effects of provided public services (carrying out of state activities) includes obtaining performance information and their use in the budgeting process. More specifically, performance measurement should improve the quality of governance and its development has three important stages: the precise definition of the method for measuring "performance"; overcoming numerous technical issues in the design and use of performance indicators; committing performance information relevant to the decision on the allocation of budget funds.[17] Aforementioned has status quite visible initiatives that extending, especially in members of OECD countries.[18]

Timely and reliable information of performance, relevant for budget planning, controlling public expenditures and budget accounting recording and reporting, it is possible to ensure the application of the improved information system for public finance management. However, this does not mean that, in practice, performance measurement and collection of the necessary information are not facing difficulties. One of the main to be seen in the absence of motives to minimise expenses to the overall effect of public spending was socially optimal in the given circumstances. In addition, it is necessary to increase the degree of decentralisation of the budget process and the performance of individual budget users should be evaluated based on relevant performance indicators. A number of challenges usually follow the

[16] M. Dimitrijević, *Noviteti u savremenom javnom budžetiranju*, Pravna riječ, br. 46, 2016, 264.
[17] J. Diamond, *Budget System Reform in Emerging Economies: The Challenges and the Reform Agenda,* IMF Occasional Paper, No 245, Washington, 2006, 17.
[18] T. Curristine, Z. Lonti, I. Joumard, *Improving Public Sector Efficiency: Challenges and Opportunities*, OECD Journal on Budgeting, No. 1, 2007, 2.

determination of these indicators. In addition, the levels of fulfilment of public policy (results) are not always properly measured due to the existing conceptual and practical reasons.[19]

Performance indicators are specific to each department, which is financed from the budget. They should be unambiguous, measurable, comparable, and suitable for control. In addition, the cost of collecting performance indicators must not be greater than the utility of the information that they carry. In other words, the performance indicators should be cost-effective.

Designing a developed system of quality performance indicators is a multi-phase and time-consuming process. In fact, it can take years (decades) which do not need to be a cause for the abandonment of this process. The introduction of a simpler form of performance budgeting, with a smaller number of reliable performance indicators, which will be implemented properly, should be the initial activity. In fact, adequate formulation of a small and highly selective set of performance indicators in certain parts of the public sector (e.g., health, education, defence, etc.) can improve the budgetary procedure and decisions concerning the determination of priorities in public spending. Performance indicators are unquestionably complement of budget reporting, which, at the same time, increases the credibility of the budget preparation.

It is common to divide performance indicators: input indicators; indicators of output; outcome indicators.[20]

Indicators of input (resource) are concerning the use of staff, equipment, materials and others. Inputs are usually expressed amount of expenditure and staff time. Input indicators are focused on the economy with which resources are used for the delivery of outputs and outcomes.

Indicators of output are related to the provided public goods and public services and are used for evaluating effectiveness.

Outcome indicators are corresponding to the final purpose and objectives of the public policy. These indicators are regarding the effectiveness of budgetary activities and taken budgetary measures.

In summary, all of these cited types of indicators indicate what has been achieved with spent budget funds, whether the outputs and outcomes are good, or whether the perpetrators of the budget act responsibly in meeting the objectives of budgetary policy.

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[19] M. Andjelković, M. Dimitrijević, *Fiskalna konsolidacija kao imperativ upravljanja javnim finansijama u Republici Srbiji,* Finansije, 1-6/2015, 44.

[20] R. Allen, D. Tommasi, *Managing Public Expenditure – A Reference Book for Transition Countries,* 360-361.

In the budgetary systems of developed countries, there is no generally accepted form of performance budgeting. Bearing in mind the fact that information on the performances can be used differently and affect the proposed budget funds allocation the following are different forms of performance budgeting: presentational performance budgeting; performance-informed budgeting; performance-based budgeting.[21]

Presentational performance budgeting realises the improvement of budget planning with a simple presentation of performance information on the budget and other related documents. Information on the objectives achieved (performances) do not affect the rules of allocation of funds, or in the process of deciding on the budget. So there is no strong link between performance information and funding (budgeting).[22] The budget is still showing in individual items in spending budget of user and performance information is provided. However, the possible impact of this information on a real distributed budget funds is not enounced.

Performance informed budgeting is a more advanced form of performance budgeting with respect to indirectly linking the allocation of funds from the past or future expected performances. Informations on the performances, along with many other informations are included in the process of making budget decisions. It is characteristic that, in this form of performance budgeting, information on the performances does not directly affect the actual allocation of funds, i.e. do not have a formally established weight in the decision process. However, they in this form of performance budgeting, and compared to the previous form, still can achieve a better effect in the domain of more responsible use of public money.[23]

Performance-based budgeting means that the current allocation of funds from the budget is based solely on the performances achieved in the past. Among information on the performances and financing, there is a strong (direct) connection. This form of performance budgeting is used only in certain segments of the public sector in some countries. So, it is nowhere applied in the budget system as a whole. The reason for this should be sought in large information requirements and complex management systems

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[21] A. Shah, C. Shen, *A Primer on Performance Budgeting*, in: Budgeting and Budgetary Institutions (ed. A. Shah), The International Bank for Reconstruction and Development / The World Bank, Washington, 2007, 153.

[22] OECD, Performance Budgeting in OECD Countries, Paris, 2007, 21.

[23] D. Vujović, *Studija o delotvornom korišćenju indikatora performansi u procesu izrade budžeta i planova u javnom sektoru: Kreiranje indikatora performansi u cilju unapredjenja učinaka programskih budžeta u Srbiji,* USAID projekat za bolje uslove poslovanja, Beograd, 2012, 53.

that are necessary for this purpose. Apparently, previous experience in the implementation of performance budgeting confirms the accuracy of the statement that this is an old idea with unsatisfactory past and uncertain future.[24]

5. CONCLUSION

The use of funds from the budget should bring benefits to the whole society in a way to ensure the speediest possible economic, social, political and general cultural progress and prosperity of the country. The management of public money, i.e. public finance is one of the most important policies at the national level. Therefore, the selection of an appropriate approach in this area is extremely important since it achieves short-, medium- and long-term effects on all segments of the public sector and their development.

The continuous increase in public expenditures imposes the need, that in the current circumstances, must be approached on a different way of budget planning. As the traditional method of budget planning is proved to be the limiting factor in efficient spending of public funds and prudential management of public finances, the solution of the problem is trying to find in the application of contemporary methods of budget planning. Line-item budgeting should gradually change with the programme budgeting and performance budgeting. The above mentioned is a presumption of good fiscal management, transparent use of public resources and a legitimacy of public spending.

