

Faculty of Law,
University of Niš

**LEGAL, SOCIAL AND POLITICAL CONTROL IN
NATIONAL, INTERNATIONAL AND EU LAW**

**Collection of papers from the
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LEGAL, SOCIAL AND POLITICAL CONTROL IN
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Introductory Note

The International Scientific Conference “Legal, Social and Political Control in National, International and European Union Law”, held on 19th and 20th May 2016 at the Faculty of Law, University of Niš, gathered a large number of foreign and local experts in different areas of law. The choice of the Conference topic reflects an endeavour of legal science to contribute to the development of legal, social and political control, to improve the quality of protection of both natural and legal entities in all domains of social relations, and to reduce the growing disparities and inequalities among people at the global and local level.

There is a general consensus that the Conference proceedings demonstrate a high level of scientific attainment, both in terms of the authors’ choice of topics and contents of the submitted papers. The best evidence is the publication of more than 60 scientific articles, which have been published in two thematic collections of papers of the Law Faculty journal: “Collection of Papers of the Law Faculty in Niš”. The first thematic collection comprises 47 papers in English and the second one includes 14 papers in Serbian. The publication of these collections of Conference proceedings is an expression of an effort to make the research results available to the general public in order to foster scientific and professional debate on theoretical and practical issues important for the community at large.

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PUBLIC LAW

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CONSTITUTIONAL REGULATION AND PRACTICAL IMPLEMENTATION OF PUBLIC CONTROL IN RUSSIA

Abstract: *The paper deals with the problem of the constitutional legal regulation and implementation of public control in Russia. Public control is seen as one of the main social management functions, designed to provide feedback between civil society and state (local) authorities. Without effective control, it is impossible to achieve significant results in the fight against corruption, violations of human and civil rights and freedoms. The paper deals with the concept and forms of public control as a type of social control. It provides a critical analysis of the current constitutional legislation regulating relations in the implementation of various types and forms of public control in Russia, as well as practice of its implementation. The implementation of the proposals contained in this paper can significantly increase the efficiency of public control in Russia.*

Keywords: *constitutional legal regulation, public control, social control management function, practical implementation.*

1. Introduction

Public control is one of the main functions of social management (public governance in society), a necessary means of feedback between the state and the people, the community, non-governmental organizations, each citizen. Social control is a form of realization of the constitutional principle of democracy (popular sovereignty), an important form of citizens' participation in the state government. The efficiency of the public administration functioning, the possibilities of the progressive, advanced development of the organized society as a whole and any social system (regions, municipalities, different institutions, enterprises, etc.) largely depend on the efficiency of public control. Without any real and effective control it is utterly impossible to achieve significant results in the fight against corruption, violations of the human and citizen rights and freedoms, etc.

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All this proves the relevance of a comprehensive, multi-dimensional study of "public control" from a theoretical aspect as a notion in various social sciences (legal, political science, theory of social management), as well as analysis of its implementation practices in a particular country. Given the important role of the Russian Federation in the modern world, the issue dedicated to the implementation of public control in Russia is apparently not of solely domestic Russian interest.

Unfortunately, in the Russian legal science, there are no systemic, comprehensive studies on constitutional law consolidation and implementation of public control in Russia. In this regard, the author of this article attempted to make a certain contribution to the replenishment of the existing unfortunate gap in the study of such theoretically and practically important scientific issue. This article deals with the concept of public control, determines its types, focusing on types and forms of public control as one of the forms of social control, and provides a critical analysis of the current constitutional and legal legislation regulating relations in the implementation of various types and forms of public control in Russia, as well as its implementation practices. In our view, the implementation of the proposals of this paper can significantly increase the efficiency of public control in Russia.

2. The concept, types, forms, features of public control as varieties of social control in Russia

2.1. The concept and types of social control

From the perspective of management theory, "control" is regarded as an integral part of the process of adoption and implementation of management decisions as one of the main social management functions¹, i.e. one of the types of management, along with other basic functions: planning, organization, accounting, regulation, motivation². The essence of control is to verify the conformity of the achieved result with the original goal. From the perspective of management science, control represents a kind of administrative activity enabling tracking of the process of implementation of any management decisions, laws and other

1 Уколов, В.Ф., А.М. Масс, А.М., Быстряков, И.К. Теория управления: Учебник Москва: Экономика, 2003. С.519-522; Масловская, М.В. О понятии «контроль». Некоторые размышления в конституционно-правовом аспекте//Конституционное и муниципальное право. 2016 №1, С 4-8; Голощапов, Р.В., Пятков, А.Г. Государственное управление: учебное пособие.- Хабаровск. 2005. С.122; Атаманчук, Г.В. Теория государственного управления: Курс лекций. Москва : Изд-во ОМЕГА – Л, 2005 и др.

2 Management theory sometimes entails other basic management functions, such as the coordination function.

normative legal acts and, in a timely manner, identifying and eliminating the deviation in the process of their implementation from what was planned (for example, deviation from the content of legal requirements). The implementation of control functions, in particular, is designed to provide feedback between the authorities and the people, between the public authorities and civil society groups. That is to say, it is the control that ensures the implementation of the principle of feedback as one of the most important cybernetic principles, and ignoring it would lead to inefficient functioning of any social system and to their destruction; (the history of destruction of a number of states, including the Soviet Union, in the second half of the 20th century may serve as a bitter confirmation of the veracity of this conclusion).

In the science of the Russian administrative law, there is also a proposal to consider “control” as a management method, containing verification of the actual implementation of the law, legal act, administrative decision, as well as measures and means of their implementation, and adoption of measures for stimulation of performers or (depending on the result) remedial measures to punish those responsible³. Yet, the control is not a method; it is one of the types of management work, the function which can be implemented by using a variety of methods.

For a deeper understanding of the content and features of social control as management functions, it is possible to select different types of control by different classification reasons that are of greatest interest, taking into account the subject of this article.

In accordance *with the objects of management of different social systems* (understood as certain groups, communities of people), it is possible to distinguish controls of state-organized society in general and governance of other social systems - various territorial communities, organizations, administrative and territorial units, etc. (the concept of “social management” - governance of a society and within the society is applicable to a variety of social systems).

With regards to the *control implementation period*, constant (systematic) and temporary (episodic) control can be distinguished. According to the same classification, it is possible to identify *preliminary, current and subsequent (final)* control. If during the implementation of the current and subsequent control one compares the achievements with the goals that have been set, to order to identify how it is implemented or to determine whether, for example, a law or administrative decision had been implemented, the preliminary control should be implemented at the stage of development of administrative, political decisions, laws and other normative-legal acts, when it is possible; moreover, it is

³ See: Манохин, В.М., Адушкин, Ю.С. Российское административное право: учебник. Саратов. 2003. С.242.

necessary to foresee the consequences of their implementation, whether the intended purpose will be achieved, in order to avoid the negative effects and unnecessary costs associated with the implementation of management decisions and laws (for which reason preliminary control is particularly important). Proposals, applications and complaints of citizens in the various bodies of state power and local self-government may be considered as means of control. With reference to the history of the Soviet constitutions, there have been examples of nation-wide discussions on the drafts of USSR Constitutions from 1936 and 1977, when the citizens of the country made a huge number of amendments to the texts prepared by the Constitutional Commissions requiring the proper mechanism of practical implementation.⁴

Considering the *subjects of control activity*, there are different kinds of control implemented by the state, municipal control, departmental control, non-departmental control, control implemented by law enforcement agencies, judicial control, and, finally, non-state (public) control, whose features shall be discussed in detail.

2.2. The concept, features, types and forms of public control in Russia

Public control is one of the types of control in terms of the subjects of control activity. Public control covers all levels of government and administration (in Russia: the federal level, the level of Federation subjects, and local self-governments). Thus, *objects* of public control are the activities of public authorities and local self-governments.

Public control is performed both in terms of the rule of law, compliance with the human rights and their legitimate interests, and the practicability of certain administrative decisions, normative acts implemented by the said authorities. Analyzing the practice of implementation of public control by its various subjects, it can be concluded that the criterion of expediency in the exercise of public control includes scientific soundness and economic efficiency not contrary to the principle of social justice.

Subjects of public control are individuals (Article 2, 32, 33 of the Constitution of the Russian Federation⁵), Russian multi-ethnic people (Article 3 of the Constitution of the Russian Federation), civil society, various citizen associations, including the political parties (Article 13 of the Constitution of the Russian Federation), as well as other public associations (e.g., public councils under

4 See: Авакьян, С.А. Конституция России: природа, эволюция, современность. – Москва.: РЮИД, 1997. С. 67, С.76-77.

5 Конституция Российской Федерации : Принята всенар. голосованием 12 дек. 1993г. (с измен. и доп. - М.: Юрид. лит., 2015. – 65с.

government bodies, public chambers, public monitoring commissions; public inspections, public control groups, etc.), as specified by the Russian legislation⁶.

At a national level, public control implies the control of the people over the highest state authorities, primarily exercising the state sovereignty. Control over the activities of certain state bodies and local self-government is implemented by public organizations (citizen associations) and individual citizens. As practice shows, such control is much more effective than the control exercised by public authorities (apparently, in line with the proverb: “Dog doesn’t eat dog”).

It is worth recalling the content of one of the most important principles of social management: the widest possible involvement of citizens, their various associations in the process of management of the state and society affairs. The public control activity is an extremely important part of the participation of the people, citizens and their organizations in the management of the state. It is an objective requirement of the management science, which is intended to ensure the efficiency of management, especially in the modern world in which any social system is affected by a variety of disconcerting factors (forces of entropy).

Public control at all levels of government, as practice shows, is objectively necessary for the development and the very existence of different social systems, including the preservation of the states themselves.

Specific historical examples can serve as convincing proof of the veracity of this conclusion. In particular, we recall the history of the destruction of the Soviet Union, when in fact both the federal and the Russian ruling elite ignored the will of multinational multi-million Soviet people, expressed at the federal referendum on 17th March 1991, when more than 75 % of the total number of registered voters in the referendum voted in favor of the preservation of the Soviet Union (for example, more than 70% of voters in and over over 71% of voters in Russia said “Yes”, voting for the preservation of the Soviet Union). It should be noted that the further development in the same state (the USSR) was envisaged in almost all of the Declarations of State Sovereignty adopted by that time by the republics of the Soviet Union. Therefore, the referendum on the preservation of the Union *may also be considered as a form of people’s control over government power, over the consistency of its intentions for further development and preservation of the Federal state.*

Such control of the people did not give the desired results, due to the great violations of both the will of the people and the Federal Constitution. Russian political leaders, as well as the federal center, at that time, apparently, did not consider

⁶ See: Об основах общественного контроля в Российской Федерации : Федеральный закон от 21 июля 2014 г. N 212-ФЗ // <http://base.garant.ru/70700452/>

the Constitution as an absolute value, and as a result based the ruling decisions solely on their personal political considerations. The unconstitutional actions initiated by the political leadership of Russia, aimed at the final destruction of the Union, ended in denunciation of the Treaty on the Formation of the USSR by the Supreme Soviet of the RSFSR.⁷ The president of Russia, Vladimir Putin, called "the collapse of the Soviet Union" "*the greatest geopolitical catastrophe of the century*" and "one of the largest humanitarian disasters of the XX century..."⁸ Apart from the continuing bloodshed in Ukraine, as a dreadful confirmation of these words, we can say with confidence that the Serbian people would not have been bombed by the NATO in 1999, if only there had been a strong preserved Soviet Union, and the world would not have become unipolar at that time. *This is a serious lesson for all politicians who have to respect democratic values, without forgetting the bitter, tragic pages of history.*

3. On the problems of Constitutional-legal Regulation and implementation of the public control in Russia

3.1. Constitutional legal regulation of public control in Russia

The constitutional law regulation of public control in Russia is primarily carried out by the norms of the Constitution of Russia 1993 and variety of laws and other normative legal acts. Among those of particular importance is the Federal Law "On the Basis of Public Control in the Russian Federation"⁹, adopted in July 2014, whose advantages and disadvantages will be discussed below. All other legal acts regulating public control, in whole or in part, as sources of constitutional law, may be divided into 4 main groups: 1). Acts establishing the legal status of public control entities, their powers, organization and activities; 2). Acts establishing the order of interaction of state and local self-government bodies with social control entities; 3). Normative acts establishing the legal framework for

7 This Decree of the Supreme Council was initially null and void, as it denounced an act which was not an international treaty; moreover, it lost its validity long ago, and the act was not an acting right! The egregious legal and political blunder was corrected by the Resolution of the State Duma of the Russian Federation on abolishment of the denunciation of the Treaty on the formation of the USSR only 5 years later, when the realities of life were impossible to change. (In more detail, see: Бутусова Н.В., О конституционной реформе в современной России: цели и условия успеха//Проблемный анализ и государственно-управленческое проектирование. 2012. №2, том 5, С.86-88.

8 See: Послание Федеральному Собранию Российской Федерации от 25 апреля 2005// Российская газета. 2005. апр. 26; Интервью В.Путина Французским СМИ// <http://www.fontanka.ru/2014/06/05/064/big.5.html>

9 Об основах общественного контроля в Российской Федерации: Федеральный закон от 21 июля 2014 г. N 212-ФЗ // <http://base.garant.ru/70700452/#ixzz4KiDqTQEB>

the implementation of certain forms of public control, which are not reflected in the given general law on the basis of social control; and 4). Group - normative legal acts for carrying out public control in various areas of public policy.

Among the acts referred are the Federal Laws “On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation”; “On the Order of Consideration of appeals in the Russian Federation”; “On public associations”, “On Noncommercial Organizations”, “On General Principles of Organization of Local Self-government in the Russian Federation”, “On General Principles of Organization of Legislative (Representative) and Executive Authorities of the Subjects of the Russian Federation”, “On the Media”, “On Environmental Protection”, “On Public Control over Ensuring Human Rights in Places of Detention and on Assistance to Persons in Places of Detention”, “On the Public Chamber of the Russian Federation”, similar laws of the subjects of the Russian Federation on public chamber of the Russian Federation subjects, normative acts of the President and the Government of the Russian Federation, establishing the status of Public Councils etc.¹⁰

The very adoption of the Federal Law “On the Basis of Public Control in the Russian Federation” was perceived by lawyers and political scientists as a major achievement in the cooperation between the state and the civil society. The law, in particular, enshrined the right of Russian citizens to participate in the implementation of public control, both personally and as a part of public associations and other non-profit organizations (Art. 3), as well as democratic goals, objectives and principles of public control (Art. 5-6 .), etc. However, the serious shortcomings of the Act overlap its advantages.

1. The analyzed Law did not streamline vast array of normative acts regulating relations in the implementation of public control; it merely lists the types of normative acts in force in this area: the federal laws, the laws of the RF subjects, other normative legal acts. The legislator did not mention the Russian Constitution in this list, the generally recognized principles and norms of international law which are an integral part of the legal system of the Russian Federation (paragraph 4 Art. 15 of the Constitution), as well as the federal constitutional laws! It is true that such position of the legislator in the legal literature is characterized as « puzzling and does not stand up to critical examination».¹¹

Noting the role of the Russian Constitution in the regulation of relations in the sphere of public control, attention should be drawn first and foremost to the fact that the Constitution enshrines the principle of democracy (popular sovereignty)

10 See: Гриб В.В., Актуальные проблемы формирования правовых основ общественного контроля // Конституционное и муниципальное право, 2014, № 2 С.32-37.

11 See: Гриб В.В., там же, С.33.

and the possibility of its implementation directly, and also through authorities, as well as the principle of straight, direct action of its norms (Art.15,18) that allows citizens and their associations to monitor the activities of the authorities and their decisions, even in the absence of detailed legal regulation of various forms of democracy. For example, despite the absence of the law on petitions, in Russia there are many social websites, as well as government websites, above all, the site for petitions to the President. However, regarding the most important burning issues, citizens prefer to collect signatures in the petition lists (by analogy with the election campaign) and submit the petition to the President directly, to the Administration of the head of the state.

A year ago in the Voronezh region, more than 100 thousand signatures of citizens were collected under the appeal to the President of the Russian Federation, as the guarantor of the Constitution and the rights and freedoms of Russian citizens (Article 80 of the Constitution of the Russian Federation), demanding cancellation of the Government's decision on the exploration and possible subsequent extraction of copper-nickel ores of dangerous category in the Voronezh region as inconsistent with the Russian Constitution, as it violates the rights and freedoms of the citizens. The Russian Ombudsman, Ella Panfilova, informed the President in her Annual report for 2015 about the mentioned appeal of the citizens, and the Head of State ordered the Government to deal with this issue.¹²

2. It gives rise to fundamental objections to the list of entities provided for the analyzed law that can carry out public control: citizens and their associations are not listed as such. They are given the right only "to participate" in the implementation of public control by its "subjects", among which, according to the Law (Article 9), are included only public chambers (Russian, Russian regions and municipalities), public councils with the state executive authorities at a federal level and in the subjects of the Russian Federation; public monitoring commissions, public inspection, groups of social control. Of course, it is not the same thing to be a subject of public control and to participate in the control activity of subjects. In addition, the given concept of the Law, in our opinion, is contradictory to the Constitution of the Russian Federation, which enshrines the right of citizens to participate in managing state affairs, both directly and through their representatives, the right to association to protect their interests, the right to appeal to various state bodies and local self-government bodies (Articles 32, 30, 33 of the Constitution of the Russian Federation) and others.

It should be noted that practically almost all of the subjects of public control listed in the Law are "dependent" subjects. Dependent subjects of control are

¹² See: Доклад Уполномоченного по правам человека в Российской Федерации за 2015 год// Российская газета. 2016, 24 марта.

those where the state is involved in the establishing and financing of their activities. In contrast, citizens and their associations are “autonomous” entities of public control since, in terms of organization, they are independent from the state and the municipal authorities and are not funded by the state (except for recipients of government grants)¹³.

Evaluating the effectiveness of the Russian legislation on public control, bearing in mind the practice of its implementation, one can distinguish two contradictory tendencies:

First tendency: Authorities, first and foremost the President, initiate the establishment of public unions performing control activity, working in close cooperation with the authorities, in order to solve the tasks of economy modernization, provision of social development, as well as to fight corruption and strengthen legality. In addition, as a result of the activities of such organizations, the presence of positive changes in the moral and political climate in the Russian society in recent years cannot be ignored.

Thus, the Public Chamber of the Russian Federation has started functioning since 2005. The Public Chamber implements public control over the activities of the authorities at all levels; in particular, it carries out public expertise on drafts of federal laws and draft laws of the Russian Federation subjects, as well as drafts of normative legal acts of the executive authorities of the Russian Federation and drafts of legal acts of local self-government bodies. Its activities bring about positive results.

The improvement of confidence of the people in the authorities and the greater transparency of the elections was due to the expansion of opportunities of citizens in implementing control over the results of the elections in accordance with the decision of the Constitutional Court of the Russian Federation from 22 April 2013¹⁴: the citizen was given the opportunity to appeal to court demand-

13 See: Полещук, А.С. Конституционно-правовые основы общественного контроля в Российской Федерации: автореферат дис...канд. юрид. наук. М., 2012; Гриб, В.В. Актуальные проблемы нормативного закрепления системы субъектов общественного контроля в Российской Федерации// Конституционное и муниципальное право, 2016, №1, С.15-16.

14 See: По делу о проверке конституционности статей 3, 4, пункта 1 части первой статьи 134, статьи 220, части первой статьи 259, части второй статьи 333 Гражданского процессуального кодекса Российской Федерации, подпункта «з» пункта 9 статьи 30, пункта 10 статьи 75, пунктов 2 и 3 статьи 77 Федерального закона «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации», частей 4 и 5 статьи 92 Федерального закона «О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации» в связи с жалобами граждан А.В. Андропова, О.О. Андроновой, О.Б.

ing abolishment of the voting results at the polling station, if gross violations of the electoral legislation can be proven (the author of this paper was fortunate enough to take part in this process and contribute to the overall victory).

Furthermore, President Putin initiated the establishment of "All-Russian Public Front", and he has become its head and leader. The Popular Front represents an association of civic-political organizations that support the tactical and strategic goals of the party "United Russia" (the ruling party), in order to contribute to the development of the country, maintaining the dialogue between society and the authorities, detection of corruption and other abuses, violations of the rights and freedoms of citizens. In a short period of time, by means of implementing public control over the activities of government bodies, the All-Russian Popular Front was able to identify throughout the country thousands of cases of corruption, violations of the law, in particular, the facts of inefficient use of budget funds, and outright theft¹⁵.

Second tendency: However, there is another (opposite) tendency that indicates the unwillingness of authorities, despite the growth of the civil and political activity of Russian citizens, to actively involve large segments of civil society, independent, autonomous non-profit associations of citizens, in the activity to solve the tasks the state is confronting.

So far, there has not been passed a law on the national discussion on important issues of public life, the need for which has been discussed for many years by legal scholars. Article 24 of Law on the Basis of Social Control considers public discussion as a form of control, but does not specify any procedure, any mechanism of discussion that would have the power to influence the decisions made by the authorities. At federal and regional levels, there are no referendums held on issues of public life, including the amendments to the Constitution of the Russian Federation (except for federal relations). As already noted, there is no law on petitions or public initiatives. The procedure for dealing with public initiatives of citizens and their organizations, provided for by the Decree of the President¹⁶ on the Internet and hosted on a specially created website "Russian Public Initiative", is extremely complicated; so, citizens often place their initia-

Белова и других, Уполномоченного по правам человека в проблемы Российской Федерации и регионального отделения политической партии СПРАВЕДЛИВАЯ РОССИЯ в Воронежской области: Постановление Конституционного Суда РФ от 22.04.2013 N 8-П// http://www.consultant.ru/document/cons_doc_LAW_145469/

15 See: <https://onf.ru/>; https://ru.wikipedia.org/wiki/Общероссийский_народный_фронт

16 О рассмотрении общественных инициатив, направленных гражданами Российской Федерации с использованием интернет- ресурса: Указом Президента РФ № 183от 4 марта 2013 года // base.garant.ru/70326884

tives on various social websites. Yet, of particular concern is the underestimation of the role of non-governmental organizations.

The public associations should serve as a crucial link between the civil society and the state. However, in comparison with the Soviet period, they have lost a number of important rights, in particular the right of legislative initiative, which is so essential both for the purposes and the process of establishing public control. The serious concern is caused by the underestimation of the role which public organizations may play in the exercise of the public control in the sphere of fighting corruption (which is confirmed by anti-corruption legislation). It is a paradox but the Federal Law on public control, as already mentioned, does not mention citizens and public organizations as the subjects of public control, although it mentions in general terms the importance of their participation in public control! It is difficult to find an excuse for such a situation.

The enormous potential of the public associations in the process of implementation of public control at the stage of development of administrative decisions and a variety of normative acts remains untapped. In accordance with the provision of Article 17 of the Federal Law “On Public Associations”¹⁷ on the issues concerning the interests of public associations, in cases provided by law, these issues shall be solved by public authorities and local government bodies with the participation of relevant NGOs, or in agreement with them. So far, this legislation is not working¹⁸. Most public associations have established their right to participate in the decision-making bodies of the state power and the local self-governments in their own charters. But the Russian laws governing relations in various spheres of social life either remain silent about the involvement of NGOs in the development of administrative decisions or normative acts or contain general words about the possibilities of such participation, without fixing any of its mechanisms.¹⁹

17 Собрание Законодательства РФ. 1995. № 82-ФЗ, (по сост. на 31.01.2016)// http://www.consultant.ru/document/cons_doc_LAW_6693/

18 Бутусова, Н.В. Конституционно-правовой статус российского государства. Москва – Воронеж: Изд-во Моск. гос. ун-та; Изд-во Воронеж. гос. ун-та, 2006. С.170-171.

19 Устав общероссийской общественной организации «Знание» [электронный ресурс] URL www.znanietula.ru/dokum-org/7-ustav/; Устав общественной организации «Союз музеев России» [электронный ресурс] URL; <http://www.souzmuseum.ru/>; Устав всероссийской общественной организации «Всероссийское общество инвалидов» [электронный ресурс] URL; <http://www.voi.ru/>;

О науке и государственной научно-технической политике: Федеральный закон от 23.08.1996 N 127-ФЗ (ред. от 13.07.2015) www.consultant.ru/document/cons_doc_LAW_11507/; Основы законодательства Российской Федерации о культуре (утв. ВС РФ 09.10.1992 N 3612-1) (ред. от 28.11.2015) (с изм. и доп., вступ. в силу с 01.01.2016) [//http://www.consultant.ru/document/cons_doc_LAW_1870/](http://www.consultant.ru/document/cons_doc_LAW_1870/); О социальной защите

Nevertheless, until recently, a number of public organizations, in accordance with their statutory tasks, have performed important control activities. But the enactment of the law on so-called «foreign agents»²⁰ put an end to the activities of many such organizations. According to this law, foreign agents are the public associations which have a status legal entities, which are financed or receive other properties from foreign sources and participate in political activities carried out in the territory of the Russian Federation. Such legislative innovation in terms of imposing a number of additional responsibilities on public associations, as well as restrictions on their activity, is destructive in relation not only to public associations, hundreds of which have ceased to exist in the country, but also to civil society where the most important elements are the public non-profit organizations.

Here is an example. In particular, due to the fact that it was listed in the register of foreign agents, the Association of non-profit organizations "In Defense of the Rights of Voters" GOLOS" - a leading Russian non-profit organization, dealing since 2000 with independent public monitoring of elections and protection of the rights of voters, ceased its operations.²¹ The Association worked in 48 regions. In 2013, it was included by the Ministry of Justice in the register of so-called "foreign agents" and its activity was suspended because it received the annual prize established by the European Parliament "Sakharov: For freedom of thought" (even though the association presented evidence in the court that it refused to receive the award). Of course, this is an example of the bureaucratic approach to the activities of public associations, an absurd situation that requires a resolution. After all, the association "Voice" was an actively conducting voter education, advocating fair, free and transparent elections, without rigging, i.e., it encouraged what the Russian President Vladimir Putin called upon in his public statements during the September election campaign for the State Duma (the Lower house of the Russian Parliament) in 2016.

All of this suggests mistrust of state power towards the citizens' associations as an important element of civil society, against the background of the significantly

инвалидов в Российской Федерации: Федеральный закон от 24.11.1995 N 181-ФЗ (ред. от 29.12.2015) // http://www.consultant.ru/document/cons_doc_LAW_8559/ etc.

20 О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента.: Федеральный закон от 20 июля 2012 г. N 121-ФЗ // <http://base.garant.ru/70204242/>

21 [https://ru.wikipedia.org/wiki/Голос_\(ассоциация\)](https://ru.wikipedia.org/wiki/Голос_(ассоциация))

grown trust of the citizens and the people towards the President Putin²². This situation can hardly be called reasonable and fair.

Under the influence of strong criticism from both civil society and the scientific community, the legislation on non-profit organizations²³ in the regulation of relations with participation of “non-profit organizations carrying out foreign agent functions” have been amended, but none of them (including the latest change)²⁴ have eliminated the uncertainty of the concepts of “political activities”, as well as “receiving money and other property” from foreign states, international and foreign organizations, etc., nor have they led to a reduction of restrictions in the status of organizations recognized as “foreign agents”. We see the solution to this problem in excluding from the Russian legislation the concept of “foreign agent”, which in Russian has purely negative sense.²⁵ The current Russian legislation, even without the legal institution of “foreign agent”, completely allows the relevant state bodies to ensure the protection of the interests of national security without the hard pressure of civil society, the most important element of which are non-profit organizations (and associations).

3. Conclusion

Improvement of public control, first of all, requires a significant change in the ideology of relations between the state and civil society in the political sphere: from paternalism to partnership. As a starting and main idea may be proposed the principle formulated and repeatedly voiced by Russian President Vladimir Putin at various official meetings on the eve of the recent parliamentary elections in Russia and after the voting results: all politicians and officials need to be able to engage in dialogue, *to listen and hear the citizens*, representatives of

22 See: Путинское большинство: этапы формирования, структура, ценности: политические исследования// civilfund.ru/mat/niew/79

23 Public associations in the Russian legislation are considered as a form of non-profit organizations.

24 See: О внесении изменений в статью 8 Федерального закона «Об общественных объединениях» и статью 2 Федерального закона «О некоммерческих организациях»: ФЗ от 02.06.2016 N 179-ФЗ // www.consultant.ru/document/cons_doc_LAW_198862/

25 По делу о проверке конституционности положений пункта 6 статьи 2 и пункта 7 статьи 32 Федерального закона «О некоммерческих организациях», части шестой статьи 29 Федерального закона «Об общественных объединениях» и части 1 статьи 19.34 Кодекса Российской Федерации об административных правонарушениях в связи с жалобами Уполномоченного по правам человека в Российской Федерации, фонда «Костромской центр поддержки общественных инициатив: Постановление Конституционного Суда Российской Федерации от 08.04.2014 № 10-П// http://www.consultant.ru/document/cons_doc_LAW_161690/

various political forces²⁶. Apparently, only under such condition can be expected both a legislative reform regulating various types of public control in Russia, and its effectiveness.

Speaking of strengthening the guarantees of public control in the Russian Federation, it is possible to discern the most common areas:

- in order to enhance public control capabilities at the national level, it is important to adopt a Federal law on public discussion of the most important issues of public life, as well as a legislative consolidation of the possibility of a consultative referendum on such matters;
- in the implementation of preliminary, current and subsequent (final) public control at all levels of authority and administration, an extremely important role could be played by public associations which should be included in the process of adoption and implementation of administrative decisions, laws and other normative acts, which requires not only changes in legislation but also a formation of a reliable mechanism for its practical implementation;
- as social control involves ability of control subjects not only to detect deviations from what should have been achieved but also to participate in the elimination of violations, all subjects of public control should be provided guarantees of participation in such activities for all kinds of public control.

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26 See.: Meeting with the leaders of the parties that won the elections to the State Duma of the Federal Assembly of the Russian Federation, during a meeting with members of the Russian government after the results of the preliminary voting results// <http://www.putin-today.ru/archives/33455>

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УСТАВНО РЕГУЛИСАЊЕ И ПРАКТИЧНА ПРИМЕНА ЈАВНЕ КОНТРОЛЕ У РУСИЈИ

Резиме

Контрола је једна од неопходних функција јавне управе у друштву. Са становишта друштвеног управљања и уставноправне теорије, у раду се на примеру Русије разматрају садржај, карактеристике, облици и врсте друштвене контроле, и испитује како јавна контрола може да допринесе ефикасности јавне управе у друштву, као и откривању случајева кршења закона и корупције у раду државних и локалних власти. Неопходно је унапредити руско уставноправно законодавство које треба да обезбеди учешће народа, цивилног друштва у целини, грађана и њихових удружења у доношењу стратешких одлука у законодавном процесу. У процесу доношења закона треба обезбеди облик прелиминарне (превентивне) контроле усклађености законодавне политике са правцима развоја националне политике, и осигурати усклађеност нормативних аката са интересима народа. Осим тога, потребно је осигурати спровођење постојеће и завршне контроле активности државних и локалних власти. Аутор указује на неопходност доношења федералног закона о јавној расправи о важним питањима јавног и државног живота, закона о петицијама, итд., као и на неопходност измена и допуна закона о јавним удружењима грађана и јавној контроли.

Кључне речи: *уставноправно законодавство, јавна контрола, друштвена контрола функција јавне управе, практична примена.*

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THE IMPACT OF CONSTITUTIONAL REVIEW ON THE “LIVING” CONSTITUTION

Abstract: *The paper analyses the dynamic nature of the process of constitutionalisation which generates a tension between the need for the Constitution to reflect the social reality and the need to ensure its consistency over time, which is a presumption of stability of the entire legal system. The main goal is to explore the relations between consistency of the Constitution and its stability, emphasizing the interpretative role of the Constitutional Court in maintaining and developing the so-called Living Constitution.*

Keywords: *constitutional revision, living constitution, constitutional court, constitutional review.*

1. Introduction

Given that the process of constitutionalisation can be observed as a permanent and dynamic development, resulting in the ongoing revitalization of the Constitutional theory, it raises an issue concerning the role of the Constitutional Court in that process. Some believe that the Constitution is a “living organism” which has to be constantly adjusted to the ever-changing social structure/reality; therefore, the Constitutional Court can provide the necessary coherence between the static legal framework and the dynamic political reality by using its interpretative functions for the purpose of constitutional evolution.

The term “*Living Constitution*” was first used in the American theory in 1927 and, ever since, it has denoted any interpretive effort to adapt an aging legal act to the contemporary circumstances and developments. Today, the phrase “*Living Constitution*” is used as a hallmark of “judicial activism” aimed at breathing a fresh breath of life into the aging normative act by rendering judicial decisions on the merits of individual cases. In modern constitutional jurisprudence, the term “*invisible constitution*” is used in the constitutional principles doctrine as

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an expression of the doctrine stipulating that the fundamental constitutional principles in the legal order are the starting point for judicial interpretation, which ensures permanence and stability of the constitution. Consequently, it is important to consider the dynamics and duration of the “Living Constitution” from the standpoint of constitutional review and a new wave of judicial activism which is not only the exclusive feature of common law systems but also it is also exercised through an active role of the constitutional judiciary in the process of constitutional control.

As an independent constitutional authority, the Constitutional Court “occupies” its own legal space. Thus, in terms of the traditional principle of the separation of powers, it cannot be strictly designated either as a merely judicial or merely political space. The role of the Constitutional Court may be explained by the need to establish a legal counter-majoritarian balance to the political branches of government, which raises the separation of powers to an entirely new developmental level. The Constitutional Court has a delicate and well-developed corrective function, which has been built into the “body” of the constitution in order to ensure its legal position as the supreme law and to protect it from outbursts of political emotions. The constitutional jurisprudence embodies the continuity and stability of the constitutional principles as compared to the variable and volatile activity of political actors in the legislative and the executive authorities.

In literature, the problem of frequent constitutional revision, which was commonly regarded as the “French syndrome”, was mainly the subject matter of theoretical discussion in the long historical period starting from the establishment of the liberal state. However, at present, this problem is revealed in a whole new light of constitutional dynamism which can often surpass the dynamics of the ordinary lawmaker (Parliament). Therefore, a constitutional act is perceived quite differently from the perspective of citizens as holders of the constituent power and from the perspective of the external and largely objective circumstances which call for the constitutional change. Considering that this article reflects the perception of a country that is heavily shaped by external circumstances, it seems that only its citizens may declare: Give a chance to the Constitution, while the social circumstances constantly make us experience a civil catharsis anew when adopting another Constitution.

Without disputing the need for harmonizing the Constitution with the ongoing social processes and changes, it must be noted that such an approach may result in a constant constitutional revision in which the citizens as the constituent power become as active as the ordinary legislator (Parliament). Instead of nurturing “the spirit of the Constitution”, the constant changes in the legal order bear “the wraiths of the Constitution”.

2. The dynamism of the “living Constitution”

In the comparative constitutional theory, there is a growing number of articles which analyze the durability of national constitutional documents in given historical contexts, with the purpose of answering the following question: What are the factors that determine the time span of the Constitution before its demise or “death”?¹ After the Second World War, in the surge of constitutionalisation, the same question preoccupied the minds of great Constitutional theorists. On the foundations of K. Loewenstein research,² B. Akzin created a theory on “stability and reality of the Constitution”. There were two main aspects of this theory: first, stability and fragility of the Constitution, and second, reality and normativity of the Constitution (Akzin, 1956). The main focus of B. Akzin’s theory was the constitutional development of about forty countries until the end of 1952; in these countries, the collected evidence suggested that “extremely short-lived Constitutions, which are trying to achieve some constitutional changes, usually neglect the requirements of the legal continuity”. Half of the countries which were included in this research were prone to constitutional fragility because they had nominal Constitutions, unlike others “which undoubtedly show a high degree of reality and stability over a long period of time”.³ There are opinions

1 In the recent literature, there is a group of authors advocating for introducing a biological method in the constitutional research. The Constitution is perceived as a living organism which thrives and evolves depending on its surrounding, whereby the correlation between the Constitution and the social environment is based on the “*nature versus nurture*” model. The nature of the Constitution is set but its nurture in a given environment has a great impact on its longevity. The goal is to explore the phenomenon of the “constitutional mortality” on a world scale. (Cf. Elkins, Ginsburg, 2007; Ginsburg, Elkins, Blount, 2009; Elkins, Ginsburg, Melton, Shaer, Sequeda, Miranker, 2009; Elkins, Ginsburg, Melton, Shaer, Sequeda, Miranker, 2009; Ginsburg 2012; Elster, Offe, Preuss, 1998; Go, 2003.)

2 K. Loewenstein has established one of the most important classifications of the Constitution according to the ontological criterion of “harmonizing the reality of the governing processes with the constitutional norms”. His classification of constitutions into *normative*, *nominal*, and *semantic* constitutions is the cornerstone for subsequent research on the stability and longevity of the Constitution. The *normative* Constitution exists when *it is integrated in the state union: “Its norms regulate the political process”*. The *nominal* Constitution is not actually used in practice and it lacks “*existential reality*”. The *semantic* Constitution is a “suit which is not a real suit, but rather a cloak or elegant outfit” (Loewenstein, 1972: 203-248).

3 The subject matter of his work was an attempt to establish a correlation between normativity and stability, as well as between nominally and fragility of the Constitution. B. Akzin’s definition of the Constitution includes both the formal and material Constitution, which is defined as “any document, or any number of documents, or any customary law rules which were formally adopted by the highest authority and managed to become the rules of political and legal order” (the formal Constitution), and any document or rule “which regulates the basic structure and functions of the state” (the material Constitution). B. Akzin states that the measure of fragility or stability is determined by the duration of the Constitution

suggesting that we are still living in an era of constitutional design, given that more than a half of the total number of 200 national Constitutions have been written or altered in the last thirty years.⁴

The 21st century has "redefined the long tradition of professionally adopted Constitutions" (Hart, 2003:2) and developed a form of wide participation of citizens in the following phases of constitutional design: the process of preparing the Constitutional draft, an open public debate and a debate in the representative bodies. Yet, the legitimacy of the Constitution as the supreme legal act has not been strengthened by direct citizen participation, nor has it reflected on the durability of the Constitution, considering that the comparative literature shows that the average life-span of a constitutional document is about 15 years. Thus, we may conclude that, at any moment, there is some kind of Constitutional revision underway somewhere in the world.

There is a recurrent question on the longevity of the Constitution based on the estimated rate of constitutional "mortality", especially in the countries which do not have a long constitutional tradition, commonly designated in legal and politicological literature as "transition countries in transition". Hence, this article is an attempt to point out to the perpetual tension between the need to ensure that the Constitution adequately reflects the social reality and the need to provide its durability, as a presumption of the stability of the entire legal system. In both cases, the key prerequisite is that the legitimacy of the Constitution and the citizens' original constituent power are indisputable.

What does the Constitution mean to a state? As stated by the comparativist *P. Pasquino*, the democratic Constitution must achieve two main functions. First, the Constitution must contain "a morally superior set of values, rights and principles", which represent a generally accepted tendency in the social life and politics. Second, the Constitution determines the separation and redistribution of power among state institutions and political actors, as well as other procedures which oblige other governmental participants (Pasquino, 1998: 45). Some authors suggest that, by vesting power in the constitutional authorities and establishing various procedures, "the Constitution creates stability and predictability which is essential for a democratic system" (Elgie, Zielonka, 2001: 28).

itself, i.e. by "managing its obvious validity without disrupting its continuity", while its nominality and normativity can be measured "through the legal framework which reflects real requirements and the Constitution is truly respected". (Wolf-Phillips, 1972: 21-22.)

⁴ According to some estimates, three to four new Constitutions are adopted across the globe each year, ten to fifteen Constitutions are changed, and twenty of them are in some stage of Constitutional revision. (Ginsburg, Elkins, Blount, 2009: 201)

The American Constitution is often portrayed and commonly experienced by US citizens as a “holy grail”, the fundamental constitutional document which served as the cornerstone for establishing the state union. However, French history paints a different picture: the spirit of constitutionalism is not to be found in the Constitution but rather in the constitutional power of the nation which rises above the Constitution and cannot be bound by the Constitution itself. The nation has its original right to establish and change “its own government, and by its own free will to determine the governments institutional shape” (Preuss, 1996: 22-24). As opposed to the static form of the US constitutional system, the explanation for such occurrences can be found in the extraordinary dynamic of the French constitutional history. The European-continental Constitutional law is much closer to the French model. Regarding the dynamics of adopting and introducing alterations in the Constitution, the continental system of Constitutional law is somewhere in between the French and the American model of the Constitution; however, it is closer to the French constitutional practice: “Many Europeans have never actually seen a copy of their country’s Constitution, and have only the most general notion of what it contains” (Gallagher, Laver, Peter, 2001: 18). The Constitution is interpreted in a pragmatic way; it has an instrumental value and, therefore, the citizens will not hesitate to take part in constitutional change or to replace the current Constitution with an old or new one.

If we look at the core of the Constitution, there is no need for revision or any kind of alteration, unless there are some major changes in the governing structure of the state or some external threats to the state sovereignty. The basic constitutional principles rest upon fundamental values, such as the rule of law and the national sovereignty. Therefore, it is difficult to justify a complete constitutional revision if this *conditio sine qua non* is met but the “Constitutional momentum” has not occurred which would justify the need for reexamining the constitutional values and ensuring their compliance with the current social reality.⁵

A reverse situation, where the basic constitutional principles (such as national sovereignty) should be changed for the sake of pragmatics of the legal system mechanisms, which are in effect (sometimes by force) in the national or international legal order, is absolutely unacceptable. This would allow for the legitimization of the legal instruments which are used to delegitimize the constitutional principles. Establishing the constitutional power in the field of politics, where

5 The theory of “Constitutional momentum”, developed by B. Ackerman, signifies the time of political crisis in which all chosen representatives act collectively with the goal of Constitutional reform/change, in order to ensure its compliance with the social reality. In the common law system, Ackerman considered that the revision could be achieved beyond the regular Constitutional instruments, primarily by judicial interpretation. (According to: McConnell, 1994: 115-144.)

the basic constitutional values are being replaced by the “practical value” of the Constitution, may bring us to the point where the constitutional revision is the only constant in the legal system.

The goal of this research is not to challenge the need for the constitutional revision, nor to diminish the value of *T. Jefferson’s* words that every generation should have its line in the Constitution: “The dead should not rule the living”.⁶ As *A. de Tocqueville* concluded long time ago, in the new era of constitutionalism, there is no economic, political or public affairs issue which, sooner or later, does not turn into a problem that calls for judicial interpretation or resolution (Cappelletti, 1981: 115). The contemporary constitutional systems are based on this opinion: the Constitution needs an appropriate interpretation from the moment it is put into effect, while constitutional cases are subject to the constitutional or judicial jurisprudence which, by rendering its decisions, breathes life into the normative structure.

3. The Constitutional Court as a creative interpreter of the Constitution

The analysis of the Constitutional Court role should contribute to providing the answer to the initial question: Are frequent constitutional changes necessary in order to validate the Constitution, i.e. to make the Constitution more compliant with the social reality? An additional question is closely related to the previous one: Is it necessary to single out the normative construction of the Constitution in the legal theory and observe it in isolation from the political notion of the Constitution and the concept of the “Living Constitution”, which “in the same suit” accompanies the evolving legal, political, economic and general social development

In the opinion of O. Pfersmann, if we may raise an issue about the Constitutional Court capacity to evaluate the “unconstitutionality of constitutional amendments”, then we have an entire field of the constitutional continuity in which we can provide a long life to any constitutional norm (Pfersmann, 2012: 84). The Federal Constitutional Court of Germany has developed a doctrine on the existence of “suprapositive law, which is binding for the constitutional legislator”, as well as the fundamental principles, which enable the Constitutional Court to balance two constitutional norms and give priority to the fundamental constitutional principles, thus protecting the essential values of the constitutional system.

⁶ *The letters of Thomas Jefferson to James Madison, 1789.* (<http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/>, accessed 27.07.2015.)

The modern constitutional state has vested the power in the Constitutional Court to resolve constitutional disputes which may not necessarily be “authentically legal” as they may include some political elements to a smaller or larger extent. Thus, the Constitutional Court is involved in the process of creating the law alongside with other legal and political actors. These two properties of the Constitutional Court have been brought together in its role of the “guardian of the Constitution”. Besides, the Constitutional Court can ensure “peace in the social reality” (Nova, 1976: 117). In determining the role of the Constitutional Court, no extremes are acceptable: on the one hand, the interference of politics would discredit the idea of constitutional review; on the other hand, this judicial authority may not be expected to act as a “mechanical technician” and strictly apply the positive law. By their nature, constitutional disputes are legal disputes but the role of the Constitutional Court in the process of resolving these disputes is to provide an authentic interpretation of the Constitution. In all cases where there is a legal gap or loophole, the Constitutional Court has the discretionary authority to interpret the Constitution and to construe the intention of the lawmaker regarding the fundamental constitutional principles. As noted by *G. Leibholz*, “The Federal Constitutional Court had brought “genuine judicial decisions”, not by limiting itself to the role of mechanical technicians, but by finding and probing into the Constitution-makers` intention”. (Nova, 1976: 117).

In exercising its basic function as “the guardian of the Constitution”, the Constitutional Court, has a degree of freedom in interpreting constitutional norms, taking into consideration the ever-changing social circumstances. The Constitutional Court is granted “a discretionary authority regarding creative interpretation” (*W. Geiger*); in effect, the Court needs to establish a rational connection between the meaning of constitutional norms and constitutional institutions, and the real political environment (*M. Drath*). In order to have a fully functioning Constitutional Court, it is insufficient (yet necessary) to meet the legal requirements embodied in Ch. Montesquieu’s idea that only the Court may “declare the law” or specify the legal norms by formal interpretation of the Constitution. Furthermore, the Constitutional Court is “a creator of the law” which has original jurisdiction to act in the spirit of the Constitution; namely, it is a creative interpreter of the Constitution, thus exercising its judicial as well as political role.⁷

7 This view was prominent in West Germany at the time when the Federal Constitutional Court was forefronted by distinguished jurists, such as: *J. Wintrich*, *R. Katz*, *G. Leibholz* (1954); at that time, the pragmatic interpretations of the German Constitution by the Federal Constitutional Court drew very close to the interpretations issued by the American Supreme Court. *G. Leibholz*, a long-term judge at the Federal Constitutional Court (1951-1971), belonged to a group of jurists who advocated for instituting judicial and legal aspects of control, political neutrality and mutual compliance of constitutional norms (Nova, 1976: 117).

The Constitutional Court may review legal disputes involving less rational legal standards and calling for a much more flexible approach to interpreting constitutional norms, given the fact that constitutional judges are required to take a stand on the current political environment while considering every constitutional norm. The Constitutional Court may not be indifferent to the political surroundings. Considering that the constitutional norms and social reality are not always in accord, the Court is expected to align constitutional principles with the current political environment by establishing a rational and justifiable correlation. To that effect, apart from relying on the grammatical, historical and logical methods of interpretation, constitutional judges are also obliged to understand the original meaning of the Constitution as a whole, which implies their responsibility to face the political consequences that their decisions may produce (Nova, 1976: 120).

Comparing the European-continental system of constitutional review with the Anglo-Saxon system of judicial review, it may be noted that the former is largely based on the positivist approach in the process of resolving constitutional disputes. However, in practice, the functions of constitutional courts are not exclusively restricted to the interpretation of constitutional norms and providing a normative hierarchy in the legal order; rather, the constitutional court functions have grown and expanded towards the interpretation of the so-called natural (inalienable) rights and fundamental constitutional standards in the democratic system.⁸

In the first few years after the German Constitutional Court had been established, the Court decisions included the use of phrases such as: "suprapositive basic norm", "fundamental postulates of justice", "norms of objective ethics" or "natural law" (Rommen, 1959: 1-25; Dietze, 1956: 1-22). Thus, in exceptional circumstances, the Court was able to explain and justify the decision if the Court found that the norms of the Basic Law were (in one way or another) in collision with the "higher law". At present, the German Constitutional Court is much more inclined to interpreting "the fundamental principles" of the Basic Law, which gives the Court certain latitude in exercising its judicial functions; yet, all of this was a result of the development of well-established constitutional democracy.⁹ Finally, international conventions provided an opportunity to introduce an "extra level" of interpretation in the constitutional review, which allows the

8 By rendering the decision on a gender equality case on 18th December 1953, the German Constitutional Court is considered to have made the first step towards introducing the principle of interpreting "the natural law principles" alongside with the principle of "hierarchy of legal norms". (Cole, 1959: 973; Brünneck, 1972: 387-403.)

9 As a result of interpreting constitutional norms through numerous decisions of the Constitutional Court, there are opinions that the Basic Law is now virtually identical with

Constitutional Court to exceed the traditional boundaries when interpreting the national law. This is particularly important for EU member states in terms of observing the compliance with and implementation of the basic EU law principles. (Hague, Harrop: 2004: 217).