Whether it will be successful and how fast contemporary methods of budget planning to be implemented, depends primarily on the existence of a political demand for better results in the public sector. A consistent application of advanced methods of budget planning is a complex task, the results of which are being gradually reflected in practice. It is therefore not surprising that the current innovations in public budgeting is reduced, primarily to the partial attempts in measuring and recording operational in fiscal terms move from costs (input) to the results. This include the procedures and their mandatory compliance with legal regulations on programmes and their more or less recognisable performances in reality.

[24] A. Schick, *The Performing State: Reflection on an Idea Whose Time Has Come but Whose Implementation Has Not,* OECD Journal Budgeting, No. 2, 2003, 100.

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INCENTIVES TO ATTRACT FOREIGN DIRECT INVESTMENT

Abstract

The aim of this paper is to present and analyze different types of incentives that countries use to attract foreign direct investments. The aim of attracting foreign direct investments is to achieve a higher level of economic development and social welfare. Investment incentives are used by developing countries as well as developed ones. There are various types of incentives such as fiscal, financial and regulatory incentives. The author attempts to determine the justification for the use of incentives, but also attempts to state the reasons why their use is not justifiable. The paper also points out the situation in which investments are profitable only until the incentives last, meaning that incentives themselves can be very expensive and inefficient for the host country. Approval for incentives to attract FDI is usually motivated by the desire to achieve spillover effects in the countries receiving the investment, such as transfer of new technologies, know-how, increase of competitiveness, etc. Those investments that are expected to have the strongest spillover effects are therefore the ones that need to be attracted.

The rules of the law of the Republic of Serbia which regulate a variety of incentives to attract investments are also the subject of this analysis.

The methodological approach for this research includes using different methods such as the comparative method, the normative-dogmatic method as well as the analytic-synthetic approach.

Key words: *incentives, foreign direct investments, grants.*

1. INTRODUCTION

Foreign direct investment[1] is of particular value to the national economy, especially the economies of developing countries that do not have enough of

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[1] There is a presumption in literature that foreign capital, on average, has a positive effect on domestic investments, but not on the national savings. However, regardless of the increasing integration of financial markets and based on the assumptions about the low mobility of capital between member countries of the OECD, the conclusion is that there is

their own capital to finance economic development. A built institutional system, a real exchange rate, low inflation, legal security, or in other words, a stable legal system that protects property and encourages savings and investments are particularly important for foreign direct investments.

There are three forms of foreign capital inflow into the country. These are foreign direct investments (FDI)[2], portfolio investments and other foreign investments (such as foreign loans).[3] FDIs occur as a result of expectations of higher profits from abroad, thanks to cheaper manufacturing factors, often with the help of various benefits and incentives by the host country. Through FDI, the investor acquires a lasting interest by acquireing 10% or more stake in a foreign company.[4] Portfolio investments represent the kind of foreign investments that provide the investor with return on equity (actually generate income through the purchase of securities), but not with control over the company's operations abroad. Thus, the investor here has no influence on the use of his invested capital in securities.[5] Unlike FDI, portfolio investments enable the investor to acquire less than 10% of the ownership. Other investments usually include different types of loans. These may be state loans, bank loans, international financial organizations loans, etc.

The size of the market, income, possession of natural resources, skilled work force, infrastructure and things that enable specialization of production, as well as the macroeconomic stability in the host country are the things that

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a close connection between domestic savings and domestic investments. This is the so-called Feldstein - Horioka puzzle (1980). This is one of the major "mysteries" of the international economy. However, the truth is that in the years that followed the setting up of this conclusion, the mobility of capital between countries increased, whereas the correlation between savings and investments decreased, or became very low in last twenty years (D. Giannone, M. Lenza, *The Feldstein-Horioka fact,* ECB, Working Paper Series, No. 873, 2008, 7, 19).

[2] FDI as a form of foreign capital had the largest inflow in transition countries in the period between 1993 and 2000. Then followed the loans, and portfolio investments (Ž. Lovrinčević, Z. Marić, D. Mikulić, *Priljev inozemnog kapitala – uticaj na nacionalnu štednju, domaće investicije i bilancu plaćanja tranzicijskih zemalja srednje i istočne Evrope,* Ekonomski pregled, 56 (3-4), 2005, 168). It is interesting to indicate the fact that in 2013 FDI had a value of 1.300 billion dollars, while the budget of the EU for a six-year period (2014-2020) was projected to 960 billion euros (R. Vukadinović, *Pojam i pravno regulisanje stranih investicija*, Pravo i privreda, 7-9/2016, 148).

[3] Foreign direct investments and portfolio investments belong to the category of private capital and loans are in the category of public capital (S. Kovačević, *Međunarodni ekonomski odnosi,* Kragujevac, 2000, 302-303).

[4] Ž. Lovrinčević, Z. Marić, D. Mikulić, *op.cit.*, 167.

[5] S. Kovačević, *op.cit.*, 303-304.

motivate companies to invest their capital.[6] We can, therefore, say that the market itself attracts investments and its characteristics make it a magnet for attracting them.[7] If the aforementioned fundamental conditions existed, then the investment incentives would not be of great importance. Globalization, i.e. liberalization, contributes to easier movement of the market.[8] This is why investment incentives are becoming more and more important as the new way of competition with the aim of increasing the production, employment and so on.[9] Competition is particularly present between those countries or regions that are already attractive enough for investors due to their favorable location. In that sense, countries can improve their laws, which can lead to the abolition of barriers to foreign capital entry (liberalization).[10] Competition between countries can lead to a real "bidding war" which often results in very high (expensive) subsidies[11] for the country, and on the other hand,

[6] M. Blomström, A. Kokko, *The Economics of Foreign Direct Investment Incentives*, Stockholm, 2003, 4.

[7] Investments should be directed to the real sector of economy and to the service sector. UNCTAD's document from 1999 states that FDI in the service sector contribute to the employment growth and growth in exports, and also contribute to the highly specialized services. However, we should critically view the fact that FDI is dominant in the service sector since it may create problems for the host country. This trend was typical for Serbia, in the period between 2000 and 2008, where most foreign investments were concentrated in the following sectors: banking, insurance, telecommunications, real estate and retail trade. The problem with this kind of dominant investment structure is reflected in the fact that it can cause a number of negative consequences, especially if the economic activity is not accompanied by large inflows of foreign currencies (B. Begović *et al., Grinfild strane direktne investicije u Srbiji*, Beograd, 2008, 27). If there is a high import demand, this inevitably leads to the deepening of the balance of payments deficit. It is also interesting that customers can benefit from cheaper imports due to FDI, and on the other hand, it can cause the loss of jobs in certain sectors, although UNCTAD's report contains a statement that this would be offset by employment growth in other sectors of the economy of the host country: UNCTAD, *Foreign Direct Investment and Development*, New York, Geneva, 1999, 45-46).

[8] At the same time these are the processes that promote integration, especially financial integration. More information on that: J. Labudović Stanković, *Finansijska tržišta Evrope – pregled i analiza,* Kragujevac, 2012, 14-22.

[9] M. Blomström, A. Kokko, *op.cit.*, 6.

[10] The abolition of barriers has led to intense movement of capital and greater integration of financial markets (J. Labudović Stanković, *Potreba i razlozi regulisanja finansijskog sektora,* u: XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Kragujevac, 2013, 5).

[11] It is interesting to note that it is very difficult to determine which is the right size of subsidies received by foreign investors.

causes a drastic reduction of labor standards, environmental protection and so on. The funds for government investments are usually provided by loans, particularly from abroad. Therefore, this is the use of foreign accumulation. There are examples, albeit very rare, in which investment funds are provided from domestic resources,[12] i.e. from domestic savings. Such an example can be found in Japan and a number of other Asian countries in which there is a high growth rate of savings.[13]

2. JUSTIFICATION FOR THE USE OF INCENTIVES

When a country approves incentives for attracting investments it always raises the question of the eligible costs of those incentives and whether the incentives can provide a return that is at least equal to the spendings that the incentives require. In other words, can the earnings compensate for the expenses that the country had due to the granted incentives.[14] The earnings of the investments should also provide the profit that the investors could have earned if he had invested funds in other businesses. The question of the justification for the use of incentives is always related to the effects of the investments in the host countries, and a certain amount of time is always needed for that.

It is believed that investment incentives are justified in a situation when conditions for doing business and approaching the market are different, depending on whether it is a foreign or a domestic company.[15] Danger for the host country arises in a situation in which the subsidies or incentives are so large that they "eat up" the expected gain for the host country. This way, all the benefits belong to the foreign investor and domestic companies are being discriminated against, while the host country is left without the

[12] In this context, we can mention Norway as a very specific country (it has a very open economy with a very powerful and developed public sector). It is a symbol of a healthy and strong economy and is the epitome of high living standards. As one of the world's largest oil exporters, it has huge capital, and it formed the National Petroleum Fund from oil revenues and now invests funds in accordance with the ethical policies of the Norwegian Government (J., Labudović Stanković, *Finansijsko tržište Norveške,* u: XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Kragujevac, 2014, 104, 108).

[13] A country used domestic savings for building infrastructure is for example Singapore (R. Vietor, *Kako se zemlje natječu – strategija, struktura i državno upravljanje u globalnoj ekonomiji*, Zagreb, 2010, 33).

[14] M. Blomström, A. Kokko, *op.cit.*, 7.

[15] For example Ireland and Singapore have based their development on the investment incentives policy.

expected public revenues.[16] Incentives for attracting investments can contribute to disruption of healthy competition and lead to the loss of local companies due to the more favorable position of foreign investors. The public often talks about insufficient protection of foreign investors, while practice shows cases of foreign investors being "over-protected".[17] We believe it is unjustifiable to grant incentives that are only politically motivated and are not economically justified. It is also noteworthy that developing countries, due to their weak negotiating position, tend to offer various kinds of incentives in order to attract foreign investments.[18] Their reasons for using incentives lie in the fact that the investments are their only way to solve the problems of unemployment, debt settlement, economic growth, etc.

The literature states that the justification for investment incentives is a situation when a foreign company differs from a domestic company in terms of economic activity, the manufacturing process and the possession of specific or intangible assets - (such as knowledge, new technology, managerial skills)[19] that can be passed on to local companies. In addition to raising revenue, the external effects of FDI, i.e. spillovers, are very important for the host country. However, spillover as a positive externality of investments does not occur immediately and often depends on local companies. Namely, it is important that domestic companies want to invest in new technology and learn from foreign companies.[20]

Spillover effects can be seen through: entry into branches that are characterized by high entry barriers, abolition of monopolies, transfer of technology, increase of competitiveness, eliminating the so-called bottlenecks, introduction of know-how, higher productivity of domestic companies, new types of economic activity, better management, and the like.[21] Spillover effects are divided into the inter-branch and the intra-branch (horizontal) effects.[22] There are numerous data on the positive spillover effects but research shows that negative spillover effects have also been

[16] M. Blomström, A. Kokko, *op.cit*, 17.
[17] V. Draškoci, *op.cit*, 412.
[18] V. FitzGerald, *Regulatory Investment Incentives*, OECD, 2001, 2.
[19] C. Sanda, L. Dana, *Foreign direct investment incentives,* Revista Tinerilor Economisti, 7/2007, 150.
[20] M. Blomström, A. Kokko, *op.cit.*, 19.
[21] China is a true example of a country in which the FDI led to transfer of technology, know-how, improvement of managerial skills (R. Vietor, *op.cit.*, 13).
[22] B. Begović *et al.*, *op.cit.*, 58-59.

identified.[23] It is believed that the spillover often depends on the characteristics of the host country. Spillover effects will be more pronounced in countries with higher levels of education of the labor force, greater competition, etc. Some conclusions state that not all the industrial branches can count on spillover effects.

The important rule in granting investment incentives is that incentives must be equally available to both domestic and foreign investors, i.e. without discrimination against local companies.[24] It is important to note that they should primarily be granted to companies or sectors that are expected to have the greatest spillover effects. Along with the approval of incentives, the country needs to build infrastructure (for example, industrial parks), educate the labor force, improve the business climate.

It is often written in literature that, macroeconomic and political stability of a country, a large market, skilled labor force, free entrance to the market, infrastructure, developed banking (financial) sector and quality of telecommunications are of great importance for foreign investors with long-term investments, while fiscal and financial incentives are not so important.[25] Of course, if the location of a country is attractive, the country will not have to worry about incentives. However, if that is not the case, than the country will have to base the attraction of foreign investors on incentives and privileges. The host country can allocate privileges based on the billateral agreement on investments by which it often waives a part of their sovereignty.[26]

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[23] Limitations arising from FDI inflow can be of both economic and non-economic nature. Thus, for example, it can lead to deterioration of the balance of payments, bad influence in the environment, etc. (*Foreign Direct Investment for development: Overview,* Paris, 2002, 6). In addition, there can be a very small effect on the growth of productivity of local companies, the absence of a significant transfer of high technology, etc. (M. Blomström, A. Kokko, *op.cit.*, 13).