Judicial activism in the domain of constitutional review has been developed in the Constitutional Courts of the third generation, including the Constitutional Courts of the former socialist countries. For example, apart from being involved in the process of reviewing the old socialist and adopting the new Constitution, the Constitutional Court of Hungary had an important role in shaping the so-called “Living Constitution”. The interpretative role of the Constitutional Court contributed to instituting a system of judicial control similar to that exercised through judicial review in the US legal system. Some Hungarian authors emphasize the connection between the Constitutional Court and the citizens through the instrument of *actio popularis*, which allows citizens to raise any constitutional question and demand Constitutional review.¹⁰ Although this instrument of constitutional review has been heavily criticized in theory and practice, there is no doubt that it enables the citizens as original holder of constituent power to influence the creation of the constitutional practice, bring the formal Constitution to life and put it into effect by the means of constitutional interpretation. According to S. Freeman, “In exercising their constituent power at the level of constitutional choice, free and equal persons could choose judicial review as one of the constitutional mechanisms for protecting their equal basic rights. As such, judicial review can be seen as a kind of shared pre-commitment by sovereign citizens to maintaining their equal status in the exercise of their political rights in ordinary legislative procedures.” (Freeman, 1990-1991: 327)

Juta Limbach, a judge of the Federal Constitutional Court of Germany, points out that “Intellectual honesty compels us to state that there is no usable catalogue of criteria that could serve as a signpost in the ridge-walking between law and politics.” (Limbach, 1999: 29). These two fields are partially intertwined and cannot be categorically separated from each other. The criteria for examining a constitutional dispute are structural constitutional principles, which are aimed at supporting not only judicial revision but also political life. The principle of the separation of powers and the principle of constitutional democracy are structural principles which need to be present as a corrective factor in every juridical decision. Notably, voluntary judicial self-restraint and the scope of judicial responsibility are essential; by observing the separation of powers, the

its interpretation issued by the Federal Constitutional Court” (H. Abraham, D. Kommers). (Gallagher, Laver, Mair, 2001: 24).

¹⁰ Everyone is entitled to initiate a procedure before the Constitutional Court in Hungary; hence, 90% of all cases are initiated by citizens themselves (Sólyom, 2003: 151-152).

constitutional judiciary permanently watches over the balance in exercising the governing power.¹¹

Under the Constitution, the Constitutional Court is obliged to watch over the separation and the balance of governing powers but, in due course, it must carefully observe the boundaries of its own responsibility. Therefore, disputes concerning the separation of powers may involve elements of “political nature”, but the Constitutional Court decision to exercise judicial self-restraint and stay away from such cases does not mean that the Court competences have been reduced or undermined; it actually reflects a strong commitment to refrain from “being involved in (daily) politics” and interfering in “the limited constitutionally created field of free political design” (Papier, 2010: 35).

4. Conclusion

After the creation of national states as well as international and transnational organizations, one could expect that the reasons for dynamic constitutional revision would cease to exist. Yet, the opposite occurred,¹² and the surge of constitutionalism did not subside. At the beginning of the new millennia, it is not uncommon to adopt new constitutions, and their short life-span is extended by a life-support system; thus, constitutional provisions are amended in short intervals, and their incorporation into the legal structure is limited from the outset by enacting regular legislation. Without disputing the need to adjust the Constitution with the ever-changing processes in the society, we may conclude that such an approach leads to a permanent state of constitutional revision in

11 Some authors suggest that constitutional courts of Eastern European countries demonstrate a greater degree of condescending superiority in their attitude towards Parliament in terms of constitutional disputes involving the separation of powers, as opposed to cases involving human rights issues (Sadurski, 2008: 51). Some other authors do not support the conclusion that it may be easier for the Constitutional Court to materialize its political potential in the sphere of human rights, given the fact that the disputes on the separation of powers involve more risk and the Courts have to treat them with great caution (Epstein, Knight, Shvetsova, 2001: 117-163). Using the example of the Germanic Constitutional Court, D. Kommers shows that, when deciding on disputes involving the separation of powers (including an abstract review of constitutionality as well disputes on competences), this Court rationally prolongs the delivery of the final decision until tempers cool down. In this case, time is a great ally and, due to the postponement of the final decision, the controversy either loses its momentum or is often self-resolved by other political means; in many cases, it induced the initiators of the procedure to withdraw their propositions (Kommers, 1989: 38).

12 In the seventies the number of Constitutions of postcolonial countries accounted for two-thirds of all Constitutions in the world. After the fall of the Berlin Wall and the systematic changes in the socialist countries the share of the new national Constitutions rose to four-fifths of all Constitutions worldwide (Go. 2003: 71-72).

which the citizens as holders of constituent power become almost as active as the ordinary legislator (Parliament).

In exercising its fundamental role of “the guardian of the Constitution”, the Constitutional Court has a certain degree of freedom when interpreting the constitutional norms, in line with the ever-changing social circumstances. Considering that the positive law regulates the basic principles of the legal as well as the political aspects of the Constitution, the constitutional judiciary is vital as it provides the overall political and governmental stability of the system of government. The primary jurisdiction stipulated by the Constitution, the procedure for their implementation as well as relations between constitutional authorities fall within the scope of “the fundamental law”, whose implementation is secured by the Constitutional Court. Taking into account the scope, complexity and abstract nature of constitutional norms, the envisaged goals may be accomplished in various ways, each of which may be reasonably explained and justified.

In order to have a fully functioning Constitutional Court, it is insufficient (yet necessary) to meet the legal requirements embodied in Ch. Montesquieu’s idea that only the Court may “declare the law” or specify the legal norms by formal interpretation of the Constitution. Furthermore, the Constitutional Court is a creative interpreter of the law, which has original jurisdiction to act in the spirit of the Constitution. Formally speaking, the Constitution is not altered (especially over a longer period of time) by constitutional revision alone; actually, it also implies the evolution in understanding and interpreting legal rules. In order to rationally express the values which are embodied in the constitutional and political culture, the fundamental constitutional principles are subjected to the process of modernization. In that context, the role of the Constitutional Court is of special significance. Consequently, the modern age has developed a new function of this constitutional authority, which is reflected in the interpretative evolution of the Constitution.

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УСТАВНОСУДСКА КОНТРОЛА У ФУНКЦИЈИ „ЖИВОГ“ УСТАВА

Резиме

У савременом конституционализму не постоји ни једно економско, политичко или питање јавних послова које, пре или касније, не постане проблем и које не тражи судско тумачење или разрешење. Од тренутка ступања на снагу устав тражи одговарајућу интерпретацију, а уставни спорови постају предмет уставносудске јуриспруденције која својим одлукама удахњује живот нормативној конструкцији. Појам „живи устав“ (Living Constitution) употребљен је први пут у америчкој литератури 1927. године и од тада се њиме означава сваки интерпретативни напор у циљу усаглашавања старог документа са савременим потребама. Данас се синтагма „живи устав“ користи као одредница за „судски активизам“ који кроз појединачне судске пресуде омогућава времешном нормативном акту да дише. У савременој уставносудској пракси користи се и термин „невидљиви устав“ као израз доктрине да уставни принципи, који се могу сматрати фундаменталним у правном поретку, представљају полазни основ за интерпретацију која обезбеђује трајност уставном акту. Отуда је важно размотрити трајање и динамику „живог“ устава кроз оптику контроле уставности и нови талас судског активизма, који није искључиво обележје прецедентног права већ се остварује и кроз активну уставносудску контролу.

Уставни суд је постао креативни интерпретатор права који својим оригиналним акцијама делује „у духу“ устава, па се може рећи да је овај уставни орган добио нову функцију која се огледа у интерпретативној еволуцији устава. Судска креативност може се окарактерисати не као одступање од формалног устава, већ као својеврсна перцепција правних правила кроз опште уставне принципе и сагледавање њихове будућности. Његова улога се може објаснити потребом за успостављањем једног правног противтега политичким гранама власти, чиме је систем поделе власти подигнут на виши ниво развоја. Уставни суд има обележја једног филигрантски израђеног правног коректива, који је уграђен у „тело“ устава са циљем да осигура његов правни изражај и сачува га од излива политичких емоција. Уставна јуриспруденција представља сталност и одражава стабилност уставних принципа наспрам променљивости у деловању политичких актера у законодавној и у извршној власти.

Кључне речи: уставна ревизија, „живи устав“, уставни суд, уставносудска контрола.

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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MACEDONIA: A VETO PLAYER OR A VETOED BODY?!

Abstract: *This paper examines the role of the Constitutional Court in the political system of the Republic of Macedonia. Within the envisaged normative framework, the Constitutional Court of the Republic of Macedonia has been given the opportunity to be an active player in the constitutional and political system. However, due to the lack of constitutional activism, the Constitutional Court has not become the cornerstone of constitutional democracy. From the outset of the transition period, there were periods when many constitutional court decisions were reached under political pressure exerted by the executive power. These political decisions undermined the authority of the Constitutional Court. In some other periods, the Parliament did not abide by the Constitutional Court decisions; instead, it passed very similar or much worse legal provisions than those that had been nullified by the Constitutional Court. In these periods, the Constitutional Court was "the vetoed body", subject to parliamentary scrutiny.*

Keywords: *Constitutional Court, Macedonia, lustration, referendum, pardons, Parliament.*

1. Introduction

The constitutional provisions regulating the Constitutional Court of the Republic of Macedonia provide an opportunity for an active position of this body in the political system. The constitutional provisions on the Constitutional Court are modest and leave space for their legal development and interpretations by the Court itself. There is no legislative act on the Constitutional Court. Besides the Constitution, the only legal act that regulates the issues pertaining to the Constitutional Court activities are the Rules of Procedure, adopted by the

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Constitutional Court itself. Under the Rules of Procedure, *anyone* is entitled to submit an initiative to initiate a procedure before the Constitutional Court. The Constitutional Court also has original jurisdiction to start a procedure without anyone's initiative. The Constitutional Court used this competence a few times (e.g. in Decision U. No.206/94; Decision U. No. 81/95). The Court has also used the right to broaden the assessment of constitutionality or legality to some provisions and questions which were not raised in the initiative but which came up during the work of the court. This creates a possibility for judicial activism, which has never happened in Macedonia.

The Constitutional Court was a veto player only in several situations when it was in a position of "cohabitation" with the Government. The Constitutional Court in Macedonia is a body comprising nine judges elected by the Parliament. Two of these nine judges are elected upon the proposal of the President of the Republic and two are elected upon the proposal of the Judicial Council of the Republic of Macedonia. The mandate of the judges is nine years; thus, it was only in the first composition of the Constitutional Court that all judges started their mandate at the same time. After that, some of the judges were elected to other positions, others resigned, so that new judges never started their mandates at the same time. The ruling majorities in Parliament strived to take control over the majority of the Constitutional Court. The periods in which they did not manage to do that, the periods of "cohabitation", were the periods when the Constitutional Court acted as a veto player in some "highly politicized cases". But even in such periods, the ruling majority was taking measures to "discipline" the judges, by means of financial restrictions and cuts of the Budget of the Constitutional Court (in February 2001), personal pressure and attempts to discredit the judges or members of their families, etc.

In all other periods, the Constitutional Court was a vetoed body. Unfortunately, the obedient attitude of the Constitutional Court became dramatically obvious in 2016, when the Court controlled by the ruling majority adopted two opposite decisions on the same issue in a period of 3 months, to meet the interests of the political elites.

This dramatic example of the Constitutional Court as "a rubber stamp" of the Government showed to the general public what was already noticed and criticized by the expert public: the "obedience" of the Constitutional Court to the directives of the Government in "politically" sensitive cases, when the Court majority was affiliated or elected by the current ruling majority.

The general public was dramatically confronted with the partisanship, politisation and unprofessionalism of the Constitutional Court of the Republic of Macedonia,

which acted not as the guardian of the constitutional “spirit” but as the executor of the will of the ruling majority.

In most of the “problematic” cases, the Constitutional Court misused the “modest” constitutional norm on its competence, to deliver decisions grounded on the procedural reasons according to the will of the executive power. In other cases, the substantial reasoning was problematic.

2. Arbitrary Interpretation of its Competencies

According to Art. 110 of the Constitution, the Constitutional Court of the Republic of Macedonia decides on:

- The conformity of the laws with the Constitution
- The conformity of collective agreements and other regulations with the Constitution and the laws.

As it could be seen, instead of enumerating the acts which are subject of judicial review, the Constitution uses the term other regulations which is very broad and entails: by-laws (decrees, Government decisions, directions, rules and other acts of administrative bodies) enacted by the executive power; local-government acts (municipality statute, decisions and conclusions of the municipal council, etc.); the acts of institutions and organizations with public powers; the statutes and rules of the educational, health and other institutions and organizations; the regulations of the Assembly of the Republic of Macedonia which do not have the status of law (decisions, conclusions, declarations, resolutions and recommendations), etc. These acts are subject to judicial review if they are general acts, i.e. if they are valid for an unspecified number of entities in RM. But the assessment whether some act is general or not is in power of the Constitutional Court.

The Constitutional Court misused this power to declare itself incompetent to decide on constitutionality of some acts which the members of the Constitutional Court considered not to be general acts. This misuse of power of the Constitutional Court was made in the cases concerning:

- Conclusion of Parliament not to issue a notice of referendum for pre-term elections;
- Different decisions on the competence to decide on constitutionality of international agreements;
- The procedure for adopting the Budget of the Republic of Macedonia, and
- Different decisions on the competence to decide on constitutionality of the decision for dissolution of the Assembly.

2.1. The Decision on the Act of the Parliament Refusing to Issue a Notice of Referendum

One of the earliest examples of problematic interpretations of the Court competencies was the decision of the Constitutional Court of the Republic of Macedonia adopted in 1996, where the Court declared that it was not competent to decide on the constitutionality of the Conclusion of the Assembly that there was no constitutional base for Parliament to issue a notice of referendum for pre-term elections.

According to the Constitution, the Assembly decides on issuing notice of referendum concerning specific matters within its sphere of competence. The Assembly is obliged to issue notice of referendum if one is proposed by at least 150,000 voters. In 1996, 150,000 voters demanded from the Assembly to issue a notice of referendum on the question: "Are you for pre-term elections for representatives in the Assembly of Republic of Macedonia, which would be held at the end of 1996?" The initiative for referendum was submitted by the largest opposition political party, which boycotted the second round of parliamentary elections held in 1994, complaining that the elections were not free and fair. The Assembly did not accept this initiative, with the explanation that it can issue a notice of referendum concerning specific matters within its sphere of competence but not for pre-term elections. An initiative was sent to the Constitutional Court to decide on the constitutionality of this Conclusion of the Assembly.

The Constitutional Court decided that it was not competent to decide on the constitutionality of the Conclusion of the Assembly, explaining that the Conclusion did not regulate relations which make this act general, and that it was an act regulating the work of the Assembly which was used for deciding a concrete question (Resolution of the Constitutional Court of the Republic of Macedonia, No. 150/1996). This explanation is very problematic because it raises many questions, such as the question of the definition of general acts; if general acts are acts which *erga omnes tangit*, it poses the question whether this Conclusion of the Assembly produces consequences *erga omnes*, etc.

In determining the nature of some act (i.e. whether it is general act or not), the Constitutional Court should consider the relations regulated with the specific act and the effects produced with that act. The name of the act should not be primary concern, especially when other bodies could misuse their competence and try to avoid review of constitutionality by giving "wrong titles" of the acts.

The Constitutional Court stated that, "conclusions are acts regulating the work of Parliament; they are not regulations or general acts which normatively regulate relations." The Constitutional Court reasoned that the Conclusion of the

Assembly did not regulate the issues concerning the referendum, or relations concerning an undefined number of people, or norms that would apply in future cases, but that it decided on concrete demands of individually determined persons. This explanation is problematic because the Conclusion of the Assembly did not concern only 150,000 people who signed the initiative but also all voters that would have had the right to vote in the referendum, had it been called by the Assembly. This Decision of the Constitutional Court left the right to referendum and the constitutional norms on referendum without legal protection.

Unfortunately, this was only the beginning of problematic interpretations issued by the Constitutional Court.

2.2. Decisions on International Agreements

The Constitutional Court showed inconsistent attitude when it interpreted its competence to decide on the constitutionality of international agreements. Several initiatives for assessing the constitutionality of the laws on ratification of international agreements (having provisional reference for the country) were submitted to the Constitutional Court after the UN General Assembly Resolution 817/1993, in terms of the UN membership of Macedonia under provisional reference.

In these cases, the Constitutional Court of the Republic of Macedonia stated that Article 110 of the Constitution did not explicitly envisage the competence of the Constitutional Court to decide on constitutionality of ratified international agreements. The Constitutional Court stated that the evaluation of compliance of an international agreement with the Constitution is performed by Parliament in the procedure for ratification of the international agreement (Resolution of the Constitutional Court of the Republic of Macedonia, No. 230/1996).

In 2000, the Constitutional Court was asked to decide on constitutionality of the Act on the Ratification of the Agreement between the states-parties in North-Atlantic Agreement and other state parties in the Partnership for Peace (Resolution of the Constitutional Court of the Republic of Macedonia, No. 178/2000). The Constitutional Court of the Republic of Macedonia rejected this initiative because its content was evaluation of the “content of an international agreement”. The Court ruled that it did not have such competence.

In 2002, the Constitutional Court (in same composition) decided that the Constitution provided a possibility for the Court to decide on formal and material aspects of the Act on Ratification of the Bilateral Agreement between the Republic of Macedonia and the Republic of Greece for Building and Management of Oil Pipeline (Official Gazette of the Republic of Macedonia, No. 62/99). The

Agreement was concluded by the Government, which was replaced in 2002, and the new Government opposed that Agreement. The Constitutional Court met the "demand" of the new Government.

In its Decision, the Constitutional Court stated that it was competent to decide on constitutionality of the international agreements which upon ratification become part of the legal system of the Republic of Macedonia and should be in conformity with the Constitution (Decision of the Constitutional Court of the Republic of Macedonia, U. No.140/2001).

But in 2005, the Constitutional Court passed a decision in which it returned to its primary stance and decided that it was not competent to evaluate the constitutionality of content of international agreements, and rejected the initiative for the assessment of certain articles of the Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Albania on cooperation in the field of education and science and certain articles of the Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Bulgaria on mutual recognition the documents on education and scientific degrees (Resolution of the Constitutional Court of the Republic of Macedonia, U. No. 150/05). The Constitutional Court explained that the assessment of compliance of international agreements with the Constitution is exercised by the Parliament of the Republic of Macedonia in the procedure for ratification of the international agreement, which after its ratification becomes part of the domestic legal system and is thus directly implemented.

2.3. Decision on the competence to decide on the procedure for adopting the Budget of the Republic of Macedonia

At the end of 2012 the 2013, the Budget was adopted after a serious clash between the ruling majority and the opposition in the Parliament. The opposition was using filibustering to postpone the adoption of the Budget. The Government wanted to adopt the Budget before New Year and the procedure was violated in Parliament. Even more, the opposition and the journalists were expelled from the plenary session by the police forces on the day of adoption of the Budget.

Because of the violation of parliamentary procedure, the initiative for judicial review of the 2013 Budget was submitted to the Constitutional Court (Resolution of the Constitutional Court of the Republic of Macedonia, No. 20/2013, adopted on 19.01.2014). The applicant asked the Constitutional Court to decide on the constitutionality of the Budget because it was adopted in a procedure that was not in accordance with the Rules of Procedure and because the illegal procedure also implied the violation of the Constitution. This initiative was refused on two grounds. First, the Constitutional Court decided that it did not

have competencies to decide whether the Budget was adopted in a procedure prescribed in the Parliamentary Rules of Procedure. The Constitutional Court noted that it was only competent to decide whether the acts are adopted by the competent body! This conclusion of the Constitutional Court is very dangerous because it leaves leeway for Parliament to violate the law-adopting procedure without any legal consequences. Another reason for the Constitutional Court refusal in this case was the temporary character of this initiative, given that the Constitutional Court decides only on the constitutionality and legality of valid acts. The 2013 Budget was out of legal system by the end of the year 2013. As the decision was rendered in January 2014, there was a reasonable suspicion that the Constitutional Court purposefully waited for the year 2013 to finish.

2.4. Decision on the Constitutionality of Dissolution of Parliament

In 2016, within a period of three months, the Constitutional Court adopted two contrary decisions on its competence to decide on the constitutionality of the act for dissolution of Parliament.

On 18 January 2016, the Parliament of the Republic of Macedonia adopted a Decision on its dissolution, which should have entered into force on 24 February 2016. This Decision was challenged before the Constitutional Court because of its postponed effect. On 18 February 2016, the Constitutional Court refused the initiative for review of constitutionality of the Decision, stating that it is a subject-specific act which does not contain general norms, i.e. does not at all regulate relations in a general manner. The Decision is an act of “individual character” which decides “on individual legal situations in which the application of some general regulation is exhausted only once.” In addition to this strange explanation, the Court stated that “the challenged decision does not regulate legal relations in a general manner and its function is exhausted only in one concrete case of dissolution of the Parliament” (Resolution of the Constitutional Court of the Republic of Macedonia, U. No. 9/2016). From constitutional standpoint, the Constitutional Court majority issued a very dangerous decision. It is not understandable to state that the Decision for dissolution of Parliament (with a delayed effect) is an individual act and to leave the Parliament the possibility for arbitrariness.

Three judges of the Constitutional Court wrote two Dissenting Opinions. They pointed out that the “challenged Decision has universal effect because it affects all citizens of the Republic of Macedonia who vote for Members of the Parliament in general and direct elections.” The Decisions which refer and involve voters, “in essence are not referring to the Parliament itself and to its internal operation, but initiate a series of legal activities and implications, which refer to their

parliamentary mandate and legitimacy, as well as to the power (Government) and thus universally to all citizens. With contrary interpretation, there will be no systematic possibility for control of the Parliament, whether it performs its function according to the Constitution, which will mean that there is a serious legal void in functioning of control mechanisms between three branches of state power, and which will generate arbitrariness." (Dissenting Opinion on Resolution of the Constitutional Court of the Republic of Macedonia, U. No. 9/2016).

The Decision on dissolution of Parliament was amended on 23 February 2016, and the date for entering into force was changed. With these changes, the dissolution of Parliament should have become effective on 7 April 2016, instead of 24 February 2016. The Parliament was dissolved on 7 April 2016 and the elections were called. The country was in political crisis and the conditions for free and fair elections did not exist. The State Electoral Commission announced that only one political party (the ruling one) would run for elections, which were supposed to be held on 5 June 2016. In such circumstances, demands for postponing the elections and reconvening the Parliament were posed. The "salvation" came from the Constitutional Court. On 18 May 2016, the Constitutional Court unanimously decided that it was competent to decide on the Decision on Dissolution of Parliament considering that "it has a character of regulation, because the decisions of this type has a universal effect and indirectly refers to all citizens who vote for certain Member of the Parliament in direct elections, i.e. transfer the mandate to MPs but thus they also transfer the sovereignty to the Parliament to decide in their name." (Decision of the Constitutional Court of the Republic of Macedonia, U. No. 104/2016).

There is no doubt that these two completely different decisions, adopted within a period of three months, testify for the politicization and political influence over the majority in the Constitutional Court, who vote according to the will and needs of the ruling majority. But, the dilemma is which of these two completely opposite attitudes is really held by the "changing mind" of majority in the Court! Especially when the President of the Constitutional Court, while deciding the second time (on 18 May 2016), stated that she would make a precedent and accept the initiative because of the political crisis in the country. It implies that, as the one representing the "changing mind majority" in the Court, she did not think that she made a mistake while deciding the first time.

3. Interpretation of other Constitutional Norms - "As the Government likes it"

The Constitutional Court arbitrarily interpreted not only its own competencies but also some other constitutional norms in order to "please" the Government.

There are several decisions “as the Government likes it”, among which are the cases on the Judicial Council, on pardons, on lustration, etc. There are also important examples in which the constitutional complaint for protection of the freedom of expression was decided in favor of high politicians.

3.1. Judicial Council

The desire to control the judiciary has always been present in the executive power in Macedonia. After the elections in 2002, wanting to control the Judicial Council, the new Government adopted amendments of the Act on Republican Judicial Council introducing a pre-term termination of mandate of the Council members, which opened the possibility for new composition of this body.

The Constitutional Court did not consider these legal changes unconstitutional (Resolution No. 118/2003, adopted on 16.07.2003). The Constitutional Court did not find it problematic that the Act introduced conditions for the termination of the mandate of the Judicial Council members that were not contained in the Constitution. The Constitution guaranteed a six-year mandate of the members of this body, while the Act envisaged a pre-term end of the mandate of the current members of the Republic Judicial Council. Thus, the Act had primacy in regard of the constitutional norms.

The Constitutional Court stated that the Constitution regulated the election and duration of the mandate of the members of the Republic Judicial Council, but that it did not regulate the condition for dismissal of the members of the Judicial Council nor other conditions under which the mandate of its members could end before the expiry of the six-year term, which meant that the Constitution left these questions to be regulated by a specific act.

The Constitutional Court also stated that the provision that the mandate of all current members of the Council shall end was not unconstitutional because, in 2001, the Constitution was amended in the provisions on the Republic Judicial Council and the need for electing new members came from the direct application of the new constitutional amendment.

This reasoning of the Constitutional Court is unacceptable because the constitutional amendment provides a new majority for the election of the Republic Judicial Council, but it does not include a provision on the termination of the mandate of the current member. Also, the constitutional amendment was not accompanied by the constitutional act regulating the implementation of the constitutional amendments that provided the terms for election of the new Republic Judicial Council as a new judicial body. If the constitutional amendments

do not regulate that the mandate of the current body shall end, then it is logical that it shall proceed with its activities until the end of its mandate.

Moreover, the Constitutional Court explains that the legal provision on the termination of the mandate of the current members of the Republican Judicial Council "does not create new relations, but it has the character of a transitional provision which is needed for adjusting the current situation concerning the Council members with the constitutional amendment", particularly considering that "the aim of the legislator is the operationalization of the constitutional amendment". Such reasoning is unacceptable because the "omission" (if it was an omission) of the legislation to adopt the constitutional act for implementation of the constitutional amendments cannot be "corrected" by adopting a legislative act with simple majority.

3.2. The Clemency Act

In March 2016, in an unusually express procedure, the Constitutional Court abolished the 2009 Act on Amendments to the Clemency Act (Decision of the Constitutional Court, No. 19/2016). This 2009 Act specified the criminal offences and circumstances in which the President could not grant pardons; it also eliminated the possibility of granting pardons without following any procedure (which may include a request for pardon/clemency, a proposal of the Ministry of Justice, an opinion of the Pardoning Commission, etc.). The entire process concerning the decision of the Constitutional Court to abolish the 2009 Act was followed by controversy and public protests. The Decision of the Constitutional Court was intended to enable the President of the Republic to pardon politicians who were accused of corruption and committing other crimes by the Special Public Prosecutor, elected as part of the political agreement for overcoming the political crisis in Macedonia which started after the leaked telephone conversation that disclosed electoral fraud, crime and corruption in the government.

In its decision, the Constitutional Court exceeded its competencies because it assessed the appropriateness of the legal provisions related to the prohibition of clemency for certain crimes. Thus, the Constitutional Court refers to the rationale of the 2009 Act, which states that the main objective of the proposed amendments dealing with the prohibition of clemency for certain crimes is "prevention from committing these crimes in the future." In its decision, the Constitutional Court argues against the rationale of the legislator, indicating that prevention from committing certain crimes in the future "cannot be a reason for restricting the right to grant a pardon".

This interpretation of the Constitutional Court is outside the constitutional framework of pardon. The Constitution states that the President "grants pardons

in accordance with the law". Shocking is the claim of the Constitutional Court on the inviolability of the right of the President to pardon, whereas the law can only regulate the pardoning procedure. Such an argument, which equals the President with the medieval monarch, confirms the allegations and suspicions of the public about the political instrumentalization of the Constitutional Court, which (in this case) used unsustainable arguments to verify their scandalous decision. The Constitution gives the opportunity to the legislator to enact laws to regulate not only the procedure but also all aspects of pardon. Moreover, the Constitution suggests that the presidential power is not unlimited, that the President must not be arbitrary in granting pardons, and that he must exercise this competence as prescribed by law.

As the second argument for its decision, the Constitutional Court invoked the right to equality, arguing that the ban on pardoning for certain offenses violates the constitutional right of equality of citizens. "The convicted criminal offender who committed a crime that, under the letter of law, cannot be pardoned, is thus deprived of the opportunity to be pardoned, unlike the convicted offenders of other crimes, which represents a different treatment of persons who have the same status (as imprisoned persons) and are in the same legal situation." (Decision of the Constitutional Court, No. 19/2016).

This statement of the Constitutional Court is paradoxical because persons who are convicted of committing different crimes cannot be treated as having the same status. For example, a person convicted of pedophilia and a person convicted of petty theft cannot be considered to be in the same status. In fact, criminal legislation provides a range of different penalties for the commission of various criminal offenses.

The third argument on which the Constitutional Court based its decision is the separation of powers, but this argument is also unsustainable. There is no violation of the principle of separation of powers if the Assembly, on the grounds of a constitutional provision, regulates the right of pardon and determines cases where pardon cannot be granted.

What is really surprising is that the Constitutional Court abolished the entire 2009 Act in spite of its stance that only two provisions were unconstitutional. The Constitutional Court decision was adopted by a majority of five judges, while four judges dissented, stating that there was no constitutional basis for the abolition of this Act.

After the Decision of the Constitutional Court, on 12 April 2016, the President of the Republic issued decisions for pardoning 56 persons (published in the *Official Gazette of the Republic of Macedonia*, No. 72/2016). In some cases, a number of decisions for pardoning were issued for some of these persons. For example,

the former Minister of Transport and Communications was pardoned 16 times in 16 decisions, the former Minister of Interior was pardoned 13 times, the former Director of the Intelligence Service was pardoned 6 times, the former Prime Minister was pardoned 5 times, etc. Most of the pardoned persons were politicians and their accomplices.

3.3. The Lustration Act

In Macedonia, the Lustration Act was adopted in 2008, providing for the lustration of all holders of public offices, as well as the possibility for political parties, NGOs and religious organization to ask for lustration of holders of offices in their bodies. The lustration was intended to include all holders of public offices from 1944 until the adoption of this Act.

The Constitutional Court was required to decide on the constitutionality of lustration. In its Decision No. 77/2008 („*Official Gazette of the Republic of Macedonia*", No. 45/2010), the Court nullified the optional lustration for political parties, NGOs and religious organizations, providing an explanation that it constitutes state intervention in a civic sphere. The Constitutional Court also decided that lustration was unacceptable, particularly after the adoption of the new Constitution in 1991, because it would undermine the constitutional values and institutions, and violate the rule of law.

After this Decision of the Constitutional Court, the Assembly adopted the Act on Amendments to the Lustration Act („*Official Gazette of the Republic of Macedonia*", No. 24/2011) which included an unclear provision on the duration of the lustration period. This provision was again nullified by the Constitutional Court (Decision No. 52/2011 from 28.03.2012).

The legal changes from 2011 extended the circle of persons that may be subject to lustration, including former holders of public offices (those who are still alive). In the Decision from 2012, the Constitutional Court stated that the aim of lustration is to prevent the possibilities for further violation of human rights in the current political system, i.e. that the aim of lustration is protection of the future; the Court considered that the lustration of ex-holders of public offices violated their moral integrity and dignity, and nullified this provision.

The legal changes from 2011 also introduced provisions on obligatory lustration in political parties and NGOs. The Constitutional Court repeated its decision and nullified these provisions. The legislative changes introduced provisions on lustration for media owners and employees, for barristers and mediators, which were also nullified by the Constitutional Court.

After this Decision of the Constitutional Court, the new Lustration Act was adopted in 2012 („*Official Gazette of the Republic of Macedonia*”, No. 86/2012). This new Act contained provisions that had already been nullified by the Constitutional Court, as well as provisions which were radically opposite to the reasoning of the Constitutional Court until then. For example, the new Act envisaged that even the dead holders of public offices shall be subject to lustration.

The constitutionality of this new Act was also challenged but, this time, the Constitutional Court (whose composition was changed given the fact that the majority of judges were elected by the current Government) rejected the initiative for judicial review and did not find the Act to be unconstitutional (Resolution No. 111/2012 adopted on 09.04.2014). The reasoning was completely different from the reasoning provided in previous decisions on the same issue.

4. Conclusion

The Constitutional Court of the Republic of Macedonia has not had high professional authority in the past period. It has often exercised self-constraint in its activities and in some “highly politicized cases” it has been constrained by the interests of the executive power. The explanations of its decisions were not elaborate, well-argued and suggestive, and it is quite obvious that some of them bear the political hallmark. These decisions and overall assessment of its work (so far) show that the Constitutional Court of Macedonia has not been ready to assume the role of the guardian of the Constitution and exercise its authority to check on the ruling power.

Thus far, the predominant criterion in the process of selecting the Constitutional Court judges was their political “affiliation” to the majority that elected them, or the body that proposed them. A combination of political affiliation with professional authority and knowledge is something that is quite common and acceptable, even in developed democracies. But, in Macedonia, there were case where the criterion of political affiliation was not only the predominant but frequently the only criterion for the selection of the judges, which resulted in the selection of judges who had insufficient legal experience, inadequate knowledge of constitutional law, and no professional reputation. Considering that personal reputation of all judges contributes to building the overall reputation of the court as a competent judicial authority, the ultimate result is the lack of professional integrity, credibility and reputation of the Constitutional Court.

The reasoning provided in the decisions of the Constitutional Court of Macedonia is not something that can inspire lawyers in Macedonia; nor are these decisions contributing to a further development of the constitutional system of Macedonia. Some of these decisions are not even protecting the Constitution because

the Constitutional Court of the Republic of Macedonia has not been ready to become a scrutinizer on the Government and Parliament, and the guardian of the Constitution.

The Constitutional Court of Macedonia very rarely reflected the “idealism” of the envisaged constitutional provisions, as opposed to the “pragmatism” of other state bodies. The Constitutional Court was a real veto player in very few cases, usually in times of “cohabitation” of the Constitutional Court with the Government. In all other times, the Constitutional Court was mainly a vetoed body, subject to parliamentary scrutiny and political influence.

References

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УСТАВНИ СУД РЕПУБЛИКЕ МАКЕДОНИЈЕ: ОГРАН КОНТРОЛЕ ИЛИ КОНТРОЛИРАНИ ОРГАН?!

Резиме

Овај рад је посвећен улози Уставног суда у политичком систему Републике Македоније. Полазна тачка ће бити положај и надлежности Уставног суда, али посебна пажња ће бити посвећена факторима који одређују ефикасност ове институције, као што су персонални састав и спољне факторе који утичу на његов рад. Правни оквир даје могућност Уставном суду Републике Македоније да буде активан учесник у уставном и политичком систему. Али страх од уставног активизма не постоји у Македонији, где Уставни суд није постао темељ уставне демократије.

У неким периодима од почетка транзиције било је много примера одлуке донесене под политичким притиском од стране извршне власти. Ове политичке одлуке подривале су ауторитет Уставног суда. У неким другим периодима Скупштина није поштовала одлуке Уставног суда, и усвајала веома сличне, или још горе одредбе од оних које поништио Уставни суд. У овим периодима Уставни суд је био “контролисано тело”. Уставни суд Македоније веома ретко је заступао “идеализам” уставних прописа, наспрот “прагматизма” других државних органа. У само неколико случајева Уставни суд је био прави контролни орган.

Овај рад ће анализирати разлоге за тако различите односе између Уставног суда на једној страни и извршне и законодавне власти на другој, као и ефеката одлука Уставног суда у политичком систему.

Кључне речи: Уставни суд, Македонија, лустрација, референдум, помиловање, Парламент.

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THE CONSTITUTIONAL COURT OF SERBIA: A CONTROLLER OR AN APOLOGIST?*

Abstract: *Some of the most significant novelties introduced by the Constitution of Serbia in 2006 pertained to the organization and proceedings of the Constitutional Court. The institutional presumptions for its independence and autonomy seemed to have been established. However, the Constitutional Court did not function in the period from October 2006 to the very end of the year 2007, when the first ten judges were elected in accordance with the new Constitution. The Constitutional Court was finally constituted in April 2010, when the remaining five judges were elected. It was a clear message of the governing majority that the Constitutional Court and all other bodies of control are no more than a necessary evil. In line with such a political message, accompanied by underdeveloped legal culture, the Constitutional Court was for the most part a reliable anchor for the current politics. Namely, instead of the law, it was politics that determined the dealings of the Constitutional Court when the most significant political decisions were being made. Certain institutional solutions do not favour the establishment of an independent and autonomous Constitutional Court which would be free from all forms of political pressure. Instead of judicial re-appointment, it may be more opportune to introduce a single longer-term judicial mandate. Due to the significance of the Constitutional Court composition, it is necessary to objectivise the "eminent jurist" standard so as to avoid arbitrariness in the selection of the Constitutional Court judges. Simultaneously, it is necessary to ensure full transparency of the process of selecting judges, which shall not be marked by politicization and powerful influence of the executive authorities.*

Keywords: *Constitutional Court, 2006 Serbian Constitution, Constitutionalism, Post-communism.*

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1. Introduction

Observed nominally, Serbia has a respectable tradition of constitutional judiciary. As a federal unit within the socialist Yugoslavia, Serbia established the institute of constitutional review in 1963, at the same time the Constitutional Court was constitutionalized at the federal level. It was an exceptional case amongst the socialist countries because there was a belief that judicial review of law is inconsistent with the assembly system and the principle of unity of powers.

Multiple reasons had influenced the decision of Yugoslavia to opt for the establishment of the constitutional judiciary. Apart from the principle reason, embodied in the need to improve the humble mechanisms for reviewing the constitutionality of law that had been in place up until then, the federal character of the state was a powerful catalyst for accepting the model of constitutional review so that the distribution of competences between the federation and federal units would be effectively protected (Vučić, Petrov, Simović, 2010: 79). After all, the Constitutional Court, as a separate institution, originated in Austria, with its only goal to be an arbitrator in conflicts between the federal law and the legislation of the member states (Ohlinger, 2003: 210). In addition, there was a distinctive motive which was reflected in the need to secure appropriate protection of the principle of self-governance which according to the 1963 Constitution had become an integral principle of the social system (Vučić, Petrov, Simović, 2010: 79). As already emphasized, the introduction of the constitutional judiciary is a "consequence of the maturation and institutionalization of the socialist society and its political system" (Đorđević, 1985: 721). "That model of direct, abstract, judicial review of law supplemented certain forms of direct control (the right of regular courts to stop a proceeding and request a review of the constitutionality of law which they should apply to the particular case in question) and it was in accordance with modern European tendencies of that time. Of course, not even the Constitutional courts could have a different fate from that of the state in which they existed" (Košutić, 2004: 77). In an environment of a socialist single-party authoritarian system, the Constitutional Court could not effectuate its mission as the protector of constitutionality. The existence of institutionalized constitutional review in a system governed by the unity of powers was a facade that was supposed to point to the commitment to the principle of constitutionality. Presented in that context, the Constitutional Court in the socialist Yugoslavia (notwithstanding the fact that it existed nominally) did not leave a significant trail in the history of constitutional theory.

Whereas the half a century long existence of the constitutional judiciary in Serbia deserves recognition, such a long tradition has its negative side. Although it was constituted in 1963, the Constitutional Court was not affirmed as an authentic

protector of the Constitution and an effective counterbalance to the political power. Not even in the latter period of post-communist constitutionalism did the Constitutional Court manage to gain authority, nor did the judiciary manage to preserve their independence and autonomy in relation to the political powers. Comparative experience points to the fact that the constitutional courts of those states that had established a constitutional judiciary only after adopting their first post-communist constitutions have much more easily affirmed their role in the constitutional system. A representative example may be the Hungarian Constitutional Court which had in practice proven to be an authentic protector of the Constitution and a barrier to the political power (Solyom, Brunner, 2000). Since the adoption of the first post-communist Constitution of 1990, the Serbian Constitutional Court has not managed to free itself from the legacy of the past; so, it continued with the practice of cooperation and alignment with the politics of the executive power.

2. The Constitutional Court of Serbia from 1990 to 2006

Although the 1990 Serbian Constitution evoked contradictory views, the general perception was that a significant qualitative shift was made in the constitutionalization of the Constitutional Court (Stojanović, 1991: 118). Perceived nominally, there was headway in practice. Namely, “an extremely active role is being observed of authorized proposers and the circle of subjects that are addressing the Constitutional Court with their proposals and requests for judicial reviews of constitutionality and legality is growing in all areas of law. In addition, the number of cases and requests has increased specifically in relation to the highest legal act, such as the laws and regulations of the Government of the Republic of Serbia. From 1990 to 2003, there were more than 800 requests for a judicial review of constitutionality of law and in excess of 100 submissions for the judicial review of regulations” (Čiplić, Slavnić, 2003: 28). Within this 13-year period, the Constitutional Court of Serbia had passed 85 decisions on the unconstitutionality of certain provisions of legislation and regulations. “The principle of the separation of powers was most often violated by executive acts; thus, in reviewing the constitutionality and legality of the Governments provisions, the Constitutional Court had protected the legislative power of the National Assembly whilst the constitutional jurisprudence was aimed at protecting that principle even with respect to the relation between the National Assembly and the President of the Republic” (Stanković, 2013: 117). Nevertheless, despite these facts, the practice of the Constitutional Court was not characterized by cases that would represent confrontation to the political power. The activity of the Constitutional Court was characterized by the readiness to follow the current politics instead of the Constitution. Its cooperativeness was particularly

emphasized in those cases which were related to the politically very sensitive questions (The Constitutional Court on the additions and amendments to the Constitutional Act for implementing the Constitution of the Republic of Serbia, the Act on the Election of Member of Parliament, The Act on the Election of the President of the Republic, The State of Emergency Act) (Čiplić, Slavnić, 2003: 28).

The Constitutional Court was particularly reserved in the area of electoral legislation which was "an instrument of electoral manipulation" (Pajvančić, 2005, 36). The Constitutional Court had an explicitly restrictive approach in view of electoral disputes. In the period from 1990 to 2004, the Constitutional Court had only in two cases appeared as the competent body for resolving an election dispute (Nenadić, 2004: 279). As already emphasized, the Constitutional Court had for many reasons avoided to effectuate its competence in election dispute, primarily due to the former political character of those disputes (Nenadić, 2004: 267). Thus, the judges did not have enough courage to protect the dignity of the Constitutional Court and their own personal honor and to resolve election disputes exclusively as legal matters by not allowing the influence of politics. Therefore, it is not surprising that in the sixteen years of practice the Constitutional Court had had no significant decisions which channeled and directed the actual politics.

Following an authoritarian era in which the Constitutional Court was supposed to serve only as a screen which shall nominally bear witness to the devotion of the principle of constitutionality, it could not have been expected that this body would consistently effectuate its protective mission of the Constitution. Simultaneously, the personal composition of the Constitutional Court did not instill confidence because professional affirmation and morality were not measures which were taken into considerations when the judges were elected. Bearing witness of the debacle of the Constitutional Court is the fact that the position of its President was for a significant period of time held by Ratko Butulija (1996-2001), an economist by profession. Something like that was possible because the Constitution did not precisely define the requirements for electing judges. Such a solution was possible because it was grandfathered from the socialist period and was a logical consequence of the position of the Constitutional Court in the non-democratic system of unity of powers.

Finally, the significance of the Constitutional Court in the Serbian political system is best reflected in the fact that this state body did not function from February 2001 to June 2002, due to the untimely election of new judges. Therefore, taking into consideration its practice and role in the Serbian political system, it can be stated without any irony that the Constitutional Court did not even have to exist.

3. The Formation and Work of the Constitutional Court under the 2006 Serbian Constitution

Considering the fact that the Constitutional Court was not affirmed as an institution that was a reliable protector of the Constitution, there was an almost unanimous standpoint that the normative framework of the Constitutional Court needed a significant makeover. Truth be told, the most significant innovations in the 2006 Constitution pertained to the organization of the proceedings of the Constitutional Court (Marković, 2007: 19-46). Contrary to the key role of the head of state as prescribed by the former Constitution, a new process was envisaged for electing judges. It was accepted that each of the three branches of state government would participate in the process of electing 15 judges.

Aside from the break in proceedings from February 2001 to June 2002, the Serbian Constitutional Court did not function again in the period from October 2006 until the very end of 2007, when it elected the first ten judges in accordance with the 2006 Constitution. The Constitutional Court was finally constituted in April 2010, when the remaining five judges were elected by the General Assembly of the Supreme Cassation Court. Therefore, for a period of almost two and a half years the Constitutional Court functioned with incomplete membership, which was not a significant cause of concern for anyone. There was a general impression that it was a clear message of the governing majority that the Constitutional Court was a necessary evil that was grudgingly formed. Undoubtedly, it was a matter of irresponsible bearing of the holders of political powers toward the constitutional judiciary. Such a careless approach toward this institution is a consequence of the lack of affirmation of the constitutional judiciary in Serbia, and the public was uninterested in the formation of the Constitutional Court because the majority of people did not recognize its significance.

The logical epilogue of such a political climate, which was a result of a lack of constitutional provisions that would provide wider authorities to the bodies which nominate the candidates, was the complete politicization of the election of the Constitutional Court judges. A list of ten candidates was put together by the National Assembly where each parliamentary group nominated a previously agreed upon number of candidates (Nenadić, 2012: 102-103). The political party of the President of the Republic did not participate in the nomination of candidates for judges; so, it could be assumed that the ten candidates who were nominated by the Head of State were in fact the candidates of that political party. As the entire procedure unraveled behind closed doors, it may be concluded that the process involved the distribution of the election prey, whereas the authorized proposers did not offer adequate rationale on the specific professional qualities of the nominated candidates, which made them eligible for the

position of eminent jurists. It was possible to assume that the election of five judges by the Supreme Cassation Court shall be the least contested issue and without the involvement of politics. However, it turned out that that part of the Constitutional Court, which was in fact elected without any public involvement, "was the most problematic, but politically suitable (...) because during their election, aside from political party involvement, there was also that of familial relations" (Čavoški, 2011: 85).

Given that political factors dominated in the formation of the Constitutional Court, it is not surprising that the Constitutional Court proceedings were under the powerful influence of political authorities. It is evident in multiple examples. Thus, the Constitutional Court refused to complete a constitutional review of Article 7, Paragraph 2 of the Constitutional Act for implementing the Constitution which envisages the reelection of judges, even though the Constitution guaranteed the lifetime appointment of the judicial function (Article 146, Paragraph 1). The rationale of the Court was unconvincing. Namely, the Constitutional Court established that the Constitution does not explicitly envisage the Constitutional Act as an act which is subject to constitutional review. However, given that the Constitutional Court, among other things, decides on the harmonization of the legislation with the Constitution, this body "did not recognize that in this context the word law is used as a familial notion, which encompasses all types of laws" (Čavoški, 2011: 87). Nevertheless, the Constitutional Court was not allowed to stand in the way of the so-called reforms of the judiciary which involved the elimination of inapt judges; so, the Court found an excuse in unbelievable arguments.

In contrast to the previous example, when the Constitutional Court involvement in current political events was undesirable, in another case the Constitutional Court did proceed even though it was not a matter which was part of its jurisdiction. The case involved the banishment of the organization "*Nacionalni stroj*", which was initiated by the Republic Public Prosecutor "due to activity aimed at invoking racial and national hatred". Without opposing the fact that the "*Nacionalni stroj*" was an organization that promoted racial and national hatred, which was evident in the fact that the activists of this association were charged with the criminal offence of invoking national and religious hatred and intolerance (decision of the Supreme Court of Serbia, Kz 1.617/07; dated June 6, 2008), the Constitutional Court had assumed the competence to prohibit an organization which was actually prohibited by the Constitution. Namely, the Constitution explicitly prohibits secret associations (Article 55, para. 3) and, as noted by the Constitutional Court, the "*Nacionalni stroj*" represented such an organization in all its characteristics. In this case, the Constitutional Court had made a decision guided by the political requirements at that time, even though it was out of its

jurisdiction. Until this decision, the Constitutional Court had often declared itself incompetent to address the matter of prohibiting informal associations. Immediately before that, in 2011, the Constitutional Court had overruled the proposal of the Republic Public Prosecutor to prohibit the 14 sport-team supporter groups, providing the rationale that the entry of these groups into the register is *conditio sine qua non* for establishing the competences of the Constitutional Court to decide upon the prohibition of associations.

Bearing witness to the strong influence of the executive power on the Constitutional Court proceedings is the fact that only after the demise of the governing political party at the 2012 parliamentary elections did the Constitutional Court (after a long period of time and in a very short time interval) pass judgment on very delicate and politically sensitive cases, such as the grievances of non-elected judges or judgments on the unconstitutionality of certain provisions of the Act on Establishing the Competences of the Autonomous Province of Vojvodina. To classify these events as coincidental is unfitting, considering that the Constitutional Court had in a previous proceeding (dated February 18, 2010) submitted to the National Assembly a Proposal for the Review of Constitutionality of the Act on Establishing the Competences of the Autonomous Province of Vojvodina for a response, and that the National Assembly had not responded to the Constitutional Court until January 20th, 2011. Thus, these facts point to a logical conclusion that there was no political will for this controversial issue to be resolved in a timely manner.

The increasing politicization of the work of the Constitutional Court was reflected in the changes concerning the transparency of its work (Simović, 2016: 88-96). Namely, in accordance with the normative framework from 1991, the principle of transparency is extensively interpreted and the transparency of all meetings of the Constitutional Court was proclaimed. After the adoption of the 2006 Constitution, the Constitutional Court kept pursuing this practice in spite of the changes to the legislation and Rules of Procedure of the Constitutional Court introduced in the meantime. Yet, under the provisions of the Act on the Amendments and Supplements to the 2011 Constitutional Court Act and the 2013 Rules of Procedure of the Constitutional Court, the principle of transparency was established very restrictively and is exclusively connected with the presence of public information media at the public discussions in the Court and not in all regular sessions of the Court, as it was previously prescribed. This change can be interpreted, first and foremost, as a way to cover-up the weakness of the Constitutional Court whose functioning, as a result of strong political influence, needs to be concealed from the public.

4. The Final Triumph of Politics over the Constitutional Court

Two recent events confirm the final triumph of politics over the Serbian Constitutional Court. Specifically, we refer to the Brussels Agreement of 2013 and the Act on Temporary Regulation of the manner of paying out pensions of 2014. Both events deserve a separate review because the Constitutional Court had in accordance with the expectations of the political powers refrained from constitutional review of the aforementioned acts, regardless of the widespread standpoint of the Serbian legal scholars and experts that these two acts are unequivocally unconstitutional.

The Brussels Agreement, i.e. the first Agreement of Principles Governing the Normalization of Relations, concluded on April 19, 2013, was the result of the process of mediation of the European Union for the purpose of normalizing the relations between Serbia and Kosovo. The Agreement was the result of an informal written political agreement and, then, its content acquired an external form of a general act of the Government, under the title "Conclusion", and a general act of the National Assembly, under the title "decision" (Marković, 2014: 348-349). Thus, this Act became a part of positive law of the Republic of Serbia which has a general effect. According to the officials of the Republic of Serbia, the Brussels Agreement is a political act by way of which the Government effectuates its constitutional authority for administrating the internal politics with the aim of resolving the Kosovo problem. The Brussels Agreement, according to the Minister of Justice Nikola Selaković, is only a phase in the process of constituting the real autonomy of Kosovo, and by deciding on its constitutionality, the Constitutional Court would undertake the role of the Government of Serbia for establishing and administrating the state politics (Selaković, 2014). In tune with such politics and with the rationale that the Brussels Agreement is neither an international treaty nor a general legal act of internal law, the Constitutional Court of Serbia refused to get involved in reviewing and deciding upon its constitutionality.¹

Undoubtedly, the Brussels Agreement transformed from a primarily political agreement into a general legal act. For the purpose of its implementation, other general and individual legal acts were adopted in the areas of security, local self-government and local election, the judiciary, etc. It is the key argument in the debate that the Brussels Agreement is not a political but a binding general legal act which must be in accordance with the Constitution. However, the content of the Brussels Agreement is not in line with the Constitution of Serbia. The Brussels Agreement envisages the establishment of the Community of majority Serbian Municipalities at Kosovo whose status shall be guaranteed by Kosovo

1 The Constitutional Court of Serbia, Conclusion from December 10, 2014, The Official Gazette of RS, no.13, 2 February 2015.

law. In that way, this act guarantees the protection of Serbs as a national minority within the scope of the Kosovo constitutional system. Given that the Constitution of Serbia prescribes that security and defense are in the exclusive jurisdiction of the Republic of Serbia, the Brussels Agreement establishes a separate Kosovo police. Also, it envisages the integration of the judicial powers which shall function within the scope of a unique legal system of Kosovo. This means handing over the judicial power to the Republic of Kosovo, which is according to the Constitution of Serbia, one for the entire territory. Furthermore, without any mention of the Serbian legislation, it was established that in 2013 the local elections in the municipalities in northern Kosovo would be organized in accordance with the Kosovo law and international standards. Therefore, from a constitutional perspective, all solutions point to the fact that Serbia has handed over by way of the Brussels Agreement the execution of all state functions in Kosovo as an independent state in exchange for envisaging institutional guarantees for protecting the Serbs as national minority (Simović, Jugović, 2015: 515-525).

The 2014 Act on Temporary Regulation of the manner of paying out pensions envisaged the decrease in pensions starting from November 2014. The temporariness was disputed in the initiative for instituting the proceedings of constitutional review of this act but, at the same time, there was emphasis on the infraction of: the obligation of the state to care for the economic security of pensioners, the prohibition of discrimination, the constitutional principle that the achieved level of human rights cannot be decreased, and the constitutional guarantee to legal instruments (remedy).

The right to pension is not an absolutely protected law but the necessity of its limitation in the period of economic crisis does not give the legislator full freedom in adopting restrictive measures, because it represents an encroachment on the right to peaceful enjoyment of property. For this reason, the undertaken measure of limiting the right to pension must be justified, which means that the state government is obliged to provide convincing and transparent evidence that the undertaken measure is necessary for the purpose of consolidating the state budget in periods of economic crisis. However, in this case, the Constitutional Court refused to participate in the constitutional review of this law. Analysis of the Constitutional Court Act provisions concerning the refusal of the initiative to evaluate the constitutionality of this Act leads to the conclusion that the Constitutional Court has transformed from the body responsible for exercising control over the constitutionality of administrative acts of political authorities into an apologist for the current politics, because it has entirely relied on the rationale of the Draft Act.

The Constitutional Court failed to respond to the following question: where are the constitutional limitations of the legal measure which diminishes legally obtained property rights (i.e. pension)? The legal viewpoint of the Constitutional Court is wrong with respect to establishing the legal nature of the right to pension, because this right was separated from the constitutional right to pension insurance and was devalued to a legal (statutory) right. Such a standpoint allows the legislative power to freely model the right to pension. The duration of the legal measure concerning the decrease in pension was not explicitly limited; instead, it was tied in with circumstances that are not certain and cannot be foreseen. In that sense, the decrease in pension was envisaged for an indefinite period of time; thus, concurrently, the fact that the undertaken legal measure fulfills the test of proportionality can be disputed. Although certain categories of pensioners may be legitimately excluded from the implementation of the pension decrease measure (in case their economic security is in peril), those employed in the public sector may not fall into the privileged category of citizens. The condition of proportionality involves that restrictive measures encompass the inclusion of the private sector in an adequate way, so that the economic crisis will equally affect all citizens. However, the Constitutional Court completely disregarded all of these arguments.

These examples only confirm that the Constitutional Court is rather cooperative in politically sensitive cases and that it adheres to the politics of the executive power, even though all arguments point to the fact that the legislative acts were unconstitutional. The Constitutional Court has chosen the position of an apologist that abides by the current politics and decides not to act in order to avoid confrontation. In case there had been some dilemma about this matter, these two cases actually confirmed the thesis of the final triumph of politics over the Constitutional Court.

5. Conclusion

Normatively speaking, the institutional presuppositions for the existence of an independent and effective Constitutional Court in the Republic of Serbia are largely fulfilled. However, the Constitutional Court has not fulfilled its mission of being the protector of constitutionality. Thus far, experience shows that the politicization of the actual process of electing the Constitutional Court judges has resulted in the subsequent politicization of its work that followed. Instead of being loyal to the Constitution, the Constitutional Court has emulated into an "obliging court" (Marko Pavlović) (Stojanović, 2013: 129) because "there was no lack of less or more secret collaborations, not even an a kind of alliance of the Constitutional Court or some of its judges with the members of the political

powers, especially with the bodies which are responsible for their nomination or election, or those who expect to be re-elected after the expiry of their mandate” (Nenadić, 2012: 150).

The question arises as to how the constitutional judiciary can be improved in the Republic of Serbia. First and foremost, it is necessary to secure a good quality membership of the Constitutional Court, which shall be composed of eminent jurists in the true sense of the word. The road to accomplishing this goal is to ensure transparency of proceedings for the election of judges. These proceedings should entail an open public competition for filling in the available judicial positions in the Constitutional Court. The public debate with the candidates would contribute to the transparency of the proceedings because the authorized nominators would not be able to bypass the public and pass off their suitable candidates. Thus, the bodies that nominate their candidates for judges must have valid justification why they have chosen that particular candidate and not another one. Establishing clear procedures and binding time limits for filling in the available judicial positions in the Constitutional Court would contribute to preventing any obstruction or discontinuance of the Court proceedings.

Strengthening the independence of the Constitutional Court would contribute to introducing the qualified majority (for example 2/3 of parliamentary votes) for the nomination and election of judges by Parliament. In that way, parliamentary political parties would be forced to search for the best candidates who would be acceptable for both the positional and oppositional parties. The inevitable compromise between the political opponents contributes to the development of political culture which involves a quest for the best candidates for judicial offices rather than for the most abiding ones. Instead of the possibility of re-election, it may be more fitting to envisage a longer single-term mandate. The possibility of re-election creates additional risks of politicizing the Constitutional Court proceedings because the judges will aim to secure another mandate by exhibiting desirable behavior.

Although there are convincing reasons for the deliberations and voting of judges not to be public, when viewed from the aspect of the practice of the Constitutional Court of Serbia to date, it seems that arguments in favor of complete acceptability of the principle of transparency in the work of this body prevail. The public eye is the only possible medium of democratic supervision over the implementation of this state function. Continuous enforcement of the principle of transparency in the work of the Constitutional Court would contribute to its gradual affirmation because, in the political system of Serbia, this body has yet to be recognized as a reliable protector of the Constitution. Publicity of all sittings of the Constitutional Court should contribute to the increase in the quality of

deliberations and final decisions. The wakeful eye of the public should serve as a constant reminder to the judges to approach their duties conscientiously, with more expertise and accountability. By making the judicial deliberation sessions open to public, the public would be able to check upon the elected judges and see if the "eminent jurists" are apt to justify their virtues in action. Not only would the judges have to be more prepared for their sessions but they would actually have to demonstrate genuine, conscientious and accountable involvement in the deliberations, and show to what extent they accept the envisaged role. Concurrently, the holders of political power will be forced to approach the process of selecting judges more cautiously, in order to ensure that they do not reelect judges who have shown lack of expertise or who have given up their loyalty to the constitution in lieu of their loyalty to the current politics.

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УСТАВНИ СУД СРБИЈЕ – КОНТРОЛОР ИЛИ АПОЛОГЕТА?

Резиме

Доношењем Устава Србије од 2006. године неке од најзначајнијих новина односиле су се на организацију и рад Уставног суда. Чинило се да су установљене институционалне претпоставке за његову самосталност и независност. Међутим, Уставни суд Србије није функционисао у периоду од октобра 2006. до самог краја 2007. године када је изабрано првих десет судија сагласно новим уставним решењима. Уставни суд је коначно конституисан тек априла 2010. године, када је изабрано преосталих пет судија. Дакле, безмало две и по године Уставни суд је функционисао у окрњеном саставу, али то никога није претерано забрињавало. Била је то сасвим јасна порука

владајуће већине да Уставни суд, као уосталом и друга контролна тела, представља само нужно зло које се невољно конституише.

У складу са таквом политичком поруком, уз незрелу правну културу, Уставни суд је у највећој мери био поуздани ослонац актуелној политици. Наиме, политика је уместо права одређивала поступање Уставном суду када се радило о политички најважнијим одлукама. Уместо да буде непремостива препрека за повреду Устава, Уставни суд је себе претварио у безазлену сенку политичке власти. Тако је Уставни суд саучествовао у неуспелој реформи правосуђа и у реизбору свих судија, Бриселски споразум је оквалификован политичким актом који не подлеже уставносудској контроли уставности, а одбачена је и иницијатива за оцену уставности закона којим су смањене пензије. Да је претходни период био обележен снажним утицајем егзекутиве на уставносудску функцију сведочи чињеница да је након промене парламентарне већине маја 2012. године, Уставни суд, након дужег оклевања, веома брзо донео одлуке у деликатним и политички осетљивим предметима, као што су усвајање жалби нерезабраних судија или доношење одлуке о неуставности појединих одредби Закона о утврђивању надлежности АП Војводине.

Поједина институционална решења не погодују успостављању независног и самосталног Уставног суда који би био ослобођен свих видова политичког притиска. Уместо могућности реизбора, требало би предвидети дужи, једномандатни избор судија. Реизборност ствара додатне ризике од политизовања рада уставног суда, јер ће судије настојати да пожељним владањем обезбеде нови мандат. Због значаја састава уставног суда неопходно је, у што већој мери, објективизовати стандард „истакнути правник“, да би се избегла арбитражност при одабиру судија уставног суда. Уједно, неопходно је да буде обезбеђена потпуна транспарентност избора судија да тај процес не би био обележен политизацијом и снажним уливом егзекутиве чији рад овај орган такође треба да контролише.

Кључне речи: *Уставни суд Србије, Устав Србије из 2006, конституционализам, пост-комунизам.*

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THE POSITION OF HEAD OF STATE UNDER THE INTERNATIONAL LAW RULES AND THE REGULATIONS OF THE REPUBLIC OF SERBIA

Abstract: *Pointing to the importance of summit diplomacy in today's world, the authors first analyze the position of the head of state under the rules of international law by focusing on the issues of privileges and immunity, as well as on the assumed competences of the head of state in the treaty process and in the attributed unilateral acts which are binding for the state. Notably, we draw attention to the immunity of the head of state from the jurisdiction of foreign authorities and courts, which is substantiated by the judicial practice (case law) of national and international courts as well as the work of the UN International Law Commission. Then, we discuss the heads of state visits, as well as the existing bodies within the framework of some international organizations that are made up of heads of state or heads of government. In the second part of this paper, we analyze the norms of internal law of the Republic of Serbia regulating the position of the head of state in our country. In this regard, we point to the most recent judicial practice on this issue and explain the position of the head of state in relation to other highest office-holders in our country.*

Keywords: *head of state, international law, International Court of Justice, Serbian constitutional law.*

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1. Introduction

From the standpoint of international law, the head of state represents the highest authority of representation. This paper deals with the legal status of the head of state from two aspects: international and domestic. While the position of the head of state from the standpoint of international law is governed by common rules which apply to all countries, the position of the head of state in national law is governed by the regulations of each particular country. Internal regulations cannot affect the position of the head of state in international law but they may be relevant in some legal effects, such as the process of concluding international agreements. It is important to emphasize that, in the modern international community, there is a significant number of countries which do not recognize only the head of state as the highest authority of state representation. Thus, in the G8 group (for example), the United States, Russia and France are represented by the Heads of State while the United Kingdom, Germany, Italy, Japan and Canada are represented by the heads of government. International law recognizes an integrated system of standards applicable to the "head of state", which is a broader concept of national leadership including the Head of State, the Head of Government and the Minister of Foreign Affairs. As there is no difference in the legal status of these persons, all the references made in this paper equally apply *mutatis mutandis* to all the aforementioned persons.

In today's international community, heads of state have a very important position in terms of conducting the foreign policy course, but there are legal restrictions concerning their authorities in domestic law. Heads of state had the key role in the summit diplomacy which developed after World War II but we certainly should not disregard the great importance that heads of state had throughout history. In the period of classical international law, heads of state were subjects of law; so, they could represent the state at the international level and they were not subject to the provisions of domestic law of foreign states. The head of state was seen as a sovereign who could perform all public functions without restrictions. Under the classical international law, the head of state had complete freedom when he represented his country - *ius repraesentationis omnimoda* - without any restrictions (Andraši, 1954: 128). In the period starting from the end of the Congress of Vienna in 1815 until the beginning of the First World War, the role of heads of state in the operative management of international relations was substantially reduced (Kreća, Milisavljević, 2016: 78). During and after World War II, the role of heads of state became more prominent; due to the constant contacts of Roosevelt, Churchill and Stalin and then through the development of summit diplomacy, heads of state became unavoidable actors of the most important foreign policy events. So, from the aspect of international relations, heads of state are very significant in modern international community. All acts

of the head of state is automatically attributed to the country he represents, and this is the common rule that has developed in international law.

2. Immunity of the Head of State

From the standpoint of international law, heads of state have always enjoyed a broad range of privileges and honors. In addition, the recognition of the broadest range of privileges and immunities of heads of state implies the acknowledgement of the state they represent and personify (Milisavljević, 2015: 159). Given that the Charter of the United Nations confirmed the principle of the sovereign equality of States,¹ this automatically means that all heads of state are legally equal (Mallory, 1986: 169 – 170). This may cause a problem in determining the order of priority at some major events or circumstances, but in such cases heads of states are commonly ranked in alphabetical order, by the name of their country. Acknowledging the highest scope of state immunity to heads of states is also necessary given the common ways of communication between states and their role in negotiation processes (Tunks, 2002: 656).

Heads of state are holders of the highest privileges, which are equivalent to diplomatic privileges, except for the fact that their privileged position applies to all countries and, therefore, has a wider scope of *ratione loci*. The head of state is exempt from the jurisdiction of state authorities of other countries, which is a reflection of the old principle *par in parem non habet imperium*. The head of state is not a holder of maximum immunity just because of the position he occupies but also because of what he/she personifies - a sovereign state (Akande, 2011: 824). He is the bearer of absolute criminal immunity as well as civil law and administrative immunity. In the latter case, he does not have the full consent of the State, especially when it comes to the status of former head of state. Criminal law immunity implies that heads of state cannot be the subject to proceedings before their internal organs, i.e. the highest representatives cannot be criminally prosecuted. Thus, Gligorije Geršić concluded that the rule of criminal immunity of the highest state representatives is unconditionally recognized in State practice, and also has received explicit recognition in many modern jurisdictions (Geršić, 1995: 173).

Rational justification for the existence of privileges and immunities of the highest representatives of the state, and of the absolute exemption from criminal jurisdiction, is based on the need to make their activities immune from foreign jurisdiction, and preclude the infringement of the prerogatives of state sovereignty and interference with the official functions of these authorities (Cassese, 2002: 862). On the other hand, since all the actions undertaken in the official

1 UN Charter, article 2;

capacity of the head of state are attributed directly to the State, he has not undertaken them in the personal capacity. This is why the head of state should not be held responsible for these actions, since they are the actions of the state. The head of state in a foreign country is entitled to personal inviolability, exemption from the jurisdiction of the authorities of the country, freedom of communication and honors and privileges.

The practice of the International Court of Justice has a particular importance in the formation of customary rules of criminal law concerning absolute immunity of the head of state. In the case of *Arrest Warrant*, the Court confirmed the customary rules on this issue as follows: "*as well as diplomats and consular agents, certain holders of high-ranking offices in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from the jurisdiction of the foreign states, both civil and criminal immunity.*"² In one of the latest cases, *Djibouti v. France*, the International Court of Justice (ICJ) reiterated that: "*Head of State particularly enjoys full immunity from criminal jurisdiction and the inviolability which protects him or her from any act of government of other countries which might prevent them from performing their functions.*"³ The existence of absolute criminal immunity of the head of state derives from the inviolability of the head of state. If the head of state resides in the territory of a foreign state, it establishes two obligations on the side of the host country. The obligations of a positive nature of the host state pertain to the guarantee of personal inviolability, immunity, ensuring the freedom of communication, honors and privileges to the head of state. The host State is obliged to provide the absolute inviolability of the head of state, in terms of physical integrity, and to protect his/her autonomy, honor and dignity. Therefore, negative and insulting journalist writing or publishing media messages that may offend the honor and dignity of the head of state are considered to be unacceptable. The obligations of a negative nature are equally important. They entail refraining from exercising foreign jurisdiction over the head of state, as well as his family and entourage. If the head of state is the head of a special mission, then each member is the holder of the largest scope of privileges and immunities.⁴ This obligation has been confirmed by the practice of internal courts; thus, deciding on the responsibility of Libya's head of state (Gaddafi) for the aircraft explosion in 1989, the French Supreme Court of Cassation in France quashed the lower

2 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, para. 51. Accessible at: <http://www.icj-cij.org/docket/files/121/8126.pdf>;

3 Case concerning certain questions of mutual assistance in criminal matters (*Djibouti v. France*), Judgment of 4 June 2008, para. 170. Accessible at: <http://www.icj-cij.org/docket/files/136/14550.pdf>;

4 See: Convention on special missions 1969, Article 21;

court decision on the grounds that Gaddafi enjoyed absolute immunity from a foreign state jurisdiction (Zappala, 2001: 595 – 596).

Although it seems that international norms on absolute immunity of the head of state are clear, in practice it may be a difficult issue. This may occur when national courts apply provisions on immunity to persons who are not officially recognized as heads of state. For example, the Italian Court of Cassation was called to decide whether Yasser Arafat, as the Head of the Palestinian Liberation Organization, shall be recognized absolute immunity from criminal prosecution. Although the Court concluded that the leader of an organization who is not officially recognized as the head of state may in certain situation enjoy the absolute immunity of the head of state, in this case the Court found that there were no grounds for the application of such analogies.⁵ In other similar cases, domestic courts acted in a more correct way but concluded that this is a political issue that goes beyond the competence of the judicial authority.⁶ In such cases, the competent authority should stop the proceedings and seek a second opinion of the competent state authority in charge of these matters, such as the Ministry of Foreign Affairs.

The immunity of the head of state can be understood in a personal and in a functional sense (Mohanty, 2015: 59). Bearing in mind the function he/she performs, the head of state is the holder of immunity, which is organic and *functional immunity (ratione materiae)*, as it ensures protection for all the acts undertaken in the official capacity. *Personal immunity (ratione personae)* means that the privileges and immunities enable the head of state to freely carry out his/her work, and the difference in terms of such immunity is clearly visible after the expiry of the term of office. The head of state who is no longer in office will not be covered by immunity for acts exercised outside his/her official duties, especially if it is a violation of the norms of cogent nature or serious war crimes. Unfortunately, the International Court of Justice has missed an opportunity to accept the aforementioned concept in the case *Congo v. Belgium*, but the traditional common law concept of absolute immunity from criminal prosecution was supported by 13 votes in favor and three against.⁷ This decision of the International Court of Justice is on the line with provisions in the ICC “Rome Statute”, which provides as follows: “*This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an*

5 Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat, 31 March 2008, pp. 64-65.

6 See: case *Lafontant v. Aristide*, *ibidem*, p. 65;

7 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment of 14 February 2002, para 51. Available on: <http://www.icj-cij.org/docket/files/121/8126.pdf>;

elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."⁸ Thus, in the *Pinochet* case, the British House of Lords held that immunity of a former head of state did not extend to a trial for charges of torture which is a crime violating *jus cogens*.⁹ In the hierarchy of legal norms in international law we can find rational arguments in favor of establishing exceptions to the absolute immunity of the head of state from criminal jurisdiction. In fact, there is no doubt that a cogent norm is at the top of the hierarchy of norms in international law; as the prohibition of committing crimes of genocide can be seen as such a norm, it is clear that its effect should be above the standards of immunity of a head of state which do not have a cogent nature. (Bassiouni, 1996: 63 – 74)

3. Powers of the Head of State under International Law

In considering the responsibilities of the heads of state, we must start from the dualism of legal provisions governing their authorities. In this regard, it is important that the rules of domestic law explicitly prescribe the jurisdiction of the head of state, irrespective of whether it is a presidential, a semi-presidential or a parliamentary system. In terms of the internal legislation, the head of state has the highest authority, as the head of the executive branch, and he/she is also authorized to perform all foreign policy activities. Yet, in parliamentary democracies, the head of state has representative function.

On the other hand, we should bear in mind that international law provides for the common jurisdiction of heads of state, irrespective of the rules of domestic law. Thus, the traditional international law provides the general jurisdiction of the Head of State, who is authorized to: declare war and peace, conclude international treaties, and appoint and receive diplomatic representatives. These functions of head of state are largely ceremonial, and exceptional in terms of application. However, when it comes to the process of concluding international agreements (treaties), we must refer to the Convention on the Law of Treaties, which provides that by virtue of their functions and without having to produce full powers, the head of state has power to take all actions relating to the conclusion of a treaty.¹⁰ Here it is necessary to point out that the practice may be

8 Article 27 (1) of the Rome Statute of ICC;

9 *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 2) (1999)1 All ER 577, HL;

10 Article 7. point 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;(b) Heads of diplomatic missions, for the purpose of adopting the

unclear about what is considered by “all actions concerning the treaty”. Since the process of concluding international agreements involves a complicated procedure, which has a number of stages and may sometimes take a long time, there is no doubt that the Head of State (as the highest representative of the State) is authorized to represent the country and negotiate on its behalf without the need to produce a special authorization. In addition, the head of state can sign the treaty on behalf of the country, even without authorization, and this is the end effect of international norms on the envisaged authorization of the head of state. The domestic rules prescribe whether the head of state has the power to commit the country to a treaty. If the internal law envisages such a possibility, the head of state will have that authority; if not, the power is vested in the parliament or the government. On the other hand, although there is no convention in international law on unilateral acts of the heads of state, their statements can bind the state and all their actions are attributable to the country (recognition, denial, acceptance, apology, etc.) The assumed jurisdiction of the head of state in respect of unilateral acts and international treaties may be perceived differently. Thus, in the dispute between Australia and France on nuclear tests, the International Court of Justice ruled that the statements of the head of state, regardless of the form in which they are given, are binding for the state bearing in mind the intent and the circumstances in which they are given.¹¹

4. General View of the Powers of the Head of State in the Parliamentary System

In a parliamentary system, the powers of the head of state can be classified as follows: 1) typical executive powers; 2) the impact on the legislative power; 3) the impact on the legislature; 4) the power to influence the politics of the state; 5) powers in emergency situations; and 6) other powers.

The executive powers of the heads of state are typically operational and non-operational. *Non-operational powers*, for example, imply representing the state in the country and abroad, the authority to promulgate laws without the possibility to return the law back to parliament (suspensive veto), the right to receive credentials and revocable letters. *Operational powers* are: to act as the Commander-in-chief of the army and exercise the civilian control of the military; to appoint

text of a treaty between the accrediting State and the State to which they are accredited; (c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ;

11 Nuclear Tests Case, *Australia v. France*, ICJ Reports, 1974, p. 253;

ambassadors and other diplomatic representatives of the country; to appoint judges and constitutional court judges; to conclude international agreements.

Head of state may have *influence on the legislative power*. The two most prominent of these powers are: he may send the message to parliament (*droit de message*), and he may return an act passed by parliament for reconsideration (suspensive veto). In theory and in practice, greater significance is attributed to the suspensive veto which is specifically defined as the authority of the head of state (President of the Republic) to return (in the period defined by the Constitution) a bill to parliament for reconsideration when he/she considers that this is unconstitutional or inappropriate; however, the head of state cannot prevent the law to enter into force if the prescribed parliamentary majority votes in favour of the act again.

When it comes to *the powers to influence the legislature*, the most important is *the dissolution of Parliament*. In some countries, this power is fully in the hands of governments; in others, the head of state is entitled to dissolve parliament either on one's own initiative or on a reasoned proposal of the government.

As regards the powers to influence the state policy, it is most prominently expressed in the authority to propose legislation to parliament. However, in parliamentary democracies, this authority is very rarely exercised by heads of state. It actually indicates a serious disturbance in the separation of powers, where the legislative power ends in the hands of the executive. At best, in a parliamentary system, the head of state may send a message to parliament (*droit de message*), pointing to the need to reconsider the legal regulation in some area.

The powers of the head of state in emergency situations include the authority to declare war and state of emergency, and to take appropriate measures to restrict constitutionally guaranteed individual rights and freedoms. As a rule, these are powers that are not original jurisdiction of the head of state, but they are performed either by the head of state alone or together with other state bodies, when Parliament is not in a position to convene.

Other powers of the head of state are authorities that are less commonly exercised by the head of state, such as the authority to issue regulatory acts (by-laws, decrees, decisions), or some distinctive authorities, such as the right to grant pardons. Amnesty which implies the authority to interfere *post factum* in the court decision and which does not include a review of the legality of a final court decision. In a sense, this authority could be considered closest to the nature of presidency defined as "an embodiment of national unity." (Simović, Petrov, 2014: 223 – 228).

5. Constitutional Powers of the President of the Republic of Serbia

The Serbian Constitution of 2006¹² provides that the President of the Republic “expresses the national unity of the Republic of Serbia” (Art. 111). In the system of government, the President of the Republic is not part of the executive, but his constitutional role is similar to that of the president of the mixed system. It is the role of an intermediary or “moderator” in relations between the executive and legislative. When it comes to the President’s executive powers (in the narrow and broad sense), President of the Republic shall: 1) represent the Republic of Serbia in the country and abroad; 2) promulgate laws by issuing decrees, in accordance with the Constitution; 3) propose to the National Assembly a candidate for Prime Minister, after considering the views of representatives of the elected lists; 4) propose to the National Assembly the holders of official positions, in accordance with the Constitution and the law; 5) appoint and recall ambassadors of the Republic of Serbia at the proposal of the Government; 6) command the Army and appoint, promote and relieve officers of the Army of Serbia.

As for the *influence on the legislative power*, President of the Republic has a suspensive legislative veto, which is related to the authority to promulgate laws. Thus, under the Constitution (Art. 113), the President of the Republic has the power to veto an act adopted by the Parliament. Not later than 15 days after passing the law or within a period of 7 days at the latest if the law was passed in emergency procedure, President shall issue a decree on the promulgation of the law, or return the act to the National Assembly for reconsideration, along with a written explanation. If the National Assembly decides to vote on the law which has been vetoed by the President of the Republic and returned for consideration, the law shall be adopted by the majority vote of the total number of deputies (MPs).

The Act on the President of the Republic of Serbia¹³ provides the reasons that the President may be guided by to return the law to Parliament for reconsideration (Art.19). These reasons are: a) the unconstitutionality of the law (if the President considers that the law is not in conformity with the Constitution, or that it is inconsistent with ratified international treaties and generally accepted rules of international law, or that prescribed procedures have not been observed in the process of enacting the law); b) inexpediency (if the President considers that the law does not regulate an area appropriately). In case the vetoed act is re-enacted in the National Assembly, the President of the Republic is obliged to promulgate

12 Constitution of the Republic of Serbia (Part 5: Organisation of Government; 2. President of the Republic, Articles 111-120), «Official Gazette of the RS» no. 98/2006

13 Zakon o Predsedniku Republike Srbije (Act on the President of the Republic of Serbia), “Službeni glasnik RS”, br. 111/2007

the newly adopted act. If the President of the Republic fails to issue a decree on promulgation of the law within the deadline stipulated by the Constitution, the decree shall be issued by the Chairman of the National Assembly (Article 13 of the Serbian Constitution). The violation of this constitutional provision is the basis for the dismissal of the President of the Republic.¹⁴

The President of the Republic also has a significant *impact on the legislature*. Thus, Article 20 of the Act on the President of the Republic of Serbia envisages the President's authority to issue a decree on the dissolution of the National Assembly. However, this is not an exclusive authority of the President because this power is shared by the President and the Government; namely, acting upon the reasoned proposal of the Government, the President may issue a decree on the dissolution of the National Assembly. The President is not legally obliged to act on the Government's proposal, but the constitutional practice shows that the President of the Republic accepted the Government proposal under the 1990 Constitution of SRY and the 2006 Constitution of Serbia.¹⁵

The President of the Republic has the right to grant pardons. By its very nature, this special authorization cannot be classified into any of the aforementioned group of powers. This equally applies to the authority to declare war and a state of emergency in case the National Assembly is unable to convene, which the President exercises together with the the Prime Minister and the President of the National Assembly. Generally speaking, these powers could be classified as other powers of the President of the Republic only because of their nature but not because of their importance. This particularly refers to the presidential right to grant pardons, bearing in mind the large number of applications submitted by convicted offenders serving the sentence of imprisonment to the President's Office every year. Although the consideration of these requests is a regular ongoing activity of the President of the Republic, the decision on granting pardon

14 The suspensive veto of the President of the Republic is the authority which raises various concerns in both general and professional public. At the end of 2015, the President of the Republic issued a veto and addressed the public, pointing to numerous dilemmas concerning the constitutionality of the adopted law. It raised an issue whether the act shall be returned to the Assembly whenever the President considers that the law is unconstitutional. In other words, the issue was whether the presidential power is converted into a constitutional duty, which becomes the basis for violation of his responsibility or, even then, remains his discretionary power.

15 The absence of President's legal obligation to act upon the Government's reasoned proposal (on the one hand) and the President's automatic acceptance of this proposal (on the other hand) have led to distorted interpretations that the Assembly is dissolved at the moment of the submission of the Government's proposal to the President (and even before that, at the time when the Prime Minister and leader of the ruling party publicly announced their decision to dissolve the parliamentary Assembly).

is an exception rather than a rule. Otherwise, the act of pardon would lose its meaning; it would no longer be an “act of mercy”, but a means for political correction of final court judgments.

Presidential powers are a constitutional category. This means that a legislative act cannot define new powers, abolish or modify the existing ones. This constitutional provision is in line with the fundamental constitutional role of the President, envisaged in the Serbian Constitution. Finally, we should point out two things. First, the constitutional power vested in the President (*per se*) is not a sufficient instrument to make the President a strong constitutional factor. Different presidents act differently even though they are vested with the same constitutional powers. Some of them are (or seem to be) strong, while others prove to be weak presidential figures. In our constitutional practice, it is evident when comparing two different presidential styles: the former President Tadić, who produced an impression of omnipresence and omnipotence in the constitutional order, and the current President Nikolić, who seems to have conceded the key role in the constitutional order to the Prime Minister (perhaps more than he was required to do under the Constitution). In our constitutional theory and political analysis, excessive attention has been paid to the authority and election of the President of the Republic, whereas disproportionately little attention has been given to the presidential duties. Just like the former SRY Constitution, the current Serbian Constitution (2006), the weakest point in the constitutional regulations of this institution are the constitutional provisions on the nature and implementation of the President's responsibilities (Marković, 2015). This is certainly an issue which should be taken into consideration in the prospective constitutional changes-reform.

6. Concluding remarks

This paper has attempted to provide an overview of rules of international and domestic law relating to the position of the head of state. Based on the conducted research, it can be concluded that the position of the head of state is predominantly regulated by the rules of international law when considering his powers in terms of conducting foreign policy. On the other hand, the position of head of state in the national legal and political system is explicitly prescribed by the internal law provisions, and it varies depending on the established system of government. In today's international community, heads of state have an important role in the creation of foreign policy; they make the most important strategic decisions which are then put into action. Here, we should bear in mind that the bodies of some international organizations, such as the European Council of the European Union, are made of heads of state, who make very important strategic

decisions. As there is no doubt that heads of states will play a significant role in the future, it is therefore necessary to pay attention to their status and responsibilities in the applicable rules of international law as well as in the legislation of the Republic of Serbia.

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ПОЛОЖАЈ ШЕФА ДРЖАВЕ ПРЕМА ПРАВИЛИМА МЕЂУНАРОДНОГ ПРАВА И ПРОПИСИМА РЕПУБЛИКЕ СРБИЈЕ

Резиме

У раду се анализира положај шефа државе како према правилима међународног права, тако и према прописима Републике Србије. На почетку се указује на значај који има самит дипломатија у данашње време и износе полазне поставке у истраживању ове теме. Првенствено се анализира положај шефа државе према правилима међународног права у смислу привилегија и имунитета, али и постојање предпостављене надлежности у уговорном процесу и приписивању једностраних изјава шефа државе. Посебно се истиче јурисдикциони имунитет који има шеф државе у погледу домашаја судова других држава, што потврђује пракса унутрашњих судова, али и рад Комисије за међународно право Уједињених нација. У раду се образлаже могућност заснивања надлежности међународних судских тела за најтежа међународна кривична дела. Обрађује се и питање посета шефа државе, као и постојање органа у оквиру неких међународних организација који су састављени из шефова држава или шефова влада. Други део рада акализира норме унутрашњег права Републике Србије које се односе на положај шефа државе код нас, указује на најновију праксу у том погледу и објашњава позиција шефа државе у односу на друге највише носиоце власти у нашој држави.

Кључне речи: шеф државе, међународно право, Међународни суд правде, уставно право, Република Србија.

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THE STATUS AND CORRELATIONS BETWEEN THE OMBUDSMAN AND THE COMMISSIONER FOR THE PROTECTION OF EQUALITY IN THE SERBIAN LEGAL SYSTEM**

Abstract: *In this paper, the authors analyze the legal status, position and correlations between the Protector of Citizens (Ombudsman) and the Commissioner for the Protection of Equality in the Serbian legal system, as competent professional supervisory bodies that have the key roles in the promotion and protection of human rights. In the introductory part of the paper, the authors present a brief outline of international principles related to the establishment and activities of national institutions for promotion and protection of human rights, and provide an overview of different models applied in the comparative systems to shape their legal form. The central part of the paper focuses on the critical analysis of the legal profile, status, domain and the correlations between the Protector of Citizens and the Commissioner for the Protection of Equality. Starting from the opinion that the professional supervisory bodies are an imminent need of every democratic constitutional state, the authors elaborate on the discrepancies and inconsistencies in the constitutional positioning of the Protector of Citizens and the Commissioner for the Protection of Equality, and point out to the potential ways of overcoming the observed normative shortcomings.*

Keywords: *national institutions for promotion and protection of human rights, Paris Principles, Ombudsman (Protector of Citizens), Commissioner for the Protection of Equality, Constitution of Serbia.*

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1. National human rights institutions – role, status and organization models

In the contemporary world, the development of human rights law has been marked by a trend of establishing national human rights institutions (NHRI), specialized state bodies authorized to supervise, promote and protect human rights. These specialized governmental bodies are established and funded by the state but their activities are autonomous and independent from the government and other state authorities in the public government sector (Pohjolainen, 2006: 6).¹ This international document which has given a strong impetus for the establishment and development of national human rights institutions are the so-called Paris Principles (1993)². These principles set the minimal international standards related to the status, scope of activity and *modus operandi* of the NHRIs³: wide mandate based on the universal human rights' standards, autonomy in relations with other state bodies, independence guaranteed by the law and constitution, pluralism in terms of membership and cooperation, adequate resources and relevant authorization for investigation (National Human Rights Institutions, History, Principles, Roles and Responsibilities, 2010: 103-106). The Paris Principles are a lexicon of the NHRIs, a test for assessing their legitimacy and credibility, and the key criteria for the accreditation of the NHRIs, which has been performed by the International Coordinating Committee (ICC) of National Human Rights Institutions for the protection and promotion of human rights⁴ ever since 1993; in the process of assessing their legitimacy and credibility, the NHRIs are assigned an appropriate status, depending on the extent of accomplishing the envisaged principles.⁵

1 The idea of founding NHRIs first appeared in 1946, and the first guidelines on their structure and functioning were adopted by the General Assembly of the UN in 1978. (Further: Carver, 2010: 1–32)

2 The Principles relating to the status and functioning of National Institutions can be found in the annex of the General Assembly Resolution 48/134 of 20 December 1993; <http://www.un.org/documents/ga/res/48/a48r134.htm>.

3 The Vienna Declaration was passed in the same year, during the World Conference on Human Rights held in Vienna in 1993. It reaffirmed “[...] the important and constructive role of the national institutions for the promotion and protection of human rights”, and encouraged their establishment and strengthening (par. 36. Vienna Declaration, Retrieved 24 April 2016; <http://www.ushrnetwork.org/sites/usshrnetwork.org/files/vdpa1993.pdf>

4 The ICC has the status of an international organization which gathers more than 1,000 NHRIs from different parts of the world. Its primary aim is to strengthen the NHRIs and secure their leadership position in the promotion and protection of human rights. The ICC coordinates the relations between the NHRIs and the UN human rights system.

5 In the process of accreditation, the fulfillment of stipulated conditions is evaluated by a special ICC body– the Sub-Committee on Accreditation. Depending on the level of fulfilling

Reserach shows that there is a great diversity with regard to the concept, design, legal status and the domain of the NHRIs because the respective states have applied different approaches in establishing these institutions, primarily driven by their own needs and legal culture. Generally speaking, the NHRIs can be classified into one of the four models: the Committee for Human Rights model, the Advisory Committee model, the Ombudsman model, and the Institute for Human Rights model (Pohjolainen, 2006: 16).⁶ Depending on the chosen model, the legal composition of the NHRI differs: in some states, they act in a collegiate structure and, in other states, they have the characteristics of independent bodies; in most countries, they are chosen by Parliament but in several states they have the status of government agencies (Ammer, Crowley, Liegl, Holzleithner, Wladasch, Yesilkagit, 2010: 64-143). There are further differences between states regarding the number of NHRIs. Some states established a single NHRI, which is authorized to act in all areas of human rights. Other states established several different NHRIs, some of which have general competences while others specialize in specific areas of human rights (for example, the so-called *equality bodies* focusing on equality protection).⁷ In the states with several NHRIs, the correlation between the NHRIs is based on different approaches: 1) co-exchange, 2) joint activities, 3) joint strategic and business planning, and 4) joint action with the goal of achieving synergic effects (Carver, 2011: 17).

In the states where there are specialized bodies for equality protection, the number of these institutions is not the same. Some states have only one such

the conditions set by the Paris principles, the NHRIs may obtain the "A", "B" or "C" status. According to the data issued by the ICC, 106 NHRIs were accredited until 23rd May 2014: 71 NHRIs attained the "A" status, 25 NHRIs attained the "B" status and 10 NHRIs got the "C" status (ICC, *Chart of the status of national institutions*. Retrieved 24 April 2016; <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf>)

6 The ICC identified six models: Human rights commissions, Human rights ombudsman institutions, Hybrid institutions, Consultative and advisory bodies, Institutes and centers, and multiple institutions (ICC, *Roles and types of NHRIs*. Retrieved 24 April 2016 <http://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx>)

7 The establishment of equality bodies was initiated by the ECRI General Policy Recommendation no.2 (1997) issued by the European Committee for Combating Racism and Intolerance of the Council of Europe (ECRI) in 1997, in which the members of the Council of Europe were suggested to found specialized government bodies for combating racism (ECRI General Policy Recommendation No. 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism And Intolerance at National Level., Retrieved 24. 4. 2016; http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp.) In the EU member states, the establishment of independent bodies for equality protection is the result of fulfilling the obligations specified in the Directive on racial equality and the directives pertaining to the equal treatment of the sexes (Detailed: Petrušić, 2014: 30).

institution and other states have a number of them, while their competences are usually differentiated according to the social group which is provided assistance and protection (e.g. national minorities, persons with disabilities, LGBT persons, etc.)⁸ (Carver, 2011: 1-24; Petrušić, 2015: 65-86).⁹ There are significant differences between the equality protection bodies in their roles and competences; accordingly, there are two basic types of equality protection bodies: *promotion-type bodies* and *tribunal-type bodies* (Krusaa, 2011).

Research shows that the NHRIs are the key actors of human rights, regardless of their legal status, organization form and domain. Often perceived as "disconcerting partners" of their governments, the NHRIs are the bridge which connects the national systems of human rights with the universal and regional systems of human rights (Assessing the Effectiveness of National Human Rights Institutions, 2005: 7), as well as the civil society with the government bodies. Thus, they concurrently exercise three complementary roles in the area of human rights: the roles of the "protector" of citizens' rights, the "expert" and the "educator" (Pohjolainen, 2006: 1).

In Serbia, there are two NHRIs operating in the area of human rights: the Protector of Citizens of the Republic of Serbia and the Commissioner for the Protection of Equality. This paper examines their legal position and correlation through analysis of the constitutional and legal norms which regulate their legal status, jurisdiction and domain of their activities. The aim of this paper is to determine whether these two independent professional bodies are properly positioned in the legal system, and whether there is an adequate constitutional framework for the regulation of their activity on the promotion of human rights.

8 In Europe, the institutions whose mandate includes the protection of equality are members of the European Network of Equality Bodies, which comprises 45 institutions from 33 European states (Equinet highlights, 2015:20); Retrieved 24.4.2016; http://www.equineteurope.org/IMG/pdf/equinet_highlights-2014-15_defelectronic.pdf

9 In recent years, two parallel processes have been underway in European states: the integration of several institutions for the equality protection into one institution (e.g. the United Kingdom and Sweden) and the integration of the institutions (bodies) for equality protection and the NHRIs of general character (e.g. Austria i Australia), the result of which is one "hybrid" institution (*Hybrid equality/human rights institutions*) (Equality Bodies and National Human Rights Institutions, 2011: 7). These integrated institutions are expected to act proactively, to be the cornerstone of cooperation with the government bodies and civil society organizations, and to develop an all-encompassing and consistent approach to the promotion of human rights and equality. Research shows that this process has positive as well as negative consequences (Crowther, O'Conneide, 2013: 38-74).

2. The constitutional position of the Protector of Citizens and the Commissioner for the Protection of Equality

The effort to determine the constitutional position of the Protector of Citizens (hereinafter: PC) and the Commissioner for the Protection of Equality (hereinafter: CPE) in the constitutional system of the Republic of Serbia is seemingly not a difficult task. That is especially true for the PC, the body defined in Article 138, item 1 of the Constitution of the Republic of Serbia¹⁰ as “an independent state body which protects the rights of the citizens and controls the activities of the state administration bodies [...] and other bodies [...] which have public authorizations”. Moreover, apart from the fact that all five items in Article 138 of the Constitution are dedicated to the body of the PC, this Article is further transposed and expanded into a whole section of Chapter 5 of the Constitution, titled “Government organisation”, which reaffirms the “independence” of the PC in relation to the bodies that are considered the holders of the three branches of government (legislative, executive and judicial branch) as well as in relation to the state administration. In a similar manner, the PC is defined in the Act on the Protector of Citizens (hereinafter: the Ombudsman Act);¹¹ according to Article 2 (item 1) of this Act, the PC is an “independent and autonomous” state body, whereby the independence of this body is explained as the organizational autonomy in performing activities in this domain as established by this Act.

The systemic “independence” guaranteed to the PC by the Constitution is not present in the case of the CPE, which was established by the Act on the Prohibition of Discrimination (hereinafter: the Anti-Discrimination Act).¹² Namely, Article 1 (item 2) of the Anti-Discrimination Act envisages that the CPE is “an autonomous state body, independent in performing activities in the domain as provided by this Act”. Therefore, the legislator decided to emphasize the independence of the CPE relating to the organizational autonomy in operating in the domain established by the Act, whereas the concept of independence was not treated in a special systemic meaning (as it was done in the case of the PC¹³) but merely as clarification of the (organizational) autonomy. Anyway, the terminological misunderstanding is by no means coincidental; it is a reflection of the lack of any consistent theoretical postulates which would be used by the competent supervisory bodies as guidelines for a comprehensive unification of legal rules contained in the Serbian Constitution, the Ombudsman Act and the

10 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, 98/2006.

11 Act on the Protector of Citizens, Official Gazette of RS, 79/2005 and 54/2007 (hereinafter: the Ombudsman Act).

12 *Act on the Prohibition of Discrimination*, Official Gazette of the Republic of Serbia, 22/2009. (hereinafter: the Anti-Discrimination Act).

13 Article 138, item 1 of the Constitution and Article 2, item 1 of the Ombudsman Act.

Anti-Discrimination Act (ADA). The state of affairs would be relatively simple if the constitutional position of the CPE would be related to that section of the Constitution ("Government organisation") which regulates the state, i.e. more precisely, to Article 137, item 3, which states that "according to law, public authorizations [...] can be vested in the specialized bodies which have the regulatory function in certain areas and activities". Thus, the CPE could be put into the group of "holders of public authority" in the system of state administration;¹⁴ unlike the PC who is an "independent and autonomous" body, the CPE is an "independent state body" (Article 1, item 2 of the ADA) acting "in compliance with" the rules of the general administrative procedure (Article 40, item 4 of the ADA). This state of affairs implies that the Constitution-maker wanted to regulate the position of the PC in a different manner in comparison to all regulatory state bodies, including the CPE: whereas the former is elevated to the level of an "independent" state body, all others are fitted into one (regulatory) part of the system of state administration, which should be given concrete public authorizations by a legislator within the framework of "state administration activities".¹⁵

However, problems arise if the nature of the CPE as a state body endowed with a regulatory function is contended. As a matter of fact, the "regulatory function" is mentioned neither in the Public Administration Act (especially not in Part 3, dealing with "state administration activities") nor in the Anti-Discrimination Act. On the other hand, "regulatory activities" are mentioned in the Public Agencies Act,¹⁶ in Article 37, which obviously cannot be applied to the CPE in any way. It does not come as a surprise, having in mind that the regulatory "functions" and "activities" stem from the regulatory activity of the state in specific areas of market economy, most frequently in the domain of businesses which operated as the public entities but have been privatized in the meantime (Tomić and Jovančić, 2012: 24-25). Indeed, what is "regulatory" in the protection of equality and combating discrimination?

If the perception of the CPE as an autonomous state body performing a "regulatory function" (pursuant to Article 137, item 3 of the Constitution) can be dismissed, there follows the conclusion that this body must be incorporated

14 In the context of Article 4 of the Public Administration Act (Official Gazette of the Republic of Serbia, 79/2005, 101/2007, 95/2010 and 99/2014).

15 Public authorization in the system of state administration pertains to the "specific activities of state administration", in the context of Article 4 of the Public Administration Act: "Specific activities of state administration can, by law, be given to autonomous provinces, municipalities, cities and the city of Belgrade, public companies and other organizations (in the following text: holders of public authorization."

16 Public Agencies Act, Official Gazette of the Republic of Serbia, 18/2005 and 81/2005 - correction.

into the group of the regular “bodies of state administration specified by the law” (pursuant to Article 136, item 2 of the Constitution), as the body that was granted certain “state administration activities” by the Anti-Discrimination Act. In the classification of the “state administration activities”, the activities assigned to the CPE could mainly be qualified as the activities pertaining to control or supervision. It is, however, obvious that they are neither the activities of “instance supervision”¹⁷ nor the activities of “inspection supervision”, in the context of Article 18 of the Public Administration Act.¹⁸ The Anti-Discrimination Act assigned the regular instance supervision relating to the subject matter of equality protection to the competent Ministry in charge of human and minority rights¹⁹; however, given the fact that it is the National Assembly that appoints the CPE, reviews its regular and special reports on the state of affairs in the area of equality protection and listens to its opinions on the related legislation, the Anti-Discrimination Act also includes provisions on the parliamentary supervision over the public administration as a whole, including the ministries.

Yet, the domain of the CPE activities is not exhausted and limited to assisting the National Assembly to conduct parliamentary supervision in the context of equality protection and, generally, to stay in touch with the contemporary issues related to this matter and act accordingly through legislation. Above all, the CPE is authorized to “warn the public about the most common, typical and difficult cases of discrimination”²⁰ and, thus, to activate the mechanisms of the “public” (civil society) supervision over all state government bodies, including the National Assembly. Furthermore, the CPE is authorized to conduct proceedings based on the discrimination complaints,²¹ to give opinions and recommendations to all persons/entities that are proven to have violated the right to equality (which may include the National Assembly) on the manner of eliminating the infringement of the right to equality, and to issue warnings notifications in order to draw attention to those cases in which the infringement has not been eliminated.²²

17 On instance supervision in the hierarchy of the state administration bodies, compare Popović, Marković and Petrović, 1992: 497.