[24] Yet, incentives to domestic investors are not always the example of efficient government policy. Such was the case in Italy. Italy approved incentives to domestic companies in the industry sector, based on Law 488, in order to invest in the lagging regions, particularly in the regions in the south of Italy. The funds were granted according to the previously defined criteria (number of jobs, the percentage of capital invested, the amount of assistance required). However, the results were not quite as they had expected (R. Bronzini, G. de Blasio, *Evaluating the impact of investment incentives: The case of Italy's Law 488/1992,* Journal of Urban Economics, No. 60, 2006, 346).

[25] C. Oman, *Policy Competition for Foreign Direct Investment - A study of Competition among Governments to attract FDI,* Paris, 2000, 17.

[26] Đ. Popov, *Procesi u svetskoj privredi i Srbija,* Novi Sad, 2011, 34.

3. CONCEPT AND TYPES OF INCENTIVES

Although generally accepted definitions do not exist, we can say that investment incentives are instruments for stimulating investment activity in a country, and can refer to attracting both FDI[27] and domestic investments. However, special attention is often given to attracting foreign investments.[28] A broader definition would say that any kind of help provided to the investors by a certain country could be considered an investment incentive. On the other hand, a narrower definition would refer to providing specific assistance[29] to investors. The main feature of incentives is that they are limited in time. The investor should make his investment profitable as much as he can while the incentives last. However, this fact opens up a new problem. It is possible that the investment is profitable only because of the subsidy[30] and that the foreign investor will leave the country as soon as the incentives are exhausted. These are therefore incentives for short-term investments and they are just a waste of public funds.[31]

The Agreement on Subsidies and Countervailing Measures of the World Trade Organisation, among all the other international multilateral investment contracts, contains a definition of investment incentives. This agreement

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[27] The principle of nondiscrimination is directly connected to attracting foreign investments. It is manifested through the national treatment principle and the most favored nation principle. These principles are supposed to guarantee equal (non-discriminating) treatment to all the investors. In the sense of attracting FDI, the national treatment principle implies that contracting parties treat foreign investors the same as the domestic ones. On the other hand, the most favored nation principle implies that contracting parties recognize the foreign investors all the laws and privileges that are recognized in any other country. Practically, this is some sort of a guarantee that contracting parties will treat foreign investments equally, without discrimination. However, it should be pointed out that the most favored nation principle is not only applied within the liberal conception of international economic relations and it is not only used for assigning privileges to countries (investment incentives in our case), but it is also used for introducing many protectionist measures to countries, i.e. investors. These protectionist measure are also imposed upon all the other countries (S. Kovačević, *op.cit.*, 182).

[28] This is why in some definitions incentives are only related to foreign investments, not to domestic investments (A. Charlton, *Incentive bidding for mobile investment: economic consequences and potential responses*, 2003, 9).

[29] UNCTAD, *Incentives,* UNCTAD Series on Issues in International Investment Agreements, New York, Geneva, 2004, 11.

[30] For more information: Dž. Stiglic, *Protivrečnosti globalizacije*, Beograd, 2002, 84-85.

[31] Đ. Popov, *op. cit.*, 42.

recognizes the concept of subsidy[32] and identifies it with the concept of incentive. Talking about subsidies in terms of this agreement is possible only if two conditions are met. The first condition is that there is a cash benefit given by the government or other public body, or any income or price difference in terms of Article XVI of this agreement. The second condition is that the benefits[33] are assigned. Accordingly, those would be direct budget transfers, subsidized loans, tax incentives, the purchase of goods by the state, and the like.

Generally speaking, there are two types of incentives; those that aim to reduce risk and uncertainty,[34] and incentives that aim to encourage investors to direct their investments towards activities that are of interest for the host country.[35]

Literature accepts incentives being classified into financial, fiscal and other incentives. Financial investment incentives are, in fact, funds, subsidies and grants for covering production costs and marketing related to investment activities and can also be used for covering part of the capital.[36] These incentives include subsidized loans and guaranteed loans as well as state insurance at lower premium rates. This type of insurance usually covers the risk of exchange rate fluctuations, the risk of the national currency devaluation as well as the non-commercial risks (political risks, expropriation).[37] Financial incentives are also the subsidizing of salaries, funds for training of the workers, donations of land, funds that the Government sets aside for the construction of railways, roads, industrial parks, often in concert with local authorities.[38]

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[32] This agreement dates from the Uruguay Round, and the definition of the term subsidy is established in the first part of it. Subsidies are divided into three categories: prohibited; actionable, which can be subject to disputes, and non-actionable. Subsidies in this agreement refer only to the trade in goods. Besides the WTO agreement which establishes different categories of subsidies, there are also rules in the EU that define which subsidies are prohibited. They take the matter one step further. Namely, the prohibited subsidies are those that limit exports and imports of goods (international trade) as well as those subsidies that have adverse effects on the competition and international trade between the EU Member countries (UNCTAD, *op. cit.*, 34-35).

[33] *Ibid*, 12.

[34] A. Charlton, *op.cit.*, 10.

[35] Đ. Popov, *Podsticaji i kontrola inostranih investicija*, Zbornik radova Pravnog fakulteta u Novom Sadu, 3/2008, 44.

[36] UNCTAD, Incentives, *op.cit.*, 6.

[37] *Ibid*. 6.

[38] C. Oman, *op.cit.*, 20-21.

There is a very wide range of different mechanisms that serve to attract and encourage investment in the group of fiscal incentives. Those would be the following incentives: tax holidays,[39] lower tax rates, transmission of losses; accelerated depreciation allowances; incentives for investment; reduced social security contributions; non-payment of customs duties on imports of capital goods, equipment, raw materials; non-payment of taxes on products which are subject to export; tax credits; incentives for the export sector of the economy; tax cuts for foreign nationals, etc.[40]

The category of other incentives includes those of regulatory character. Apart from regulatory incentives this category includes various market privileges, the subsidizing of services and the like. Regulatory incentives are, actually, those incentives that are offered to investors by a certain country and are neither classified as fiscal nor as financial incentives.[41] Thus, they are related to deregulation,[42] the mitigation of environmental standards,[43] reduced protection of labor force, the guarantee that the existing legislation will not change to the detriment of investors and the like. There are very important incentives in this category relating to the use of infrastructure (for example, investors can use energy, water, telecommunications, transport infrastructure, etc. under favorable conditions, at lower prices); giving assistance in finding funding sources, management of investment projects; market analysis prior to the implementation of the investment project; advice in the production process; technical assistance; training the labor force to use

[39] Tax incentives are in many countries seen as one of the most important determinants of the choice of investment location. It should be noted that the sensitivity of companies, as potential investors, is higher in case of larger cash flows (J. Edgerton, *Investment incentives and corporate tax asymmetries*, Journal of Public Economies, No. 94, 2010, 949).

[40] C. Oman, *op.cit.,* 20.

[41] V. FitzGerald, *op.cit.*, 2.

[42] Thanks to deregulation and other incentives, values of FDI have grown sharply since the 1980's. For example, their annual value was 20 billion dollars at the time. In the period between 1994 and 1995, the annual value was 93 billion dollars and in 1997 it reached 149 billion dollars. From that moment on, investments in Asian countries (especially in China, followed by India, Indonesia, Pakistan, South Corea, etc.) and the Latin America countries (Argentina, Mexico, Brasil, Peru, Chile, Colombia, etc.) started to increase rapidly. Among the African countries, attention was given to Egypt, Morocco and Nigeria (UNCTAD, *Foreign Direct Investment and Development*, New York, Geneva, 1999, 11, 14).

[43] Environmental issues and liability for damage caused to the environment is extremely important, since environmental pollution is a constant companion of modern economic development. This problem is of international proportions (J. Labudović Stanković, *Osiguranje od odgovornosti za štete prouzrokovane životnoj sredini*, Teme, 3/2012, 1262).

new technologies; improving quality control, etc. The category of other investment incentives also includes: the conclusion of preferential agreements, closing the market for entry of new competitors or giving a monopolistic position to a certain business entity; elimination of exchange risks on foreign loans and so on.[44]

The host country often resorts to lowering labor standards,[45] and standards related to health care and environmental protection[46] in order to make the investors lower the costs. The host country can create its regulations in line with the needs of foreign investors. However, such practice can lead to social dumping in order to make the country as competitive as possible. It is important to emphasize that regulatory standards are very important. Their influence depends on the type of company (the investor) and the economy sector that is being invested in, i.e. it depends on the sector the production process will be taking place in. For example, it is very important to some investors for the investment to have good protection of intellectual property. Some investors consider it to be very important for the host country to have protection of corporate ownership and property rights in general, as well as the ability to access the market.[47] If countries compete in attracting FDI in terms of better protection of property rights and market access, such competition is beneficial because it raises the standards. Yet, the competition that goes towards lowering labor standards and standards related to environmental protection, has no justification because it leads to disturbance of social welfare.[48]

Incentives to attract FDI can be distingushed depending on whether they are provided by developed countries or developing countries. Developing countries usually provide for fiscal incentives, particularly tax relief (exemptions from income tax), low tax rates, accelerated depreciation, return

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[44] UNCTAD, Incentives, 7.

[45] For example, China is well-known for its low labor standards in the sector of textile industry, i.e. readymade garment industry being the labor-intensive industry (V. FitzGerald, *op.cit.*, 7-8).

[46] When prescribing standards for the protection of the environment the state must be cautious, in the sense that it must not discriminate domestic companies on account of the foreign companies in case of introducing severe environmental protection standards to domestic companies. This means that domestic companies would become less competitive compared to foreign companies (J. Labudović Stanković, *Osiguranje od odgovornosti za štete prouzrokovane životnoj sredini*, 1267).

[47] V. FitzGerald, *op.cit.*, 4.

[48] *Ibid.* 10.

of paid customs duties, exemption from customs clearance, etc.[49] On the other hand, developed countries prefer financial incentives and subsidies, which often cover up to 50% of costs on investments.[50] They also grant interest-free loans or subsidized loans (at lower interest rates than on the market).[51] These countries, as a rule, grant incentives for attracting investments in under-developed regions[52] and aside from this their investment insentives policy can also be selective.[53]

On the one hand, incentives are allocated to attract investments that are necessary for the growth and development of the host country and on the other hand to compensate for some shortcomings of the business environment. Incentives may influence the allocation of financial resources towards those sectors into which incentives are being introduced because it is believed that the resources will be used more efficiently[54] there. However, there are opinions that incentives are nothing but a waste of resources and that they are not an important factor in attracting FDI.

In some cases, the literature states that externalities from previous investments, shown through the reduction of production costs and facilitating of specialization, may be used as incentives for attracting future investments. It is also stated that market imperfections can be considered as a form of an incentive, such as the labor market in which the unemployed have a much better chance of getting a job with the arrival of investors.[55] The downside of such incentives lies in the fact that it is very difficult to determine the expected future returns. In other words, it is hard to calculate the expected growth rate, as in employment growth and the increase in tax revenues due to the arrival of foreign investors.

When it comes to incentives, a question that often arises is whom they should be granted to. Should they be granted to all the investors or should a

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[49] UNCTAD, *Incentives,* 5.

[50] Besides granting subsidies, it is extremely important to ensure the control of expenditure as well (J. Labudović, *Makroekonomska politika Evropske unije,* u: Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope, (ur. S. Bejatović), Kragujevac, 2008, 408).

[51] UNCTAD, *Incentives,* 5.

[52] One of the typical problems of underdeveloped regions is typical of the EU as well. Large assets are allocated for the purpose of financial aid. These assets are often inappropriately spent and are often misused by some interest groups, such as the politicians. This is why the incentive system can sometimes be inappropriate (J. Labudović, *op.cit.*, 407).

[53] Đ. Popov, *Procesi u svetskoj privredi i Srbija*, 41.

[54] UNCTAD, *Incentives,* 2.

[55] M. Blomström, A. Kokko, *op.cit*, 7.

choice be made depending on the origin, and the sector in which operations are performed? Incentives should be approved in a way to avoid any kind of discrimination. Yet, distinctions can be made depending on the economy sector which is the carrier of economic development and is expected to contribute to the growth of exports.