18 “Through the inspection supervision, the bodies of state administration examine the application of laws and other regulations through a direct insight into the work and activity of physical and legal persons and, depending on the results of the supervision, appropriate measures in the domain of the bodies are offered.”

19 Article 47 of the Anti-Discrimination Act.

20 Article 33, item 1, point 6 of the Anti-Discrimination Act.

21 Article 33, item 1, point 1 of the Anti-Discrimination Act.

22 Article 40, item 1 of the Anti-Discrimination Act. The analysis of the legal competences of the CPE shows that this body performs three key roles: it is a quasi-judicial body when it acts upon anti-discrimination complaints; it is the body which provides assistance and

Also, much like the civil society organizations which are concerned with the protection of human rights, the CPE is authorized to initiate the so-called *strategic* civil proceedings for protection against discrimination²³ (Petrušić, 2012: 905-922); these lawsuits are a special anti-discrimination method and mechanism aimed at accomplishing a wider societal change through court rulings, exerting an influence on the legal practice and public policies, and improving the position of the discriminated social groups (Coomber, 2012: 11-21; Schokman, Creasey, Mohen, 2012: 3). In all those instances, the CPE acts as the body of the general public, i.e. the civil society. For these reasons, the CPE supervisory activity cannot be classified as "inspection supervision".

Two additional reasons point to such a conclusion. Firstly, the CPE is obliged not only "to apply the laws and other regulations" but primary to ensure the application of Article 21 of the Constitution which guarantees the equality before law and prohibits any form of discrimination, as well as the application of all the legal provisions in the ratified international documents which regulate the right to non-discrimination, *as one of the human rights*. Secondly, the CPE is not authorized to handle cases involving a violation of the citizens' subjective rights and obligations. Just like the civil society, the CPE assists the government and state administration bodies in cases where this body is eligible to act in compliance with the applicable law, pressing state authorities for action in cases requiring professional expertise, exerting pressure in cases of observed inactivity or hesitancy of the public authorities, and urging citizens to accumulate their social power in order to counteract any violation of the right to equality, in cases of its recurrent and substantial infringement. All the aforementioned activities are also encompassed in the domain of the Protector of Citizens.²⁴ Therefore, the PC is a general-type ombudsman whereas the CPE is a specialized ombudsman (Petrušić, Krstić, Marinković, 2014: 14, 231), exclusively authorized to protect only one human right – the right to equality.

All the observations so far lead to the conclusion that there is no reason for the CPE to have a different constitutional position in comparison to the PC: namely, neither the PC nor the CPE can be treated as a regular "state administration body regulated by the law" (pursuant to Article 136, item 2 of the Constitution), nor as "a special bodied for exercising the regulatory function in some areas or activities" (pursuant to Article 137, item 3 of the Constitution). In that context, it should also be noted that there is no reason for the CPE to act "according to"

support to the victims of discrimination; and it is the body which promotes equality and non-discrimination principles (cf.: Petrušić, 2014: 27-43).

23 Article 46, item 1 of the the Anti-Discrimination Act.

24 Article 31, item 5 of the Ombudsman Act.

the rules of the general administrative procedure,²⁵ as stated in Article 40, item 4 of the Anti-Discrimination Act. In this case, the phrase “according to” is more of a hindrance than of assistance to the CPE: its procedural freedom is thus unnecessarily limited as compared to the one granted to the PC, and placed in the sphere of administrative procedure logic even though there is no specific reason for the legislator to prefer *a priori* the general administrative procedure in comparison to the civil (lawsuit) procedure, which offers much greater guarantees for rendering legitimate decisions in the proceedings on anti-discrimination complaints.

Considering all the above, it may be concluded that there are no reasons of material nature which should lead to the CPE not having the same constitutional position as the PC: in order to ensure an effective supervision of human rights, both bodies need to be equally “autonomous” in relation to the governmental and state administration bodies, and “independent” in performing their activities concerning the protection of citizen rights and control of the activities of the state administration bodies and other organizations that are vested with public authorities. This entails a conclusion that the Serbian constitutional system includes an entire sector outside the government and state administration – the sector of the competent professional *supervisory bodies*; in this sector, the position of the PC has already been recognized but there is a need to equally recognize some other bodies, such as the CPR, which should be anchored and mutually connected thorough a standardized systemic framework. Yet, there are neither constitutional nor legal conditions for satisfying this need; thus, until a change in the Constitution occurs, the *quasi-constitutional* position of these bodies could be advanced only in practice, through *analogous* application of provisions from Article 138 of the Constitution, rather than Articles 136 and 137 of the Constitution regulating “Government Organization”.

The choice to make analogies would, naturally, open up a plethora of other problems. One of the most delicate issues would be related to the constitutional and legal limitations of the PC's authority to control the activity of the government authorities and public prosecution offices.²⁶ Neither the Constitution nor the Anti-Discrimination Act includes a provision on the PC's authority to control the responsible persons in those bodies and institutions; however, pursuant to Article 20 of the Anti-Discrimination Act which only deals with the authorization to control the activity of the responsible persons in the government bodies (which can be further applied to all organizations with public authorization),

²⁵ This proceeding is regulated by the General Administrative Procedure Act, Official Gazette of RS, 18/2016.

²⁶ Compare: Article 138, item 2 of the Constitution and Article 17, item 3 of the Ombudsman Act.

it could be concluded that the PC is deprived of the authorization to control the activity not only of the government bodies and public prosecution offices but also of the responsible persons working in those institutions. On the other hand, the Anti-Discrimination Act enables the CPE to act against the responsible persons in all “public government bodies”,²⁷ which allows the CPE to participate in the area where the PC, according to the logic of the existing legal solution, has no authorization.

Creating the analogy between the constitutional position of the PC and the CPE, as two homogenous competent supervisory bodies, would pose the question whether it is warranted to limit the authorization of the PC to control the activity of the responsible persons in the government bodies and public prosecution offices. At first glance, it seems that the principle of efficiency justifies this limitation, having in mind that there is a great disbalance between these two bodies in the scope of their activities: the PC protects all human rights guaranteed by the Constitution,²⁸ whereas the CPE protects only one – the right to equality. Yet, the disbalance is not as substantial as it may be expected, having in mind that it is lessened by the Anti-Discrimination Act, connecting the right to equality with a plethora of other human rights.²⁹ Thus, there remains the question whether the supervisory activity of the PC in the domain of the “public government bodies” is legally impossible and beyond the PC's reach, or whether it is part of a huge legal void which (once filled) would not obstruct the PC's activities on principled grounds requesting from the PC to follow the already established practice of the CPE in actions/proceedings against the responsible persons in these bodies. The latter option would follow the logic of the systemic solution according to which the relationship between the PC and the CPE is described as the relationship between an ombudsman having general authority and an ombudsman having special authority: if that kind of logic would enable the CPE to achieve “independence and autonomy” equal to those vested in the PC, it would also enable the PC to supervise the activities of the responsible persons from the “public government bodies” in the same manner as the CPE.

27 According to Article 2, item 1, point 4 of the Anti-Discrimination Act, the phrase “a body of public government” implies a state body, a body of an autonomous province, a body of the local self-government, public company, institution, public agency and other organizations which was given public authorization, as well as a legal entity which was founded or financed by the Republic, autonomous province or local self-government.

28 Article 18-81 of the Constitution.

29 For example, Article 11 of the Anti-Discrimination Act prohibits hate speech as a form of discrimination, while Article 49 of the Constitution the basic right to non-discrimination is protected by an explicit prohibition of inciting racial, national, ethnic and religious hatred.

3. Possibility of filing complaints against the actions of the Protector of Citizens and the Commissioner for the Protection of Discrimination

In order to establish the existence of legal grounds for filing complaints against the actions of the PC and the CPE, it is necessary to determine the legal nature of the complaints proceedings that these two bodies are involved in as well as the nature of legal acts that are issued in those proceedings. In this context, we encounter the problem of different regulation of the positions of these two bodies: while the PC issues individual acts in the form of opinions and recommendation in the course of a minimally formalized action,³⁰ the CPE issues its opinions and recommendations in the course of action regulated by the Anti-Discrimination Act and the Rules of Procedure of the CPE,³¹ which are subject to an appropriate application the the General Administrative Procedure Act.³² Yet, this difference in the proceedings carried out by these two bodies does not imply the differences in the legal nature of the opinions and recommendations that are the result of these actions. Namely, the opinions and recommendations of the PC and the CPE do not have the force of an execution document; instead, they produce effect by the power of authority of the institution itself and the power of persuasive argumentation used in the legal reasoning. (Petrušić et al. 2007: 273).

The most significant difference lies in the ability of the CPE to issue a warning to every person/entity that does not act in line with its recommendation. This warning is a special legal act which does not entail a possibility of filing a complaint,³³ but it does not produce any direct legal effect: thus, the person/entity

30 The action of the PC on complaints is regulated in Articles 24-32 of the Anti-Discrimination Act.

31 Official Gazette of the Republic of Serbia 34/11. The Rules of Procedure regulating the work of the CPE were adopted by the CPE on the basis of the authority envisaged in Article 34 of the Anti-Discrimination Act to more specifically regulate its *modus operandi*, activities and proceedings.

32 The legal nature of proceedings on anti-discrimination complaints has not been elaborated to a greater extent in theory. Having in mind that Article 40, item 4 of the Anti-Discrimination Act explicitly prescribes that the provisions governing the general administrative procedure should appropriately apply to the action/proceeding instituted before the CPE, it may be concluded that this proceeding is a special administrative action/proceeding. However, considering the goal and the purpose of the proceeding on (anti-discrimination) complaints, it does not have the character of an administrative action; actually, it resembles the *sui generis* proceeding, which is carried out by a specific independent state body (See: Petrušić, Krstić, Marinković, 2014: 236-237).

33 Notably, pursuant to Article 12, item 2 of the General Administrative Procedure Act, a complaint may not be filed in the administrative procedure only in cases where “the protection of the party’s rights and legal interests, or the protection of legality, has been secured otherwise”.

that has received a recommendation and a subsequent warning from the CPE may completely ignore these legal acts. In that case, the CPE is only authorized to inform the general public on undertaken actions,³⁴ which is a form of "moral repression" in its own right aimed at exerting mental pressure on the person/entity that performed the act of discrimination, and preventing other potential discriminatory acts (Petrušić, Grubač, 2014: 78). On the other hand, the PC is not authorized to issue warnings. In case "the body responsible for the violation of human rights does not act according to the recommendation, and no warranted explanation for such actions is offered", the PC is required to "inform a superior authority about it and, ultimately, the Assembly and/or the government of the appropriate level"; if such actions do not prove to be effective, the PC has to "inform the public through mass-media" in order to exert pressure on the competent authority (Teofilović, 2012: 49).

Directing the CPE to some fragments of the general administrative procedure, which would be "accordingly" applied in its activity– along with the authority to issue a "decision" on warning which may not be subject to filing a complaint, is redundant and even harmful; it introduces confusion and does not add to the efficiency of the CPE. Finally, it may be concluded that neither those who have already filed a complaint nor those who received the recommendations (or warnings) are entitled to file complaints against these recommendations and warnings of the CPE or against the opinions and recommendations of the PC.

Yet, we may still pose the question whether the responsible person in the administration body (or the organization performing some public authorization) is entitled to file a complaint to the CPE for the discriminatory action of the PC. Namely, hypothetically speaking, the PC might refuse to act upon a citizen's complaint due to some personal characteristics of the claimant, or the PC may keep issuing recommendations to some organization with public authorization because of the personal characteristics of its responsible person. If the CPE received a complaint against the PC on the grounds of "unequal treatment"³⁵, the CPE would have to discard it given the fact that the PC is not authorized to delve with the subjective rights and obligations of the citizens, nor does it provide "legal protection" in the context of Article 21, item 2 of the Constitution and Article 4, item 1 of the Anti-Discrimination Act; therefore, the PC cannot commit discriminatory acts in the course of providing "legal protection". Accordingly, the CPE would be obliged to reject the complaint, invoking Article 36, item 4 of

34 Article 40 of the the Anti-Discrimination Act.

35 In its rulings, the European Court of Human Rights is increasingly using the phrase "equal treatment", which embodies the "equality before the law" and the "equal protection of law"; thus, the Court ensures equal legal effects for all the persons in similar legal situations (cf. Etinski, 2009: 314).

the the Anti-Discrimination Act, which states that the complaint is to be refused if “there is no infringement of the claimant's right as alleged in the complaint”.³⁶

However, this logic cannot be applied *vice versa*, if we start from the premise that the CPE is one of the bodies of state administration which (unlike the PC) does provide “legal protection” to the citizen, regardless of the fact that neither the CPE nor the PC have the authority to deal with the citizens’ subjective rights and obligations. Thus, it would be subjected to the control of the PC, just like all other bodies of state administration. Such a state of affairs is certainly unfavourable as it may give rise to unnecessary instability, disbalance and tension in the relations between the PC and the CPE. Therefore, in case the PC receives a complaint against the activity of the CPE (regardless of whether it refers to the legal act/decision issued upon a complaint or an inadequate “unequal treatment” of the claimant or the respondent), the most adequate solution for the PC would be to declare having no jurisdiction in the case at issue. The same rule would apply in case the CPE receives a complaint against a legal act/decision or “unequal treatment” of the PC. Such a solution would serve to consequently avoid any connection between the CPE and state administration, even at the expense of depriving the CPE of the authority to issue decisions on warnings, which anyway are not higher in rank of legal acts than recommendations. The Commissioner for the Protection of Discrimination and the Protector of Citizens must be acknowledged as two equal *competent supervisory bodies* and, as such, they should develop a relationship of close cooperation, coordination and distribution of workload (in the sector previously designated as “the field outside the government and state administration”). For that reason, all legal bases for creating unnecessary asymmetry of their authorizations should be eliminated.

4. Deficiencies of the normative framework

The issues observed in the constitutional position of the PC and CPE and their correlation are a consequence of theoretical inconsistency and even confusion in the domestic constitutional and legislative framework. The Constitution of the Republic of Serbia (2006) is a constitution written in haste and without a solid underlying theoretical framework which would ensure the much needed consistency. Therefore, there are certain unclear points: 1) whether the far-reaching “independence” of the PC stems from the fact that it is a *competent supervisory body*, 2) whether the law makes allowances for the establishment of

³⁶ In such cases, the CPE could instruct (and eventually support) the citizens and responsible persons who are dissatisfied with the works of the PC to submit a proposal to the National Assembly to remove the PC from office due to the unprofessional conduct and unconscientious performance of its function and/or for acting in bad faith (Article 12, item 3, point 1 of the Ombudsman Act).

other supervisory competent bodies, and 3) whether the correlations between these two bodies have to be based on close cooperation, coordination and distribution of workload. Positive answers to these three questions are more likely to ensue from the *perspective of the democratic constitutional state* rather than from the perspective of the Constitution and the legislation developed thereof. Furthermore, it could be concluded that the sloppy constitution-making process, without a clear governing idea, contributed to the state of affairs where only the PC is implicitly treated (in the applicable legislation) as a competent/professional supervisory body, whereas the CPE is effectively denied this capacity in an attempt to make it fit into “*the Procrustean bed*” of state administration, thus leaving just enough space for an inadequate hierarchical relation to gradually develop and set in mutual relations between these two bodies.

From the perspective of the theory of the democratic constitutional state, the PC and the CPE can be treated as *equal competent supervisory bodies* which are assigned to protect the *constitution as a social agreement*. If the Constitution is the social agreement of citizens (as individuals), then, it ensures the equality of the citizens' basic rights and enables them to create such an organization of government (and state administration) which would be highly committed to the protection of its citizens (as the absolute imperative). However, setting up an adequate control over this protection is the most difficult task; for this reason, the theory of the democratic constitutional state focuses on research and discovery of more subtle and efficient supervisory mechanisms. On the occasion of adopting the US Constitution, James Madison noted the difficult nature of that task: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself” (Madison, 1981: 348). In more than two centuries of modern constitutionality, different “auxiliary precautions” have been tested and many valuable experiences of the competent supervisory bodies have been gathered, as one of the primary channels of control by the “people” (nowadays, it would be more appropriate to say the *civil society*) over the holders of the governing power in the democratic constitutional state.

In a democratic constitutional state, there is no need for any sovereign instance – which is actually ruled out by the efficient separation of powers (cf. in detail: Molnar, 2002: 24, etc); moreover, the civil society sector is guaranteed in the Constitution;³⁷ it embodies all citizen efforts to exercise the “external control

37 The civil society has been introduced in the constitutional subject matter as an independent category only recently; it is recognized in the constitutional documents of the Czech Republic,

of the government” and to protect their basic rights by relying on their own constitutional powers, by acting within the scope of citizen initiatives (including citizen disobedience), by establishing NGOs for the protection of human rights (whose relations to the government representatives may be institutionalized to a different extent),³⁸ and by entering corporate arrangements with the holders of the governing power. The corporate logic is primarily related to the three-partite state bodies through which the state enters into negotiations between the civil society organizations, such as the employers' organizations and the employees' organizations (cf. Taylor, 2000: 13); yet, it should not overshadow the fact that the competent supervisory bodies were born on the wings of corporatism. Furthermore, the competent supervisory bodies are state bodies whose mere presence confirms that the *multiparty elective democracy cannot adequately protect the citizens' basic rights*; it is, therefore, necessary to ensure that the most competent representatives of the civil society enter into the structures of the government and state administration, so as to have an immediate insight into the state of their human rights, to be able to quickly initiate and efficiently prevent further infringement of their rights, and to inform the general public in cases of gross or substantial violation of these rights and to raise the public awareness about the importance of taking action (by using specific instruments, such as: denying support to the ruling parties during elections; intensifying the activity of NGOs dealing with human rights protection; resorting to acts of citizen disobedience, etc). Hence, the competent supervisory bodies do not have the authority to tackle the subjective rights and obligations of citizens: they gladly yield that authority to the government and state administration bodies because they ultimately have to remain loyal to the civil society, whose members (in spite of their occasional inactivity, fragmentary liaisons and limited participation) are the only ones who are entitled to protect their own basic rights in the last instance, *as the contracting parties of the Constitution perceived as a social agreement*. The very fact that the competent supervisory bodies are not part of the government or state administration structure has prompted some theorists to speak about the evolving “fourth branch of government” (cf., for example: Smith, Kevin B. and Licari, 2006). If this figurative designation contained a grain of truth, it would point to the fact that the “fourth branch of government” in a democratic constitutional state must exist as the correctional device of the multiparty democracy, and that it encompasses all the channels which are at citizens' disposal for the protection of their basic rights beyond and outside the periodically organized elections.

Lithuania and – in a more complicated manner – Poland (Nußberger, 2011: 45, etc.).

38 As a result of lobbying by some non-government organizations during the creation of the UN Charter, the NGOs had an important position in the UN legal order from the outset. Thus, they entered the international human rights protection system and used international mechanisms to exert strong pressure on the member states (cf. Burgental, 1997: 247 etc).

The Constitution of the Republic of Serbia certainly does not recognize such a concept. It starts from the assumption that sovereignty is not vested in the state but in the "people" (citizens) who constantly exercise their sovereign (constitutional) powers through their freely elected political party representatives;³⁹ yet, in spite of the explicit prohibition envisaged in the Constitution,⁴⁰ the state and political parties may ultimately "usurp" the sovereignty from the citizens, (cf. for a more detailed argumentation: Molnar, 2013). The Constitution also mentions the people's initiative and the referendum as instruments for exercising citizens' sovereignty but the greatest irony lies in the fact that the process of passing the Constitution on 28th and 29th October 2006 only confirmed how easy it was for the ruling parties to manipulate and breach the Act on the Referendum and People's Initiative⁴¹ without any repercussions. It should not come as a surprise that the civil society remained in the constitutional "grey zone" after the year 2006, with only one exception: the PC, the body which was virtually "forced" into the final draft of the text. Under the Serbian Constitution, the PC is not included in the government and public administration structure; yet, having in mind that there is no constitutional and legal rationale that might justify the presence of this body in the part of the Constitution titled "Government Organization", the provisions on the PC keep "hanging" there. Moreover, its "independence" from the "sovereign power" of the people exercised through their "elected representatives" may be suspected.

5. Directions for overcoming the shortcomings in the constitutional position of the competent supervisory bodies

In order to overcome the shortcomings in the existing regulation of the constitutional position of the Protector of Citizens and similar state bodies, such as the Commissioner for the Protection of Equality, and promote their mutual relations, it is necessary to institute a comprehensive change of the Constitution. The provisions on the Protector of Citizens should not be included in the part of the Constitution regulating the "Government Organization"; instead, these provisions should be included in a separate part, titled "Competent Supervisory Bodies", which should enumerate all other the state bodies, such as the CPE, which are neither the holders of the governing power nor state administration

39 Article 2, item 1 of the Constitution.

40 Article 2, item 2 of the Constitution

41 Act on the Referendum and People's Initiative, Official Gazette of the Republic of Serbia, 48/94 and 11/98.

bodies. Moreover, the civil society, and particularly the NGOs⁴² involved in human rights' protection, should play the key role in process of selecting relevant professionals for these bodies. Finally, their jurisdiction and competences in the field of protection of citizens' basic rights must be thoroughly considered, systematized, synchronized and prepared for prospective legal elaboration.

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42 Chapter B.1. of the Paris principles specifies: "The organization and guarantee of independence and pluralism of the state should secure all the necessary guarantees for pluralistic representation of the state elements (civil society) included in the promotion and protection of human rights, through the participation of the civil society in the procedure of naming the members of the NHRIs and in other activities.

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**ПОЛОЖАЈ И МЕЂУСОБНИ ОДНОС ЗАШТИТНИКА ГРАЂАНА
И ПОВЕРЕНИКА ЗА ЗАШТИТУ РАВНОПРАВНОСТИ
У ПРАВНОМ СИСТЕМУ СРБИЈЕ**

Резиме

Савремени развој права људских права обележава тренд оснивања националних институција за промоцију и заштиту људских права, посебних државних органа које установљава и финансира држава, али који делују самостално и независно од владе и других органа власти. Снажан импулс њиховом развоју дали су тзв. Париски принципи из 1993. године, којима су успостављени међународни стандарди о статусу, овлашћењима и ресурсима националних институција, а на основу којих се процењује њихова легитимност и кредибилитет. Често „непријатни партнери“ својих влада, националне институције за промоцију и заштиту људских права дају значајан допринос остваривању међународних стандарда људских права на националном нивоу. У систему заштите људских права Србије делује више независних институција у чијој је надлежности промоција и заштита људских права. У раду је истражен правни положај и међусобни однос Заштитника грађана и Повереника за заштиту равноправности – инокосних надзорних стручних тела која у домену људских права остварују улоге „заштитника“, „стручњака“ и „едукатора“. Анализиране су уставне и законске норме којима су регулисани поље деловања, правни статус и надлежност надзорних стручних тела и елаборирана је некон-зистентност у њиховом уставном позиционирању, као и последице које овакав приступ изазива. Полазећи од става да су надзорна стручна тела иманентна потреба сваке демократске уставне државе, указано је на потребу далекосежних промена Устава како би се створио ваљан уставни оквир за законско регулисање њиховог положаја и надлежности.

Кључне речи: националне институције за промоцију и заштиту људских права, Париски принципи, Заштитник грађана, Повереник за заштиту равноправности, Устав Србије.

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THE EFFECTS OF COMPLAINT AS A REGULAR LEGAL REMEDY IN THE ADMINISTRATIVE PROCEDURE OF SERBIA AND MONTENEGRO

Abstract: *The reform process in the area of administrative procedure resulted in the adoption of the new General Administrative Procedure Act that has changed the former logic and established framework of the administrative procedure. The authors deal with the complaint as a legal instrument which is a relative novelty in the administrative procedure and which should be important from the point of view of protecting the rights and interests of the parties in relation to the administration. As a legal remedy, the complaint is based on the need to provide legal protection to parties within their everyday relationship with the administration. Yet, legal protection is not related to a specific administrative act but to a wide range of administrative activities undertaken by authorities. In particular, the focus is on the multiple effects of complaint, which are primarily related to everyday situations in which this legal remedy can be used, as well as on the functioning of the Administrative Court.*

Key words: *complaint, administrative procedure, regular legal remedy, legal protection of parties.*

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1. Introduction

From the point of view of the General Administrative Procedure Act (GAPA), complaint is a new remedy in the administrative procedure. However, this claim is relative for two reasons. During a period of eighty-six years of its validity, the Yugoslav GAPA had envisaged the complaint as a legal remedy¹. In fact, the Yugoslav GAPA provided the complaint as a remedy only in one case: if the municipal authority, which an organization that exercises public authority referred to with a request to apply a compulsory measure or impose a sentence, does not issue the conclusion about it and does not publish a notification within a period of eight days, the organization can submit a complaint to the competent authority of the district administration. After the changes introduced in the 1965 GAPA, complaint was present as a legal remedy in several legislative acts: it was a legal remedy against acts that are not administrative acts, a legal remedy against bodies or organizations in performing their services, a special legal remedy, a previous legal remedy against acts which do not decide on the merits of the main issue, and a legal remedy used before filing an appeal.

In the administrative procedure, the complaint has been present as a legal remedy in numerous special administrative procedures (*lex specialis*). In some administrative areas, taking into account their characteristics and specific legal-political reasons, the legislator predicted a different means of protection, which deviate from the general legal regime of appeal.

Thus, the *Act on the Election of MPs*² provides the complaint as a substitute for an appeal as a regular legal remedy. *Inter alia*, it provides for the protection of electoral rights in the electoral process. The right to the protection of electoral rights is exercised by filing a complaint to the National Election Commission for violations of the election law during the elections or because of irregularities during the nomination or election phase. The *subject matter of the complaint* is a decision, action or omission of a polling station committee. So, unlike the appeal, which is not prescribed as a legal remedy but which can only be used against acts (decisions) and omissions (embodied in the so-called "administrative silence"), an additional subject matter of the complaint in the procedure for protection of the electoral rights are actions (facts). Complaint has been envisaged in the *Broadcasting Act*³, which protects rights in the field of broadcasting.

1 Article 293, para. 3. General Administrative Procedure Act, Official Gazette SFRY, 24/70

2 *Act on the Election of MPs*. Official Gazette RS, 35/00

3 *Broadcasting Act*, Official Gazette RS, 42/02, 97/04, 76/05, 79/06-other law, 62/06, 85/06, 86/06-change, 41/09. Under this Act, a complaint can be used against decisions that are reached in the process of issuing and revoking licenses for broadcasting of radio and television programs. In this administrative area, the legislator does not provide the administrative appeal as a regular legal remedy but envisages a complaint.

There are other examples of laws which provide for the use of complaint as a legal remedy in special administrative procedures, such as: *the Health Care Act*⁴, which specifies that: “health care facilities, private practice, health care provider, or health care contributor can submit a complaint to the Minister against a report of the supervisor within three days from the date of receipt of the report.”

Complaint is also envisaged in the *Railways Act*⁵, which states: “If the competent Directorate establishes a violation of competition on the railway transport market, in the proceeding upon the complaint of the applicant for the allocation of the railway route or in the proceedings initiated *ex officio*, it shall render a decision on the measure to remedy the observed violation in accordance with this Act”.

Therefore, unlike the individual laws (*lex specialis*) that envisage a complaint as a special remedy of regular legal protection in areas where the appeal is excluded, either for legal and political reasons of the legislator or due to specific features of the administrative areas, new legal tendencies go towards expanding of this protection to the administrative areas that cannot be covered by appeal (Petrović, 2014: 141).

The adoption of a new Administrative Procedure Act in Montenegro⁶ and the General Administrative Procedure Act in the Republic of Serbia⁷ resulted in a number of changes related to the administrative procedure, which will have an impact on the administration activities; given the fact that it changes the role of the parties in the procedure, the procedural burden is transferred to the public law bodies⁸ (except in areas where the party finds an interest so that the party inclusion is necessary).

Notably, one of the main weaknesses of the former General Administrative Procedure Act was that “it was based on causal logic which led to a total stickler for details of all procedural rules and the course of proceedings which not only burdened the Act but also resulted in their non-application, or turned them into a tradition in the administrative procedure” (Ivanović, 2015: 11). The ultimate result of such administrative conduct were long administrative procedures,

4 *Health Care Act*, Official Gazette RS, 107/05, 72/09-other law, 88/10, 99, 57/11, 119/12 45/14-other law, 93/14, 96/15, 106/15

5 *Railways Act*, Official Gazette RS, 45/13, 91/15

6 Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

7 General Administrative Procedure Act, Official Gazette RS, 18/16

8 This does not mean that the party is passive in the process but that most activities are carried out by the public body which *ex-officio* collects notifications, evidence and performs other material actions which are aimed at resolving of administrative matters; a party may propose, seek opinions and explanations from authorities which are considered to be of influence for accomplishing its personal interests.

creation of a large number of special administrative procedures and legal uncertainty; namely, the burden of the administrative procedure was on the party who needed knowledge of material, general and special administrative-procedure institutes in order to exercise its rights. It is contrary to the interests of the citizens recognized in international standards (EU, Council of Europe and SIGMA) through the principles of "good governance" which, among other things, include objectivity, openness, respect for the parties in the procedure and transparency.⁹

Accordingly, in the course of administrative procedure in the specific case, the parties are not only entitled to express dissatisfaction with the decision by using the (regular and extraordinary) legal remedies at their disposal but also, as active participants in the process, to use the institute of "complaint" to draw attention to the public officials' activities which are in contravention with any of the above principles.

2. Administrative matter, administrative activity and legal protection of Parties

In the Montenegrin APA (2014), administrative matter is defined as any concrete situation in which public body decides on or determines through some other administrative activity, or otherwise affects the rights, duties or legal interests of physical persons, legal entities or other parties, or any other legal situation that is prescribed by the law as an administrative matter.¹⁰

According to the Serbian GAPA, administrative matter is "a single situation where the authority, directly applying the laws, other regulations and general legal acts, legally or practically affects the position of the party by enacting administrative acts and warranty acts, by concluding administrative contracts, taking administrative actions and providing public services".¹¹

From the above, one can conclude that extended concept of administrative matter now has a two-fold or three-fold nature; namely, it refers to the *decision-making administrative act* (decision) as well as to the process of establishing the rights, duties or legal interests through other administrative activities, or the process

9 For more on *good governance*, see in: (Lozina, Klarić: 2012, 23-37); (Koprić, Musa, Lalić Novak: 2011, 1515-1560); (Rush: 2009); (European ombudsman: 2012), (OECD, 1999); (European Union, 2012); (Council of Europe, 1977).

10 Article 2. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15. "Administrative matter is each concrete situation in which the public authority shall, by using administrative act or other administrative activity, determine or otherwise affect the rights, duties or legal interests of physical persons, legal entities or other parties, in terms of this Act, as well as any other legal situation that is prescribed by the law as a administrative matter."

11 Article 2, para. 1., General Administrative Procedure Act, Official Gazette RS, 18/16.

of exerting impact in any other way on the rights, duties or legal interests of physical persons, legal entities or other parties.¹²

Therefore, the concept of administrative matter does not imply only resolution through decisions (administrative acts) but also through any other administrative activity (administrative contract, provision of public administration services and other administrative actions) which establish or only affect the legal status of legal entities.

Further, the general clause in the Serbian and the Montenegrin GAPA widely prescribes that administrative matter is every “legal situation” which is said by the law (GAPA) to be an administrative matter. But that’s not all. “Administrative matter is also any other situation that is prescribed as an administrative matter”.¹³ Such a wording provides the possibility for a administrative matter to be prescribed with other special laws, not just the GAPA!

In the previous administrative procedure tradition, administrative matter was not subject to legal prescription; it was largely shaped by the administrative case law, particularly in terms of defining the subject matter of the administrative dispute. Thus, a clear distinction is made between the previous tradition and the “discretionary” authority of the Administrative Court, which is, according to some opinions, the first step towards establishing legal certainty of the parties in the administrative procedure.¹⁴ Having in mind that the administrative matter is “delineated” by *administrative activities* of public authorities, the law needs to provide parties with the adequate legal protection against the acts which are not in their interest.¹⁵

The Montenegrin APA (Articles 118-138) prescribes the remedies which are available to the parties in connection with the actions of the public authorities. There are three regular legal remedies provided by the APA: 1) appeal; 2) reopening the proceedings; and 3) complaint. According to the Serbian GAPA (Articles 147-174), those are: 1) the complaint and 2) appeal, although there are

12 Administrative activities are defined in Article 3 of Montenegrin APA; they include: issuing administrative acts, concluding administrative contracts, protection of users of general interest services, and taking other administrative activities in administrative matters, in accordance with the law.

13 Article 2, para. 2, General Administrative Procedure Act, Official Gazette RS, 18/16

14 It is, however, not defined by the procedural law *in abstracto*; there is a possibility that other, special laws may envisage the existence of an administrative matter depending on the matter *in concreto*. This broad definition of administrative matters is needed because of the wide jurisdiction of public authorities, a large number of areas in which they operate, and the creation of an increasing number of organizational forms that act in the public interest.

15 Under Article 7 of Montenegrin APA, parties are guaranteed the right to legal protection in administrative matters.

opinions that reopening the proceedings has characteristics of both regular and extraordinary legal remedy. The appeal can be used against decision made in the first instance forums (if the appeal is not excluded by law), or when the decision is not delivered within the prescribed time limit¹⁶ and "in other cases prescribed by law «.¹⁷ In order for the party to use the appeal as a legal remedy, there must be a decision or an administrative act that violates the party's right and/or legal interests.

3. Complaint as a legal remedy

The complaint is a new legal remedy under the APA¹⁸ that can be used by the party in two situations: 1) when an official undertakes "other administrative activities", or administrative actions,¹⁹ and violates the rights and interests of the parties; and 2) when the supplier of services of general interest does not fulfill its obligation as provided for by the law, or fails to provide the services in accordance with the rights and interests of the parties. In this case, the party is the user of *services of general interest*.²⁰ Although special laws have long mandated complaint in order to protect the users of services of general interest (e.g. *Electronic Telecommunications Act*), the prescription of complaint in the APA has brought about significant progress in creating a more secure procedural environment for the party. The current solutions contained in special laws

16 Or in procedures where the public authority appears in a two-fold role: as a party and as a decision-maker.

17 Article 151, para. 4, General Administrative Procedure Act, Official Gazette RS, 18/16

18 Article 31, 35, 137 and 138, Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15.

19 The Montenegrin lawmaker clarifies the expressions *administrative activity* and *other administrative activity*, as related to legal protection. "Administrative activity" includes: 1) issuing an administrative act, 2) concluding an administrative contract, 3) protecting users of services of general interest, and 4) other administrative activity in administrative matters in accordance with the law. (Art. 3 of Montenegrin APA). "Other administrative activity" includes: 1) the issuance of certificates of facts that are in (un)official records, and 2) any other administrative activity prescribed by law, for example, keeping records (Civil Registers Act), taking the factual actions, etc. (Article 32, Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15). On administrative actions (as other administrative activities) in more detail: (Blažić, 2015: 60-61).

20 "The user of services of general interest, who considers that his rights or legal interests are violated by the provision of these services, can file a complaint (in order to protect his rights or legal interests) to the public authority which carries out the supervision over the work of the commercial entity, other legal entities or entrepreneurs that provide services of general interest (hereinafter service provider), within a period of eight days, unless otherwise is prescribed by special law." Article 31, Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15.

open up the possibility of reexamining the (un)biased position of the providers of general interest services in handling the complaint, since the providers are the ones (rather than the supervisory authorities) that will be in the position to decide upon the complaint.

However, considering the way it is prescribed in the APA, the complaint (as a legal remedy in the areas of public interest) will have to change its nature, and decision making upon this legal remedy shall be left to supervisory authorities (agencies and ministries in the first place).²¹

In the first case, when the complaint is submitted to the head of the public body, it has a *remonstrative effect*. In the second case, when the complaint is filed with the competent supervisory authority, it has a *devolutive effect*. According to Montenegrin APA, the legal nature of complaint is dual. Although it is treated as a *regular legal remedy*, it concurrently has the functions of a *request*, since it raises the question of rights and legal interests, which is inherent to the request in administrative procedure. The head/supervisory authority is required to protect rights and interests, and the legal presumption for its use is a violation of such rights and interests by the public official/service providers.

In the Serbian GAPA,²² the complaint is a *remonstrative legal remedy* that is submitted to the head of administrative authority or the organization whose conduct it refers to. In the proceeding upon the complaint, the legality and efficiency of administrative activities are examined.²³ Before deciding upon the complaint, the head of the administrative authority or organization determines the facts regarding the complaint and examines the legality and regularity of conduct of the public bodies.²⁴

21 Thus, Article 50 para. 5 of the former Energy Act, Official Gazette MNE, 28/10, 6/13, 10/15 defined the duty of service suppliers to organise reception of objections and complaints of service users, and issue an objective decision in the terms established by law. According to the APA, decisions on complaints about services of general interest are in the jurisdiction of the supervisory authority (Energy Agency). The rules have to be amended in compliance with the APA provisions. In the meantime, a new Energy Act (Official Gazette MNE 5/16) has been enacted, which introduces the principle of devolutive decision making on complaint.

22 General Administrative Procedure Act, Official Gazette RS, 18/16

23 Article 148. General Administrative Procedure Act, Official Gazette RS, 18/16

24 In the draft version of GAPA, there was the provision that prescribed as an exception to this paragraph, “the complaint to the actions of public services shall be submitted to the head of the authority which supervises the provision of certain public services”. Now, there is no such provision!

Given that a complaint and an appeal are closely associated legal institutes, the GAPA provisions on the form and content of appeal accordingly apply to complaints.²⁵

According to the Serbian GAPA, a complaint can be filed in case of: administrative contract (not against administrative contracts), administrative actions and other administrative (in)activity and (mis)conduct of administrative authorities and organisations which provide public services, if these activities and conduct are not associated with the issuing of an administrative act.

The Serbian GAPA (2016) prescribes specific reasons that can be used as grounds for filing a complaint as a legal remedy.²⁶ Thus, a complaint can be filed in the cases explicitly prescribed by the Act: (1) for failure to fulfil obligations arising from the *administrative contract* (Article 25); (2) for (non)performance of *administrative actions* (Article 28);²⁷ or (3) for failure to provide the *provision of public services* (Article 32), but only if one *cannot use any other legal remedy* in the administrative procedure. So, if the conditions for use of the appeal or an extraordinary legal remedy are met, then they must be used in the first place. Therefore, the complaint is a secondary legal remedy. However, there lies the *raison etre* of this legal remedy. Specifically, the complaint is introduced by the GAPA to cover those situations where there is no legal protection. These are the cases of failure to meet an obligation arising from an *administrative contract*, or (non)performance of *administrative actions*, or when the *provision of public services* is the subject matter of complaint. In the above cases, the person submitting the complaint believes that the its *rights or legal interests* are violated.

Namely, in the first case, if the authority does not meet the contractual obligations, the party cannot terminate the administrative contract, but can file a

25 According to Art. 138 of Montenegrin APA, the provisions of this Act relating to the format, content and submission of appeals shall accordingly apply to complaints, unless otherwise prescribed by special law.

26 Article 147. General Administrative Procedure Act, Official Gazette RS, 18/16.

27 As a separate reason for complaint, the draft version of GAPA stipulated that complaint can be filled against "concluded settlement". The conclusion of the settlement has all the effects of the deciding administrative act, which is achieved by "other means" (the agreement) even though the procedure of settlement and the keeping case records (minutes) have the character of administrative actions. We consider that the complaint can be filed against administrative actions in the settlement procedure and against final conclusions, provided that no other legal remedy may be used in the administrative procedure. However, according to the new GAPA, the appeal can be lodged against all decisions, as well as against the conclusions (individual or contained in the appeal against a decision); therefore, there is no space for filing a complaint.

complaint²⁸. Therefore, the complaint is not filed against the administrative contract but only if the authority, as a contracting party, does not meet its contractual public law obligations.

In the second case,²⁹ the complaint may be filed against administrative actions (performance) but it can also be raised if the authority fails to take administrative action that it was legally obliged to take (non-performance). In both cases, the complaint is allowed only if the administrative action is not associated with the adoption of the administrative act. So, it is not about issuing or non-issuing of the administrative act.

Finally, in the third case³⁰, the complaint can be submitted to the provider of public services if it does not provide them in regular and quality manner, under equal conditions, does not ensure the exercise of the rights of citizens and organizations, and does not meet the needs and interests of service users.

The term “providing public services” implies the economic and social activities in the general interest, which are prescribed by the law and ensure the exercise of the rights and legal interests or meeting the needs of users of public services, and which do not represent some other type of administrative procedure.³¹ The provision of public services also implies specific administrative activities performed by the public authorities, which ensure the exercise of the rights and legal interests, or meet the needs of users of public services, and which do not represent some other form of administrative procedure.

This formulation has significantly expanded the subject matter of legal protection, although complaint (in its other characteristics) does not significantly differ from the classical regular legal remedy (appeal). Moreover, if we take into account that the subject matter of examination in the procedure upon complaint are the legality and effectiveness of administrative activities, it turns out that principles of the general administrative procedure are raised to a higher level: the principle of protection of the parties’ rights and the public interest, and the principle of legality of administration actions (Petrović, 2014: 141).

28 Article 25. General Administrative Procedure Act, Official Gazette RS, 18/16

29 Article 28. General Administrative Procedure Act, Official Gazette RS, 18/16

30 Article 32. General Administrative Procedure Act, Official Gazette RS, 18/16

31 Article 31. General Administrative Procedure Act, Official Gazette RS, 18/16.

4. Complaint against “other administrative activities”

In the Montenegrin APA, in case of infringement of the rights and interests of the parties while taking “other administrative activities”,³² the complaint is submitted to the head of the public authority, within eight days of undertaken activities. The head of the authority is obliged to decide upon complaint within 15 days.³³

The decision upon complaint is enforceable, and after the decision upon complaint is made by the head of the authority, the party may initiate a lawsuit as a legal instrument at its disposal and can initiate an administrative dispute.³⁴

In Serbia, there are different deadlines for filing the complaint, depending on the subject matter involved. Specifically, the complaint is filed within:

1. Six months after the public authority’s failure to fulfill the obligation from an administrative contract;
2. 15 days from (non)performance of an administrative action; or³⁵
3. 15 days from the failure of the public service to provide services in a regular and quality manner, under the same conditions, in order to ensure the exercise of users’ rights and meet their needs.

Head of the administrative authority or organization decides upon the complaint by rendering a decision, which is issued within 30 days from receiving the complaint (Article 149 of the Serbian GAPA).³⁶

32 Other administrative activities are all tangible administrative actions that do not involve the issuing of an act, or the conclusion of administrative contracts. These administrative actions include: issuing certificates, information, notifications; giving and receiving statements and press releases; keeping records and taking other factual actions (material acts).

33 This time limit may be different because the APA allows to special laws to prescribe this deadline otherwise.

34 “If the public law authority violates the rights and interests of the parties by taking other administrative activities regulated by special law, a party may file the complaint (within eight days) to the head of the authority which shall render a decision within 15 days, unless otherwise prescribed by law.” The party may initiate an administrative dispute against this decision. Article 35, Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15.

35 It implies the failure to take administrative action. Failure or omission to act is the negative action under which a prescribed duty or action is not performed (or taken).

36 The Draft GAPA prescribed a deadline of 15 days for deciding upon the complaint. Namely, “The head of the administrative authority or organization is bound to decide on the complaint by issuing a decision within 15 days of the day of filing the complaint”. In the Croatian GAPA, the deadline was limited to eight days (Article 122, General Administrative Procedure Act, Official Gazette, 47/02).

Head of the authority may *dismiss the complaint* which is overdue or inadmissible, which was filed by an unauthorized person, and which is not additionally regulated within the time specified³⁷, *rejects the complaint* if it is ill-founded, or *accepts the complaint* if it is well-grounded.

Under the Serbian GAPA, in the decision on accepting the complaint, the head of the administrative authority or organization may order as follows:

- 1) issue an order specifying how the public authority shall fulfill the obligations arising from the administrative contract, and decide upon the request for damages – if the complaint is filed in connection with the administrative contract or the execution or termination of the administrative contract, and determine the legal consequences of termination;³⁸
- 2) suspend the execution (or taking) of administrative actions and their consequences, i.e. the decision determines how the consequences of actions are eliminated;³⁹
- 3) order the performance (undertaking) of an administrative action or other administrative activity which party is entitled to, in case the complaint is filed for non-performance or failure to take administrative actions;
- 4) undertake the measures established by law in order to eliminate deficiencies in the provision of public services or in the actions of the organization that provides public services, if the user complained about the manner of providing public services.

However, the Montenegrin APA⁴⁰ specifically addresses and regulates the questions of issuing certificates or other documents as “other administrative activities” (administrative actions), and prescribes a special regime for them in relation to all other “other administrative activities”. The reason for this is the importance of certificates or other documents as non-authoritative, confirming, declarative, substantive acts which provide access to data or information that may be of importance to the party in legal transactions.

As prescribed by the Montenegrin APA, there are differences between the proceedings for issuing certificates or other documents, and administrative procedures and “other administrative activities” in terms of the nature of legal

37 Article 59 para. 2. Administrative Procedure Act, Official Gazette RS, 18/16

38 This formulation is very broad and allows a whole range of possible decisions; the final one is the “termination of the administrative contract and damage incurred thereof”, which was the only possible option in this case in the Draft GAPA.

39 The question is whether this can also imply “the termination of a concluded settlement”.

40 Article 33, 34. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

protection. Namely, a party may file *an appeal* against the issued certificate (and administrative decision), but in case of some “other administrative activity”, the party may file *a complaint*. This means that the protection of the parties’ rights during the issuance of certificates or other documents is treated by the APA in the same manner as the party protection in the proceedings for issuing administrative acts.⁴¹

5. The complaint for protection of the Rights of users of services of general interest

The protection of rights of users of general interest services is the standard which the Montenegrin APA retrieved from EU Directive 2006/123/EC, which obliges EU Member States to undertake appropriate activities in order to provide more efficient services to users and simpler option for access to rights and services of general interest.⁴²

Unlike the complaint against “other administrative activities” which represents the *remonstrative* legal remedy, in the proceedings for protection of service users, parties address the competent supervisory bodies which are requested to take measures within their jurisdiction and issue a decision on the submitted complain without delay (within a period of 15 days at the latest), unless otherwise stipulated by law. So, this legal remedy has *devolutive effect*. The distinctive characteristic of decisions upon complaint concerning the provision or services

41 However, due to the nature of the administrative matter which is the subject of procedure on issuing certificates, we think that complaint would be a more appropriate legal remedy at the party’s disposal in case of issuing certificates; it would provide for making a clear distinction between the procedure of issuing certificates and “the administrative procedure”. In particular, this applies to the issuance of certificates (documents) of which the authority keeps the official record. When authority keeps an official record about issues addressed in the interest of parties, there is no need to enter into the process of proving the existence of specific facts in the appellate proceedings. In this situation, it would be more expedient to file a complaint to the head of the public authority (on the substance or due to failure to issue a certificate or document), which would cut short the process of issuing the certificate and provide legal certainty. By failing to issue the certificate or documents of which the authority keeps the official record, the authority violates the law that guarantees the the party’s rights; thus, we enter the domain of the provision of Article 137 of Montenegrin APA, which states that the authority only examines the *legality of administrative actions*.

42 The term “services” implies those general (public) services that do not have a private character, given that the general/public services were previously defined by a special law (e.g., power supply, water supply, postal services, telecommunications, education, health, etc.). These are activities provided by public authorities and public enterprises, but which in practice may be subject to special conditions and be delegated to other legal and natural entities by means of administrative contracts, licensing arrangements, etc.

in relation to decisions upon appeals and decisions upon complaints concerning administrative activities is that the complaint against service providers is directly lodged with the competent supervisory body, which directly examines the allegations of the services users (Ivanović, 2015: 479-480).

The immediate result of introducing complaints against services of general interest in the GAPA will be a subsequent change in a number of special laws regulating areas of public interest, which predicted a complaint with remonstrative effects (where the complaints are decided by the providers of general interest services). The devolution upon complaints will result in more legal certainty for the parties in the different areas where the activities of general interest are exercised. In case a service has been denied denial, the complaint will be examined and decided upon by competent agencies or ministries regulating the related areas; it also involves the significant role of the Administrative Court, given that the decisions of the supervisory bodies upon complaints will be enforceable in the administrative procedure and that the injured parties are entitled to initiate an administrative dispute against these decisions.

6. Complaint and the “silence” of the administration

The Montenegrin APA regulates “silence” of the administration in cases related to issuing administrative acts; in such a case, the party can appeal because of the “silence” of the administration,⁴³ unless a positive presumption is prescribed by a special law in case of “silence” of the administration.

The “silence” of the administration exists in case the competent authority does not act upon the party’s request, which necessarily implies entering into the domain of “other administrative activities” (passivity) and, therefore, the right to file a complaint. Yet, considering the specifics of the “silence” of the administration, the Montenegrin APA regulates the (in)action of the administration in two ways: (1) a positive presumption (that the party’s request has been met) may be prescribed by a special law; and (2) “silence” has characteristics of a negative decision against which the party shall have the right to appeal.⁴⁴

When it comes to “other administrative activities”, “silence” also has a negative presumption, as it is to be assumed that the authority has made a negative decision. So, the “silence” of the administration in deciding upon the request for the issuance of certificates is treated as if the party’s request was rejected (negative

43 Article 129. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

44 Article 119 para. 1. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

presumption).⁴⁵ There is a paradox that the Montenegrin APA⁴⁶ prescribes that, if the procedure is initiated upon the request of the parties and the authority does not issue and fails to deliver the decision to the party within the prescribed or extended period, the request is considered to be adopted (rebuttable positive presumption).

According to the Serbian GAPA (2016), “silence” in the sense of omission (failure) of administrative actions, or non-compliance with obligations or non-provision of public services, provides a legal reason for the use of the complaint. In all cases, it is the legal duty to act: to meet contractual obligations, take administrative actions or provide public services, or provide them in a specific legally prescribed, orderly and quality manner, under the same conditions, and to undertake similar administrative activities that have nothing to do with the administrative acts and their issuance.

If the party decides to file a complaint because of the “silence” of the administration, the authority is obliged to consider the submission and treat it in the same manner as an appeal filed in case of “silence” of the administration.⁴⁷ When deciding on the complaint, the “silence” of the administration is treated as a *negative decision* of the head/supervisory body, against which the party may file a lawsuit and initiate an administrative dispute.

The institute of *abolishing and revoking the unlawful decisions* is one of the situations involving a dilemma on the use of ordinary legal remedies. This is especially the case if the proposal to revoke or abolish the illicit decision was submitted by the party or other public body, and the competent authority does not accept the proposal. The authority is obliged to notify the applicant about that. The “notice” (the act of notification) can be treated as a decision (Art. 18 of the Montenegrin APA)⁴⁸ or as *other administrative activity*. In this case, we believe that the notification should be treated like other administrative activity and the party should be allowed to file a complaint as a legal remedy for protection.⁴⁹

45 Article 33 para. 5. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

46 Article 117. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

47 Each submission which disputes the decision, even if it is not designated as an appeal, shall be considered as an appeal if its content clearly shows the intention of the parties to appeal to the decision. Art. 121, para. 2, Montenegrin APA, Official Gazette MNE, 56/14, 20/15

48 Under this article, the decision in the administrative matter can be designated in some other way, *in accordance with the special law*.

49 As a prior requirement for this kind of treatment, the notification shall be defined in the special law because the GAPA only prescribes issuing certificates as other administrative activities.

A comparative review of the administrative procedure in the neighboring countries shows that they have differently regulated the institute of “complaint”. The Croatian GAPA envisages the possibility of appeal against a decision on complaint issued by the head of the authority.⁵⁰ The same provision is envisaged in the Serbian GAPA.⁵¹ In this way, the administration takes responsibility for (non) performed the administrative actions, and we believe that this mode of decision making upon complaint is more expedient when compared to the administrative procedure of Montenegro.⁵²

7. The effects of complaint on the administrative dispute

The decision upon complaint issued by the administrative authority is final in the administrative procedure. When dissatisfied with the decision, the discontent party may file a lawsuit and initiate an administrative dispute proceeding before the Administrative Court.⁵³ Since the subject of the procedure upon complaint is examination of the legality of administrative activities (in Serbia, it is wider as it includes expediency),⁵⁴ the party may initiate the proceedings in front of the Administrative Court to protect its rights and interests.⁵⁵ In this way, the institute of complaint will directly affect the increase in the number of cases before the Administrative Court, particularly given the range of administration activities that can raise the protection of users of services of general interest.

This gives rise to a number of particularly important and sensitive issues; other than decisions on the previously mentioned activities/services, it includes decisions on the legal consequences of annulment of “administrative activities” by the Administrative Court (Art. 56 Draft of Montenegrin APA), which states that “when the Court annul the Act or another administrative activity against which

50 Article 122 para. 4. General Administrative Procedures Act, Official Gazette RH, 47/09

51 Article 149, 150. General Administrative Procedures Act, Official Gazette RS, 18/16

52 Due to the party’s dissatisfaction with the decision of the head of the authority, the Administrative Court may suffer damage, as it will have to rule upon another lawsuit in the dispute of full subject matter jurisdiction (Art. 36, para. 3. Montenegrin APA). When the Administrative Court has already annulled the disputed act in the same administrative matter, it is obliged to resolve the subject matter on its own, in the proceeding upon the lawsuits against the new act of public law authority in the same administrative matter, when the nature of the administrative matter allows it.

53 Article 31 para. 4 and Article 35, para. 2. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15

54 Article 137. Administrative Procedure Act, Official Gazette MNE, 56/14, 20/15.

55 Deciding on the legality of administrative acts and other administrative activities that determines or otherwise affects the rights, obligations and legal interests of the parties – Article 2 of Draft GAPA.

an administrative proceeding was initiated, the case returns to the prior state in which it was before the annulled administrative act was adopted or before the other administrative activity taken was annulled. The question is how a court may annul the administrative activity and return the case to the prior state of affairs, if a party has already suffered the consequences of administrative activities (not) taken.⁵⁶

According to the Serbian GAPA (2016), the decision on complaint issued by the first instance authority may be appealed.⁵⁷ The authority which shall decide upon *appeal* against the decision on complaint has the same competences as the authority which decided upon the complaint.⁵⁸

If the decision upon complaint was issued by the authority against whose decision appeals are not allowed, an *administrative dispute* may be initiated against such decision.

An *administrative dispute* may be instituted against the decision on complaint issued by the second-instance authority as well as against the decision issued upon appeal on the first-degree decision on complaint. If there is no second-instance authority, an *administrative dispute* may be initiated against the decisions of the authority which deliberated on the complaint.

Thus, in comparison with the decision (administrative act), other administrative activities have an additional “internal” level of legal protection: a complaint to the head of the same authority. Thus, after filing the complaint, one could appeal against the decision upon the complaint and, after that, the administrative dispute could be initiated. In this case, there is a three-stage protection, which means that there is an additional level of protection as compared to the main decisions in the administrative procedure (Milkov, 2013: 97).

Secondly, the question is whether this provision is contrary to the ADA, which regulates that the subject matter of administrative dispute can only be the

56 Under Article 14 of the Public Assemblies Act, Official Gazette RMNE 31/05 and Official Gazette MNE, 40/11, 47/14, 1/15, police officers are obliged to prevent the obstruction or holding of a peaceful assembly, held in accordance with the Act, and they may use technical means and protection measures (i.e. take certain security actions). In case of exceeding the use of these instruments or failure to use them, there may be serious consequences for participants of peaceful assembly (e.g. physical harm). Participants can use the complaint as a remedy for actions (not) taken by police officers. If the decision on complaint of the head of the authority comes back negative, the participants can file a lawsuit and initiate an administrative dispute. Yet, the question is: what are the consequences of the annulment of the decision of the head of the authority by the Administrative Court, if the participants have already suffered the consequences of (not) taken actions, which cannot be “undone”?

57 Article 150. General Administrative Procedure Act, Official Gazette, 18/16

58 Article 149. General Administrative Procedure Act, Official Gazette, 18/16

final administrative act and other final individual act, which decides upon the right, obligation or interest based on the law, in terms of which the Act did not prescribe different judicial protection.⁵⁹ So, does it refer to a decision on ones' rights and obligations, or does it refer to complaining about an administrative action? It seems that decision in a specific case may also pertain to one's right and obligations.

8. Conclusion

The new logic of the administrative procedure brings a number of changes, the most prominent of which are certainly those pertaining to the parties' position in the proceedings. Apart from the regular legal remedies at the party's disposal that can be used for challenging the decision of public law bodies, there is the complaint as the instrument for protection of parties from administrative actions.

The complaint as a legal remedy in this matter is a step forward in relation to the General Administrative Procedure Act,⁶⁰ which will be in effect until the new GAPA has started being applied. However, this institute leaves several questions open. First, there is disagreement about the term "other administrative activity", and the confusion concerning the special object of protection of this legal instrument, which has to be regulated by special laws. The issue of "other administrative activity" is to some extent specifically defined by the GAPA, and it will partly be defined by special laws, which can lead to confusion and bring legal uncertainty to the party (again) because the "other administrative activity" as defined by the GAPA is challenged by filing an appeal, whereas the "other administrative activity" which will be defined by special law is challenged by filing a complaint.

The effects of complaint can also be envisaged within the parties' administrative judicial protection. As a new legal instrument, the complaint will significantly expand the activities of the Administrative Court because the decisions of public law/supervisory bodies on complaint will be enforceable in the administrative procedure; thus, apart from the regular control of legality of administrative acts, the Administrative Court will also exercise the control of legality of administrative actions of public authorities. Hence, it will be particularly important in which way and in what direction the reform of the Administrative Court and the administrative dispute will develop, and the authors predict the necessary structural and organisational changes in order to preclude the blockade of the administrative court protection.

59 Article 3, Administrative Disputes Act, Official Gazette RS, 111/2009

60 General Administrative Procedure Act, Official Gazette FRY, 33/97, 31/01 and Official Gazette RS, 30/10

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ЕФЕКТИ ПРИГОВОРА КАО РЕДОВНОГ ПРАВНОГ СРЕДСТВА У УПРАВНОМ ПОСТУПКУ СРБИЈЕ И ЦРНЕ ГОРЕ

Резиме

Реформски процес у области управног поступања резултирао је доношењем нових Закона о општем управном поступку којим се мења досадашња логика и устаљени оквир управног поступка. Аутори се баве приговором као правним средством, који је релативна новина у управном поступку и који треба да буде значајан са аспекта заштите права и интереса странке у односу на управу. Приговор као правно средство засновано је на потреби да се странкама у свакодневном односу са управом обезбеди правна заштита, која се не односи на конкретни управни акт, већ на широк дијапазон управних активности, које органи предузимају решавајући о правима и обавезама странака, али и пружања великог броја услуга које имају карактер општег интереса. Посебно су у фокусу пажње мултипликативни ефекти приговора, који се у првом реду односе на животне ситуације које се могу третирати овим правним леком, као и на функционисање Управног суда.

Кључне речи: приговор, управни поступак, редовно правно средство, правна заштита странке.

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ADMINISTRATIVE COURT CONTROL IN THE REPUBLIC OF SERBIA

Abstract: *In the past years, the Republic of Serbia has embarked on a significant legislative reform of administrative court control. The primary aim of the reform of the administrative court control was to introduce the European legal standards into the administrative dispute proceedings in order to enhance the level of citizens' legal security in the exercise of their rights and legal interests before the administrative bodies, in a manner prescribed by the law. However, despite the extensive legal reform, the contemporary judicial practice includes ample examples of departures from some of the most important standards in the field of administrative control (judicial review). The drawbacks primarily pertain to the impossibility of exercising the right to an effective remedy and certain elements of the right to a fair trial, such as: the right of access to court, the right to a fair hearing and the right to a public hearing, enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The author proposes particular solutions aimed at eliminating the observed drawbacks and ensuring compliance with the European legal standards.*

Keywords: *administration, administrative court control, administrative dispute, European legal standards.*

1. Introductory Remarks

The legislative reform of administrative court control, which was conducted in the Republic of Serbia in the previous years, has brought about significant novelties in the field of administrative dispute proceedings. First of all, the 2008 Act on

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Organization of Courts¹ envisaged the establishment of a special Administrative Court, which became operative on 1st January 2010; it has jurisdiction to resolve administrative disputes on the entire territory of Serbia. This enabled the transition from the system of regular courts of general jurisdiction to the system of specific administrative courts, but without the possibility of appeal to a second instance administrative authority. Then, the new 2009 Administrative Disputes Act² introduced many procedural novelties, which are essential for improving the legal protection of citizens from unlawful activities of administrative bodies. These novelties include: expanding the subject matter of administrative court control (judicial review) from the final administrative act to other individual legal acts in cases where there is no other form of court protection; introducing the oral and public hearing as the basic rule for establishing facts and a prerequisite for making decisions on the type of court proceedings; prescribing significantly greater possibilities for instituting administrative dispute proceedings in full subject matter jurisdiction; introducing possibilities for delaying the execution of an administrative act even before an administrative dispute proceeding has been initiated, etc.

The primary aim of the reform of the administrative court control was to introduce the European legal standards into the administrative dispute proceedings in order to enhance the level of citizens' legal security in the exercise of their rights and legal interests before the administrative bodies, as prescribed by the law. However, despite the extensive legal reform, the contemporary judicial practice includes numerous examples of deviations from some of the most important standards in the field of administration control. Given the fact that the overall assessment of compliance with legal standards implies not only the existing normative framework but also its implementation, the paper focuses on the most significant departures in current case law from the European legal standards concerning this type of judicial control over the administration. Finally, the author proposes particular solutions for further legislative reform which are aimed at eliminating the observed drawbacks and ensuring that the Administrative Court activities comply with all European legal standards.

2. The Most Important Novelties in Administrative court Control

Under the influence of European legal standards, the legislative reform of administrative court control introduced many novelties, both organisational and

1 Закон о уређењу судова (The Act on Organisation of Courts), *Службени гласник РС*, бр. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011, 101/2013, 106/2011 и 13/2016

2 Закон о управним споровима (The Administrative Disputes Act), *Службени гласник РС*, бр. 111/2009

procedural in nature. The primary focus in the reform of the administrative court control (judicial review) was the field of administrative dispute proceedings. The most important novelties in the field of administrative dispute, established by the 2008 Act on Organisation of Courts and the 2009 Administrative Disputes Act, are as follows: expanding the court jurisdiction for resolving administrative disputes; expanding the subject matter of administrative dispute, introducing an oral public hearing as a new method for establishing facts; the possibility of requesting the delay of execution of the disputed administrative act and legal remedies which can be used in this type of disputes (Милков, 2011; Томић, 2010; Лончар, 2011a).

2.1. Administrative Judiciary

After a period of six decades when the system of regular courts of general jurisdictions was applied to administrative disputes in Serbia, under which administrative disputes were adjudicated by the Supreme Court of Serbia and district courts in special administrative disputes councils, the adoption of the 2008 Act on Organisation of Courts enabled the establishment of the jurisdiction of the Administrative Court in administrative disputes, which started working on 1st January 2010. With the completed legislative reform, Serbia finally got the Administrative Court but still did not have the separate administrative judiciary, such as the one that existed before the Second World War (the French system).³ Today, the Administrative Court is a court of special jurisdiction in charge of resolving administrative disputes but it operates within the regular organisational structure of the judiciary (the Germanic system).

Today, there is only one Administrative Court in Serbia, which has jurisdiction over the entire territory of the state. In case of filing a request for an extraordinary legal remedy (the judicial review of a court decision), there is a possibility of establishing the jurisdiction of the Supreme Court of Cassation, as the highest court of general jurisdiction. Regarding the internal organisation, the Administrative Court is a unique body. The seat of the court is in Belgrade and there are three departments outside the seat, which are located in Novi Sad, Niš and Kragujevac. According to the Decision on the number of judges in courts (issued by the High Judicial Council), the Administrative Court should have a president

3 On the creation and development of administrative dispute in Serbia, see: Кумануди, 1909, pp. 50–147; Данић, 1926; Радовановић, Протић, 1928; Костић, 1939, pp. 59–62; Денковић, 1973; Милков, 2013, pp. 53–61; Милков, 2011; Томић, 2015, pp. 369–371; Лилић, 2014, pp. 559–564; Димитријевић, 2013, pp. 505–508; Рађеновић, 2010, pp. 43–48; Кунић, 2010, pp. 508–509; Бачанин, 2000, pp. 572–575

and 40 judges but, at this point, the Court has a president and 38 judges.⁴ The basic rule is that the Administrative Court sits as an adjudicating panel (council) of three judges, except in cases where the Act on the Organisation of Courts envisages only one presiding judge. There are seven adjudicating councils at the seat of the Administrative Court in Belgrade, while the departments outside the seat have two councils each, except the department in Novi Sad which has a third council (composed of three judges who sit in Belgrade).

Shifting the jurisdiction for adjudicating administrative disputes from the courts of general jurisdiction onto the special Administrative Court is a legislative change which is in compliance with the fundamental principle concerning the *right to a fair trial*, envisaged in Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); *inter alia*, this right encompasses *the right to be heard by an independent, impartial and lawfully established court* which shall decide on citizens' rights and obligation. Formally speaking, the Administrative Court can be said to meet the basic standards in terms of applying the right to a fair trial principle envisaged in the European Convention on Human Rights (ECHR). However, serious criticism may be raised in terms of organisation of the current administrative judicature in Serbia. Some of these critical remarks are such that they call into question the capacity of the Administrative Court to actually provide not only for the effective exercise of the citizens' rights to a fair trial in administrative matters but also for the application of many other European legal standards envisaged in the new Administrative Disputes Act (Јончар, 2012).

Among numerous organisational drawbacks, the most significant one certainly pertains to the fact that Serbia still has not established a comprehensive administrative judicature system, which would be based on the regular two-instance decision-making processes in all administrative disputes by special administrative courts. By establishing a single Administrative Court, which has jurisdiction in all administrative disputes on the entire territory of the Republic of Serbia, the decision-making process in this kind of legal disputes has been reduced to single-instance adjudication. Considering that the new 2009 Administrative Disputes Act excluded the institute of appeal from the available regular legal remedies (notwithstanding the fact that it was preconditioned by the new organisation of the judicature), it still raises the issue of incompliance of the administrative dispute proceedings in the Republic of Serbia with the *right to an effective legal remedy*, as one of the basic legal standards enshrined in Article 13 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, as

⁴ Article 6: Одлука о броју судија у судовима (Decision on the number of judges in courts), *Службени гласник РС*, бр. 88/2015

well as the *right to a legal remedy*, envisaged in Article 36, paragraph 2, of the Constitution of the Republic of Serbia.⁵

By excluding the appeal as a regular legal remedy, the legal protection of parties in administrative dispute proceedings is nowadays reduced only to the possibility of a limited use of two extraordinary legal remedies: the *Request to reopen the administrative dispute*, as a remonstrative legal remedy, which is decided by the Administrative Court, and the *Request of reviewing a court decision*, which (on rare occasions) may be lodged with the Serbian Supreme Court of Cassation, as the highest court of general jurisdiction.⁶

Another very important organisational shortcoming in the present-day administrative judiciary in the Republic of Serbia is embodied in the fact that the previous legislative reform conducted in 2008 proposed an insufficient number of Administrative Court judges in relation to a huge number of pending cases, which was as a consequence of expanding the subject matter of administrative disputes to each individual legal act where there is no other form of judicial protection, as envisaged in the Administrative Disputes Act passed in 2009 (Lončar, Vučetić, 2013: 446–447). As one of the most important questions essential for further work of the Administrative Court, the large number of cases and a small number of judges first imposes the need to determine a larger number of judges in order to avoid the threat of the blockade of administrative judicature, and then to determine an appropriate number of cases per judge in order to improve the quality of proceedings and ensure that the citizens' legal protection does not suffer at the expense of achieving alleged efficiency.

A major shortcoming is also the lack of specialisation in the decision-making processes on administrative disputes. Namely, the normative framework has not only failed to establish a system of specialised administrative courts, which would have jurisdiction over different kinds of administrative disputes (taxes, customs, budget execution, social protection, etc.) but it has also omitted to ensure specialisation within the internal organisation of the Administrative Court; thus, each judge may preside in all administrative matters, irrespective

5 Article 36, paragraph 2, Serbian Constitution: "Everyone has the right to an appeal or other legal remedy against a ruling which determines their rights, obligations, or legally-based interests." Устав Републике Србије, *Службени гласник РС*, бр. 98/2006

6 Despite the wide scope of legal grounds for requesting the review of administrative court decisions (a violation of the law, some other regulation or a general act, or a violation of the procedural rule that may affect the final decision), this extraordinary legal remedy is rarely used in the contemporary legal practice due to restrictively set conditions governing its application (when it is prescribed by the law, when the court had full subject matter jurisdiction to rule on the administrative dispute matter, and when the right to appeal was not envisaged in the administrative proceeding).

of the different nature of cases at issue (environmental protection, telecommunications, taxes, urbanism, informing, education, etc.). The consequence of such internal organisation is not only a lower quality of decision-making but also almost complete absence of full subject matter jurisdiction in administrative dispute proceedings, which is now explicitly envisaged by the new Administrative Disputes Act (Лончар, 2012: 504–506).

2.2. The Subject Matter of the Administrative Dispute

The expansion of the subject matter of administrative dispute is the most important novelty in the legal regime of administrative court control (judicial review) which was instituted by the new Administrative Disputes Act (ADA). Under the previous legal regime, only the final *administrative acts* (as individual acts which determined the parties' rights and obligations in administrative matters) enjoyed the judicial protection in administrative disputes proceedings; under the new Act, the judicial protection of the parties' rights in the administrative dispute is now expanded to all other final *individual legal acts*, regardless of whether they concern administrative matters or not. Thus, besides administrative acts, the subject matter of administrative disputes can also be other individual legal acts, which are generally divided into two groups of acts: the acts for which *no other form of judicial protection is proposed* (Article 3, paragraph 2 ADA), and acts for which the Act *explicitly envisages judicial protection in administrative dispute* proceedings (Article 3, paragraph 3 ADA). Considering the first group of individual legal acts, the citizens' right to initiate an administrative dispute proceeding is a subsidiary legal protection, in case a certain law does not envisage the possibility of the parties' judicial protection; in the second group of legal acts, this right arises exclusively due to the fact that a specific law envisages that the test of their legality is conducted in the administrative dispute proceeding rather than in some other judicial proceeding (Лончар, 2014a).

The new legal regime of administrative court control retains the possibility of initiating an administrative dispute proceeding in case of *administrative silence*, i.e., in case of failure to adopt an administrative or some other individual legal acts which can be the subject matter of administrative dispute. However, the important novelty pertaining to the institute of administrative silence in the new legal regime of administrative dispute is the authorisation of the Administrative Court to autonomously decide about the party's request in the administrative dispute of full subject matter jurisdiction, without returning the case to the administrative body (Article 44), which was not possible until now (Krbek, 1937; Иванчевић, 1954: 325; Димитријевић, 1996; Рађеновић, 1994: 158–197; Ковач, 2011). Unfortunately, the significance of this legal novelty in practice is insubstantial since decisions in administrative disputes of full subject matter

jurisdiction are very rare in the practice of the Administrative Court, especially in case of administrative silence (Лончар, 2012: 508–510).

After the last legislative reform of administrative court control, in cases involving subsidiary claims in the administrative dispute proceeding, the Administrative Court is still authorized to decide on the requests for *the return of the seized property* and *the compensation for damage* caused by the execution of the disputed act. Namely, the Administrative Court can decide on the request for the return of the seized property or the compensation for damage as a secondary claim whenever such a request is based on the reliable factual grounds. Otherwise, the court is obliged to direct the plaintiff to pursue his/her request in a litigation procedure before the competent court (Articles 16 and 45). However, although such a possibility has existed for decades, the Administrative Court practice still shows that it has exclusively had a doctrinal significance.

The expansion of the subject matter of administrative dispute is the consequence of ensuring compliance of the administrative dispute in the Republic of Serbia with the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (which was initially ratified in 2003 by the State Union of Serbia and Montenegro⁷ and, then, officially acknowledged by the Republic of Serbia in 2006, as its legal successor⁸) and with the 2004 Recommendation on the Judicial Control of Administrative Acts issued by the Council of Europe.⁹ Namely, the right of access to justice, as an integral part of the right to a fair trial envisaged in Article 6, paragraph 1 of the Convention, implies that the party must be provided a possibility to initiate an administrative dispute proceeding against any administrative act involving a decision on the citizens' civil rights and obligations. The Recommendation on the Judicial Review of Administrative Acts explicitly envisages that all administrative acts, including even those which do not involve a decision on citizens' civil rights and obligations, should be subject to judicial review.¹⁰ Moreover, the Recommendation explicitly envis-

7 Закон о ратификацији Европске конвенције за заштиту људских права и основних слобода (Act on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms), *Службени лист СЦГ*, бр. 9/2003

8 Одлука о обавезама државних органа Републике Србије у остваривању надлежности Републике Србије као следбеника државне заједнице Србија и Црна Гора (Decision on the obligations of state authorities of the Republic of Serbia in exercising the competences of the Republic of Serbia as the successor of the State Union of Serbia and Montenegro), *Службени гласник РС*, бр. 48/2006.

9 Recommendation Rec (2004) 20 of the Committee of Ministers to member states on judicial review of administrative acts, adopted at the 909th session of the Committee of Ministers, held on 15th December 2004 at the level of the Ministers' deputies.

10 *Recommendation Rec (2004) 20*, Principle 1a.

ages the judicial review of legality and legally-binding elements in discretionary administrative acts.¹¹ Also, the expansion of the Court authority in terms of rendering an autonomous decision in case of administrative silence, without returning the case to the administrative body, is a consequence of adjusting the Serbian legislation with the Recommendation.¹²

However, the formal legal expansion of the subject matter of administrative dispute (from administrative acts to all other individual legal acts in case there is no other form of judicial protection) did not bring any significant change in terms of the actual expansion of legal protection of citizens' rights. The Court practice is still the major obstacle to exercising the judicial protection of citizens' rights in administrative dispute, in compliance with the basic European legal standards, which are now among the basic principles prescribed by the Constitution, as the supreme legal act in Serbia. For almost seven years since the new Administrative Dispute Act started being applied in practice, the Administrative Court practice is still governed by the old subject matter of administrative dispute. Namely, after the Administrative Court determines that the filed complaint does not pertain to an administrative act, within the meaning specified in the new Administrative Dispute Act, the Court dismisses the complaint without considering whether the case possibly involves another final individual legal act against which there is no other form of judicial protection. It may be substantiated by numerous cases from the judicial practice of the Administrative Court (Лончар, 2014б: 68–70).

The legislator has envisaged the judicial review of legality of final individual acts involving decisions on citizens' rights and obligations or their legal interests in case these acts are not administrative acts. However, contrary to the constitutional right to legal protection in administrative disputes (Article 198, paragraph 2) and the right to a legal remedy (Article 36, paragraph 2), as well as the aforesaid legal standards envisaged in the European Convention and the CE Recommendation on the Judicial Control of Administrative Acts, the citizens of the Republic of Serbia are deprived of the possibility to seek judicial protection in this kind of judicial control of the administration. Besides, it should be taken into account that the judicial protection of citizens in administrative dispute proceedings is a kind of a back-up legal protection in all cases where the assessment of the legality of individual legal administrative acts is not provided in some other judicial proceeding.¹³

11 *Recommendation Rec (2004) 20*, Comments on Principles, Paragraph 30.

12 *Recommendation Rec (2004) 20*, Comments on Principles, Paragraph 30.

13 The omission is by no means accidental, which is apparent from the fact that none of the rulings to dismiss a lawsuit (because it is not an administrative act issued in the first four years of work of the Administrative Court, which is always issued in the previous procedure) has been rendered by an individual judge, but exclusively by a judicial panel (council). The

The reason for such an attitude in Court practice should be sought in the endeavour to quickly reduce a huge caseload in this newly-formed Court, given that the number of incoming cases exceeded the capacities of a relatively small number of judges at this Court (Lončar, 2012: 504–505); above all, the reason is to be sought in the lack of possibility to provide regular legal protection to parties involved in kind of disputes, imposed by a single-instance administrative dispute proceeding. Therefore, the solution for overcoming the current situation in the administrative court control in the Republic of Serbia is to be found in the re-organisation and reinforcement of the administrative judiciary; first of all, it is necessary to provide regular two-instance decision-making processes in all administrative disputes and, second, it is essential to significantly increase the total number of judges, in line with the actual inflow of cases.

2.3. The Oral Hearing in Administrative Dispute Proceedings

One of the most important novelties in the Administrative Disputes Act (Article 33, paragraph 1) is the introduction of a *mandatory oral hearing*; this provision has established the basic rule that the court shall make a decision in administrative disputes on the basis of facts established in the course of an oral hearing. In the period before adopting this Act, the basic rule in the administrative dispute in the Republic of Serbia was that the court decided on the legality of a disputed administrative act on the basis of the factual grounds established in the administrative proceeding.¹⁴ The Court had the option to determine the factual grounds on its own and resolve the dispute accordingly, in the following circumstances: if the annulment of a disputed administrative act and a retrial before the competent administrative body would cause irreparable damage to the plaintiff; if

reason for such actions should be sought in the conscious avoidance of legal possibility for the control of such act of the Administrative Court. Namely, in case the ruling is made by an individual judge, the party has the option of filing an objection to a special judicial council; concurrently, this provision is one of the significant novelties in terms of the procedural protection of the parties' rights in the Administrative Disputes Act (Article 27). On the other hand, neither an objection nor any other (regular or extraordinary) legal remedy can be used against the ruling of a judicial council on the dismissal of a lawsuit. Such a ruling then becomes both final and legally valid. For a long time, the practice of the Administrative Court was unaffected even by the explicit stance of the Supreme Court of Cassation, in the decision issued in December 2012, that the party has the right to legal protection in the administrative dispute (regardless of the fact that it is not an administrative dispute within the meaning of the Administrative Disputes Act) whenever the case involves the final individual legal act where the law does not envisage some other kind of judicial protection, has (Lončar, 2014a: 223–224).

14 Article 38, para.1: "As a rule, the court decides on a dispute on the basis of facts which are established in the administrative proceeding". Закон о управним споровима, *Службени лист СРЈ*, бр. 46/1996

the public documents or other evidence in the case files undoubtedly indicated that the factual ground was different from that which was determined in the administrative proceeding; and if the administrative act had already been annulled in the same dispute and the competent body did not fully act according to the ruling (Article 38, paragraph 3). However, despite this legal possibility, the long-time practice of administrative disputes shows that the Court rarely established the factual grounds in the course of oral hearings.

Under the new Administrative Disputes Act, the Administrative Court can make a decision without an oral hearing only if the subject matter of the dispute is such that it clearly does not require a direct hearing of the parties and establishing the factual ground, or if the parties explicitly agree to this. In that case, the Administrative Court has the obligation to specifically state the reasons for not holding an oral hearing (Article 33, paragraphs 2 and 3 ADA). Furthermore, the new Administrative Disputes Act explicitly envisages specific cases in which an oral hearing is mandatory. Today, an oral hearing is always mandatory in cases where it is required by the complexity of the subject matter of a dispute; when this is necessary for a better clarification of matters; when two or more parties with opposite interests are involved in an administrative proceeding; when the court determines the factual ground on its own in order to resolve the dispute of full subject matter jurisdiction (Article 34 ADA); and in case the Court is required to issue a decision on an administrative dispute without being provided with the case files, which the defendant (public authority) failed to deliver to the Court even within the extended time limit (Article 30, paragraph 3 ADA). Another significant novelty in the administrative dispute proceeding is the provision on the principle of publicity of an oral hearing, as well as the possibility of excluding the public from the entire hearing or a specific part of the hearing, if it is required and justified by the protection of interests of minors or the privacy of participants in an administrative dispute proceeding (Article 35 ADA).

The introduction of a mandatory oral hearing in the administrative dispute proceeding is a novelty which is the result of the attempt to ensure the compliance of the Administrative Disputes Act in the Republic of Serbia with certain European standards, such as: the right to a fair hearing, the right to a public hearing, the right to attend the proceeding, and the right to a an adversarial (contradictory) proceeding, directly or indirectly contained in the right to a fair trial, envisaged in Article 16, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, speaking in procedural law terms, the administrative dispute in the Republic of Serbia has been formally synchronised with the European Convention¹⁵ by prescribing the rule on the mandatory oral hearing, as the basic rule for establishing facts.

15 Notably, during the ratification of the Convention in 2003, there was some doubt regarding the conduct of an oral hearing in the administrative dispute proceedings. Namely,

The aforesaid novelty regarding the manner of establishing the factual ground in an administrative dispute is also in full compliance with the Council of Europe Recommendation on the Judicial Review of Administrative Acts, which envisages as one of its main principles that the court should be in a position to examine all legal and factual issues which are of importance for resolving the dispute.¹⁶ In the commentary on this principle, it is clearly stated that the court must have the authority to autonomously determine the relevant facts or, at least, to correct the errors pertaining to the established factual ground,¹⁷ which is clearly the case with the Administrative Court in the Republic of Serbia today. Also, the rules on the exclusion of the public from an oral hearing in an administrative dispute fully comply with the court authorisations contained in the Recommendation on the Judicial Review of Administrative Acts (Principles, Item 4f).¹⁸

Despite all the aforementioned legal changes, by means of which the Serbian administrative dispute proceeding has been formally and procedurally synchronised with the European legal standards particularly in terms of establishing the factual ground in this kind of court proceeding, there are notable shortcomings in the Republic of Serbia which shed quite a different light on the issue of harmonizing the Serbian administrative dispute proceedings with the one of the most important European legal standards.

The basic problem concerning the introduction of an oral hearing in the new Administrative Disputes Act lies in the fact that it has only formally become the basic rule for establishing facts, which is subject to numerous exceptions in practice. Even though the new Administrative Disputes Act explicitly states that the court shall decide on the basis of facts established at an oral hearing, the Administrative Court has a discretionary authority to resolve a dispute

Article 3, point 3, of the Act on the Ratification of the Convention envisaged that “the right to a public hearing, prescribed by Article 6 paragraph 1 of the Convention, shall not affect the implementation of the principle that, as a rule, the courts in Serbia do not hold public hearings in administrative disputes”. The exclusion of the rule about mandatory holding of an oral hearing in this kind of judicial dispute from the implementation of the European Convention was, at the time, influenced by the insufficient capacity of the administrative judiciary. Namely, in the administrative department of the Supreme Court of the Republic of Serbia, which had the jurisdiction over the largest number of administrative disputes, there were only 18 judges, while the administrative department of the District Court in Belgrade included only 6 judges, and the District Court in Novi Sad only 3 judges. In all other district courts in Serbia, there were no separate administrative departments, and the administrative cases were taken over (as needed) by the judges allocated to adjudicate in civil matters (Саватић, 2007: 10).

16 *Recommendation Rec (2004) 20*, Principle 4e.

17 *Recommendation Rec (2004) 20*, *Comments on Principles*, Paragraph 70.

18 *Recommendation Rec (2004) 20*, Principle 4f.

even without holding an oral hearing if it estimates that the subject matter of the dispute is such that it clearly does not require a direct hearing of a party and the envisaged fact-finding process. Although the Court is obliged to provide a well-reasoned justification for not holding an oral hearing, such explanation does not actually change anything because it is always the subjective estimate of the court. Formally speaking, the oral hearing is mandatory only in case an administrative dispute proceeding of full subject matter jurisdiction has been initiated, or in case the defendant (public authority) has failed to deliver the case files, as well as in very rare situations when the administrative dispute includes two or more parties with conflicting interests. In all other cases, the court has a discretionary authority to freely assess the relevance of holding an oral hearing. (Милков, 2013: 120–123).

Thus far, the Administrative Court practise has indicated a complete circumvention of the legislative provisions on the oral hearing, as one of the most important European legal standards. Namely, in 2011, the Administrative Court started deliberating only on the newly-submitted cases, which clearly fell under the scope of the new Administrative Disputes Act provisions, which proposed an oral hearing as the basic rule for establishing the factual ground. Statistics show that the oral hearing was included in only 264 disputes out of the total number of 12,196 solved cases, which makes up 2.17% of all cases.¹⁹ The practice of the Administrative Court did not drastically change in the following years (Лончар, 2011б: 270–271). Thus, thanks to the practice of the Administrative Court, an oral hearing became a rare exception rather than the basic rule in the administrative dispute proceedings. Therefore, it can be said that the new Administrative Disputes Act has not brought any substantial changes as compared to the previous period, when there were no oral hearings at all (Lončar, Vučetić, 2013: 447–448).

In the current circumstances, it seems that the main reasons for not holding an oral hearing are of entirely objective nature. The first reason may be found in the aforementioned disproportion between a huge number of cases filed with the Administrative Court and a small number of judges at the court's disposal. Another reason lies in the fact that the decision-making process based on establishing the factual grounds by the Court itself in the course of an oral hearing requires more time than the process of making a decision *in camera* on the basis of case files, i.e. on the basis of the facts determined in the administrative proceeding. Therefore, as previously suggested, the organisational strengthening of the administrative judiciary and, in particular, the appointment of a significantly larger number of administrative judges (which is necessary for

¹⁹ Извештај о раду Управног суда за 2011. годину (Report on the operation of the Administrative Court), p. 3

the implementation of other legally introduced European standards) are the solutions which will enable the Administrative Court to adequately address the need for instituting an oral hearing, as one of the basic European legal standards in the administrative dispute proceedings.

3. Concluding Remarks

Formally and procedurally speaking, the administrative court control of administrative dispute proceedings in the Republic of Serbia is in full compliance with the basic European standards on this matter. Yet, despite the extensive legislative reform, there are numerous cases demonstrating departure from some of the most important legal standards in this field of administrative control. First of all, the drawbacks refer to the impossibility of exercising the *right to an effective legal remedy* and some elements of the *right to a fair trial* (including the right of access to justice, the right to a fair public hearing), contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 6 and 13).

The main reason should be sought in the inadequate organisation of the administrative judiciary. Although the administrative judiciary was significantly reformed in the past years by establishing a separate Administrative Court and adopting the new 2008 Court Organisation Act, the newly-formed Administrative Court still does not have the necessary organisational capacity and human resources which would enable the Court to put into effect the most important novelties envisaged in the new 2009 Administrative Disputes Act. Although the envisaged legal solutions are quite satisfactory, the administrative court control in the Republic of Serbia has not been significantly improved in relation to the period before the legislative reform, primarily due to judicial practice. The subject matter of administrative dispute is still mainly confined to assessing the legality of final administrative acts, instead of examining all other individual legal acts as well whenever there is no other form of judicial protection. On the other hand, oral and public hearings, which should be the basic procedural instrument for establishing the factual ground in an administrative dispute, are still very rare. The same can be said for initiating an administrative dispute involving full subject matter jurisdiction. When it comes to the silence of the administration, the parties' requests for delay of execution of the disputed administrative acts are almost completely ignored. As it is impossible to claim a regular legal remedy against the Administrative Court rulings, and given the significantly reduced possibility of using extraordinary legal remedies, the effects of bad judicial practice cannot be rectified against the will of the Administrative Court.

The solution for overcoming the current state of affairs in the field of administrative court control can be found in the significant re-organisation of the administrative judiciary, which would, first of all, provide the regular two-instance decision-making process in all administrative disputes; second, it would also significantly increase the overall number of judges, in line with the inflow of cases, and provide judicial specialisations (training) in the subject-specific areas that the judge is expected to adjudicate. Having in mind that taking such measures requires a new legislative activity, time and significant monetary funds, the provisional solutions could be: the gradual increase in the number of administrative judges according to the yearly inflow of cases; introducing monthly norms for the work of judges, in line with their actual capacities; as well as the internal reorganisation of the court according to the subject matter of decision-making processes and not according to the territorial criteria, which is currently the case in the seat of the Administrative Court in Belgrade as well as in the three departments of the courts in Novi Sad, Niš and Kragujevac, where each judicial council adjudicates cases in all administrative areas.

The reform of administrative court control cannot be positively evaluated until the judicial practice starts implementing the envisaged legal solutions, based on the actual capacities of the court. Moreover, despite the fact that the citizens' rights to an efficient administrative court protection are guaranteed by the Constitution (as the highest legal act) and by the Administrative Disputes Act, they cannot be exercised unless the Administrative Court activities are synchronised with the basic European principles and legal standards.

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УПРАВНО-СУДСКА КОНТРОЛА У РЕПУБЛИЦИ СРБИЈИ

Резиме

Законодавна реформа управно-судске контроле која је спроведена у Републици Србији претходних година донела је значајне новине у области управног спора. Најпре је Законом о уређењу судова из 2008. године предвиђено образовање посебног Управног суда, који је отпочео са радом 1. јануара 2010. године, са надлежношћу за решавање у управним споровима на читавој територији државе. Тиме се са система редовних судова опште надлежности прешло на систем посебног управног судства, али без могућности двостепеног одлучивања. Затим су новим Законом о управним споровима из 2009. године уведене и многе процесне новине, које су од суштинског значаја за могућност унапређења правне заштите грађана од незаконитог рада органа управе, попут проширивања предмета управно-судске контроле, са коначног управног акта и на остале појединачне правне акте у ситуацији када не постоји други вид судске заштите; увођења усмене и јавне расправе, као основног правила о начину на који би суд требало да утврђује чињенично стање на основу кога доноси одлуку у овој врсти судског спора; прописивања знатно већих могућности за вођење управног спора пуне јурисдикције, увођења могућности за одлагање извршења управног акта и пре него што је покренут управни спор, итд.

Основни циљ реформе управно-судске контроле је био да се кроз увођење европских правних стандарда у управни спор, додатно повећа степен правне сигурности грађана у остваривању њихових права и правних интереса пред органима управе, на законом предвиђен начин. Међутим, и поред опсежне законске реформе, у судској пракси се данас могу срести бројни примери одступања од неких најважнијих стандарда у овој области контроле управе. Они се односе, пре свега, на немогућност остваривања права на делотворни правни лек и појединих елемената права на правично суђење, попут: права на приступ суду, права на правичну расправу и права на јавну расправу, садржаних у Европској конвенцији за заштиту људских права и основних слобода (члан 6 и 13). С обзиром на то да је за укупну оцену испуњености правних стандарда, поред нормативног уређења, важан и начин на који се они остварују, у раду се указује на најзначајнија одступања актуелне судске праксе од европских правних стандарда у овој врсти судске контроле над управом и предлажу конкретна решења за законодавну реформу, како би се уочена појава отклонила и рад Управног суда могао ускладити са свим европским правним стандардима.

Кључне речи: управа, управно-судска контрола, управни спор, европски правни стандарди.

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BULGARIAN JUDICIAL SYSTEM BETWEEN THE PRINCIPLE OF STABILITY AND THE NECESSARY CHANGES

Abstract: *The paper presents the fundamental legal principles underlying a modern state governed by the rule of law, primarily the separation of the powers, which determine the status, functions and working model of the judiciary. The author points to the obstacles and persistent shortcomings that have been present in the Bulgarian judicial system since 1989 until the present day, during the transition process towards the rule of law and democracy. These drawbacks are confirmed by the results of a representative sociological research. In the second part of the paper, the author discusses the necessary steps that have to be taken in the Bulgarian legislation, particularly in the Constitution and in the Judiciary Act, in order to build up a modern and efficient judicial system.*

Keywords: *Bulgarian judicial system, principle of stability, legislative change.*

1. Legal-political framework of the issue

During a period of 26 years, public institutions and Bulgarian civil society have been in a constant and often heavy turbulence. The transition towards democratic state and the rule of law appears as a difficult time-consuming task.

In 1991, a new democratic Constitution was accepted. This *Lex fundamentalis* formally belongs to the fourth constitutional generation with the main principles of governance and basic citizens' rights and liberties incorporated in the constitutional texts. Among these are: independence and functional interaction of different governmental branches; independent, reliable and transparent judicial system; social security and labor rights; healthy and safe environment; free access to education; special protection of the family, children and women/mothers; defense of political rights; supremacy of human dignity; securing the

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free complete individual (personal and professional) development of every single citizen. Many of these immanent elements of the modern state order still remain only good wishes, a picturesque political tapestry at the parliament's walls than a real vivid legal-political reality.

From the dawn of newborn Bulgarian democracy, the doctrine of political pluralism became a dominant ideological postulate. The legislation and the type of governance were changed according to the relevant western models.

This formal side of political and legal changes exists simultaneously with permanent malfunctions of the different governmental branches, including the judiciary. According to the actual sociological surveys (delivered by Agency "Alpha Research"), only 9 % of the respondents define the Bulgarian judicial system as an effective and a fair one. Almost 90% of the citizens evaluate criminal justice as non effective. More than 50% of the respondents admitted refusal to collaborate with the police and judicial officials.

At the same time, the Bulgarian civil society constantly increases its demands towards public institutions and their representatives. Now, we bear witnesses of a strong social condemnation of corruption, incompetence, hidden political arrangements, and breach of public morals. This complex socio-political puzzle requires a stable and coherent judicial system which is one of the institutional pillars of the law-governed democratic state of today.

At the beginning of the Bulgarian EU membership, the judicial system has been under special surveillance of the supreme EU institutions. The instrument of this strategy is named "Mechanism of Cooperation and Inspection" (MCI). The results of this surveillance have been published annually. Some crucial spheres of EU examination are the judicial reform and effective fight against corruption and organized crime. In this course, a number of indicative points have been underscored: improvement of magistrates' qualification, better accounting papers, effective investigation of corruption at high political levels, effective strategy and real measures against organized crime and money-laundering, and effective procedures of property confiscation.

A positive step is approved by the European Commission operational program "Good governance" for Republic of Bulgaria. The financing come from the European Social Fund (ESF) for the period 2014- 2020. From the sum of 336 million Euro allocated for the public sector, judicial system receives 30 million Euro. A great part of these resources must be directed towards creating a secure and complete system of IT justice.

2. The necessary changes

Judicial system is by definition conservative and inflexible, and this *status quo* has both positive and negative side. The reality in post socialist states requires some crucial necessary changes so as to reach the standards of the modern justice.

Firstly, a new map of the courts' state should be created with optimization of the courts districts, bearing in mind the fluctuations of demography and meeting the requirements of the working capacity standards, so as to prevent case overload and professional errors.

Secondly, another necessary change pertains to the structure of the Supreme Judicial Council, the so-called Government of the judicial system. The framework of this institution has been changed recently by means of introducing constitutional amendments and legislative amendments in the Judiciary Act, the result of which were two bodies: the judicial body and the prosecutors' body. This is a crucial step towards ensuring the independence of the courts, the state prosecutors and the Service of examining officers.

Thirdly, the basic requirement is building up of independent public prosecution and investigation service. One of the instruments in this direction is decentralization of the public prosecution and ensuring a certain level of independence of each magistrate concerning his professional engagements.

The next requirement is stimulating the active participation of the magistrates' units in the process of legislative improvements concerning the judiciary. Supreme judicial bodies and the office of the Chief Prosecutor should actively support the National Assembly with competent professional opinions and suggestions concerning the urgent legislative changes.

The next necessary step is the need for precise valuation of the magistrates' staff, including regular valuation of juridical professional knowledge and skills, as well as their professional ethics in relation to other judges and different participants in legal proceedings. This again calls for the legislative amendments and improvements in the Judiciary Act. In this context, it is essential to establish measurable criteria: the number of confirmed and repealed acts, and the swiftness and good organization of the working process. In this respect, it is also necessary to establish different evaluating rules for judges and for public prosecutors.

A modern judicial system requires establishment of a rational standard of good working capacity. This standard measures the necessary time to perform certain crucial professional activities, from initial procedure steps at the beginning of the case to the final judicial act with its most powerful denotation- *res judicata*.

The next obligatory requirement for securing a modern efficient justice is increasing the level of self-governance of different magistrates' units. Every single magistrate must be involved in the process of development and improvement of his/her unit and the system as a whole. The Judiciary Act should also envisage a wider scope of competence of the magistrates' unions.

The next step towards securing a modern efficient judicial system is connected with technical support. One of the most important factors for developing the professional capacity of the judiciary is establishing a unified integrated IT system which should cover all judicial districts and provide wide range of information products and services. The crucial instruments in this direction are modern hardware systems and software products for cumulating and safekeeping, reliable defense and exchange of relevant data and documents (so called "cloud computing"). This is the only successful way to transition towards justice based on electronic database. Unfortunately, for the time being, the Bulgarian judicial system has not created such IT resources and secure integrated professional network.

The modern governance of judicial system requires objective and consistent disciplinary practice of the Supreme Judicial Council. Identical disciplinary magistrates' offences require respective punitive measures that must be categorically enforced.

The Bulgarian legal system needs actualization and reorientation of penal policy. In this direction, there is an urgent need to adopt a new modern Penal Code. Many normative deficiencies of the current Penal Code have resulted in ineffectiveness and controversial judicial practice. Some categories of crimes must be defined more precisely and it is also essential to provide a more adequate grading of the level of social threat of some categories of crime.

Some crucial changes should be made in the field of the criminal procedures. Many normative texts of the Bulgarian Criminal Procedure Code must be improved in terms of accelerating the investigation, examination and final court ruling on cases.

3. Conclusion

At the end of this paper, it should be underlined that the Bulgarian judicial system needs deep reforms and high level of technical support. Many crucial changes have just begun after more than 25 years of hesitation, lack of modern strategy and real consistent measures and actions. Many years were lost in political crises. Every rational analysis clearly shows that what is needed today, above all, are some basic principles such as: legality, equal treatment, right of defense,

professional and quick justice. Ignoring these fundamental standards and values always leads to inefficiency of justice and ruins the social trust in the judiciary, which is the main threat for the young Bulgarian democracy striving to exist under the sign of the Rule of Law.

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БУГАРСКИ ПРАВОСУДНИ СИСТЕМ ИЗМЕЂУ ПРИНЦИПА СТАБИЛНОСТИ И НЕОПХОДНЕ РЕФОРМЕ

Резиме

У раду су приказани основни принципи модерне правне државе, а пре свега подела власти, који одређују положај, овлашћења и оперативни модел функционисања правосуђа. Аутор указује на препреке и недостатке који су присутни у бугарском правосудном систему од 1989. до данас, у процесу транзиције ка владавини права и демократији. Ови недостаци су потврђени резултатима репрезентативног социолошка истраживања.

У другом делу рада се указује на неопходне мере које се морају предузети како би се изградио модеран и ефикасан правосудни систем. Бугарски Устав и Закон о правосуђу морају претрпети одређене измене и допуне. Неке од неопходних мера су следеће: установити нови систем судова; осмислити нову структуру Врховног савета судства; дати већа овлашћења Судском инспекорату; увести савремене моделе за вредновање рада судија и мерење оптерећења; установити ефикаснији систем самоуправе прекршајних судских органа; итд.

Конкретно, аутор скреће пажњу на потребу да се ојача интегритет судија за прекршаје и повећа ниво професионалне етике (у односима између судија, као и према различитим правним субјектима који учествују у судским поступцима). Ови захтеви *lato sensu* представљају *condicio sine qua non* на путу ка успостављању ефикасног и независног правосудског система.