4. INCENTIVES IN THE REPUBLIC OF SERBIA

The Republic of Serbia also needs investments in order to increase production and employment.[56] The investments in question are usually FDI. However, these investments must be profitable in order to bring social benefits to the Republic of Serbia as the host country.[57] It is not permitted that only investors benefit from the investments. On the other hand, sustainable economic growth and development cannot be achieved only by foreign investments. Investments from domestic resources[58] must also be included. The advantage of foreign investments is reflected in various aspects: new products in the domestic market, new types of economic activity, new technologies, new knowledge, capital, better quality of product, etc.[59]

Collecting taxes from foreign investors is not sufficient. Overall social benefit is also very important. For example, instead of selling agricultural land to foreigners, Serbia should let the local people own agricultural land and encourage development of cooperatives.[60] In that sense, our experts have proposed negotiations on the postponing of the application of Article 63, paragraph 2 of the Stabilization and Association Agreement, which refers to the ownership of agricultural land.[61]

The third part of the Constitution of the Republic of Serbia, relating to economic planning and public finances, states that the economic order of the

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[56] Serbia has a favorable geographical location, duty-free exports to the Russian Federation and the countries of Southeast Europe, as well as the low rate of corporate tax, which amounts to 15%. Serbia has a free trade agreement with Russia, Belarus and Kazakhstan, as well as CEFTA countries (Albania, Bosnia and Herzegovina, Macedonia, Moldova, Montenegro, Serbia, Croatia, Interim Administrative Mission in Kosovo), EFTA (Norway, Liechtenstein, Iceland and Switzerland) and Turkey.

[57] Đ. Popov, *Kako do strategije razvoja Srbije?,* Zbornik radova Pravnog fakulteta u Novom Sadu, 2/2014, 7.

[58] *Ibid.*

[59] Đ. Popov, *Strane investicije multinacionalnih kompanija i ekonomski razvoj*, Zbornik radova Pravnog fakulteta u Novom Sadu, 3/2013, 15.

[60] Đ. Popov, *Kako do strategije razvoja Srbije*?, 17.

[61] *Ibid*., 17.

Republic of Serbia is based on a market economy, an open and free market, the freedom of entrepreneurship, the independence of business entities and the equality of private and other forms of property.[62] Articles 84 and 85 of the Constitution are also of great importance for foreign investors. Article 84 regulates the position in the market. In this sense, it is prohibited to restrict the free competition by creating or abusing monopolistic or dominant position. The rights acquired through investments pursuant to the law cannot be reduced. The Constitution also provides that foreign entities are equal to domestic entities in the market. From the perspective of foreign investors it is very important to be able to acquire real estate property, and concession rights for natural resources and goods of general interest, as well as other rights provided by law.[63]

Since the Constitution of the Republic of Serbia stipulates that foreign entities are equal to domestic entities in the market, the country is, thus, sending positive signals to foreign investors. Serbia, like other countries that are facing development problems, provides incentives to attract foreign investment. The law on regional development defines an incentive as a specific investment or an investment controlled by the state and directed towards projects of special importance for regional development.[64]

Directly related to the previous is the Law on Investment[65], as well as the Regulation on Terms and Conditions for Attracting Foreign Investment.[66] The Law on Investment refers to both foreign and domestic investments.[67] The Law on Investment provides rights for investors, namely: investment freedom, protection of acquired rights, a guarantee that the investment will not be subject to expropriation (with the provison that the very property and other proprietary rights of investors in real estate may be suspended or restricted only in the public interest with the payment of an adequate compensation without delay), the principle of national treatment, freedom of international payments, the right to transfer profits and property of foreign investors as well as the consensual resolution of disputes. The Law on

[62] Art. 82 (1) Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006.
[63] Art. 85 Constitution of the Republic of Serbia.
[64] Law on Regional Development (Zakon o regionalnom razvoju), *Official Gazette of the Republic of Serbia (Službeni glasnik RS)*, No. 51/2009, 30/2010 and 89/2015.
[65] Official Gazette of the Republic of Serbia, No. 89/2015.
[66] Official Gazette of the Republic of Serbia, No. 28/2015.
[67] The Law on Foreign Investments and certain provisions of the Law on Regional Development ceased to exist after the entry into force of this law.

Investment, in addition to providing financial assistance, shows the importance of practical help provided by local, and provincial authorities.

It is interesting to note that the Law on Investment provides a definition of investment[68], which is also given in the Foreign Exchange Act[69] passed before the Law on Investment. Even more interesting is that the Decree on Terms and Conditions for Attracting Direct Investments contains a definition of investment. This is basically illogical, bearing in mind that the definitions found in the Foreign Exchange Act are more precise.[70] One of the peculiarities of the law is that it makes a distinction between investments of special importance for the Republic of Serbia and investment of local importance. The legislator recognizes the importance of incentives for economic development and for encouraging the investment environment, and provides the following incentives:[71] state aid,[72] tax incentives and

[68] It is important to note that this law, in contrast to earlier laws, does not consider investment to be a fine or other claim that arises directly from the commercial transaction (sale, exchange, service delivery etc.), a financial claim arising from the loan in connection with the commercial transaction (trade finance, etc.), or the portfolio investment. We believe this to be a good thing since Serbian legislation used to have a very broad understanding of the concept of foreign investment and the foreign investor. It included both direct and indirect investments and even such forms of investments that could practically be considered contracting businesses. Experts have warned us that such state of the matter is not good and that the definition should be narrowed down to an optimal level, because FDI are under particular legal protection of the host country. These questions are important because such a broad concept of foreign investment often causes the host country to be the defendant in investment disputes and usually the responsible party. More on this matter: M. Vasiljević, *op.cit.*, 27-46.

[69] *Official Gazette of the Republic of Serbia*, No. 62/2006, 31/2011, 119/2012 and 139/2014.

[70] R. Vukadinović, *op.cit.*, 155.

[71] Art. 13 of the Law on Investment.

[72] Since state aid represents a form of investment incentives, the Regulation on State Aid (*Official Gazette of the Republic of Serbia*, No. 13/2010, 100/2011, 91/2012, 37/2013 and 97/2013) provides the following forms of state aid: regional, horizontal, sectoral state aid, and state aid of small value. It is interesting to note that regional state aid can be granted for initial investments and new jobs openings connected to them, which represents regional investment aid. Regional aid also refers to newly created small businesses and operating costs. In the context of investment incentives, the above mentioned. The Regulation, among other things, provides for state aid for innovative clusters, which can be granted as investment or operational; the investment one being more important from our point of view.

deductions,[73] exemptions from taxes,[74] customs facilities,[75] as well as the system of compulsory social insurance.[76] The beneficiaries of these incentives