Кључне речи: Бугарски правосудни систем, процес транзиције, принцип стабилности, законодавне промене.

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RECALL OF POLITICAL OFFICIALS AS AN INSTRUMENT OF CONTROL AND POLITICAL RESPONSIBILITY

Abstract: *One of the main problems of the constitutional and political systems is the responsibility of the political officials to the citizens. The author analyzes the problem from the standpoint of the concept of the people's sovereignty, since citizens do not have real possibility to influence behavior and decisions of the elected political officials. Recall could be one of the efficient means for the political influence of the citizens on their elected representatives. The author examines the problems in the theoretical thinking about the notion of representation, and claims that the recall is fully in accordance with the notion of the democratic representation of the citizens. Second, the author analyzes the comparative legislation on recall and concludes that legal provisions on the recall are relatively rare and poor, which makes the use of this instrument quite problematic. The author also gives his proposal on adequate legislation on recall, in order to improve citizens' participation in the decision-making process.*

Keywords: *recall, political officials, sovereignty, recall elections, representatives.*

1. Introduction

The relationship between the citizens (voters) and their elected political officials is one of the cornerstones of the modern democracy. It is one of the basic issues concerning the principle of the people's sovereignty, and the representative democracy. Many authoritative and influential theoreticians discussed the issue of the legal and political position of the elected political officials. According to the widely accepted opinion, the relationship between the voters and the political officials is based on the so-called free mandate of the latter. The relationship

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between the political officials and citizens is only a political one.¹ It is based solely on the political opinion and political duty. Therefore, the citizens do not have the right to give instructions to their representatives, and they cannot recall them if they are dissatisfied with their work.

Since the principle of the people's sovereignty was invented, the question arose how it could be possible for the citizens to exercise sovereign power. The usual answer was and still is that the citizens exercise the power through their freely elected representatives. This answer, in our opinion, is not satisfying since it does not give a real chance to the citizens to exercise the power. Therefore, another answer has to be found. Otherwise, the people will remain dependent on the political elites. The recall is an instrument which gives a chance to the citizens to exercise more effective (but not necessarily decisive or dominant) political power.

In this article, multidisciplinary approach will be used in order to discuss the issues regarding the relationship between the citizens, who are only a formal sovereign, and the political elite, which is a true sovereign. First of all, we shall employ the legal approach, in order to explore possible relationships between the political officials and their voters. This approach will include the comparative method, which is very fruitful since it enables us to find out what the constitutional solutions in other states are. It gives us the idea whether there are legal and political systems in which the relationship between the two abovementioned subjects is different than in most other states. Second, the political approach is also necessary since it enables us to examine the functioning of political institutions and the dynamics of political processes. It also helps us to understand the relationship between different political subjects, and the influence of particular political forces.

The main purpose of this article is to prove the main hypothesis: that the recall, as an institute of the direct democracy, strengthens so-called integral relationship (political as well as the legal one) between the political officials and their voters, and that it is an indispensable element of the constitutional and political system based on the people's sovereignty. Without recall, the principle of representation loses its essence and becomes an empty shell, which perfectly camouflages the dominant role of the political elites in political processes.

1 However, the existence of political relationship between the two does not mean that the representatives are politically responsible to the voters, since the political responsibility of the former to the latter does not exist (Jovičić, 2006 (1968): 168).

2. The representatives and the represented – political and/or legal relationship?

It is usual to think that the relationship between the representatives and the represented is exclusively the political in its nature. This relationship exists through political processes, first of all, through the elections. There is no legal relationship between them in the sense that the representatives are in any way legally obliged to adopt the opinion of their voters, to vote or to act in any way in accordance with their opinions and interests. As a final consequence of this relationship, although the voters give the mandate to their representatives, they cannot take it away from them. Therefore, the recall is not allowed.

The absence of recall is a consequence of the free mandate of the representatives. In this way, the principle of representation is illogical.² For, if the citizens give a mandate to their representatives, it would be logical that they can take it away since the citizens give the mandate to their representatives because they think that the latter will represent their interests. If the latter fail to do it, the voters naturally would have the right to take the mandate away, i.e. to recall them. It is the essence and the purpose of the representation and the people's sovereignty. On the contrary, the sovereignty would practically pass over to the representatives since they would not fear of any kind of sanction for their wrong decisions.

One could say that the citizens preserve the sovereignty since they have the right to (re)elect their representatives. The political "punishment" comes at the next elections. This argument still misses the answer to the crucial question: what happens during the representatives' term in office? If their decisions harm the interests of the voters, the latter will not have any means at their disposal to protect themselves from the irresponsible representatives. This is one of the weakest points of the representative democracy which shows its lack of democratic potential.

The theory presupposes that the mandate is given for the entire period between two consecutive elections. Therefore, the recall is unacceptable. Birch emphasizes that the classical theory claimed that the citizens would have the right to replace a government with another one if they were not satisfied with its work (Birch, 1971: 33). However, the citizens would have this right only at the next elections, not before.

We think that this classical approach is completely wrong. If the political officials are elected for four or five years, and if the citizens think that they have

² Some authors would say that the Western liberal democracy is not a form of representative democracy but of representative government, "a government of the people *by* their representatives" (Fotopoulos 2005).

wrong policies already in the first years of their mandates, the citizens should have the right to recall them in order to prevent new wrong and harmful decisions. Birch underlines the contradictions in the Locke theory, according to which the government would cease to be legitimate if the citizens find that it does not work in their interest, while there are no institutional mechanisms for the withdrawal of the citizens' consent (Birch, 1971: 33–34). As Rousseau claimed, a man could formulate his will only by himself (Birch, 1971: 35). We can relativize this statement to some extent, and say that it is not possible for a representative to know a man's will in each case, regarding each issue which has to be decided. Even if a representative would be able to know a man's will, the question is whether he/she would like to represent it, since there could be a discrepancy between the will and the interests of the former and the latter. Without recall, the citizens do not have any institutional mechanism for the protection from the tyrannical representatives.

The theorists who oppose the recall claim that the mandate cannot be given away from the representatives since the nation is not a legal person. And if it is not a legal person it cannot establish legal relations with its representatives and therefore recall them (Đorđević, 1964: 697). It has to wait for the end of the mandate in order to "punish" its representatives. This argument is a formal in its nature since it starts with a formal assumption that the legal personality is necessary for the relationship between the nation and its representatives. When one says "nation", "people", or "electorate", one does not mean one or more legal personalities but a group of individuals with political and legal characteristics (citizens, bearers of the voting right and other political rights, politically conscious and more or less active individuals). Strictly formally speaking, the recall could be a result only of a group action of many individuals who are not a legal person as a group but each member of that coincidental group has his/her legal personality.

Another presumption is that the representatives represent the whole nation, not only those who have elected them (Vergotini, 2015 (2011): 397). Therefore, a group of electors, who live in a local constituency, cannot have the right to recall (a) representative(s). In case of the head of state, it is possible to discuss about this presumption although we disagree with it. In case of the members of the representative bodies, it is very suspicious that they can represent the whole nation. If the representatives represent the whole nation, then their relationship with the people can be only political in character. There could not be a legal dependence of the representatives from the people since it is unimaginable how the people could legally oblige the representatives to act according to the will of the people, how the people could control them and, at last, recall them. In the country with the electorate of few millions or even dozens of millions, it is

impossible for the people to control and recall their representatives. One could say that for this purpose a constituency could be used since the electorate in a particular constituency could control and recall its representative(s). But, according to dominant theoretical views, this is not possible since the constituencies are only organizational units that facilitate elections, while it is not assumed that the representatives represent only voters in the particular constituencies. Although they are elected only by a small portion of the electorate, it is conceived that they represent the whole electorate.

The theory claims that the members of the representative bodies represent the whole nation in the sense that they, acting in these bodies, establish their actions and attitudes on their own perception of the general will or the nation's interest. The members of the representative bodies have not only the right but also the duty to conclude what the interest of the nation is, and to act accordingly since they are elected as the representatives of the nation. Since the citizens elected their representatives, the attitudes of the former and the latter are presumably equivalent. On the contrary, the citizens would elect some other representatives.

There are two presumptions in this argumentation. The first one is that the representatives represent the whole nation, and the second is that they could in any time represent the whole nation. It is wrong both in theory and practice that the representatives could even think of representing the whole nation. First, if the representatives are elected in particular constituencies, they are not the political choice of the whole nation since the great majority of the nation did not get the chance to elect them. Most probably, the great majority of the nation even does not know anything about political attitudes or mere existence of most representatives. Since there is no relationship between a representative and the great majority of the nation, how is it possible to claim that he/she is the nation's representative? This is possible only if one presupposes that a representative has in mind the nation's interests when he/she decides. Having in mind the fact that the society is divided along different lines (class, ethnic, religious, ideological, etc.), it is hard to understand and explain how it would be possible for a representative to cross all these lines and behave as the agent of the whole nation, despite all these differences which breaks its unity. As some authors rightly point, the idea that a representative acts as a free agent on the basis of his/her own understanding of the general interest is archaic, and maybe was right in the states whose electorate had been composed of only few citizens who belonged to the ruling class (Ravlić, 2008: 169).

The dominant theory on the relationship between the people (principal) and its representatives (agents) rests on the claim that the agents faithfully represent the principal's attitudes. The question is whether this is true. In some states, such

as the UK, it could be so to some extent, due to the theory of mandate (Jovičić, 2006 (1984): 29), according to which the principal is at least generally informed about the political decisions which the agents are going to make after the elections. Some authors even said that the parliaments would do only what had been written in the election manifestos (Weir and Beetham, 1999: 100).³ However, the elected parliamentarians cannot know in advance all the choices they will have to make during four or five years in government. Their electoral programmes can contain only basic features of their policies. On the other hand, even if the future representatives would like to present to their principals the concrete policies they will introduce while in parliamentary majority, they would not be able to do so since the global and domestic politics change, and no one can for sure say what decisions one would have to make while governing the country. Therefore, the voters must have the right to effectively control their representatives during the latter's mandate. The recall is a final consequence of the control. Otherwise, the very idea of the representation loses much of its meaning.

It is an ordinary fiction that the representatives follow the attitudes of their voters. During their term in office, the representatives do not come into direct contact with their electors, they do not receive any instruction from them and, constitutionally speaking, they are not legally obliged to follow them even if the instructions would be given to them.

However, if the presumptions are acceptable in the theory and the political practice, then we could introduce two presumptions instead of only one. The only existing presumption now is that the representatives represent the whole nation as an abstract body. However, why shouldn't we accept another presumption, namely that a local constituency, when it decides to recall a representative, also acts in the interest of the whole nation? If a representative acts on behalf of the nation, although he/she cannot be elected by the whole nation, why could not be possible that a local constituency also acts on behalf on the nation when it recalls a representative since he/she cannot be recalled by the whole nation?

3 There are different views on the meaning of the theory of mandate (Weir and Beetham, 1999: 101). Even in theory there is no unique opinion that the winning political party has to implement its electoral manifesto a hundred percent. Two dilemmas are maybe the most important. First, whether a government has a legal or only moral and political duty to fulfill its manifesto. Second, whether a government has a duty (legal and/or political) to fulfill all points from its manifesto or only some of them. Since a government has very elaborated manifesto, it is highly improbable that the voters would agree with all elements of the manifesto. Most of them could even disagree with specific very important proposals from the manifesto. Therefore, it is not possible to claim in advance that voters support all the aspects of a government's policy just because they voted for it at the elections.

The idea of dynamic representation rests on the opinion that there is a mutual influence in the change of the opinion of the people and its representatives. The latter may wish to represent some interests or attitudes of their voters at the beginning of their mandate, but later on they will change their opinion or interest. But, is this the top-down or bottom-up system, as some authors would say (Holmberg, 2011: 57)? In other words, is the dynamic a result of the change in the people's opinion or in the representatives' opinion? Who influences whom? We think that no one would dare to claim that the influence is one-sided. Of course, the ideal of the democratic theory, as Holmberg says, is that the representation goes bottom-up, that the people is able to think independently of their representatives as much as possible (Holmberg, 2011: 57). In this paper, our purpose is not to explain how this happens and what social preconditions or political processes necessary to achieve this are. Our purpose is to show that some institutional mechanisms as well are important for the achievement, at least to some extent, of the bottom-up representation. The recall is one of these mechanisms. No doubt, social and political conditions are necessary if the citizens have to control and influence their representatives and exercise their sovereign will. However, some institutional mechanisms have to exist, too. Even if it is not anticipated that the people will be able to use these mechanisms often or regularly, they are still necessary and useful since they serve at least for partial control and, at the same time, the empowerment of the formal sovereign. The definitions of democracy which introduce the rule of the people in a narrower sense, as a rule of the elected rulers, have in mind that democracy includes "choosing the rulers and influencing their decisions" (Fotopoulos, 2005). The recall is one of the means for exerting the influence of the citizens on the rulers.

Of course, full political and legal relationship between the citizens and their representatives would be established in case when the latter have so-called imperative mandate, since only in this case the voters are sure that the representatives will follow their attitudes and interests. However, here we do not discuss this institute. We only discuss the recall of the political officials. Although there is, in our opinion, logical connection between the imperative mandate and the recall, it is not necessarily so and there are constitutional and political systems in which it is possible for recall to function without the imperative mandate.

The classical argument about the relationship between the voters and their representatives has lost much of its validity after the political parties started to dominate the elections, as well as the functioning of the parliaments and other political institutions. It is not possible to argue any more that the representatives represent the whole nation, and that they have the free mandate, when they are tied by the party discipline, and when they owe their functions to their political parties. The theoreticians rightly argue that thanks to the political parties

the relationship between the voters and their representatives lost much of its significance (Ravlić, 2008: 174). The representatives are formally free to act independently from their parties although in some states (Serbia) the constitutions even formally limited the representative's freedom of action. The strength of the opinion that the representatives have to have formal freedom even from their parties is shown in the opinion of the Venice Commission regarding the Constitution of the Republic of Serbia.⁴ According to this opinion, the representatives' mandates, at least formally and legally, cannot depend on the will of the voters or the political parties. There is another document of the Venice Commission and the Council for Democratic Elections,⁵ according to which the initial text of the Serbian law on the election of the deputies to the National Assembly wrongly prescribed that a mandate of an elected member of parliament expired if she/he ceased to be a member of the political party or coalition on whose candidate list she/he had been elected. The Commission and the Council has argued that the members of the parliament receive their mandate from the people, not from the parties, and that they have the right to hold the mandate even if they leave their parties. Having in mind that the Serbian electoral system is based on the system of closed lists, two institutions obviously think that the mandate always belongs to the members of parliament even if the voters did not have the chance to directly vote for this or that candidate.

In practice, however, this opinion has lost any significance. It is well known that the party discipline makes the representatives the mere servants of their political parties. The representatives are completely remote from their electors since they have to follow the instructions of their political parties. In such a situation, the idea of the free mandate has lost much of its significance. The representatives are not free and independent. They are only free and independent from their voters. The representatives' dependence on the voters may widen the democratic space for the citizens' influence on the political officials.

The recall election is dependent on another constitutional issue – the type of the electoral system. If a state has the proportional system based on closed electoral lists, there is a dilemma how the recall could be organized since the

4 According to Article 102, section 2 of the Constitution of the Republic of Serbia: "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal [of] a political party upon which proposal he or she has been elected a deputy." The Commission has criticized this norm since "this is a serious violation of the freedom of a deputy to express his/her view on the merits of a proposal or action." – See: *Opinion on the Constitution of Serbia*, CDL-AD (2007)004, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007, paragraph 53). As a political party does not have the right to impose the imperative mandate on its member in parliament, it also does not have the right to limit his/her freedom of action in other ways, such as the recall.

5 *Report on the Imperative Mandate and the Similar Practices*, CDL-AD(2009)027, June 2009.

representatives have not been directly elected by citizens but selected by their political parties according to their rank on the electoral list. It is different in the states with the proportional system with the open or flexible lists, or in states with the first-past-the-post system. In these states, the citizens directly vote for each candidate who has been elected to the parliament, and therefore they can recall them.

In our opinion, the fact that a state has electoral system based on closed lists should not be an obstacle for the introduction of the recall election. Although voters in this case cannot vote for this or that candidate, they nevertheless vote for a list with its composition on their mind. Therefore, they implicitly give the support for the candidates on a list. Another argument is as follows. Although the representatives have been elected on the closed list, and voters could not vote for them directly, it is still presupposed that they represent the people. Therefore, if those who are not elected directly can represent those who did not vote for them, why those who did not vote for them could not recall them? Whatever, in Venezuela, 30 per cent (previously 40 per cent) of members of the parliament have to be elected according to the proportional system on closed lists, but they nevertheless could be recalled at any time.

3. Comparative legislation

The states whose constitutions allow for the recall of political officials are very rare. The well known examples are the USA (in fact, its 19 federal units⁶), and Switzerland. These are not the only states whose constitutions prescribe the institute of recall (better known as recall election). There are many more states where this institute is recognized. However, nowhere is it as much in use as in these two countries. Also, even when the institute of recall is constitutionally recognized, it cannot be used at all levels where the power is exercised and for all political officials. It is usually possible to recall local officials or the officials at the level of federal units. Also, it is more often that the constitutions allow the recall of the head of state than of the members of parliament.

It is interesting that the recall had been regularly prescribed in the constitutions of the self-proclaimed socialist states. However, it had almost never been used. In some states, although the institute of recall had been prescribed by the constitution, it had not been regulated by ordinary laws, which meant that in practice it could not be used (Đorđević, 1964: 697; Jovičić, 2006 (1968): 202).⁷ The reasons

⁶ Including the states in which the recall is allowed only for local officials, the total number is 36.

⁷ It is interesting that even in the Soviet Union, despite Lenin's highly positive attitude towards the recall, the 1926 law regulated only the recall of the members of the local soviets. In his

for this are clear. The ruling bureaucracy in these states did not have an interest to develop the mechanism of the recall election since it wanted to preserve its monopoly on power. Therefore, the recall had been just an ideological symbol since Marx and Lenin highly estimated recall.⁸ In the Soviet Union, the recall did not have any significance since the soviets, although proclaimed as the highest body of state power, lost their authority and influence, and were not means for the participation of citizens in the decision-making (Hill, 1987: 45).

The constitutions regulate this issue only in principle. The provisions include the following issues: officials who can be recalled; reasons for recall; conditions for the beginning of the recall procedure; majority necessary for recall; the consequences of the recall.

3.1. Who can be recalled?

The first question is whether all public officials can be recalled or only some of them. The countries can be divided into three groups: 1) countries in which all public officials can be recalled, no matter whether they exercise the legislative, executive, or judicial power, or whether they are national or local officials; 2) countries in which only local officials can be recalled; 3) countries in which officials who exercise legislative or executive power (head of state) can be recalled.

Legal solutions can differentiate not only between the countries but also within the constitutional system of one country. For example, in the USA, the legal so-

famous *Draft Decree on the Right of Recall*, Lenin emphasized that "No elective institution or representative assembly can be regarded as being truly democratic and really representative of the people's will unless the electors' right to recall those elected is accepted and exercised." In his words, "the desire on the part of those elected to retain their seats should not work against the exercise of the people's will to recall its representatives." Lenin highly appreciated the recall as a means for protection of the workers' interests against bureaucracy, and as a means for transformation of soviets into working bodies, which concentrate in their hands legislative as well as executive functions. In his *State and Revolution*, Lenin particularly praised the example of the Paris Commune: "Marx, referring to the example of the Commune, showed that under socialism functionaries will cease to be 'bureaucrats', to be 'officials', they will cease to be so in proportion as – in addition to the principle of election of officials – the principle of recall at any time is also introduced (...)" – V.I. Lenin, *The State and Revolution*, <https://www.marxists.org/ebooks/lenin/state-and-revolution.pdf>, 26 August 2016.

8 Marx first wrote about the recall in his *Civil War in France*. The recall had been one of the inventions of the Paris Commune: "The Commune was formed of the municipal councillors, chosen by universal suffrage in the various wards of the town, responsible and revocable at short terms. The majority of its members were naturally working men, or acknowledged representatives of the working class. The Commune was to be a working, not a parliamentary body, executive and legislative at the same time." – K. Marx, *The Civil War in France*, <https://www.marxists.org/archive/marx/works/1871/civil-war-france/ch05.htm>, 26 August 2016

lutions differ to considerable extent. In some states, only local officials can be recalled while in others all elected officials (state as well as local ones) can be recalled. In some states, all elected or public officials (definitions are different to some extent) can be recalled regardless of their function (Arizona, California, Colorado, Georgia, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Wisconsin), while in others only those who exercise legislative or executive power can be recalled (Alaska, Idaho, Kansas, Louisiana, Michigan, Washington). In the state of Illinois, only the Governor can be recalled.

In Switzerland, recall is constitutionally guaranteed in six cantons. In most of them, it is possible to recall legislative and executive at the cantonal level while in Ticino only the recall of the executive is possible. Since the executive power is exercised by the collegial bodies, it is possible to recall this body as a whole. Out of these six cantons, municipal recall is possible in two cantons. Both in the USA and Switzerland, recall has not been prescribed in the respective federal constitutions.

In the Canadian federal unit British Columbia, where the recall is quite a new institute, it is possible to recall members of parliament of that federal unit. The law enabled this in 1995.

However, it seems that the Constitution of Venezuela gives the solution which enables citizens to recall all directly elected officials since, according to its Article 72, "offices filled by popular vote are subject to revocation".

There is logic in a constitutional solution according to which all (directly) elected officials can be recalled. If an official is elected by the citizens, they have the right to recall him/her, no matter whether he/she exercises a legislative, executive, or judicial function. This solution is based on the opinion that the citizens have the right to elect and recall officials at any time since the latter's election is a result of the former's political will. This is why even judges can be recalled in some federal units of the USA. Second, the executive officials in the USA also can be recalled since they are elected directly (governors, mayors, etc.). Therefore, the recall of both legislative and executive officials is quite logical and justified. However, it is different in the countries where both the executive and judicial officials are not elected directly. In such countries, only the recall of members of representative bodies is justified.

In our opinion, the most important issue is the recall of political officials since they exercise the political power and make the most important decisions. Besides, the political officials reflect or at least should reflect the people's will. It is different with those who exercise the judicial functions. First of all, in most cases they are elected or appointed by specific bodies or by parliaments. Second, their function is highly professionalized and based on professional knowledge

and experience. Therefore, it would be very hard for the citizens to evaluate the judges, and to estimate whether they have to be recalled. There is even no need for this since the judges do not make political decisions which can influence lives of millions of people.

The question is whether the government should be the subject of recall since it is elected by the parliament. Here one can see ambiguity in this question. On the one hand, the government is the most influential political institution although the constitutions proclaim the separation of powers. Therefore, it would be justified to prescribe the right of citizens to recall the government or some of its members. In this case, citizens would have the right to vote non-confidence in government. It is true that citizens exercise their sovereign power through the parliament, and that the government is politically responsible to the parliament. But if the parliament does not want to make pressure on the government, the latter will be able to continue with its policies even if the citizens do not support it. On the other hand, the government is elected by the parliament and it is logical that it loses the power through the vote of non-confidence by the parliament.

As one can see, there are arguments pro and contra the government's recall by the citizens. Whether one or another solution will be accepted in a country depends on the political circumstances much more than on the theoretical considerations. It just has to be stressed that the countries like Switzerland and the USA recognize the recall of the executive, be it a collegial or individual institution.

Another question is whether only local officials should be eligible for recall, or this possibility should be prescribed also for the national/state officials. In our opinion, the second solution is better. There are countries where only local officials can be recalled. This solution is not acceptable since it seems that two different logics are being used as if the national and the local officials represent different subjects and not one and the same people, of course at different levels. The idea of the representation should have the same meaning both at the national and the local level. Therefore, if the recall is not contrary to the free mandate of the representatives at the local level, why should it be contrary to the free mandate of the representatives at the national level?

One of the justifications of this solution would be that at the local level all citizens vote for their representatives since there are no constituencies; therefore, it is acceptable that all citizens vote to recall a representative since they previously elected him/her. This is not possible in a great majority of countries considering the recall of national officials since they have been voted for in constituencies. However, this argument is not quite correct since there are political officials at the national level (the head of state) who are elected by the electorate as a unique body, without constituency boundaries, but who cannot be recalled.

Another argument for the recall of local officials is that the citizens in local communities are more familiar with and more interested in local issues, as well as that it is easier and cheaper to organize the recall of a local than of a national political official.⁹ Although citizens can have interest in local affairs, there is no reason to think that they have no interest in the national or global politics. Moreover, more important decisions have been made at the national than the local level. Therefore, there are more reasons for adoption of the recall of national political officials, in combination with the recall of local officials as well.

Considering the expenses of the recall of national political officials, two arguments have to be stressed. First, according to practice of different countries, the recall of national political officials is not a prevailing practice.¹⁰ It has been quite rare to trigger a recall election. Second, the cost of the recall election is the second grade issue. The political consequences and the people's right to decide are more important issues which one has to consider.

We strongly recommend the recall of the entire legislature. It has to be admitted that it is quite a rare solution, presently known in Liechtenstein and German federal units Berlin and Baden-Württemberg. This type of recall can produce far-reaching political consequences, influencing the stability of political system, and causing exceptional parliamentary elections. However, this is sometimes necessary. For example, the parliamentary majority in a state does not have any interest to take into consideration not only the proposals and critiques of the parliamentary minority but also the interests and the will of the majority of population. The representative system does not give any chance either to the parliamentary minority or the citizens to influence the parliamentary majority. It can be quite obvious that the decisions of the parliamentary majority are illegitimate while no one can influence them. In this case, it is justified that citizens have the right to trigger the recall of the entire legislature since they find that it does not represent their interests any more.

The possibility for misuse in such a case is not big since the conditions which have to be fulfilled would be strict in the term of number of signatures which have to be collected. The right to trigger the recall would belong to any subject who proves its ability to collect sufficient number of signatures: *ad hoc* group

9 "About three-quarters of recall elections in the USA take place at the city council or school board level." – *Direct Democracy The International IDEA Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm 2008, 112.

10 In the USA, there were 38 recall elections for state legislator between 1913 and 2013, out of which 20 were successful (20 officials were recalled). There were only three gubernatorial recall elections. Two of three governors had been recalled. – National Conference of State Legislatures website, <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx#History>, 5 August 2016.

of citizens, political parties, trade unions, other organizations, etc.¹¹ This type of recall strengthens the responsibility of the parliament, and gives potentially powerful tools to citizens or different organized interests and opinions to influence the policies of the legislature.

3.2. Grounds for recall

Another important issue is whether the recall of a political official should be allowed always, or only in cases when some specific and defined reasons emerge. The practices are quite different. In some states of the USA, for example, the recall of an official is possible only when and if a particular condition is fulfilled. In other states, no particular ground for recall is necessary. It is enough that a certain number of citizens require recall, and that majority of those voting decide to recall an official.

Both solutions have advantages and disadvantages. The good side of the groundless recall is that citizens can recall an official whenever they wish, only if sufficient number of citizens claims that an official's work has been unsatisfactory. If the citizens are the bearers of sovereignty, they should have the right to recall officials at any time since sovereignty cannot be limited. Therefore, its bearers cannot be limited to use this institute whenever they desire.

The bad side of this solution is that it can be misused. An official can be recalled not only when his/her work is unacceptable for the majority of the voters but also when party leaders can influence the citizens to vote for the recall even when the latter do not have sufficient information or firm opinion on the work of an official. If recall of an official is possible for any reason, it would give rise to uncertainty since the political officials would not be certain that they would serve their term to the end.

The good side of the recall on relatively precise grounds is that the citizens cannot recall an official whenever they want but only in relatively precisely defined circumstances. This gives a degree of certainty to the officials since they are protected from arbitrary recall which could be triggered for pure political reasons. This type of recall implies that citizens, although the bearers of sovereignty, have to respect political attitudes of their representatives even when they disagree with them.

The bad side of this type of recall is, as previously said, the fact that the sovereign cannot effectively control its representatives. If the citizens do not have the

11 For example, in Berlin, the Christian Democratic (at the time an opposition party) started the initiative for the recall of the legislature in January 1981, collecting more than 300,000 signatures. – *Direct Democracy (...)*, 116.

right to effectively control their representatives, and recall is one of the means to do so, they could be called a sovereign only in strictly formal constitutional sense. There are two fears which represent two opposing views on the recall. Both were formulated during the American Revolution. The first fear is that the representatives would disregard their position as the delegates of the people, as Luther Martin said (Spivak, 2003). The opposite fear is, according to Alexander Hamilton, that “the recall will render the senator a slave to all the capricious humors among the people” (Spivak 2003).

The fear that the representatives will become the “slaves” of their electors is not reasonable. In some cases, unjustifiable recall election could happen just because the electors are not satisfied with the party affiliation of their representative. However, it is not likely that they would too often recall their representatives because of political disagreements with them. First of all, quite frequently, recall elections are not an element of the dominant political culture, and the citizens are simply not used to them. Second, the feeling of responsibility would prevent citizens from frequent demands for recall elections. Third, the citizens would trigger the recall election only when there is a serious initiative with good chances for success and with justified ground, particularly since recall elections are expensive (Holeywell, 2011).

On the other hand, the fear that the representatives would disregard their position as delegates of the people is quite realistic, as shown by the practice of all countries. The constitutions prescribe the right of representatives to act independently from their principals, and the theory has found justification for such solution.

Even when the ground for the recall election has been defined by the constitution, the definitions are quite general and could be understood in different ways. Grounds for recall are as follows: lack of fitness; incompetence; neglect of duties; corruption; malfeasance; drunkenness; permanent inability to perform official duties; conviction of a felony involving moral turpitude; violation of oath of office; failure to perform duties prescribed by law; willfully misused, converted, or misappropriated, without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed, etc.

As one could see, these grounds could not be equated with the political responsibility of the representatives. The representatives could be recalled only if there are doubts about their criminal doings, or if there is another reason which does not have anything to do with his/her political opinions but (wrong)doing of different sorts. However, it could be possible that the voters use one of the

above mentioned grounds to trigger the recall election even when they are just dissatisfied with a representative's political attitudes and nothing else.

In our opinion, recall election should be triggered without particular ground, i.e. each time voters are dissatisfied with the political attitudes and doings of their representatives. This is in accordance with the very idea of recall since it enables the realization of the principle of political responsibility. Of course, the possibility for the misuse still would exist. It could be prevented if two conditions were fulfilled. The first one is the dominance of the political culture whose origins are responsibility and political maturity. The second condition is the prerequisites for the recall election, for example, appropriate number of signatures necessary to trigger the election. If these prerequisites for the recall election are adequate, there is less chance that the election would be triggered when serious reasons lack.

3.3. Recall procedure

Few questions are important regarding the procedure: beginning of the procedure, majority necessary for recall, and the consequences of the recall. The recall procedure begins with the collecting of signatures of citizens who support the recall election. Usually, it is necessary to collect a number of the last votes cast for the office or a percent of the signatures of the eligible voters for the office at the last election. In the US federal units, the number of signatures ranges between 15 and 40 percent of the voters, although the usual number is 25 percent.¹² In most Swiss cantons where the recall election is allowed, the signatures of only between 2 and 4 percent of citizens is necessary to trigger the recall election. The exceptions are the cantons Ticino (7 percent of citizens), and Thurgau (13 percent). In Venezuela, 20 percent of the registered voters in the affected constituency may petition for the calling of a recall election.

The recall procedure has to fulfill two relatively matched aims. The first aim is to make the triggering of the recall election possible since it has to be a means in the hands of the ordinary citizens. If conditions for the recall election are rigorous, in the sense that too many signatures are necessary, then the recall election will remain just empty shell without any practical significance. This is particularly so if one has in mind that the citizens can hardly use the recall election without support of political parties or other organizations which have necessary funds, organizational structure, and cadres.¹³ The second aim is to preclude often trig-

¹² Detailed information about this issue can be found at the *Ballotpedia, The Encyclopedia of American Politics*, https://ballotpedia.org/Laws_governing_recall.

¹³ Some authors rightly emphasize that citizens cannot equally use the instruments of direct democracy, including recall: "But in both countries (Switzerland and USA - G.M.),

gering of the recall election, in cases when it is highly probable that the voters would not support the recall of an official. If very small number of signatures is necessary to petition the recall, it could happen that an initiative which is not serious enough causes financial losses for the state as well as the loss of time and energy. Some authors even argue that the recall petition can be started just in order to become outgoing campaigns, “to create an air of negativity around an incumbent when he runs for a regularly scheduled re-election” (Holeywell 2011). These two aims have to be fulfilled by finding a compromise formula for the recall petition. The number of signatures should not be as high to prevent citizens from using this institute, while at the same time it should not be as low to enable even foolish initiatives to be realized.

In some constitutions, the majority vote is required for the recall,¹⁴ in others, it is the highest number of votes.¹⁵ In our opinion, it would be a proper solution that an officer is recalled if a majority of those voting support the recall initiative. Such majority is not hard to achieve but, at the same time, the fact that such majority vote for the recall shows that the citizens are really dissatisfied with the attitudes or behavior of an official.

Another question is what happens if an official is recalled. Three solutions are possible: he/she will be replaced by another official elected after the recall;¹⁶ he/she will be replaced by an official elected at the same time when the recall election happened;¹⁷ he/she will be appointed.¹⁸ In our opinion, the better solution is that recall election is held at the same time with the election for successor official. The consequence of this solution is the lowering of the recall costs as well as a faster replacement of one official with the other. At the same time, two aims would be fulfilled. First, an official would be recalled. Second, he/she

direct democracy is followed by inequalities of participation. It is the better educated, socially better-off citizen who engages and participates significantly more in direct democracy.” (Linder, 2010: 163). One example is particularly interesting. The California Governor Davis had been recalled since the citizens were very dissatisfied with his policies which caused huge financial losses for the state and consequently new financial burden on various categories of citizens. However, 900,000 signatures were necessary in order to trigger the recall election, and the collecting of signatures had been highly eased when a millionaire invested his 1.6 million USD to pay to activists who had to collect the signatures.

14 The Constitution of California, art. 15 c; The Constitution of Colorado, art. XXI, section 3; Idaho (prescribed by the statutes); The Constitution of Illinois, art. III, section 7;

15 The Constitution of Arizona, art. 8, part 1, section 4; The Constitution of Nevada, art. 2, section 9, The Constitution of Wisconsin, art. XIII, section 12.

16 Georgia, Louisiana, Michigan, Minnesota, Montana, New Jersey, Rhode Island, Illinois.

17 Arizona, California, Colorado, Nevada, North Dakota, Wisconsin.

18 The last solution is prescribed in five US federal units (Alaska, Idaho, Kansas, Oregon, and Washington).

would immediately be replaced with another one. The recall procedure would be made more serious if the voters who want to trigger the recall election at the same time have to propose the election of the concrete candidate for an office. This would prevent foolish initiatives for recall since the voters would have the right to this initiative only in connection with the duty to propose a new candidate for a vacant post.

Interesting and, in our opinion, acceptable legal solution has been adopted in the British Columbia, one of Canada's federal units. There, pursuant to the Recall and Initiative Act, if a petition for recall of a member of parliament is supported by 40 per cent of registered voters in a constituency where an incumbent has been elected, he/she will be automatically recalled. No recall election would be necessary. The number of signatures is very high, but it is because a petition is at the same time a recall election. Those 40 per cent of registered voters give their signatures for the recall of an MP. The advantage of this solution lies in the fact that there is no need for organization of a recall election which would be followed by a by-election although a by-election must be called within 90 days if an MP is recalled using a petition.¹⁹

4. Conclusion

There is no ideal institute of the constitutional system. Recall cannot be an exception. There are more arguments in favor of recall than against it. The most important reason for the acceptance of recall is limitation of the power of political elites and the economically dominant class.

In practice, different types of recall are prescribed by the law. Depending on the accepted type of recall, it could be easy to trigger the recall election, so easy that the recall could be misused by the political elites or the capitalist class. On the other hand, if the legal provisions are too strict, the recall could become the mere empty shell without real possibility for practical realization since the citizens would be prevented from using it due to the lack of financial resources, organizational structures, and public influence through mass media.

It may be expected that the recall will not be used frequently by citizens. However, they should have a chance to use it any time they become dissatisfied with the behavior of their representatives. The conditions for the triggering of recall elections should not be strict in terms of the number of signatures, financial resources needed, or the time which the petitioners have at their disposal.

¹⁹ More: *Report of the Chief Electoral Officer on the Recall Proces in British Columbia* (2003). Victoria: Elections BC Province of British Columbia.

In our opinion, the recall has to be groundless, which means that citizens must have the chance to recall political officials whenever they think that their work is inappropriate, even for pure political reasons. Legislation should provide for the recall of all directly elected political officials at the national and local levels.

Whether recall shall be used more or less frequently depends on two crucial factors. The first factor is the level of development of the democratic participatory political culture. Its development is a matter of history, tradition, culture, as well as social and political conditions in a society and a state. The second factor is the legislation. Appropriate legal provisions can facilitate or aggravate triggering of the recall election. However, good legislation is important not only for the practical use of recall but also for the development of the consciousness that recall is useful and necessary means of direct democracy.

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OPOZIV NOSILACA POLITIČKIH FUNKCIJA KAO SREDSTVO KONTROLE I POLITIČKE ODGOVORNOSTI

Rezime

Kontrola i politička odgovornost nosilaca političkih funkcija je jedan od osnovnih problema s kojima se suočavaju demokratski politički režimi. U ovom radu, autor raspravlja o problemima kontrole i odgovornosti neposredno biranih funkcionera na državnom i subdržavnim nivoima. Predstavnička demokratija je zasnovana na ideji slobodnog predstavničkog mandata po kome izabrani predstavnici nemaju pravnu vezu sa građanima koje predstavljaju. Postoji samo labava i vrlo kontroverzna politička veza u smislu da izabrani funkcioneri neće biti reizabrani ukoliko birači nisu zadovoljni načinom na koji ih oni predstavljaju.

Moderni ustavi prihvataju teoriju narodnog suvereniteta. Međutim, postoji problem sa njenim ostvarenjem, zato što su izabrani funkcioneri u praksi odgovorni samo svojim političkim strankama. Praksa nije u skladu sa teorijom i ustavnim principom. Ideja da su politički funkcioneri odgovorni u tom smislu što neće biti ponovo izabrani ukoliko je njihovo političko ponašanje neprihvatljivo biračima, nije osnovana iz nekoliko razloga. Prvo, ukoliko se funkcioner ne kandiduje ponovo, njegova politička odgovornost uopšte ne dolazi u obzir. Drugo, kažnavanje izabranog funkcionera na način da neće biti ponovo izabran ako ne ispuni očekivanja birača nije od velikog značaja ukoliko je on već učestvovao u donošenju neprihvatljivih odluka.

Moderna ustavnost nije prihvatila ideju opoziva izabranih funkcionera od strane naroda iz političkih razloga. Jednom izabran, funkcioner ne može biti razriješen dužnosti ukoliko narod nije zadovoljan njegovom politikom. To znači da ne postoji pravna ili smisljena politička veza između građana i izabranih funkcionera. Autor u radu raspravlja o institutu opoziva, za koji smatra da se nalazi u osnovi principa narodnog suvereniteta i da predstavlja sredstvo za ostvarivanje narodnog uticaja na izabrane zvaničnike. U radu se analiziraju mogućnosti ostvarivanja instituta opoziva iz istorijske i uporedne perspektive. Autor primjećuje da se ostvarivanje ovog instituta suočava sa izvjesnim poteškoćama i ograničenjima, kao što su politička manipulacija i nestabilnost političkih institucija. Analizirajući prednosti i nedostatke ovog instituta, autor istražuje njegovu teorijsku vrijednost i praktične posljedice njegove primjene.

Ključne riječi: opoziv, kontrola, politička odgovornost, izabrani funkcioneri, narodni suverenitet.

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JUDICIAL CONTROL OVER ELECTIONS**

Abstract: *Given the importance of elections in contemporary democracies, the principle of control has to be incorporated in the concept of the electoral system. Control over the electoral process is a precondition for ensuring the regular course of elections and protection of electoral rights. Due to different legal and political traditions, there is a variety of procedures in establishing control over elections. The focal point of this article is the control exercised by the courts, particularly in regular judicial proceedings, as well as in the proceedings before Constitutional Courts. The central role of the court in exercising control over elections has been widely recognized. Judicial control over the election process has been accepted by the Serbian legislature. Bearing in mind that the effective control over the elections was absent in Serbia, and that the “controllers” have often contributed to such circumstances, this article examines the normative framework and the implementation of judicial control in Serbia.*

Keywords: *elections, judicial control, courts, Constitutional Court.*

1. Introductory notes

Starting with the fact that democratic constitution of political orders and fundamental constitutional institutions is based on the elections, there is no doubt that elections represent the most important participation of citizens in the political decision-making in one country. Elections are the foundation of legitimacy of the government and the cornerstone of democracy. Considering the role and the importance of elections in contemporary democracy, it is essential to ensure that elections are organized according to relevant legal rules. After all, the credibility of the election process is a result of the effects that elections have on democracy and the confidence that citizens should have in elected political institutions.

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Therefore, the election procedures shall "according to the criteria of necessary complexity, create uncertainty and alternatives; they must contain regulatory support and control, which allows to decide about these issues" (Luhman, 1992: 142). Given the mass participation of the entire electorate in elections, as well as the accompanying political tensions in terms of the uncertain outcome, control is more than necessary throughout the elections process.

Control over the electoral process is a precondition for ensuring the regular course of elections and protection of electoral rights. An effective electoral system should include an adequate system for resolving election disputes. Developing a well-organized system for efficient processing of complaints is crucial for the exercise of electoral justice and successful resolution of election disputes. Considering that the electoral process depends on the legal and socio-political framework as well, there are different systems of electoral justice. The system of electoral justice includes instruments and mechanisms that should ensure that any measure, proceeding and decision will be taken in accordance with the law. Bearing in mind that electoral activities begin at the moment when a competent state calls for elections and finish at the moment of verifying the mandates, it is necessary to control these activities during the entire period.

Control over the elections may be regarded as legal or political control, depending on whether it is focused on the process of running the elections or on the operations of political parties as the main actors in elections. *Political control* over elections is primarily conducted by observing the election process. It is performed by the civil society and its focal point is usually the voting procedure. *Legal control* appears in a variety of forms. It implies the control of the legality of elections at all stages, starting from the announcement of the elections, the nomination process and the electoral campaign, during the voting process and counting of votes, and ending with the process of verification of MPs mandates. This control involves the participation of different "controllers", such as: electoral commissions, courts, Parliament, and the civil society.

The focal point of this article is the control exercised by the courts, particularly in the course of regular judicial proceedings, as well as in the proceedings before the Constitutional Court. The central role of courts in exercising control over elections has been widely recognized. It should prevent arbitrariness and ensure the regularity of the election process. Courts may be included in the process of control only after the electoral administration has taken relevant action. If the electoral administration provides a relevant response to some irregularity detected in the election process, the courts control over elections may not be exercised. This means that the courts may not be obliged to resolve some less important disputes but they are expected to act in more complex situations or in cases involving inadequate election administration proceedings.

2. Judicial Control over Elections: Comparative law perspective

Due to different legal and political traditions, there are various procedures in establishing control over elections. In many established democracies in Western Europe (such France, Germany, Italy, and the UK), election complaints are discussed by administrative and ordinary courts' authorities in special proceedings. In contrast, in most emerging and new democracies in Central and Eastern Europe, control over elections is shared between the electoral commission and ordinary courts. In several countries outside Europe, there are special electoral courts¹ (Pajvančić, 2005:203; de Jesus Orozco-Henriques, 2005).

Judicial control over elections was firstly established in the British parliamentary system, thus modifying the traditional system of parliamentary control. This solution was supported by the standpoint that courts are more likely to bring more consistent decisions rather than Parliament. Judicial control over elections has evolved alongside with the construction of independent and impartial judiciary. The competent court has jurisdiction to adjudicate the validity of the disputed election process, and the court may sit in the constituency where the dispute has occurred. In the proceedings before this court, it is allowed to present relevant documents, statements and other evidentiary instruments, as well as to examine witnesses. Any person who is eligible to vote and who has run as a candidate in elections is entitled to initiate control over elections by filing a complaint contesting either the election of a specific representative or the manner of conducting the election process. The election complaint should be submitted within a period of 21 days.²

Judicial control over elections was the dominant form of control in France till the adoption of the French Constitution (1958). Namely, the administrative courts developed *electoral disputes* as a special type of administrative disputes. After the adoption of the French Constitution, control over elections was vested in the newly established Constitutional Council. However, the administrative courts, headed by the State Council, retained control over local and regional elections. Nowadays, this model of judicial control over elections has been accepted in

1 This model of resolving electoral disputes was developed in Latin America. In Uruguay, the Electoral Court has established as a specialized court that deals with all issues concerning the election procedure, performs administrative, corrective, consultative and economic supervision of the electoral bodies, and decides in the last instance on all complaints and replies to complaints. A unique case has been recorded in Nicaragua, where the election tribunal has been established as a fourth branch of government. The establishment of electoral courts in the countries of Latin America has played a crucial role in the process of democratization and democratic consolidation of the countries in that region.

2 Conference on "The protection of electoral rights and the right to political associations by the Constitutional Court" : CDL-JU (2006)-02; retrieved from www.venice.coe.int

many post-socialist countries, such as: Hungary, Poland, Czech Republic and the Russian Federation. Notably, the Czech Republic is quite specific because the resolution of electoral disputes is in the jurisdiction of courts, without any involvement of the electoral administration.

The Constitutional Court, as a special judicial institution whose main purpose and objective is the protection of the Constitution, may also be involved in the process of judicial control over elections. The Constitutional Court, as "the guardian of the Constitution" and the principle of constitutionality, is a counter-balance to the arbitrary will of the holders of public authority in their effort to usurp power and quash the constitutional norm. In this way, the Constitutional Court improves and advances the democratic system, and stands as an obstacle to autocracy and anarchy. The constitutional court control over elections has been developed in Austria and Germany.

For example, we may mention the most recent decision of the Constitutional Court of Austria brought on 1 July 2016. In exercising judicial control over election, the Court ruled that the runoff voting (the second round) in the presidential election must be repeated in its entirety in the whole territory of Austria. This was one of the most controversial and polarizing elections in the Austrian recent history.³ According to the final results of the presidential election, the former Green party politician Alexander Van der Bellen was ahead by a little more than 30,000 votes. The Freedom Party, whose candidate narrowly lost the presidential election, claimed "massive irregularities" in the absentee vote.⁴ The party filed a legal complaint on 8 June 2016, arguing that electoral law had been infringed in one way or another in more than 117 electoral districts. In the course of deciding on this electoral dispute, the Austrian Constitutional Court was guided by the following legal rules:

- *The possibility of postal voting is not unconstitutional and can, therefore, remain in effect.*
- *However, the infringements of the law occurred in numerous districts regarding the implementation of the postal voting system.*

3 The fourteen judges of the Austrian Constitutional Court were intensively engaged in these proceedings, working almost without interruption both internally and publicly during the past few weeks. They examined witnesses in public hearings in order to find out if the claims made in the complaint corresponded to the facts.

4 Head of the Constitutional Court, Gerhard Holzinger, said "The challenge brought by the Freedom Party leader Heinz-Christian Strache against the May 22 election has been upheld. There is no proof that May's count has been manipulated, but irregularities potentially affected nearly 78,000 votes." Retrieved from: <http://www.dw.com/en/top-austrian-court-annuls-presidential-election-result/a-19371074>

- *To the Constitutional Court it is absolutely clear that laws governing elections must be strictly applied, which is to exclude any abuse and manipulation.*
- *If the infringements of the law are of such an extent that they may have had an influence on the election results, it is of no relevance if manipulations have actually occurred or not.*⁵

Constitutional control over elections could be observed in the context of *constitutional review*, as one of the most important competences of the Constitutional Court. It may be defined as a “power of judicial authority to set aside ordinary legislative or administrative acts if judges concluded that they conflict with the constitution” (Vanberg, 2005:1). It is “the core competence of constitutional judicature in Europe” (Stojanović, 2014:76). Performing constitutional review, the Constitutional Court may set aside the unconstitutional electoral law and other election rules.

3. Control over elections in Serbia

After the adoption of the 1990 Constitution, multi-party system was revived in Serbia. In such circumstances, the electoral system has been given a new meaning and the control over elections became very significant. From the electoral point of view, the past period could be divided into two distinctive periods (Goati, 2013:64). The period from 1990 to 2000 was marked by dynamic development of the electoral law, which was often modified due to the absence of consent of relevant political parties. This period was also marked by the absence of proper control over the elections, which was primarily a result of numerous gaps in the electoral legislation. This period included many election irregularities, such as: double voting, organized fraudulent casting of previously marked ballot papers, modification of the election results by the electoral commission, falsifying the election results entered in the polling station minutes (vote-counting record), etc. All these irregularities were observed in the local elections held in 1996 but the courts failed to take appropriate action. Moreover, the election results were modified by arbitrary decisions of the courts. Thus, the will of the voters was, *post festum*, deformed by the biased court decisions (Goati, 2013:64). This clearly demonstrated the dependence of the judicial system on the ruling party.

Unfortunately, a similar pattern was repeated in the most drastic form during the federal presidential elections in 2000, when the Federal Constitutional Court changed its decision a couple of times. First, the Federal Constitutional Court

⁵ Constitutional Court of Austria: Runoff Elections of the Federal President must be repeated, https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/5/CH0003/CMS1467363707042/press_release_07-01-16.pdf; Retrieved 12 July 2016

ruled that the first round of elections should be repeated. When the leaders of the Democratic Opposition of Serbia (DOS) organized mass protests because of the apparent election fraud, the Federal Constitutional Court overturned the previous decision, and issued a new one adopting the Opposition complaint and nullifying the decision of the Federal Electoral Commission. This example confirms that there was no mechanism to effectively control the regularity of the election process. Significant progress has been evident since 2000, when efforts were exerted to improve the overall electoral environment. The new Constitution of Serbia, adopted in 2006, set out the relevant principles of the electoral system, as well as the basic principles governing the operation of the judicial system. It served as a solid basis and good environment for establishing comprehensive control over the elections.