[73] The Law on Corporate Profit Tax provides investment incentives (*Official Gazette of the Republic of Serbia*, No. 25/2001, 80/2002, 80/2002, 43/2003, 84/2004, 18/2010, 101/2011, 119/2012, 47/2013, 108/2013, 68/2014, 142/2014, 91/2015 and 112/2015). More precisecly it provides tax exemption for a ten-year period. Namely, taxpayers who invest in their fixed assets, i.e. and fixed assets that another party invests in more than a billion dinars, and permanently employs more than 100 people during the investment period, is exempt from paying legal entity profit tax for the period of ten years in proportion to investment. Investment in fixed assets is considered to be investment in the share capital and increase of the share capital in accordance with the law. The Law on Individual Income Tax is also one of the laws that provides tax relif for hiring new persons and persons with disabilities (art. 21v, 21g and 21d of the Law on Individual Income Tax, *Official Gazette of the Republic of Serbia*, No. 24/2001, 80/2002, 80/2002, 135/2004, 62/2006, 65/2006, 31/2009, 44/2009, 18/2010, 50/2011, 91/2011, 7/2012, 93/2012, 114/2012, 8/2013, 47/2013, 48/2013, 108/2013, 6/2014, 57/2014, 68/2014, 5/2015,112/2015 and 5/2016).

[74] In accordance with the Law on Administrative Taxes, *Official Gazette of the Republic of Serbia*, No. 43/2003, 51/2003, 61/2005, 101/2005, 5/2009, 54/2009, 50/2011, 70/2011, 55/2012, 93/2012, 47/2013, 65/2013, 57/2014, 45/2015, 83/2015, 112/2015 and 50/2016.

[75] The Law on Customs provides for customs facilities such as exemption from import duties. This is why it is important to mention article 128, paragraph 1, which states that import duties are not to be paid for new equipment, produced out of the country and imported for the purpose of establishing new production or expanding the existing one. It also refers to equipment for modernizing the production process, introducing new technology or modernizing the existing. However, this does not apply to passenger cars or slots for entertainment or games of chance (Law on Customs, *Official Gazette of the Republic of Serbia*, No. 18/2010, 111/2012 and 29/2015). Based on article 219 the Government of the Republic of Serbia had the right to determine terms, conditions and procedures for exercising the right to exemption from import duties. The Government used the right granted by the Law by November 31 2015, based on the Decision on determining the goods that import duties are not to be paid for (*Official Gazette of the Republic of Serbia*, No. 124/12, 106/13 and 143/14). The period of validity of this law coincided with the beginning of the full liberalization of trade in accordance with the existing agreements on free trade, which enabled business entities to import equipment at preferential regime, i.e. without paying customs duties even after the expiry of the measure (Act of Custom Authority No. 148-I-030-01-120/3/2016, 17.03.2016).

[76] Certain forms of incentives are provided for by the Law on Contributions for Mandatory Social Insurance which refers to a refund of part of paid contributions for newly employed persons and December 31 2017 is the time limit (art. 45(1) of the Law on Contributions for Mandatory Social Insurance, *Official Gazette of the Republic of Serbia*, No. 84/2004, 61/2005, 62/2006, 5/2009, 52/2011, 101/2011, 7/2012, 8/2013, 47/2013,

are legal entities and natural persons, payers of taxes and contributions and other public revenues. It should be noted that the incentives mentioned in the law are mainly incentives that already exist and have been introduced by other regulations.[77] Customs facility is the only novelty among the incentives. It means that the importation of equipment, which represents the investment of the foreign investor, is free. This does not apply to passenger cars and slot machines for entertainment and games of chance.[78] One of the novelties in the law, which led to some disputes, refers to information of public importance in the field of investment. This has been regulated by the Law on Free Acces to Information of Public Importance.[79] Before this legal solution, the Government used to make disretionary decisions whether to disclose information about investments or not.

The Law on Investment gives a particularly important role to the local / provincial authorities in assisting the investors.[80] The assistance refers to urgent processing of all the documentation so that necessary public documents could be issued based on them (urgent action). The Law also

108/2013, 6/2014, 57/2014, 68/2014, 5/2015, 112/2015 and 5/2016). These incentives were previously provided for by the Decree on Employment Incentives which ceased to exist.

[77] Besides the aforementioned laws, investment incentives, i.e. subsidies were provided for by the Law on Employment and Unemployment Insurance. Employment subsidies are funds that the employer provides for the employment of individuals in the forms of new job openings and job vacancies, in case of individuals belonging to the category of the people of low employability (people with disabilities) in accordance with this law and the Action Plan, in the second case envisaged by the Action Plan. The contract regulates mutual rights and obligations of the National Employment Service and beneficiaries of subsidies (art. 50 of the Law on Employment and Unemployment Insurance, Official Gazette of the Republic of Serbia, No. 36/2009, 88/2010 and 38/2015).

[78] Art. 14 of the Law on Investment.

[79] Official Gazette of the Republic of Serbia, No. 120/2004, 54/2007, 104/2009 and 36/2010.

[80] It is interesting to note that some cities have given employment incentives of up to 2.500 euros for new jobs that would employ from 20 to 50 workers, 5.000 euros if 50 to 100 people would be employed and 7.000 euros if the new jobs would provide employment for over 200 workers. Some municipalities granted incentives in the following form: free utilities, giving plots of land at no charge, issuing permits rapidly, giving free location in the industrial zone for construction of business facilities for the period of 99 years, at no charge; exemption from paying local utility taxes, compensation for using municipal building land, compensation for change of the use of land, etc.

provides a series of measures to promote competitiveness of the local government.[81]

By adopting the new Regulation on Terms and Conditions for Attracting Direct Investments in 2015, the country is trying to promote and attract investments in order to improve the competitiveness of the domestic economy. The way towards reaching this goal is through direct investments, which should enable the opening of new jobs, the transfer of knowledge and technologies as well as the a balanced regional development.[82] According to the text of the Regulation, direct investments, i.e. initial investments include investments in tangible assets (land, buildings, manufacturing plants, machinery, equipment) and intangible assets (investing in assets gained through transfer of technology-patents, licenses, know-how). They also include fixed assets of a company, in the manufacturing or the service sector, which can be subject to international trade and contribute to new job openings and economic development. This does not refer to some sectors excluded by the Regulation.[83] Incentives are therefore directed towards manufacturing which should be oriented towards the exports.[84] Direct investments refer to: commencement of new business activities; expanding the existing activities; diversification of the manufacturing program into new products, not included in the existing production program; significant changes in the overall manufacturing process of the existing business, or acquisition of assets directly connected to the company that has ceased to

[81] Art. 17 of the Law on Investment.

[82] Art. 1 of the Regulation on Terms and Conditions for Attracting Direct Investments.

[83] The funds for attracting direct investment cannot be used to finance investments in primary agricultural production, fisheries and aquaculture, transport, catering, gambling, trafficking, production of synthetic fibers, coal and steel, tobacco and tobacco products, weapons and ammunition, shipbuilding (building sea-going commercial vessels under its own power - at least 100 gross registered tonnes), the airport and the energy sector, broadband networks (Art. 4, para. 4 of the terms and conditions for attracting direct investment). The law on the allocation of funds excludes the following: a business entity in difficulty, companies that have outstanding obligations towards the Republic of Serbia, investors who own companies which significantly reduced the number of employees in the past 12 months preceding the application for funds, as well as the companies in which the Republic of Serbia, autonomous provinces and local self-government have a share of property (Art. 8, para. 1 of the terms and conditions for attracting direct investment).

[84] As a rule, the process of allocating funds involves a public notice within which the application for grants should be submitted. However, the new Law on Investments provides that for investments of special importance proposal of state aid is given without a prior public notice.

exist or would be out of business if it were not purchased by a third party under market conditions.

The Regulation recognizes greenfield investments and brownfield investments. The first kind (greenfield investments) refers to building new production capacities and the second kind (brownfield investments) refers to investing in the existing manufacturing capacities, which would mean purchasing new machinery and/or new equipment. Brownfield investments are also related to the expansion, renovation or reconstruction of the existing production area or construction within it or within a technically related production facility on one or more cadastral land plots.

The Regulation refers to both foreign and domestic investments. In other words, incentives can be used both by domestic and foreign investors.[85] The funds allocated by the state are paid from its budget, or could come from international development aid.[86] Apart from this, funds can be used for manufacturing investments, but for the service sector subject to international trade, as well.

The above mentioned Regulation provides conditions for allocation of funds. It is necessary to keep the investment at the same location in the local government unit in which direct investment has been realized, for at least five years after the implementation of the project. For small and medium enterprises investments should be kept for three years after the completion of the project. The second condition is to maintain the number of the employed among the fund beneficiaries for at least five years after the implementation of the investment project, in large enterprises, and at least for three years in case of small and medium enterprises.[87] The amount of funds granted to the investor depends on whether the company is a small, medium or large enterprise.[88] Concerning the amount of funds allocated in the name of

[85] We can say that our regulations and practice used to treat foreign and domestic investors differently, which was not justifiable in any way. Foreign investments had better legal protection compared to domestic investments.

[86] Art. 4 (1, 2) of the Regulation on Terms and Conditions for Attracting Direct Investments.

[87] Art. 10 of the Regulation on Terms and Conditions for Attracting Direct Investments.

[88] The Regulation on Terms and Conditions for Attracting Direct Investment when it comes to small, medium and large enterprises refers to regulations for granting state aid. In this respect, the Regulation stipulates that a small business entity is the one found to have less than 50 employees and if its annual turnover and / or annual balance sheet total is less than 10 million euros in dinars. Medium business entity is the one that has between 50-250 employees and if its annual turnover is less than 50 million euros and / or its annual balance sheet total is less than 43 million euros in dinars. In contrast to the small

investment incentives, special rules apply to large investment projects, which include investments larger than 50 million euros.[89]

Allocations are paid in three installments depending on available funds. The decision on the allocation of incentives is made by the Council for Economic Development.[90] Contracts on granting funds for financing incentives from the budget of the Republic of Serbia are concluded by the Ministry in charge of economic affairs. Funds are allocated as grants in order to cover the gross salaries, investments in fixed assets, intensive investment projects which create at least 200 job openings; additional incentives or funds can also be approved.

It would be appropriate to comment on such rules on incentives in the Decree. We should remind ourselves that the regulation provides for: state aid, tax incentives and deductions, and exemptions from taxes, customs facilities, as well as the system of compulsory social insurance. However, it provides for the possibility of allocating funds for attracting direct investment. In doing so, the amount of funds that can be granted to large enterprises is set to 50% of the eligible costs. For medium enterprises it is set to 60% of the eligible costs, and to the small ones to 70% of the eligible costs for the implementation of the investment project. It should be noted that these funds are allocated to both domestic and foreign investors. This still speaks in favor of the fact that our country approves major investment incentives. Alongside the fiscal incentives, our country approves significant financial incentives, as well. A justifiable question arises from all this: Are these financial incentives justified in Serbia since they can pose a significant burden to the country and are allocated from its budget and from its international development aid fund? International practice is such that financial incentives are typically granted in developed countries, while fiscal incentives are common in developing countries. Our country does not belong to the group of developed countries, but still it has decided to allocate funds as a form of incentive. This means that attracting investments is of particular importance to the country, which is not surprising, because Serbia is in need of economic growth and development. However, there still remains the

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and medium, a large business entity is defined negatively, i.e. as a business entity that is not a medium or a small business entity (art. 2a of the Regulation on State Aid, *Official Gazette of the Republic of Serbia*, No. 13/2010, 100/2011, 91/2012, 37/2013 and 97/2013).

[89] Art. 6 of the Regulation on Terms and Conditions for Attracting Direct Investments.

[90] The Economic Development Council consists of the Minister of Economy, Minister of Finance, Minister for Labour and Employment, President of the Serbian Chamber of Commerce and Director of the Development Agency of Serbia.

question of the justification for this kind of incentive because it means that, at least in theory, investors can perform their activities in Serbia until the incentives are exhausted. Their investments are of short-term nature and once the incentives are exhausted, the investor can decide to leave Serbia.

5. CONCLUSION

Approval of investment incentives is a widespread practice among countries. However, we must point out that incentives should not be focused only on foreign direct investment, but also on domestic investment because otherwise it would constitute discrimination. Thus, the incentives must be equally available to foreign and domestic investors. Developing countries are, due to economic growth and development, as well as high debt, in need of both types of investments. Approval of incentives to attract FDI, is usually motivated by the desire to have spillover effects in the host country, such as the transfer of new technologies, know-how, performing of new economic activities and the like. Therefore those investments that are expected to have the strongest spillover effects should be attracted.

Incentives can be very expensive for the country that approves them, especially if incentives are the only motivation for investing. This means that these are short-term investments and incentives can be a big burden to public finances. Governments can approve incentives that have limited effectiveness under the pretext of attracting investments to underdeveloped areas, or regions and thus enhance the already existing inequalities.

Incentives are provided for by the laws of the Republic of Serbia. The law provides for both fiscal and financial incentives. From the perspective of the author, Serbia appears to be very generous when it comes to granting incentives since financial incentives are usually approved by developed countries.

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