Before the 2010 judiciary reform, the Supreme Court of Serbia was in charge of exercising judicial control over the parliamentary and presidential elections. After that, the Administrative Court has had the leading role in exercising control over elections. The 2012 elections were the first opportunity for the Administrative Court to put its newly vested jurisdiction into practice.

Yet, it should be noted that the Administrative Court is involved in the process of election control only after the competent electoral commission has taken relevant action. Namely, the electoral commission constitutes "the first line" of electoral control in Serbia, the role stemming from the function of this electoral body as established under the electoral law. However, taking into account its dominant political composition, it is clear that political arguments often have priority over the legal ones, which makes this body susceptible to diverse irregularities. The control system before the electoral commission may be activated only if the complaint is submitted by an authorized person, which means that it cannot act *ex officio*. This legal solution has been partly corrected in the judicial practice of the Administrative Court, which established the obligation of the competent electoral commission to *ex officio* determine the voting results in case of observed technical error (e.g. when the results of one electoral list have been mistakenly assigned to another list, or when the results do not correspond to the data from the official polling station records/minutes). However, in recently held provincial elections in Vojvodina, a surplus of ballot papers was found at three polling stations. As there were no complaints by the constituents, the provincial Electoral Commission (acting *ex officio*) decided to annul the election due to obvious deficiencies. Yet, this decision was annulled after the voters' had complained that the Commission was not entitled to *act ex officio*. As an epilogue, these results were officially recorded as a statistical zero, a category which is clearly not envisaged even as a possibility in the current electoral legislation.

Judicial control over the elections is activated only after a complaint against the decisions of the competent electoral commission has been filed. The legislation does not precisely define the subjects who are entitled to submit a complaint but, obviously, they are: every voter, a candidate for a representative function (the President, an MP or a local deputy), a nominator of candidates or the electoral list of candidates. The deadlines for taking actions or making decisions in the electoral process are imperative and urgent, and they are computed in hours. The Administrative Court has pointed out that the deadlines may not be expanded.⁶ On the other hand, the Administrative Court has a 48-hour deadline to decide on the submitted complaint, which means that the Court is expected to provide a rapid and effective response in such cases.

In the former period, the Administrative Court was largely involved in the the process of nominating candidates. Then, the Court was able to control whether the submitted electoral list of candidates was in accordance with the applicable election law. Thus, it was a common occurrence (especially in the local elections) that the local electoral commission declared the coalition list including candidates of a group of citizens and political parties eligible to stand for election. The Administrative Court considered such coalition lists to be ineligible to stand for election because the election law does not stipulate that the nominator may be a coalition comprising citizens' groups and political parties. However, if such a coalition list was declared eligible by the competent electoral commission and there were no objections, which made the commission decision final, this fact cannot be used as the grounds lodging a complaint in the course of determining the summative electoral list. In the last (2016) elections, the main problem that occurred in the nomination phase referred to the falsified support signatures, which the Republic Electoral Commission (REC) revealed on the very last day envisaged for the registration of electoral lists. As a result, the REC refused to declare the three election lists eligible for election. Forged signatures were found on another electoral list, which had already been declared eligible and which was eventually included in the summative electoral list.

Namely, according to the legal position of the Administrative Court (taken in 58th session of administrative court judges, held on 29. 02. 2016), the election procedure may not subject to the analogous application of the General Administrative Procedure Act which prescribes extraordinary legal remedies in administrative proceedings. Consequently, the decision on determining the summative electoral list may not be challenged for reasons related to irregularities concerning the process of declaring individual electoral lists. The Court also refused to act as a court of full jurisdiction because the conditions for resolving disputes on the merits have not been met. However, the very fact that there were more

6 Judgment of the Constitutional Court of Serbia II- Už 58/2012 dated 3.4.2012.

than 15,000 forged signatures on seven from the total number of 30 submitted electoral lists has seriously undermined the legitimacy of the electoral process.

The Administrative Court has accepted to act as a court of full jurisdiction in disputes involving the national minority party lists. Namely, the Political Parties Act distinguishes two types of political parties: political parties (in general), and the political parties of national minorities. Pursuant to this Act, the political party of a national minority is the one whose actions are specifically aimed at presenting and representing the interests of a national minority, and the protection and promotion of the national minority rights in compliance with the applicable law. As a measure of affirmative action, the Political Parties Act stipulates that the political party of a national minority may be established by at least 1,000 adult citizens of the Republic of Serbia that have contractual capacity. During the elections, the status of the political party of a national minority has to be confirmed by the competent electoral commission, in accordance with the rules of the election legislation. The election legislation does not go beyond the provisions of the Political Parties Act and does not impose any new additional requirements that such a party should meet in order to obtain a minority status. However, the Election Guidelines issued by the REC (on 4th March 2016) state that the electoral list which intends to obtain the status of a national minority should submit a written proposal on obtaining such a status, the party program and Statute, as well as other evidence of political activity and representing the interests of a specific national minority. The REC considered that every party that intends to have the status of a minority party should take part in electing members of the national minority Council. If some ethnic community does not have a national minority council, a request for establishing the council should be submitted by a political party. Such an attitude of the REC might be acceptable bearing in mind the former abuses of the status of a minority party in earlier periods. Nevertheless, it is beyond the existing normative framework. Therefore, the Administrative Court often annulled the REC decisions. In order to obtain the status of the national minority list, a national minority party should only submit an application to be granted such a status.

The Administrative Court was clear that "no provision of the electoral law stipulates that the Electoral Commission is authorized, in the course of determining the position of political parties of national minorities, to evaluate its political activities and the implementation of its programs and the goals contained therein, nor that this decision depends on filing a request to the competent authority to form a special electoral list, in terms of Article 44 of the Act on National Councils of National Minorities". According to the legal position of the Administrative Court (taken in the 63rd session of judges, held on 07. 04. 2016), the political party which is registered as a national minority party or a coalition

of national minority parties has the status of a national minority party in the election process only if it submits a proposal to the competent electoral commission to confirm this status.⁷

Taking into account the hitherto involvement of the Administrative Court in resolving election disputes and electoral control, we may give a positive assessment on its activities. However, the main disadvantage is that this judicial control often happens behind closed doors, in sessions which are not open to public and cannot be attended by the opposing parties. The lack of publicity and transparency is one of the greatest shortcomings in the work of the Administrative Court. In addition, it is difficult to exclude the impression that the Administrative Court easily and without due consideration gets over quite serious complaints about irregularities in the election process. For example, in the context of very serious allegations about a “vote trading” case, the Administrative Court dismissed the claims as unfounded, without going into the merits. The “vote trading” phenomenon is usually observed in the context of Bulgarian elections and electoral process.⁸ In the case at issue, the appellant pointed to the “vote trading” that occurred in front of the polling station, pertaining to the vouchers issued by the Municipality or the Social Welfare Center which were given to people in need: users of social services and single mothers. These vouchers were allegedly used for the purpose of “purchasing votes”. The Serbian Administrative Court confirmed the standpoint of the REC, specifying that the evidence presented by the appellant did not provide sufficient grounds to conclude that there had been election irregularities and a violation of the election law, particularly bearing in mind that there were no objections to the official records (minutes) from the polling stations. However, if we cannot expect from the Administrative Court to reach a decision on the merits within the statutory 48-hour deadline, the issue may certainly be subjected to the jurisdiction of criminal justice.

In order to ensure the integrity and regularity of the election process, criminal law prescribes criminal liability and relevant punishment for various types and forms of violation or threat to the constitutionally guaranteed electoral rights of citizens. Election offences are mostly contained in the Criminal Code (2005), while the election laws penalize offences (misdemeanors) relating to the election process. The Criminal Code (in Chapter 15 dealing with “Criminal Offenses against Electoral Rights”) prescribes sanctions for the violation of the right to stand for election, the right to vote, as well as for giving and accepting a bribe in relation to voting, abusing the right to vote, compiling inaccurate voters’ lists,

7 The judgment of the Constitutional Court of Serbia III-27 Už 104/16 dated 10. 04. 2016.

8 Along with corruption, the “vote trading” phenomenon during elections has already become a political way of life and a huge problem for instituting the democratic election process in Bulgaria. (Manolov, 2010: 308)

obstructing or preventing the voting process, violating the secrecy of voting, falsifying the voting results and destroying documents on voting (Articles 154-162). These offences may have different forms, reflected either in the commission or omission to act, which may have a significant effect on the voting process and the ultimate election results.⁹ It is essential to cast more light on each of these attempted or perpetrated offences because the practice has shown that failure to punish the perpetrators for abuses of electoral legislation gives rise to even wider forms of abuse in the upcoming elections.

4. The role of the Constitutional Court in election control

The Constitutional Court of Serbia has a subsidiary competence in controlling the elections, which means that it may resolve electoral disputes that are not within the jurisdiction of the Administrative Court. Thus, the activities of the Administrative Court and the Constitutional Court are envisaged to run concurrently, whereby the jurisdiction of the Administrative Court over elections excludes the activity of the Constitutional Court on this matter. This legal solution implies that there shall be no competition between the two courts in terms of jurisdiction.

The activity of the Constitutional Court in the field of electoral law is regulated by Constitutional Court Act (2007). The proceeding before the Court may only be initiated at the request of the authorized person, such as: a voter, the candidate for a representative function (President, MP, deputy), a nominator of the electoral list of candidates. The Court may not act *ex officio*. The proceeding is usually initiated by the one who has failed to win in the elections as a candidate, but it raises an issue whether this process can have a subjective character. The central question which the Constitutional Court is obliged to resolve is whether the observed irregularity in the electoral process has had a significant impact on the elections results. The Constitutional Court may nullify the entire electoral process, or any part thereof, only when these two conditions are fulfilled. Understandably, every irregularity would not lead to the invalidation of election results. In effect, the primary consideration underlying the Constitutional Court assessment is the integrity of the electoral process rather than the subjective rights of individuals. This competence of the Constitutional Court has not been sufficiently affirmed in practice, especially as there is no clear distribution of responsibilities between the Constitutional Court and the Administrative Court.

Yet, in the proceedings on constitutional review (as its core competence), the Constitutional Court has had the opportunity on several occasions to exercise

⁹ During the last elections, seven people were suspected of falsifying voters' documents and statements. Criminal charges were raised against Zoran Marić, the leader of Unique Russian party, Nikola Jelikić, the director of Republican Party, but they have not been convicted yet.

control over the constitutionality and legality of the election legislation. For example, we may note the decision where the Constitutional Court declared Article 47 of the Local Elections Act unconstitutional. This Article declares that the nominator of the electoral list and a candidate for the representative function may sign an agreement on mutual relations, whereby the nominator of the electoral list is entitled to submit a resignation on behalf of the representative (deputy) concerning his/her mandate in the local assembly. After signing the agreement, candidate for the local representative (deputy in the local assembly) is supposed to submit his/her blank resignation to the nominator of the electoral list, as set out in the agreement. Blank resignation is a written document which contains a statement of the candidate for the local representative (deputy in the local assembly) that he/she resigns from the function of the local assembly representative (deputy) in the local self-government unit, as well as the authorization given to the nominator of the electoral list to submit this resignation on behalf of the deputy to the President of the Municipal Assembly of the local self-government unit. On the basis of this agreement, the nominator of the electoral list is entitled to freely dispose of the mandate of the local assembly representative (deputy) with whom he/she has signed the agreement.

The Constitutional Court considered that these rules were contrary to the fundamental constitutional principles: the sovereignty of citizens and the rule of law, as well as the electoral right as a fundamental constitutional right¹⁰ The Court pointed out that the local assembly representative (deputy) obtained the mandate directly from the citizens and that each deputy may freely use his/her mandate for the purpose of representing the citizens who elected him/her. The mandate, as a link between voters and representatives, is a matter of public law and could not be the subject to contractual relations between candidates for local representative functions (deputies) and nominators of electoral lists.

The Constitutional Court is also eligible to protect the electoral rights in *constitutional complaint proceedings*. In the proceedings on constitutional complaints, the Constitutional Court has the task to examine whether there has been a violation of constitutionally guaranteed fundamental right. In fact, the Constitutional Court decides upon a “subjective” complaint of an individual who claims that his/her fundamental right has been violated. In this case, the Constitutional Court decision on a constitutional complaint may be preceded by the decisions of the Administrative Court in electoral dispute. It further implies that the Constitutional Court is now in a position to examine and give opinion on the Administrative Court decision, to set it aside or modify it in compliance with the constitutional interpretation of the electoral legislation, as well as to nullify the Administrative Court decision.

10 The judgment of the Constitutional Court IUz 52/2008, 129/07

5. Conclusion

An effective electoral system implies the existence of well-developed control system which will ensure the regularity of the election process in accordance with the existing regulations and the effective resolution of electoral disputes. The system of electoral control may include ordinary courts or the Constitutional Court at its center, as well as the possibility of involving the election administration and Parliament. The Serbian legislator has opted for instituting judicial control over elections, which has been vested in two judicial institutions: the Administrative Court and the Constitutional Court. The Administrative Court, as a court of special jurisdiction in charge of resolving administrative disputes, is authorized to resolve election disputes and exercise control over the elections in a professional and competent manner, without any political or other undue influence. The fact that the Administrative Court has the possibility to act in full jurisdiction contributes to effective control over elections. The Constitutional Court retained subsidiary jurisdiction for resolving electoral disputes. Yet, its involvement in the electoral sphere is also embodied in its authority to exercise the normative control and decide on constitutional complaints.

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СУДСКА КОНТРОЛА ИЗБОРА

Резиме

Имајући у виду значај и функцију избора у савременој демократији, неопходно је да они буду организовани поштовањем одговарајућих правних правила. Уосталом, кредибилитет избора произилази из ефеката које има на демократију и поверења које грађани имају у изабране политичке институције. Имајући у виду масовни карактер изборног поступка, који подразумева активно учествовање бирачке популације, као и пратећу политичку напетост поводом неизвесног исхода, контрола избора је више него неопходна.

Како изборне активности започињу расписивањем избора од стране надлежног државног органа, а завршавају се верификацијом мандата, потреба за њиховом контролом постоји у читавом том периоду. То подразумева и ангажовање више различитих "контролора", попут изборних комисија, судова, парламента, као и цивилног друштва.

У фокусу рада је контрола избора коју спроводе судови, првенствено редовни судови. Судска контрола избора је поникла у британском парламентарном сиситему и развијала се истовремено са изградњом непристрасног и независног судства. Овакав модел контроле је развијан и у Француској, посебно до 1958. године, када је дограђен укључивањем Уставног савета. Примери из упоредне праксе указују на примену судске контроле избора и у многим другим државама.

Судска контрола избора је опредељење и законодавца у Србији. Имајући у виду да је у Србији често изостајала ефикасна контрола изборног поступка, као и да су "контролори" томе сами доприносили, намера нам је да анализирамо како је ова контрола данас постављена и како функционише. Посебно је важно истаћи улогу Управног суда, који се појављује као централни контролор свих избора. Нека од питања на која ћемо настојати да дамо одговоре у раду јесу следећа: да ли је Управни суд адекватно одговорио на постављени задатак, да ли су уочени недостаци у раду, а посебно какав је однос према Уставном суду, који супсидијарну улогу у контроли избора.

Кључне речи: избори, контрола, суд, уставни суд.

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DISTINCTIVE FEATURES OF SPECIAL ADMINISTRATIVE PROCEEDINGS IN HEALTH CARE MATTERS**

Abstract: *The subject matter of analysis in this paper are provisions on administrative procedures in the most important legislative acts in the field of health care in the Republic of Serbia: the Health Care Act, the Act on Medicines and Medical Devices, the Health Insurance Act, the Chambers of Healthcare Professionals Act, the Psychoactive Substances Control Act and the Act on Substances used in the Illicit Production of Narcotic Drugs and Psychotropic Substances. The main objective of this analysis is to determine whether and to what extent the provision on administrative procedures contained in these legislative acts comply with the most important principles of general administrative procedure, stipulated in the General Administrative Procedure Act. The results of research in this paper point to the necessity of harmonizing special administrative procedures with the norms of general administrative procedure.*

Keywords: *special administrative law, general administrative procedure and special administrative procedures, healthcare matters.*

1. Introduction

Rules of the general administrative procedure contained in the General Administrative Procedure Act (GAPA) regulate ways of resolving administrative matters, which are common to all administrative bodies in all areas (Milkov, 2012: 69). However, due to the specific nature of administrative matters in certain areas, the GAPA stipulates that the special laws may prescribe *necessary* exceptions

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to the general principles of administrative procedure by making the subject-specific administrative procedure rules.

Given the varied nature of administrative matters, it is impossible to regulate all of them with the same general rules of administrative procedure. As part of positive law, special administrative law greatly exceeds the volume of all other branches of positive law taken together.

The specificity of the special administrative procedures is that they "... are not separate from the substantive regulation of certain administrative branches ... and they therefore should be seen as a whole" (Petrović, Prica, 2014: 19). In other words, the specific administrative procedure norms can be found in the substantive laws regulating specific areas of administrative law.

Yet, in theory, special administrative law is divided into substantive and procedural special administrative law.

"Substantive law governs the independent rights of legal entities (right to life, right to property, etc.) and procedural rules are related to the rights and obligations within the process that starts or is in progress (the right to appeal, the right to sue, the right to defense). The rights and obligations regulated by the procedural rules are dependent by their nature and fully determined by the procedure initiated or underway. Substantive rights are interests in the subjective sense and goods in the objective sense. The rights granted by the procedural rules do not have the character of a subjective interest and good in the above sense" (Petrović, Prica, 2011:11).

As already said, there are necessary exceptions from the general administrative procedure in certain areas of special administrative law. These exceptions must be in compliance with the basic principles of the GAPA. However, in practice, the special procedural provisions of particular laws create a "procedural chaos," as they create special rules of procedure, different from those contained in the GAPA, which ultimately diminishes the importance of the rule of law and good governance. This is not characteristic only for Serbia but for all the countries in the region (Koprić et al., 2016:161).

Therefore, the intention of the GAPA framers was to approach the process of prescribing special administrative procedures restrictively in order to prevent the executive and administrative authorities from regulating the administrative procedure by enacting secondary legislation (by-laws). It was once confirmed by the Constitutional Court of Yugoslavia in 1969 in its judgment U-62/68: "The special administrative procedure for certain administrative areas can be prescribed only by law and by the decision of the Municipal Assembly" (Tomić, Bačić, 1999:43).

In this regard, there are two issues: first, are such derogations always necessary in the Serbian administrative law reality, and second, are they only prescribed by law, as it is explicitly stipulated in the GAPA (Article 3)? This paper is an endeavor to give an answer to these questions, in regards to the specific administrative procedures in the field of health care. Also, despite the fact that there is a vast number of specific administrative procedure norms within the substantive laws, very few legal articles specifically focus on these special procedural norms in isolation. According to its subject matter, this paper may fall into that group.

But, first of all, let us examine the relationship between general administrative procedure rules and special administrative procedure rules as a whole.

2. Characteristics of the relationship between the General administrative procedure and Special administrative procedures

The General Administrative Procedure Act is an umbrella law that is applied by all the bodies before which various types of administrative proceedings are conducted, unless the norms of special laws abrogate its application (Dimitrijević, 2014:330; Milkov, 2012:69; Tomić, 2002:338; Lilić 2013:441; Popović et al., 2011:174). On the other hand, the GAPA is concurrently the subsidiary law applicable only when the special procedural rules are not prescribed.

Secondly, there is a relationship of interdependence between the GAPA and special administrative procedures. Namely, in order for some institutes of the GAPA to be fully viable, they have to be developed within the laws of the subject-specific administrative areas. Hence, we will look at how the relationship between the GAPA and special administrative procedure rules is regulated under the former and the new Serbian GAPA.

The first characteristic of this relationship is the principle of subsidiarity of the GAPA rules. This means that the rules laid down in the specific administrative laws are applied first, and then the rules of the GAPA may ensue. Namely, the GAPA rules apply only to issues which are not regulated by a special administrative law (Popović et al. 2011: 175).

The second characteristic of the relationship between the general administrative procedure and special administrative procedures is the application of the old rule of Roman law: *lex specialis derogat legi generali*, which implies that the existence of a special law excludes the application of the general one (Dimitrijević 2014: 331).

The new Serbian General Administrative Procedure Act (GAPA), adopted on 29 February 2016, shall fully enter into force on 1 January 2017.¹ Regarding the relationship between the general and special administrative procedures, the new GAPA (2016) has largely retained the solutions from the previous GAPA (1997),² according to which the rules of general administrative procedure shall apply to all administrative matters (including special ones). The new GAPA also provides that certain administrative procedure issues may be regulated otherwise in certain special administrative areas when necessary and if it is in compliance with the basic GAPA principles (Article 3). However, unlike the previous one, the new GAPA adds a new condition - that such regulation does not reduce the level of protection of the parties' rights and legal interests guaranteed by the GAPA!

Furthermore, in the transitional and final provisions, the new GAPA also contains norms concerning general and specific administrative procedures. In fact, bearing in mind the common practice that in some cases special administrative laws deviated from the GAPA norms, transitional and final provisions of the new GAPA (Article 214) provide for the harmonization of special administrative laws with the GAPA solutions within the prescribed period (until June 1, 2018), "wherein the 'burden of proof' of the need for specific regulation of certain issues (where permitted) should be on the authorities which point out to those specifics". In order to achieve this objective, the provision in Article 214 paragraph 2 of the new GAPA provides for establishing a special coordination body for assessing the conformity of special administrative laws with the GAPA provisions.

3. Most important Special administrative procedures in the field of health care matters

In accordance with the goal of this paper to examine the laws that regulate the field of healthcare, we first highlight the laws that contain procedural provisions. These are the following acts: The Health Care Act, the Medicines and Medical Devices Act, the Health Insurance Act, the Chambers of Healthcare Professionals Act, the Psychoactive Substances Control Act. Currently valid versions of those Acts have been used for the purpose of this analysis.

A number of other laws in the field of healthcare have remained outside the scope of his analysis because they do not contain procedural provisions. These are: the Patients' Rights Act, the Act on the Protection of Persons with Mental Disabilities, the Act on the Protection of Population from Contagious Diseases,

1 The General Administrative Procedure Act (GAPA), *Official Gazette of the Republic of Serbia*, No. 18/2016.

2 General Administrative Procedure Act (*Official Gazette of the FRY*, No. 33/97 and 31/01 and *Official Gazette of RS*, no. 30/10).

the Act on Health Control over Food and General Consumer Goods, the Sanitary Inspection Act, the Act on Substances used in the Illicit Production of Narcotic Drugs and Psychotropic Substances, and the Act on Abortion in Health Care Institutions.

Further on, we will analyze the most important procedural provisions of the aforementioned laws.

3.1. Special administrative procedures regulated by the Health Care Act

3.1.1. The Health Care Act³ contains *ten specific administrative procedures*: the procedure for determining the fulfillment of conditions for performing healthcare activities; the procedure for approving the performance of certain healthcare-related activities; the procedure for issuing permits for the use of new medical technologies; the procedure for approval of specialization and sub-specialization; the procedure for issuing, renewing and revoking the licenses for independent operation; the procedure of internal and external quality check control of healthcare facilities; the process of accreditation of healthcare institutions; and the procedure for revoking the certificate of accreditation. In this paper, we highlight the most important specifics of these procedures.

The Health Care Act does not contain any special procedural features in terms of the procedure for determining the fulfillment of conditions for performing healthcare activities and the procedure for approval of certain healthcare related activities; it merely envisages a series of special substantive law conditions which must be met in order to render an appropriate decision. Thus, procedurally speaking, we can conclude that these special administrative procedures are in accordance with the general principles of administrative procedures.

3.1.2. The procedure for issuing licenses for the use of new medical technologies. When it comes to the procedure for issuing licenses for the use of new medical technologies, under the Health Care Act, the special procedural characteristic of this special administrative procedure is embodied in the provision that the first instance decision or license issued by the Minister is a *complex* administrative act (as it is based on the opinion of the Medical Technologies Assessment Commission) and *final* in the administrative procedure. The same applies to the decision to ban the use of new technologies. If a health care institution or private practice use healthcare technologies without proper license, the Ministry shall issue a decision prohibiting the use of new medical technologies; the decision is final in the administrative procedure, and the discontent party is entitled to

3 The Health Care Act, *Official Gazette of RS*, no. 107/2005, 72/2009 - another act 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 -another act 93/2014, 96/2015 and 106/2015.

initiate an administrative dispute proceeding against this decision before the competent Administrative Court.

3.1.3. *The procedure for approval of specialization and sub-specialization* also includes such a complex administrative act. A specialization and sub-specialization is approved by a healthcare institution or private practice, in accordance with the professional development plan envisaged in Article 183 of the Health Care Act; the decision on approving specialization and sub-specialization is made by Director of a healthcare institution or the founder of a private practice, and this decision is officially confirmed by obtaining the final consent of the Minister of Health. This Ministerial decision is final in the administrative procedure and it may be subject to an administrative dispute.

3.1.4. *The procedure for issuance, renewal and revocation of licenses for independent work*. According to Article 190 of the Health Care Act, the issuance, renewal and revocation of the authorization for independent work (license) to healthcare workers is a procedure carried out by the competent Chamber in order to determine the professional competences of healthcare professionals to work independently. Director of the competent Chamber makes a written decision on the issued, renewed or revoked license to the healthcare worker. This first instance decision is final in the administrative procedure and it may be subject to an administrative dispute.

The license, which is issued for a period of seven years or renewed every seven years, has the legal nature of a public document. The Health Care Act authorizes the competent Minister to enact a bylaw, which will closely regulate the conditions for the issuance, renewal or revocation of healthcare workers' licenses.

As we see, the issuance, renewal and revocation of licenses for independent work has several specific features that are not characteristic for the general administrative procedure: first, the decision to issue a license has the legal nature of a public document; second, there is no right to appeal against the decisions; and third, the procedural rules governing this issue are prescribed in a special by-law enacted by the competent Minister!

3.1.5. *The accreditation process*. In terms of the Health Care Act, accreditation is the process of evaluating the quality of healthcare institutions, based on the application of the optimal level of established standards of healthcare institutions in a particular field of health care or branch of medicine, dentistry, and pharmaceutical activities. Accreditation is conducted by the Agency for Accreditation of Health Care Institutions of Serbia, as an organization that has been vested with the public authority to perform professional, regulatory and development activities (state powers); it is established by the Government on behalf of the Republic, in accordance with the law regulating the activities of

public agencies. Accreditation is *voluntary* and the process ensues upon the request of the healthcare institution!

In the course of administrative procedure, the Accreditation Agency shall issue a *certificate of accreditation* to a healthcare institution that has met the established standards. The decision on the issued certificate is final in the administrative procedure and the discontent party may initiate an administrative dispute proceeding against this decision.

The certificate is issued for a specified period (not exceeding seven years). After the expiry of the specified period, the accreditation procedure may be repeated upon the request of the healthcare institution. The Agency for Accreditation of Health Care Institutions of Serbia may *ex officio* revoke the certificate of accreditation, provided that the health institution no longer meets the established standards in the specific field. The Agency also issues a decision on the revocation and the discontent party may initiate an administrative dispute proceeding against this decision. The decision on revoking the accreditation certificate shall be published in the “Official Gazette of the Republic of Serbia”.

3.2. Special administrative procedures regulated by the Medicines and Medical Devices Act

The largest number of special administrative procedures standardized by the Medicines and Medical Devices Act (hereinafter: MMD Act)⁴ are conducted before the Agency for Medicines and Medical Devices of Serbia. The provision in Article 3 of this Act regulates the responsibilities of the Agency for Medicines and Medical Devices of Serbia.

The Agency has been vested with delegated public powers to exercise certain responsibilities by applying the GAPA rules; thus, the Agency is authorized: to issue medication permits/licenses; to decide on changes, supplements, renewal, conveyance, and termination of medication licences; to register medical devices in the Register of Medical Devices; to decide on amendments and supplements, renewal of registration, and deletion of medical devices from the Register of Medical Devices; to enter traditional herbal medicines in the Register of Traditional Herbal Medicines and to enter homeopathic medicines in the Register of Homeopathic Medicines; to issue licenses for conducting clinical trials of medicines and medical devices; to decide on amending and supplementing a medication licence or the Protocol on conducting clinical trial of medicines; to decide on applications for clinical trial; to control the course of clinical trials; to

⁴ The Medicines and Medical Devices Act (MMDA), *Official Gazette of RS*, no. 30/2010 and 107/2012.

monitor adverse effects of medicines and medical devices; to issue certificates for the purpose of exporting medicines and medical devices in accordance with the recommendations of the World Health Organization; to approve the import of drugs and medical devices for the treatment of a particular patient or a group of patients, as well as drugs and medical devices for scientific and medical research; to classify drugs and medical devices into specific categories; to approve advertising of drugs and medical devices; and to give opinions for import and export of specimens of cells or tissues used in the process of clinical trial of medicines.

The Agency decisions, rendered in the course of exercising the delegated public authority, are appealable; the appeal is filed with the Agency and then forwarded to the competent Ministry which decides on the merits. The Ministry decision is final in the administrative procedure, and a discontent party is entitled to initiate an administrative dispute proceeding.

3.2.1. *The procedure of issuing a medication licence.* One of the most specific procedures envisaged in this Act is certainly the procedure of issuing a medication licence.

The provision in Article 27 of the MMD Act specifies the parties in this special administrative procedure, i.e. who can apply for a medication licence and what specific conditions should be met by such legal entities. The Act envisages special properties of these legal entities, as a condition of their participation in the procedure for issuing a medication licence. Thus, the applicant is obliged to appoint a qualified responsible person for pharmacovigilance, as well as a responsible person for documentation in the process of obtaining a medication licence (amending and supplementing, or renewing the licence), both of whom shall be employed by the applicant on the basis a full-time employment contract for an indefinite period of time. Certain categories of applicants must also employ a responsible person for the marketing and distribution of the medicine: that person shall meet the requirements prescribed by the Act and the secondary legislation adopted for the purpose of implementing this Act.

The provision in Article 28 stipulates that a medication licence can be obtained on the basis of complete or abridged documentation. The licence may also be obtained under special conditions if the medication is permitted as a cure under a centralised procedure in countries of the European Union.

The Act has delegated the normative powers to the individual heads of certain ministries. Thus, the competent Minister of Health and the Minister responsible for the veterinary affairs jointly prescribe the specific requirements for issuing a medication licence, the content of documents necessary for obtaining a medication licence, as well as the procedure for obtaining the licence.

According to the provisions in Article 31, if a medication license is issued for the first time in the Republic of Serbia or in the countries of the European Union, in compliance with the MMD Act and the secondary legislation for the implementation of this Act, or in accordance with the EU requirements for the specific medication, any new medication license that includes changes or additions to this medication licence (in terms of drug strength, pharmaceutical forms, manner of administering the drug, and packaging), as well as all variations and applications for extension of the medication licence, should be an integral part of the first medication licence, and they are part of a single, global system of issuing medication licences (the global license for medication).

According to the provisions in Article 33 of the MMD Act, in the Republic of Serbia the medication is marketed on the basis of licences issued by the competent Agency for Medicines and Medical Devices. Request for a medication licence shall be submitted to the Agency with appropriate documentation prescribed by the Act and the secondary legislation for the implementation of this Act.

The Agency shall formally assess the submitted documentation within a period of 30 days from the date of receipt of the request. If the request documentation is incomplete, the Agency shall notify the applicant, in writing, to supplement the required data within 30 days from the date of delivery of the written notification.

No later than 210 days from the date of receipt of a complete application, the Agency shall make a decision to issue the medication licence or to reject an application for a medication licence, relying on the opinions and documentation reviews made by the relevant Commission established by the Agency on the quality, safety and efficacy of medicines. The period of 210 days stops running from the date when the Agency issues a formal request to the applicant for further information, and it continues to run from the day of submitting the requested data.

A medication license is issued for a period of *five years* from the day of rendering the decision on the issuance of the medication licence, unless the Act provides otherwise. The medication license is issued for a particular strength, pharmaceutical form and packaging of a particular drug. In the licence, the Agency also lists each production facility and each distribution facility where of medication is placed on the market in the territory of the Republic of Serbia.

According to the provisions in Article 34 of the MMD Act, a medication license may be issued under *accelerated procedure* in the following cases: if a medication used in human medicine is of the highest interest for the protection of general health of the population, primarily regarding therapeutic innovations; for a drug that has already been granted a licence under a centralised procedure in the EU countries.

The application for a medication licence under the accelerated procedure must include a list of all reasons related to the protection of general health of the population and the applicant must submit all documentation prescribed by this Act and the secondary legislation. If an application for a medication licence under accelerated procedure is incomplete, the Agency shall notify the applicant in writing to supply further information within 30 days from the date of delivery of the written notice. No later than 150 days from the date of receipt of a complete request, the Agency is obliged to decide to issue the licence or to reject the request, on the basis of the opinions and assessment of documentation regarding the quality, safety and efficacy of the drug. The period of 150 days stops running from the date when the Agency issues a formal request to the applicant for further information, and it continues to run from the day of submitting the requested data. The medication license under the accelerated procedure shall be issued for *five years* from the day of rendering the decision on the issuance of the licence, unless the Act provides otherwise.

3.2.2. Conditional medication license. Article 35 provides that, subject to a prior agreement with the applicant, the Agency may issue a medication licence while obliging the applicant to fulfill specific obligations; in that case, the Agency checks whether the applicant has fulfilled the obligations once in every 12 months, starting from the date of issuing the conditional licence. The obligations to be fulfilled by the applicant, as well as the period for which the conditional license has been issued, shall be published on the Agency website within a period of 8 days from the day of issuing the conditional licence. A conditional licence may also be issued under the accelerated procedure, as envisaged in Article 34 of the MMD Act.

A conditional medical licence is issued for a period of 12 months, and it may be subsequently renewed until the applicant has fulfilled all the conditions specified in Article 29 (para. 1, point 4) of the Act (concerning the clinical data about a medication) if the public health benefits of applying this medication outweigh the risks stemming from the lack of specific information about clinical trials. In emergency cases involving immediate danger to public health, a conditional medication licence may be issued without all the data required in Article 29 (para. 1, points 2 and 3) of the Act. If one meets the conditions specified in Article 29 (para. 1, point 4), or the conditions specified in Article 29 (para.1, points 2 and 3) of the Act, the Agency shall issue a medication licence for a period of five years.

The holder of a conditional medication license is required to submit a *periodic safety report* of the drug to the Agency every six months during the period of validity of the conditional license.

3.2.3. Issuing a medication licence under special circumstances. The provision in Article 36 stipulates that, exceptionally and subject to a prior agreement with the applicant, the Agency may issue a medication licence under special circumstances: for a mediation of particular public health interest for a period of 12 months from the date of issuing the licence, whereby the applicant is obliged to fulfill the obligations related to the safety of the drug and inform the Agency of any unwanted event during the use of the drug as well as of the security measures that have been taken thereof. The obligations that the applicant is bound to fulfill in that situation, as well as the period for which a medication licence is issued under special circumstances, shall be published on the Agency website no later than 8 days from the date of issuing the licence.

Upon the applicant's request, the Agency may extend the validity of the issued licence for another period of 12 months from the date of its issuance if there is still a special public health interest, and if the stipulated conditions are met. Under special circumstances, the Agency may extend the validity of the medication licence to a third (and final) 12-month period.

The components of the medication licence are prescribed in Article 37 of the MMD Act. An integral part of the medication licence are the summary characteristics of the medical product, instructions for using the medicine or medical device, and package inserts and outer labels; for veterinary medicines, the components of the licence are the summary characteristics and instructions for use. The Agency is required to publish information about the medication licence with its component parts on the Agency website not later than 30 days from the date of its issuance. The content of the licence is prescribed by agreement between the competent Minister of Health and the competent Minister responsible for Veterinary Affairs.

The provision in Article 40 of the Act which regulates the procedure of amending and supplementing the medication licence will not be analyzed here since it is very similar to the procedure of issuing a medication licence itself; yet, it includes one specificity: no later than 12 months from the date when the Agency delivered the decision on the approval of variations, the holder of a medication licence is obliged to place the medication on the market in accordance with the approved variations.

3.2.4. The procedure for conveyance of a medication licence. One of the characteristics of this special administrative procedure is the possibility of conveying (transferring) the medication licence to another subject. This provision constitutes an exception to the rule that the administrative acts shall regulate personal subjective public rights and statuses, which places a medication licence

in the category of the so-called real administrative acts (Milkov, 2012:32). This exception is pertinent to some other special administrative matters as well.

According to the provisions in Article 41 of the Medicines and Medical Devices Act (MMD Act), the holder of a medication licence may, upon obtaining the approval of the Agency, transfer the license for a particular medication to another medication licence holder who meets the requirements prescribed by the Act and the secondary legislation; thus, on the day when the transfer of the licence is effected, the latter becomes the new holder of the licence for the particular medication.

Within a period of 15 days from the date of receipt of the request, the Agency shall perform a formal evaluation of the documentation pertaining to the conveyance of the medication license in accordance with the MMD Act and the secondary legislation. Within a period of 60 days from the date of receipt of a complete application for conveyance, the Agency shall issue a decision approving the transfer of the licence to a new holder, or refuse a request to transfer the medication license to another. The period of 60 days stops running from the date when the Agency requests further information from the applicant, and it continues to run from the day of submitting the requested data. The new holder of the medication licence is required, not later than 12 months from the date of delivery of the Agency decision on transferring the license, to place the medication on the market in accordance with the approved transfer of the medication license.

Therefore, in this case, there is *derogation from the rule* prohibiting the conveyance of the parties' subjective public rights which are recognised in the administrative procedure. Transfer is permitted only upon obtaining the approval of the Agency. The other specificity (which upgrades the general principles of administrative procedure) is the stay of procedure until a later date when the applicant has submitted the supplements required by the Agency.

Pursuant to the provisions in Article 42 of the Act, a medication license may be renewed after the expiry of the initial five-year period that the licence has been granted for, and on the basis of re-evaluating the risks and benefits of renewal. The request is to be submitted to the Agency 180 days at the earliest, but not later than 90 days, before the medication licence expiry date. Within a period of 15 days from the date of receipt of the request, the Agency shall perform a formal assessment of documents for renewal of the medication license, in accordance with this Act and the secondary legislation. If the request is incomplete, the Agency shall notify the applicant in writing and request additional documents to be submitted within a period of 30 days. The Agency shall make a decision upon the request within a period of 90 days from the date of receipt of a complete request. The period stops running from the date when the Agency requested

from the applicant to submit additional information, and it continues to run from the day of submission of the required information. In accordance with the decision on the license renewal, the holder of a medication licence is required to place the medication on the market within a period of 12 months from date of being delivered the decision concerning the renewal of the medication licence.

3.2.5. Issuing a medication licence for an unlimited time. According to the provisions in Article 43 of the MMD Act, if the Agency determines that the medication licenced in accordance with this Act and the secondary legislation is safe (on the basis of records of pharmacovigilance for a period of five years from the date of issuance or renewal of the license), the Agency shall issue a medication licence for an unlimited time. If the Agency determines (within the specified period of time) that the drug is not safe (on the basis of the pharmacovigilance data), it is obliged to reject the application for a medication licence for an unlimited time; in this case, the Agency shall decide on the renewal of the licence for a period of five years. In accordance with Article 43 paragraph 2 of the Act, the Agency may renew the medication licence only once; if the Agency finds on the basis of the pharmacovigilance data that there are still reasonable grounds for suspicion that the drug is safe, it shall revoke the medication license.

According to the provisions in Article 44, the validity of a medication licence expires upon the expiry of the period for which it is issued, or upon the request of the licence holders, or upon an *ex officio* decision of the Agency in specific cases (as envisaged in Article 44). Before making a decision, the Agency is required to notify the competent Ministry that the conditions for termination of validity of the medication licence have been satisfied. In order to protect the health of people and animals, the competent Ministry may suggest to the Agency not to take a decision on termination of the medication license in such cases. These provisions do not apply to drugs that holder of the medication licence places on the markets exclusively outside the territory of the Republic of Serbia.

3.2.6. Issuing a medication production licence. According to the provisions in Article 103 of the MMD Act, a license to produce a medication is issued pursuant to a decision of the competent Ministry for a specific production facility and the specific pharmaceutical form that is being produced at that production facility. In its decision, the competent Ministry is also required to specify the distribution facility through which the specific series of that medication will be placed on the market.

An integral part of the decision is the Form of the licence for the production of drugs/mediations, which is prescribed by the competent Minister of Health. The license to produce a specific medicine may also refer to a process or parts of the production process. Unlike the medication licence, the license for the production

of medicines is issued for an indefinite period of time. The drug manufacturer who has been granted the production licence is required to produce the medicine in accordance with the given permission. According to the provisions in Article 104, the competent Ministry runs the Register of licenses issued for the production of drugs.

According to the provisions in Article 105 of the MMD Act, the competent Ministry shall issue a production license within a period of 90 days from the date of receipt of a complete request, if the conditions prescribed by this Act and the secondary legislation have been met. The period stops running from the date when the competent Ministry requests from the applicant to submit the necessary information, and it continues to run from the day of submitting the requested data.

According to the provisions in Article 106, if the manufacturer introduces some changes in terms of the production licence for a particular drug, the manufacturer is obliged to submit a request to the competent Ministry to amend the licence for the production of a specific drug. The licence may be changed under the conditions provided in Article 106.

The competent Ministry may issue an order that repeals the decision on issuing the license to produce a drug in compliance with the conditions provided in Article 107 of the Act.

3.2.7. Issuing of the wholesale licence for distribution of medicines. According to the provisions in Article 123 of the MMD Act, a wholesale license for the wholesale distribution of medicines is issued pursuant to the decision of the competent Ministry for a certain type or class of drugs, as well as for a particular territory where the medicines will be distributed by the legal entity registered for the wholesale of drugs. The wholesale license for distribution of drugs is issued for an indefinite period of time, and a Register of issued permissions is kept within the competent Ministry.

According to the provisions in Article 125, the competent Ministry will issue a wholesale license for the distribution of drugs within a period of 90 days from the receipt of a complete request. The period stops running from the day when the competent Ministry has requested from the applicant the necessary additional information and it continues to run from the day of submitting the requested data.

As in the previous cases, a wholesale license for distribution of drugs may be modified, under the terms envisaged in Article 126, or discontinued under the conditions specified in Article 127 of the Act.

The procedure for issuing the decision on the registration of medical devices in the Register of medical devices and the procedure for issuing the licence for the production of medical devices are similar (but somewhat simpler) to the aforementioned procedures. For this reason, they will not be analyzed in this paper.

3.3. Special Administrative Procedures regulated by the Health Insurance Act

3.3.1. The process of entering a drug on the List of Medicines. According to the provisions in Article 43 of the Health Insurance Act,⁵ the holder of licence to market a medicine shall submit a request and the necessary documentation to the Republic Health Insurance Fund to enter a medicine on the List of Medicines, to modify and update the List, or to remove a medicine drug from the List.

Special characteristics, or deviations from the general principles of the administrative procedure, are reflected in the fact that the decisions upon request are final in the administrative procedure, which means that there is no right of appeal and that the Republic Health Insurance Fund adopts a general legal act that sets out a list of medicines as well as the criteria and conditions that need to be fulfilled.

3.4. Special administrative procedures regulated by the Chambers of Health Professionals Act

According to the provisions in Article 7 of the Chambers of Health Professionals Act (hereinafter: the Chambers Act), the Chamber has eleven competences under its own jurisdiction, whereas the GAPA is applied in the following cases: when the Chamber performs the registration of health workers, under conditions prescribed by law, and keeps directory of all members of the Chamber; when it issues, renews and revokes the license for independent work to members of the Chamber who are registered in the directory of members, and keeps the directory of issued, renewed and withdrawn licenses; and when, upon the request of the Chamber members or other authorized legal or natural person, the Chamber publishes public documents, such as: extracts from the directories, certificates and confirmations of facts on which records are kept.

3.4.1. The procedure of issuing, renewing, and revoking the licenses. Article 9 of the Chambers Act provides that the Chamber issues, renews or revokes licenses of healthcare workers, under the conditions stipulated in the Health Care Act. This has already been discussed in point 3.1.

⁵ The Health Insurance Act, *Official Gazette of RS*, no. 107/2005, 109/2005 - amended, 57/2011, 110/2012 - decision, 119/2012, 99/2014, 123/2014, 126/2014 - Constitutional Court Decision and 106/2015.

Pursuant to the provisions in Article 10 of the Chambers Act, the Chamber (or a branch of the Chamber) keeps the Chamber directories, including: the Directory of all members of the Chamber; the Directory of issued, renewed or revoked licenses; the Directory of disciplinary measures issued to the Chamber members. According to the provisions in Article 11, upon the request of a health care professional, a decision on registration in the directory is issued by the respective branch of the Chamber, within a period of 15 days from the date of submission of the request, in accordance with the Act and the Chamber Statute. This decision is issued by the responsible person in the Chamber branch, as defined by the Statute. This decision may be subject to appeal to the competent body of the Chamber, within a period of 15 days from the date of rendering the decision. The decision upon appeal is final in the administrative procedure and a discontent party may initiate an administrative dispute against it. As we can see, this particular administrative process deviates from the general administrative procedure principles because the decision on registration in the directory needs to be made within a period of 15 days!

Similarly, under Article 12, the registration of issued, renewed or revoked licenses into a relevant directory, which is made by the Chamber *ex officio*, shall be effected within a period of 15 days from the date of issuance, renewal or revocation of the license.

3.4.2. Procedure before the Court of Honor. According to the provisions in Article 43, the Court of Honour may impose appropriate disciplinary measure in case of a breach of professional duty or a violation of reputation of a Chamber member envisaged in Article 40 of the Chambers Act.

Pursuant to the provisions in Article 45, relevant administrative procedure rules concerning the oral hearing, evidence, records and delivery shall accordingly apply in the proceedings before the Court of Honour. The Chamber member whose disciplinary responsibility has been established must be heard in disciplinary proceedings and the member is entitled to legal representation. The Chamber members shall be heard in the course of the disciplinary proceeding before the Court of Honour, and their statements and other presented evidence shall be recorded in the Court minutes. A party dissatisfied with the decision of the first-instance Court of Honour may file an appeal with the second-instance Court of Honour.

One atypical solution set forth in Article 46 of this Act is that an administrative dispute cannot be initiated against a final decision of the Court of Honour which imposes the disciplinary measure of public warning! On the other hand, an administrative dispute may be initiated against the final decisions of the Court of Honour which imposes other disciplinary measures specified in Article 43 points 2), 3) and 4) of this Act.

The Chamber of Health Professionals, or its branch, is required to notify the Ministry of Health about the final decision of the Court of Honour within a period of 8 days. Acting *ex officio*, a Chamber branch is also required to enter the disciplinary measures imposed to the Chamber members in the relevant directory within a period of 15 days from the date of issuing a disciplinary measure.

3.5. Special administrative procedures regulated by the Psychoactive Controlled Substances Act

According to the provisions in Article 18 of the Psychoactive Controlled Substances Act (hereinafter: the PCS Act),⁶ the legal entity which intends to undertake the activity of physico-chemical identification of psychoactive controlled substances shall submit a request to the Ministry of Health *to issue a license to perform the activities of an authorized laboratory*. The Minister decides on issuing a license to perform the activities of an authorized laboratory. At the same time, according to Article 20, the Minister issues a decision that specifies the referential lab for identification and testing of psychoactive controlled substances. In the process of issuing of the decision, the Minister may seek the opinion of the relevant Ministry Commission.

Unlike the Medicines and Medical Devices Act, the PSC Act explicitly prohibits to a legal entity which has been issued the licence to produce or distribute medicines to transfer the production or distribution licence to any other legal or natural person. This raises a theoretical question whether this is the so-called personal or real administrative act, which has been “removed from legal transactions” in the public interest.

The Psychoactive Controlled Substances Act regulates the procedure for issuing licences to import or export psychoactive controlled substances and the procedure for issuing permissions to cultivate hemp or poppy, but these procedures will not be analyzed in this paper.

According to the provisions in Article 6 of the Act on Substances used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances,⁷ manufacture of or trading with the precursors of the first, second or third category can be performed by a legal entity which has been issued a permit by the Ministry to produce or trade with the precursors of the first, second or third category.

6 The Psychoactive Controlled Substances Act, *Official Gazette of RS*, no. 99/2010.

7 The Act on Substances used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances, *Official Gazette of RS*, no. 107/2005.

4. Concluding remarks

The paper presents the most important characteristics of special administrative procedures regulated by the Health Care Act, the Medicines and Medical Devices Act, the Health Insurance Act, the Chambers of Health Professionals Act and the Psychoactive Controlled Substances Act. The analysis does not cover the Act on the Substances used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances, which contains norms that regulate the procedure of issuing permissions for the manufacture of and trading with precursors, and the procedure for issuing permits for the import, export or transit of precursors of the first, second, or third categories. These procedures have not been analyzed because they do not contain especially significant deviations from the general administrative procedure.

The key characteristics of the legislation in the area of healthcare matters are given in Table 1.

Table 1. *Key characteristics of legislation in the area of healthcare*

	Does the Act contain special administrative procedure provisions?	Does the Act provides for the subsidiary application of the GAPA?	Does the Act specifically regulate the application/ registration of the party?
Health Care Act	Yes, procedure for assessing the fulfillment of conditions for performing healthcare activities; process of approving the performance of certain healthcare-related activities; procedure for issuing permits for the use of new medical technologies; procedure for approval of specialization and sub-specialization; procedure for issuing, renewing, and revoking licenses for independent work; procedure of internal and external quality checks of healthcare facilities; the process of accreditation of healthcare institutions; procedure for revoking the certificate of accreditation.	Not explicitly.	Yes, but not in all cases.

Medicines and Medical Devices Act	Yes, procedure for issuing the medication licence; procedure for issuing a production licence for medicines; compliance procedure; procedure for issuing the wholesale licence; procedure for registration in the register for of issuing permissions for the production of medical devices	Yes.	Yes, Very precise.
Health Insurance Act	Yes, the process of entering a drug on the List of Medicines; procedure for exercising the right to compensation of earnings during the process of determining incapacitation to work; procedure for obtaining the status in the capacity of insured persons; procedure to determine temporary disability; procedure to establish the rights from obligatory health insurance.	Yes	Yes, but not in all cases.
Chambers of Health Workers Act	Yes. The issuance, renewal and revocation of licenses; proceedings before the Court of Honor.	Yes, but not in all cases.	Yes, but not in all cases.
Psychoactive Controlled Substances Act	Yes, procedure for issuing licences to perform the activities of authorized and referential laboratories; procedure for issuing licences for production or trading with controlled substances; process of issuing licenses for the import or export of controlled substances; procedure of issuing licences for the cultivation of hemp or poppy.	Yes	Yes.

	Does the Act prescribe specific administrative decisions, acts, contracts, warranty acts?	Does the Act prescribe time limits for the issuance of administrative act, action, agreement?	Does the Act explicitly provide for remedies?
Health Care Act	Yes. (decision, permissions, license-public documents, a temporary license, the decision on issued certificate)	Yes, standard administrative procedure deadlines.	Yes (only administrative dispute)
Medicines and Medical Devices Act	Permissions. Register of issued licenses.	Yes, in some cases significantly longer than in classic administrative procedure: 210, 150, 90 days.	Yes (appeal and administrative proceedings).
Health Insurance Act	Decisions.	Yes, 120, 90 days and standard administrative procedure deadlines, which in some cases can have a specific effect (art. 81).	Yes (only administrative dispute)
Chambers of Health Workers Act	Licence.	Yes. The standard administrative procedure time limits.	Yes. Administrative dispute except in case of public warning.
Psychoactive Controlled Substances Act	Decisions. Permissions. Certificate of acquired knowledge in the field of psychoactive of controlled substances. Notices and records (registers).	Yes. 90 days.	/

Table 1 shows that almost all of the analysed laws include provisions on the *subsidiary application* of the General Administrative Procedure Act (GAPA) to special administrative procedures. Most of these laws additionally regulate

the form of applications and types of decisions of the administrative authority (different permits and licenses); in the author's opinion, it is a good solution.

The Medicines and Medical Devices Act, the Health Insurance act and the Psychoactive Controlled Substances Act envisage longer deadlines for the decision making of administrative bodies, which may be justified considering the complexity of those special administrative procedures.

In most of the analyzed procedures, the appeal may not be used as a regular legal remedy; when the issued administrative decisions become final, the party is referred to initiate an administrative dispute before the Administrative Court. This deviation from the principle of two-instance adjudication is a result of organizational solutions or the lack of a hierarchically higher authority (to act) in such situations.

It may be noted that the general lack in the regulation of the analyzed special administrative procedures, not only in the field of health care but also in many other special administrative areas, is that *a more detailed regulation of procedures contained in these laws is largely left to the secondary legislation of administrative bodies and specialized agencies*. This is contrary to the standards specified in Article 3 of the GAPA, which stipulates that that special administrative procedures may be elaborated only by the acts of Parliament, not with the secondary legislations. These administrative regulations have remained outside the framework of this analysis.

The next problem is the designation of individual *positive administrative acts* (licenses, permits and others) as *public documents*, which further implies that a discontent party may not seek legal remedy against such acts. The legal character of the classic administrative acts has only been given to the *negative* decisions, as the legislation explicitly provides that the discontent party is permitted to initiate an administrative dispute proceeding.

Another interesting solution that deviates from the GAPA rules is the stay of procedure until the parties complete their applications (most of the procedures regulated by the Medicines and Medical Devices Act).

Finally, according to the provisions in Article 46 of the Chambers of Health Workers Act, an *administrative dispute cannot be instigated* against final decisions of the Court of Honour which has issued the disciplinary measure of public warning!

The overall conclusion is that the aforementioned laws should be further harmonized with the GAPA rules but in such a way that it does not jeopardize the specific features of the matter they regulate.

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Закон о психоактивним контролисаним супстанцама (the Psychoactive Substances Control Act), *Сл. гласник РС*, бр. 99/2010.

Закон о супстанцама које се користе у недозвољеној производњи опојних дрога и психотропних супстанци (the Act on Substances used in the Illicit Production of Narcotic Drugs and Psychotropic Substances), *Сл. гласник РС*, бр. 107/2005.

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СПЕЦИФИЧНОСТИ ПОСЕБНИХ УПРАВНИХ ПРОЦЕДУРА У МАТЕРИЈИ ЗДРАВСТВА

Резиме

Предмет анализе у овом раду су управно-процесне одредбе најважнијих закона у области здравства у Републици Србији: Закона о здравственој заштити, Закона о лековима и медицинским средствима, Закона о здравственом осигурању, Закона о коморама здравствених радника, Закона о психоактивним контролисаним супстанцама и Закона о супстанцама које се користе у недозвољеној производњи опојних дрога и психотропних супстанци. Основни циљ рада јесте да се утврди да постоје одступања управно-процесних одредби наведених закона од најзначајнијих принципа управног поступања предвиђених Законом о општем управном поступку. Резултати до који се у раду дошло (дужи рокови за доношење управног акта, одступање од начела двостепености, претерано коришћење подзаконских општих аката управе ради регулисања ове материје, карактерисања позитивних управних аката као јавних исправа, и др.) указују на неопходност усаглашавања посебних управних поступака са нормама општег управног поступка.

Кључне речи: *посебно управно право, управни поступак, посебни управни поступци, здравство.*

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CONSTITUTIONAL ASSUMPTIONS OF PUBLIC AGENCIES CONTROL

Abstract: *In some constitutional systems, the establishment of public agencies creates a parallelism of institutions at the same state legislative and political level, which has proved to be an unsatisfactory solution. The most important consequence of such a solution is a renewed increase of influence of Ministries and Departments, and their control over public agencies which were previously given considerable amount of autonomy. On the other hand, is the problem of inadequate control mechanism for scrutinizing the work of public agencies through ministries, government and parliament. The control of political influence can be achieved by specifying the legal status of public agencies. From the rule of law standpoint, it is necessary to change legislation and create conditions for free functioning of independent regulatory bodies and other types of public agencies. Therefore, in future legislative solutions, the status of different public agencies (both within and outside the state structure) should be clearly defined, especially those that perform regulatory functions. The author believes that it is possible to establish a clear and coherent constitutional model of public agencies within the administration; it means that agencies need to solve difficult tasks and problems but, given that political influence is unavoidable in all comparative law systems, political influence should be controlled by institutional legal mechanisms as well as the mechanisms of public policy evaluation. The research results on this subject matter should be the basis for creating public policy guidelines in the agencification of the Serbian political system.*

Keywords: *control, public agencies, agency governance, regulatory bodies, agency autonomy.*

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1. Advantages and problems of agencification

The agency model of public administration aims to divide large ministries and administration in order to create smaller organizations that are more flexible and easier to manage, with clearly defined rules and tasks, as well as open and subject to review. Public agencies should correspond to the idea of a user-oriented administration. However, the emergence of this new organizational form (public agencies) raises numerous theoretical challenges and opens practical questions (Lilić, 2010: 37-48). Public agencies may be entrusted different public authorities: administrative, developmental and regulatory. The issues of independence of public agencies and their legal responsibility are particularly emphasized, as well as the administrative and judicial control of acts passed by these agencies.

The main advantages of establishing different kinds of independent public agencies, including regulatory agencies, outside the state administration system are the following:

- increasing the level of operative efficiency of the administrative system,
- increasing the system flexibility in achieving public interest,
- managerial autonomy in the execution of agency operations,
- increasing the expertise in the decision-making and the execution of decisions,
- ensuring the independence of agencies,
- distancing from political influences and pressure in the implementation of public affairs,
- involving the civil society in decision-making (e.g. membership in public agency councils, etc.).

The major point concerning the existence and criteria for establishing public agencies is embodied in the fact that certain public affairs are performed more efficiently and rationally than when the same affairs are performed by state administration bodies. An additional criterion for the establishment of agencies (not all of them though) is that the funds for such activities can be provided from administrative taxes, that is, from other forms of public agencies' direct financial income (licenses, tariffs, etc.). Finally, an important criterion is the fact that a permanent political control is not required in the areas of activities of public agencies. On the contrary, the implementation of tasks in the jurisdiction of agencies should be kept away from the influence of daily politics (Laking, 2002).

Apart from some advantages of transferring public functions to public agencies, there are certain problems or risks that have been noticed in the operation of public agencies. They are:

- fragmentation of the administrative system,
- lack of transparency in the work of agencies and their internal organs,
- *degree of control* over the agencies is reduced as there is no more direct control (influence) of the Ministry,
- the degree of *Minister's responsibility* is reduced proportionally to the degree of independence of public agencies,¹
- dysfunctionality of agencies since they can put their narrow interests before the interests of service users,
- restriction of the autonomy of agencies with the covert activity of political factors,
- balancing the autonomy, control and accountability of public agencies.

Therefore, the advantages of regulatory bodies can potentially be their greatest weakness. Market regulation by means of independent bodies encourages the multiplication of administrative procedures, inflation of regulations and bureaucratization of the state apparatus. A significant part of the normative activity is carried out within the framework of regulatory bodies. This causes a normative hyper-production and creation of a large number of non-harmonized regulations, which paralyzes the functioning of the legal system and the market.²

The mass creation of independent bodies increases the budget costs. Significant financial investments, fulfillment of complex technical and personnel requirements are necessary for their functioning. In poor countries, such as Serbia, a lack of resources prevents the idea of independent regulatory bodies and public agencies.

Some public agencies are becoming alienated power centers. On the one hand, that power is the consequence of a covert politicization of public agencies which comes from the state, that is, the current political elite, which acts institutionally; on the other hand, major capital and economic interests are a real threat

1 In this case, we believe that the Minister should be responsible for the state in a particular administrative area which is in the jurisdiction of a particular public agency.

2 Looking at some influential public agencies, such as the *Anti-Corruption Agency* and the *Commission for Protection of Competition*, which have the status of independent regulatory bodies, we can observe the problems in the position, role and functioning of independent regulatory bodies in the Republic of Serbia.

to independent public agencies, especially in transitional societies. Instead of reducing corruption, public agencies are becoming "cooperative", politically biased and unprofessional.

A large concentration of jurisdiction (authorities) as well as legal and factual power in the hands of public regulatory agencies raises the question of who will control our controllers. The irresponsible performance of supervisory and regulatory authorities also jeopardizes the meaning of the basic principle of the legal state – the principle of the separation of powers and the rule of law.

Another problem for the functioning of public agencies is that the regulatory function is not separated from the operational performance of activity. The main problem and the risk of agencification can best be seen on the example of the most developed agency organization form – independent regulatory bodies. It is the question of (non)separation of roles, that is, the regulatory and the operational-executive functions. The function of determining the legal basis and individual public policies should be separated from the regulatory function, and both of these functions should be separated from the function of service provision in these areas. This division is necessary not only at the global level, but the infrastructure facilities should also be separated from the service provision function. Hence, the function of the national regulatory body in the area of electronic communications should be separated from the function of organizations that provide electronic communication networks, equipment and services. The separation of these functions is required by the aforementioned EU Directive Union,³ which also suggests the separation of the accounting and financial reports on the performance of that activity.

The basic problems of agencification are insurance and the balance of the optimal degree of autonomy, as well as the implementation of appropriate control mechanisms.

Institutional prerequisites for the proper functioning of public agencies and regulatory bodies are: clear and quality legislation, appropriate public policies in the respective administrative sectors, and the separation of service provision from the regulation function. In order to determine the legal basis and public policies, clear laws (determining standards, regulatory powers and institutional frameworks) should primarily be adopted, and clear objectives of the policy (standards; a certain level of expected services; social, economic and time frames to provide services) should be established. The regulatory framework for the functioning of an individual sector means the implementa-

3 See: Article 13 of the Directive no. 2002/21/EC of the European Parliament and of the European Council from March 7, 2002 on a common regulatory framework for electronic communication networks and services.

tion of a legally determined policy, compliance with statutory obligations and unhindered performance of activities by approving the tariffs and prices of public services, monitoring of policy implementation, monitoring, supervision and assessment of the performance of services. These are typical methods of a new public management.

A particular challenge of the regulatory process is the fact that many questions are not defined, such as: who sets the national standards in a particular field of regulation; who defines the infrastructure needs and who is the owner of the infrastructure; who implements the public policy of a particular area; how is the (economic) cost of public services defined; who approves the prices (tariffs); who protects the interests of consumers, i.e. the users of public services; what subjects provide services or carry out operational activities – public enterprises and institutions or private providers, or organizations of public-private partnerships.

Because of the aforementioned problems and risks created by the process of agencification, there is a de-agencification trend in the practice of many countries, which includes the strengthening of executive agencies which are directly subordinate to the central government administration. Such “silent” organizational trends can be seen especially in the British Executive Agency model, which is designed to re-establish the division between the politics and management (Verhoest, Van Thiel, Bouckaert, Laegreid, 2011: 62).

2. Challenges of the regulatory process and independent Regulatory agencies

The contemporary society is characterized by the emergence and development of independent regulatory bodies. The term (independent) regulatory body comes from the term regulation, which means ‘to regulate, control and direct by using rules, restrictions and sanctions’ (Dujčić, Marković, 2006: 1555–1580). Regulatory is something that has the power to officially control a particular sphere to ensure the orderly functioning (McVicar, 1998: 360–362). Regulatory bodies are state institutions authorized to regulate certain areas of social interest. They manage and direct and thus control economic, administrative, cultural and other social activities in the public interest.

Agencies that have regulatory powers have become the main instrument of the state for the improvement of efficiency, service delivery, competition and protection of consumers and citizens in order to set the standards for performing public service (Majone, Surdej, 2006). They appear in economic and non-economic public services.

Independent regulatory bodies represent a special organizational form of exercising public powers. Unlike other public agencies, they are characterized by a higher degree of independence and autonomy in relation to the executive and legislative (political) power. Regulatory agencies have the necessary financial resources allocated in the central budget, the right to make by-laws on internal organization and to independently decide on the involvement of officers and other persons employed at the regulatory (personal power) body. One of the advantages of their autonomous position is that it provides a better quality of services to citizens, which has a positive influence on the development of democratic processes.

On the other hand, risks and new challenges of a decentralized and dispatched regulatory process are being created. Normative and regulatory activity of independent agencies has reached gigantic proportions (Martinović, 2012: 392). There is almost no area of social life that is not regulated by thousands of different regulations issued by independent agencies. Thus, in the United States, since the beginning of the eighties, agencies have annually issued an average of seven to nine thousand regulations, both new and the amended versions of the existing ones. This increases the Federal Register of regulations for tens of thousands of pages each year, over twenty times more than the American Congress (Smerdel, 1984: 273).

During the Republican election campaign, US President Ronald Reagan proclaimed seven principles of the so-called *regulatory reform*: 1) strengthening the budget control of independent agencies, 2) a temporary moratorium on all legislative proposals found by the new administration, 3) Congress veto, as a form of control of the legislative body over the normative agency activity, 4) judicial review of normative acts of independent agencies even before using the legal remedies in the administrative hierarchy, 5) elimination of the presumption in favor of the validity of federal regulations, 6) agency obligations to strictly adhere to their regulations, unless the Congress amends or repeals them by a law, or a veto, 7) compensation of damage to those who suffered it due to the regulatory activity of agencies. Having won the race for the new US president, in early 1981 Reagan issued the *Executive Order* number 12291, which suspended the adoption of all regulations that were in the stage of preparation and formed a working group for the regulatory reform in order to limit and reduce the legislative activity of independent agencies (Smerdel, 1984: 322).

In the Republic of Serbia, independent regulatory bodies have been established since 2002, therefore, before the adoption of the Law on Public Agencies (2005), primarily in the area of media law (broadcasting and telecommunications) and energy resources. They are established in order to prevent the conflicts of inter-

est, fight corruption, control the administration and protect human rights, audit the state revenue and expenditure, securities, etc. In the last couple of years, dozens of independent agencies have been formed in various fields.

However, public agencies are faced with three main groups of problems: the slow-paced establishment of public agencies, the inadequate working conditions, and problems and misunderstandings in relations with other state authorities (which are burdened with politicization or ignore the activities of agencies). For us, the third complex of problems is of special importance because it puts the actual position of public agencies at the center of our attention and reveals that there is a kind of paralysis and ineffectiveness of institutions in the political arena. The powerlessness of independent regulatory bodies points to another important aspect – the need for its effectiveness to depend on political support.

3. Politicization of public agencies

The political influence on agencies is obvious and uncontested. It cannot be avoided at the current level of social and political development of the Serbian society. Therefore, we need to find mechanisms and ways to measure, control and regulate it.

Politicization can be defined in different ways. Politicization is dynamically determined as a process in which professionalism and merit system are replaced with the political and party criteria. However, such a view of politicization is too narrow because there are various types of agency politicization, such as: (1) political and ideological influence, e.g. the ideology of the “new” centralization of public administration based on the understanding that a large number of agencies leads to a lack of transparency and democratic deficit of the system; (2) organizational and structural politicization, which implies that the political elite establishes or cancels certain agency bodies or makes any other organizational changes; (3) personal politicization, which is manifested in the political appointment of the agency director, or in the shift or firing of officials or agency employees; and (4) financial politicization, which is reflected in the budgetary control and other financial mechanisms of giving or withholding material resources for the operation of public agencies. Thus, in the United Kingdom, there are two ways to finance executive agencies: from the Parliament-approved funds, which may fully cover their activities (*fully-funded basis*) or just the basic part (*net-funded basis*), and from market funds, which are not politically conditioned and controlled (Verhoest, Van Thiel, Bouckaert, Laegreid, 2011: 60).

Therefore, politicization must be comprehensively defined as any other form of excessive supervision or control, which comes from political sources or which

is driven by political motives and criteria outside or beyond the legislative framework (legal norms).⁴

There are opinions that there should be a higher political influence on the work of agencies. The political influence on agencies is a common occurrence in all systems. Politicization is something that should be an integral part of political processes in the institutional arena. In contrast to purely technical and bureaucratic agencies, the politicization of agencies is preferred because it leads and directs the operation of agencies, and it assumes the concept that politics is a good thing. In fact, all institutions should be more politically controlled. This attitude is particularly advocated by American and German authors (Verhoest, Van Thiel, Bouckaert, Laegreid, 2011: 166).

Such understanding is contrary to the concept of agencies as independent bodies. Yet, it also implies an attitude that agencies, which are quite independent of political influence, are threatened by other types of institutional risk, and come under the influence and control of the economic power of industry and private capital. For this reason, a much better and a more natural position of public agencies is the one that brings them back into the sphere of political influence, which is such that it not only allows for the processes of politicization of agencies but also ensures the public agencies' feedback on the political processes and institutions of the legal and political system (*agencification*).

Agencies may preserve their identity only by preserving the principle of legality, which includes independent and individual management, i.e. the implementation of legal procedures by agencies themselves. This is because agencies suffer numerous informal influences due to which they often exhibit certain weaknesses.

However, the political influence and the institutional control over agencies are necessary to prevent an excessive independence of agencies. The autonomy and neutral position of agencies is generally a good and desirable thing. It is a precondition of their full professionalism and a quality impact in the institutional arena, either at the national or international level. However, the problem is not an independent position of agencies as such but rather the abuse of that position and their distancing from the real political and social needs. Hence, their democratic deficit is often emphasized as an objection to the work of agencies.

In many countries, agencies are envisaged in legislation whereas in some other countries they are also envisaged in the constitution, which guarantees their separation from ministries and a certain amount of independence, including the right to control, usually by judicial authorities. The principle of autonomy,

⁴ As a matter of fact, by-laws of the government, ministries or agencies themselves (the same or others) can often be used to introduce control authorities beyond those that are defined by the law.

envisaged either by the law or by the constitution, means that no one, not even the Parliament, can determine how agencies should make a decision or apply the law. That institutional independence is a bar from any legal impact (of a ministry or government) and any political influence on agencies when it comes to applying the law in specific legal situations.

However, agencies are still subordinated to the Government as the executive, or the executive and political power. Hence, agencies should be accountable and submit reports on their work to Parliament. The parliamentary control is perceived as a healthy and desirable political influence which should prevent a bad political influence of the executive authorities, inevitably exerted through the ministries and the Government, which is not purely legal but it is also “covertly” political, especially in transition countries (Profiroiu, Petrovsky, Jennings, 2011).

4. Control of public agencies

When talking about the forms of agency control, a distinction is made between the political control and the judicial control. Political control of agencies is carried out by the legislative and executive authorities, and it focuses on the evaluation of discretionary powers of an agency to perform specific activities. However, the executive branch bodies (ministries, government) may also exercise the legal control over an agency’s work, especially control over the operations of (executive) agencies that are part of the organizational structure of ministries; yet, that control is narrowed because the decisions of agencies are final. In many countries there is not much space to appeal, but there are other corrective remedies (reports, instructions, etc.).

The agency model sets new requirements before administrative system relating to securing the control of a large number of agency organizations, the introduction of various mechanisms and instruments for raising and monitoring the quality of work and, finally, the coordination of the entire complex system. Thus, a new system of public responsibility is created, which is based on three criteria. Firstly, the activities leading the public bodies must be in the “public interest”; secondly, the state must be the main funder of public bodies; and, thirdly, public bodies must be under the direct control of the country.

How to establish a relationship, or rather a balance, between the autonomy which should follow the status of public agencies and the control of their work (Lilić, 2009: 284)? The autonomy and independence of public agencies represent their main characteristics and the reason for their institutional shaping (Musa, 2003: 198), but their autonomy is not (just) a formal matter, given that it should actually function in the system of institutional relations as well. Hence, the important

questions are: who controls public agencies, what are the controlling powers of the authorized controlling authority, and what is the subject of control?

The state can narrow the autonomy of public bodies because the managers are often appointed by the Minister, so there is a strong personal influence. In France, for example, this applies not only to non-autonomous but also to autonomous public bodies (Verhoest, Van Thiel, Bouckaert, Laegreid, 2011: 98).

Another problem refers to the broad powers of agencies, especially of independent regulatory agencies. Due to a wide range and diversity of agencies, there are frequent complications in their relations within the public administration system, and in the entire institutional arena. The main reason is that functions of control over public agencies are not completely defined, and the system of accountability is also not developed. Their legal and constitutional status is yet another problem.

The Constitution of the Republic of Serbia, in Article 137, prescribes that in order to have a more efficient and rational exercise of the rights and obligations of citizens and in order to satisfy their needs of vital importance for life and work, the law can entrust the execution of certain tasks within the jurisdiction of the Republic of Serbia to the autonomous province or a unit of a local self-government. Certain public powers may be legally delegated to enterprises, institutions, organizations and individuals. Public authorities may also be legally delegated to specific bodies through which they perform the regulatory function in particular fields or business activities.

The scope of control of the operation (acts and actions) of public agencies depends on the legally regulated relations between agencies and state administration bodies, or on the degree of influence that state administration bodies have or may have on agencies. However, these relations are not only controlled by the state/public administration. Public agencies are also closely related to Parliament and the government. There is an opinion that these links are so "numerous and complex" that there is an impression that "no one controls the operation of public agencies, but they are nevertheless under control." (Terry, 1985: 1094–1116; cited after: S. Lilić, 2009: 285).

(1) There is the highest level of control over the so-called *state agencies* because they are established and operate as part of the organizational structure of state administration. In this sense, the work of state agencies is controlled by higher bodies in the public administration system: ministries or, exceptionally, the government (the legality and discretionary powers) and the courts (administrative courts), which control the legality of their work (in administrative dispute proceedings). In principle, each authorized ministry controls the legality and discretion of measures and actions of state agencies.

However, all general rules of administrative control based on hierarchical control do not apply to specific organizations. Thus, the Ministry of Economy does not have all the legal control powers over the Serbian Investment and Export Promotion Agency (SIEPA). The Ministry can only request reports and information on the agencies' work, establish the state of affairs in performing their tasks, warn them about the observed irregularities, issue instructions and possibly suggest to the Government that it should take appropriate measures. It should be kept in mind that in most legal systems (among others, in Serbia and in Montenegro) agency decisions are final because there is no legal possibility for appeal. In a small number of countries, there is a possibility of appeal which is decided upon by the authorized ministry. In most cases, only an administrative dispute before the competent court can be initiated against the decision of an agency. The administrative court can review the legality of administrative and other individual acts of state agencies and other public agencies in individual administrative matters.

In Great Britain, agencies are formally part of ministries. They are not completely separated, but they are not simply a constituent unit within the structure of the authorized ministry. The ministry control is primarily exercised through financial constraints, leading to the strengthening of organizational and managerial autonomy. A significant feature of agencies is also the performance orientation. The performance of British agencies is expressed by key performance indicators (KPI), which are specific and publicly published indicators. They show the performance indicators for each agency in great detail, and the agencies are compared with each other. The key performance indicators are specified for each agency by ministers. It is the control of output results, whereas the resources (input) are controlled in a different way (income of the agency, officials, public policy) (Pollitt, Bouckaert, 2004).⁵ Ministers have the right to control finances and to give instructions, although it is considered that regulatory bodies are independent from the government. They are known as *ad hoc* bodies, *guangos* or quasi-autonomous non-governmental agencies and non-department public bodies (Adler, 2009: 83).

(2) **Public agencies**, as special non-state organizations, perform numerous tasks that may be developmental, professional and/or regulatory. Although these are public agencies as organizations outside the state administration, there are special laws by which they may be given tasks of the state administration bodies and public authorities. Public agencies can primarily be given *traditional tasks of state administration bodies*, such as the resolution of the administrative pro-

⁵ One of the innovations in the funding of agencies were the so-called *net-funded agencies* that could keep part of the income from various taxes and fees, which had a positive effect on their efficiency.

ceedings, keeping records and issuing official documents, etc. If the director of a public agency or a person authorized by him makes the first instance decisions on administrative matters, it raises the following question: which hierarchically superior body decides on the appeal, i.e. in which way a two-stage administrative control is enabled. The authorized ministry, whose scope of work covers certain public agencies, shall decide on the appeal as the second instance organ. This rule arises from the Public Agencies Act, special laws on agencies and the General Administrative Procedure Act (Lilić, 2009: 286).⁶

From the aspect of administrative control, independence means that their administrative acts are final, so they cannot be reviewed in an administrative procedure. A hierarchically higher authority is not established over them, which excludes a regular two-level resolution of administrative matters. Individual decisions of regulatory agencies can only be the subject of judicial review in an administrative dispute before the Administrative Court (e.g. the Republic Broadcasting Agency, etc.).⁷

Thus, apart from the court, no one can annul decisions of regulatory agencies. In a small number of countries, there are special organs of executive and administrative authorities that have special powers to annul the acts of regulatory agencies, such as: the Council of Ministers in Belgium, the Governor in Council in Canada, the Administrative Appeals Chamber in Ireland, and the Board of Appeals in Denmark (Dujčić, Marković, 2006: 1555–1580).

In order for regulatory bodies to be independent from the ministries, and thus from covert political influence of the central administrative authority, it is very important to ensure that the regulatory agencies decisions have the “authority” of the final decision. The independence will be compromised if other state institutions, primarily the ministry whose jurisdiction is closely related to the particular agency area or subject matter,⁸ can annul the decisions of regulatory

6 It should be borne in mind here that, if special agency laws contain specific procedural provisions for action, then these agencies are derogating the general procedural norms contained in the Administrative Procedure Act. In that case, in deciding on the competition for licenses for broadcasting of radio programs of RBA, the norms of the Broadcasting Act will be applied first, and then the norms of the General Administrative Procedure Act (GAPA).

7 *The Broadcasting Act*, Article 37. However, the Broadcasting Act (Article 54) allows the right to complain, in case the applicant for a public tender is dissatisfied with the decision of the RBA Council. The deadline for filing a complaint is 15 days upon receipt of the negative decision (rejecting the application), and the complaint shall be submitted to the Council of RBA. The objection is a remonstrative remedy because there is no higher body than the RBA. The decision of the RBA Council issued upon the complaint is final, and a person can only initiate a lawsuit and start an administrative dispute against it.

8 It should be indicated that the term “power agency” does not coincide with the term appropriate “administrative area” because the agency has much broader powers (regulatory

agencies. Even if ministers sometimes have a formal authority to annul the decisions of a regulatory body, they rarely exercise this right (Dujčić, Marković, 2006: 1555–1580).

In the conditions of an absent or a very limited administrative control of public agencies, there is a special issue of not only administrative but any kind of control, including the judicial control of the adoption of discretionary acts (decisions) by regulatory agencies. Based on legal authorizations, public agencies can resolve discretionary matters, by applying the criteria of suitability in the selection of legally permitted alternatives in a particular case. The issue of assessing the appropriateness of discretionary acts can only be examined in the administrative procedure. Since such a possibility is not permitted by the law, which does not prescribe the right of appeal, such discretionary acts can only be assessed by a competent court in an administrative dispute proceeding, but only by examining their legality and not their appropriateness (Lilić, 2010: 37–48).

Thus, the legal control of the acts issued by public agencies in the Republic of Serbia includes, according to the subject of control, the review of the legality of the relevant acts of public agencies, including:

- the legality of regulatory acts (general and abstract laws), which is examined by the Constitutional Court;

the legality of specific and individual administrative acts (for example: licenses, consents to prices, decisions of inspectors, etc.), which is examined by the Administrative Court; exceptionally, in case of a violation of substantive law and a violation of the procedural rules in administrative disputes, which could affect the solution of legal matters, a request can be submitted for an extraordinary review of a court decision against the final decision of the Administrative Court, which is decided by the Supreme Court of Cassation;

in case of lawsuits filed by a dissatisfied party against the acts involving disputes between telecommunications operators (e.g. the Agency for Telecommunications and similar agencies), the legality is examined by the Commercial Court.

By using the control mechanisms of agency “authority”, the institutional balance between the basic holders of government functions is more stable. This is particularly important because it often occurs that agencies, as “independent” bodies, are used in political relations of power control for disputes and political games. Sometimes ministries, government or the president of the state (e.g. USA) stand behind the agency bodies in the game of power in the institutional arena. Namely, by creating independent public agencies, the American Congress

and sometimes judicial), which also include the corresponding administrative area under the jurisdiction of a particular agency.

wanted to limit the authority of the President, whereas the reverse efforts were even more apparent.

A conclusion can be made that the main and perhaps the unattainable goal remains to find a balance between the need to control the agencies and the necessary freedom in their work.

5. The relationship between agencies and the executive authority

Even though the legislative authority in a large number of constitutional and administrative systems represents a source of control over agencies, there is also a number of other sources of controls related to the executive branch of the government. The executive branch has three levels: the ministries, the cabinet of the ministry or of the department that represents the government in a parliamentary system, and the presidential level of the executive authority, which is represented by the President.

The actual political effect of the system of separation of powers is a true strengthening of the executive authority, which firmly stands in front of the legislature, as the original legal and political authority.

1) Ministries. In the majority of the governing systems, the main issue of control over agencies is connected to the control carried out by the ministries. In theory, the relations between ministries and agencies can be represented in three models (Bouckaert, Peters, 2004): (1) the Scandinavian model, (2) the American model and (3) the British model.

The Scandinavian model means that the ministries are formed in certain areas and they are strictly responsible for the management and creation of public policies. On the other hand, there are a number of various collegial bodies and agencies (headed by directors) that are in charge of implementation. Those bodies deal with internal organization. The relationship between the ministries and the agencies is specific because the agencies increasingly take on the role of the creation of public policies, which is the main activity of the ministries. This model is characteristic only for Sweden, while other Scandinavian countries in that area only practice such a model to a certain extent (Bouckaert, Peters, 2004: 32).

The British model shows that at the head of the agency, as a collegial body, is an executive director, who is directly responsible to the ministry. The director of the agency comes to that position after signing the contract and can be dismissed only in specific conditions. That model is different from the classic managerial approach, because the agencies do not have the sufficient autonomy in performing their functions and they are not distanced from the ministry when it comes to control. However, there is a managerial autonomy in terms of operational task

management. The minister can decide to terminate an agency or to reorganize it, by disbanding it or merging it with another one, by restoring its function to the department (ministry) which had entrusted them in the first place, or by replacing that agency with some new kind of public body. In the practice of British agencies, a very large number of agencies was discontinued or reorganized in one of the aforesaid ways (Verhoest, Van Thiel, Bouckaert, Laegreid, 2011: 63).

The American model is characterized by the existence of a number of departments (ministries) which are composed of many different types of agencies. However, their leaders are elected by the President of the USA, usually on the advice of the secretary of the department. Aside from the agencies that are part of the department, there are other numerous independent executive and regulatory agencies. According to the functions and the way they are carried out, that model is similar to the Swedish model but, in Sweden, the ministries are organized on a lesser scale. The autonomy of the agencies within the ministries is different and it varies: from the FBI which has a greater influence than the ministry itself (Bouckaert, Peters, 2004: 33-34)⁹, to the agencies that are under a strict control of the ministry. The ministries still have classic assignments, involving the creation of public policies, their control and coordination with the help of different types of agencies that have various relationships, both within the ministry and among themselves.

In transition countries the relations between the ministry and the agencies were such that the ministries were weaker both legally and in terms of expertise, given that they were not able to recruit appropriate experts with unappealing working conditions. Financial management was weak in the whole public sector, partly due to the insufficient power of the Ministry of Finance, especially in relation to agencies. It led to the increase of salaries and benefits of the employees in agencies and their privileged position in relation to civil servants in the ministries, high administrative costs, cases of fraud and corruption in agencies, and to non-transparent financial operations of agencies, because the agencies' accounts were managed outside the treasury.

In Serbia, the ministries follow the opinions and recommendations of public agencies in various degrees. The control exercised by the responsible ministry is defined by law. There are several forms of ministerial control envisaged in the *Public Agencies Act* (2005).

⁹ *The Federal Bureau Investigation* – the intelligence service that operates within the US Ministry of Justice (whose activities are related to research in more than 2,000 types of federal crimes) in effect denotes the main instrument for fighting against crime (Bouckaert, Peters, 2004: 33-34).

a) First, there is **control over regulatory acts** issued by the public agency (Article 43 PAA), concerning independent regulatory agencies. Prior to the publication of regulatory acts, a public agency is required to obtain from the ministry, within the scope of its operations, the *opinion on the constitutionality and legality* of these regulations.

At the same time, the responsible ministry has the obligation to deliver to the agency in question *a reasoned proposal* on how to harmonize these regulatory acts with the Constitution, the law, the legislative and other general acts of the National Assembly and the Government. The agency is obliged to act in accordance with the ministry proposal. If the public agency does not act according to the ministry proposal, it is required to propose to the founder (the Government) to adopt the *decision on the suspension of the implementation of regulatory acts* and the individual acts based these regulatory acts, as well as to propose the *initiation of the procedure for assessing the constitutionality and legality of regulatory acts*. The decision on suspending the implementation of regulatory acts comes into force when it is published in the "Official Gazette of the Republic of Serbia", but it ceases to be effective if the founder in the following 15 days does not initiate the procedure for the assessment of constitutionality and legality of these regulatory acts .

b) Another form of ministerial control is *control over the operations and performance of a public agency* (Article 44 PAA). The control over the operations and activities entrusted to a public agency by the state is performed by the competent ministry in charge of supervising the public agency activities.

The ministry in charge of financial affairs controls whether the allocated public agency funds have been used lawfully and purposefully, and whether the public agency has implemented the provisions regulating the public finances and financial and accounting operations.

The implementation of the regulatory acts on the official use of language and script, office management, business with clients and customers, the efficiency and timeliness of decision making in administrative procedures, the qualifications of employees that make decisions in administrative procedures, and the authority for decision making in administrative procedures is controlled by the ministry in charge of administrative affairs.

In parliamentary democracies, public agencies are primarily controlled by relevant ministries, which the agencies are accountable to before answering to the parliament. The focus is on the political control of ministerial bureaucracy because, in parliamentary democracies, there is an "indirect control" of the legislative bodies over the agencies. In contrast, in the USA, the Congress can directly control the federal agencies.

In transitional societies, the governments do not always have political will to institute independent regulatory bodies. For certain governments, it is an act of “political suicide” to replace the traditional state administration with independent regulatory bodies (Radojević, 2010: 53–76).

In practice, considering the *modus operandi* of the administrative system, the most prominent problems are the overlapping functions performed by the agencies and the ministries, and the coordination of these functions, which additionally contributes to their complexity. For this reason, one of the priorities in many administrative systems has been to introduce order in the system of agencies, which implies defining the principles and criteria for their establishment, organization and functions, as well as the need for more rational spending of public funds (rationalization of the public sector). There is a clear tendency and practice to define the criteria for forming agencies, given that they spring up uncontrollably like “mushrooms after the rain”, and most often at the initiative of a political factor. Secondly, there is a tendency to define the criteria for the control of agencies as well. Lastly, there is a clear need to redefine the purview of the existing bodies by concentrating similar jobs in the agency or the ministry (by merging or increasing the number of agencies).

2) Government. Pursuant to the *Public Agencies Act* (2005), the founder of public agencies is the Government of Serbia. Namely, the founder’s rights and duties on behalf of the Republic of Serbia are exercised by the Government unless it is otherwise provided by a special law.¹⁰ However, the decisions are proposed to the government by the ministry in the purview of which are the activities of the public agency, so that the decisions and relations between the Government and the agencies are coordinated by the responsible ministries. Thus, in case the public agency activities are in the purview of several ministries, those ministries propose decisions to the Government, as a rule, by mutual agreement.

The Government resorts to a special kind of institutionalized assessment of the agency performance. The Government gives consents to the annual work program, the financial plan of the public agency and other acts determined by this or a special law (Article 42 PAA).¹¹ First, there is also a special form of preventive control through monitoring and evaluation of the annual work program

10 However, there are numerous and significant public agencies that were before, but also after the adoption of the Public Agencies Act (2005), established by the National Assembly. These are mostly independent regulatory agencies, e.g. the Anti-Corruption Agency (2008), the Republic Broadcasting Agency (2002), the Republic Agency for Postal Services (2005) and others.

11 Public Agencies Act (“Official Gazette of the Republic of Serbia”, no. 18/2005, 81/2005).

of the public agency¹² and the financial plan (Article 45 PAA). Namely, until the 15th of December of the current year, the board of directors of the public agency adopts the public agency operative program for the following year and the public agency financial plan, and submits them to the government (as the founder of the public agency) for approval.

Within the scope of *control over regulatory acts* of the public agency (Article 43 PAA), acting on the proposal of the relevant ministry, the Government (as the founder of the public agency) is responsible to issue a *decision on suspension from implementation of regulatory acts* and the individual acts based these regulatory acts. The relevant ministry is at the same time obliged to propose to the Government the *initiation of proceedings for assessing the constitutionality and legality of regulatory acts*. However, the requirement for these Government measures is that the public agency has not acted upon the reasoned proposal of the ministry pertaining to harmonizing the legislation with the Constitution, the law, the legislative or other general acts of the National Assembly and the Government.

The Government, as the founder of public agencies in the Republic of Serbia, also has authority over the agency officials (personnel) because it appoints and dismisses the main bodies of the agency (the board of directors and the director). Namely, the Government appoints the public agency director at the proposal of the ministry in charge of the activities of the public agency, which previously announced a job vacancy and public competition for the position. The public competition is conducted by the board of directors (Article 24 PAA); this body forms a list of candidates that it submitted to the Governments. The Government appoints the members of the board of directors as well. Aside from these appointments, the Government also dismisses the director and members of the board of directors of the public agency.¹³

6. Conclusion

Relatively wide agency autonomy in decision making should be subject to control over the public agency results and performance (*performance management*). That is dictated by the basic principles of the rule of law, contemporary parliamentary democracy and the separation of powers in the innovated institutional arena, which is involved in the process of redesigning the agencies (*agencification*).

12 In line with the act on establishing the public agency, the annual program specifies the main objectives for the following year, as well as the ways in which they will be achieved. The annual program of work includes a proposal of measures for more effective work and more efficient use of resources of the public agency. By a special law or act on establishment, the public agency can be required to cover other issues important for its operation in the annual work program.

13 Public Agencies Act ("Official Gazette of the Republic of Serbia", no. 18/2005, 81/2005).

The problem arises from the fact that agencification is not the subject of a devised strategy followed by appropriate legal regulation and control. Not all public agencies have an “independent” status in accordance with the autonomy proclaimed by the law. Hence, there is the need to improve the legal framework and a stronger commitment to respect the mandate of independent regulatory bodies. Due to political and other pressures on the work of public agencies as independent bodies, the agencies should be depoliticized in the process of decision making and their work should be transparent. It is not enough to just change their name (like, for example, in France) (Verhoest, Van Thiel, Bouckaert, Laegreid, 2011: 101).

At the same time, the state is passive in providing the necessary conditions for independent functioning of public agencies. It may especially be seen in transition countries (Serbia, Croatia, etc.), where there is no legal regulation of the agency model, nor clear criteria on designing the organizational forms and establishing legal control (appeal, administrative dispute proceedings, etc.) (Staničić, 2010). The status of public agencies is not regulated by the Constitution of the Republic of Serbia either. The need for precisely and clearly regulating the position of the agency board stems from the special circumstances where the public agencies were granted a wide scope of authorities that go beyond the public administration affairs (both state and non-state administration); thus, given the absence of a clear scope of competences and insufficient transparency of their work, public agencies infringe the concept of “traditional” separation of powers. That is risky for the legal state, and its underlying principles and standards, because the power of the executive becomes virtually unattainable. The legislative reform of public agencies should first simplify the numerous agency models because it blurs transparency, control and the responsibility of the agencies.

Agencification, as a form of administrative decentralization, can turn into its own opposite by moving towards the center and reducing organizational divergence. Excessive decentralization and oversized establishment of agencies breaks the unity of the administrative system. Fragmentation reduces transparency, control and responsibility, all of which leads to weakening the powers and influence of democratic institutions.

The public reasonably raises the question about what it is that agencies do, why they were formed, and who actually controls them. Politicians, as national public officials (ministers, state secretaries, etc.), “symbolically” bear responsibility for their departments and for the agencies that operate in the field of agency policy, but the key question is how substantial their actual responsibility to control agencies is. The administrative and judicial practice show that the high level of political influence, direction and control of agencies existed especially at

the beginning of agencies' work, when agency directors were obedient to their "mentors" in the ministries. However, in time, the political influence gradually weakened, and it seemed that the agency was finally becoming an autonomous body with independent institutionalized position; yet, it often turned out that it was only the center of political influence on the same agency body that had changed. Therefore, the reform of agencies implies the redefinition of the relations between agencies and ministries in terms of refining the legal provisions on the agency control and the preservation of agency autonomy.

The main problem and task that remains is to maintain control, coordination and quality in fragmented agency administration, and even the state (Power, 2005). It further implies that a system of control or influence of the state on the agencies should be established, which would correct all the weaknesses, problems and risks of agencification. However, the impact exerted on agencies should in fact be focused on the performance and results of the agency work. It implies professional rather than political influence. Thus, the agency performance should be the only criterion for the assessment of agency work, and the key requirement for reforming the legislative/normative framework of public agencies in Serbia.

The agency reform should contribute to the control of the results of the entire administration. The control of the results should be based on concrete indicators such as the number of complaints, the level of bad management and mistakes (*maladministration*), etc. It also includes the economic dimension, since the agencies cause the increase of administrative costs. The reform should further emphasize the dimension of efficacy and effectiveness of the work of agencies, because it affects the economy of the central government as a whole. The reform of public agencies should be based on the achievements of administrative cultures, which are oriented towards the control of performance and results and not the "criteria" of political voluntarism of the current political elite. Performance control through the so-called *on-going* studies and evaluation shifts the whole agency system to establishing more accountability to service users, the executive government, and thereby, to the parliament as well. The reform of agencies must re-establish the principles of the rule of law and restore clear institutionalized rules of the game, but in favor of democratic institutions and the idea of the rule of law.

Many believe that this battle has already been lost in favor of the executive bodies of state government, which have structurally become stronger through executive agencies and the influence they have or may have on these agencies. We believe that the battle is not lost but that the existing system of agencification should be flexibly and wisely reformed, by gradually activating the reversible process of de-agencification, which is necessary due to the excessive autonomy

of agencies and observed weaknesses of agencification. Therefore, the “deficit” of democracy should be corrected in the executive agencies themselves, which should be controlled by a wide range of instruments, one of which is the financial influence and control of every kind (e.g. in the USA).

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УСТАВНЕ ПРЕТПОСТАВКЕ КОНТРОЛЕ ЈАВНИХ АГЕНЦИЈА

Резиме

У неким уставним системима оснивањем јавних агенција ствара се паралелизам институција на истом државноправном и политичком нивоу, што се, показало као нецелисходно решење. Последица таквог стања је поновно јачање утицаја министарстава и департмана и њихове контроле над агенцијама, којима је претходно била дата знатна аутономија. С друге стране, проблем је што министарства, влада и скупштина немају адекватан механизам контроле рада јавних агенција. Контролу политичког утицаја можемо постићи прецизирањем правног положаја јавних агенција. Осим недостатака у нормативном оквиру, техничке препреке и политички притисци отежавају функционисање јавних агенција. Са становишта поштовања начела владавине права, неопходно је изменити правне прописе и створити услове за несметано деловање независних регулаторних тела и других врста јавних агенција. Стога, у будућим нормативним решењима, треба јасније одредити статус различитих врста агенција (оних у државној структури и оних изван ње), а посебно оних које обављају регулаторну функцију. Сматрамо да је могуће успоставити јасан и кохерентан уставни модел агенцијске управе, која подразумева да агенције треба да решавају тешке задатке и проблеме али да политички утицај, који је неминован и очигледан у свим компаративним системима, буде контролисан институционалним правним механизмима, али и механизмима евалуације саме јавне политике. Резултати истраживања ове материје треба да буду основ за уобличавање смерница јавне политике у агенцификацији политичког система код нас.

Кључне речи: контрола, јавне агенције, агенцијска управа, регулаторна тела, агенцијска аутономија.

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MORAL AND LEGAL CONTROL OF POLITICS**

Abstract: *The authors discussion in this paper is based on several methodological and theoretical assumptions: (1) the moral and legal control of politics is a prerequisite of any responsible and effective government; (2) contemporary politics is essentially alienated from ethics, and legal rules are to a much lesser extent based on the compelling moral rationale and values; (3) as such, politics indisputably has a predominant impact on all important developments in society (4) the current politics has become a major determinant of the legal system; (5) law can no longer be studied narrowly (senso strictu) from the standpoint of dogmatic and normative method; in addition, the study of law has to include legal ethics, politicalology of law and sociology of law; (6) correlations between morality, politics and law are highly complex, multifaceted and contradictory. Politics has always endeavored to instrumentalize and rationalize the law in line with the prevailing interests of the dominant economic and political center(s) of power. In turn, in spite of exerted efforts to restrict and channel the political power, the law has often recoiled and given way to authoritarian political aspirations aimed at subordinating the law to political interests.*

Keywords: *moral, law, values, politics, control.*

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1. Introduction

Possible relations between morality, politics and law, as well as the control of the politics by morality and law, should be set on axiological foundations, which would enable the assessment of what makes the binding force of law and the legal norm. Ensuring the control of politics by law and morality also implies examining the possibility for the decisions of the state authorities to be open to criticism, as there is a clear link between the state and politics (Schmitt, 2001: 7). By doing so, we avoid this work to become *la chronique scandaleuse politique* (Zsifkovits, 1996: 16), as it is not the cause but the consequence. Examination of these relations and control of politics is a value-task of the law which is also its moral imperative in the process of combating against the political "sale" of the future. Thus, an individual as an imperative of the future can be protected from the state. As the State is not a mystical creation led by the "chosen" individuals, it is important to examine and control the amount of "bad fruits" of unconsciously conducted politics. The goal of this control is to determine the current situation in the society and the behavior of an individual who is forced to choose between political action which may be in compliance with the law but is still inconsistent with moral values. It, therefore, implies control of politics in terms of transcendent principles rather than in the positivistic manner, which only examines which regulation should be applied to a given political and legal situation and what are the underlying principles governing human conduct. So, what is the ultimate benchmark: the value-oriented scaffolding of human life or a simple combination of lucrative and fearful conduct of an individual?

2. Is politics beyond control?

This question may be posed in slightly different terms. So, should politics be guided by moral values? The question concerning the state of affairs in political activities may be addressed by looking at the relations "beyond" the field of control, i.e. the relations between politics, law and morality. The reality (what control is) is under the query of what it should be. This ontological-axiological premise concerning control is actually the issue concerning the essence of control itself, the one that is outside the mere positivist-tautological conclusions. This control carries reasoned postulates of the good moral conduct of all participants in the legal and political reality.

Have the adopted legal provisions become an absolute barrier for the political abuse? In response to this question, we find the very limitations of the law; namely, although the law is expected to "restrain" politics, the law finds sophisticated ways to exceed the boundaries of "permissible" activities and defiles human dignity. History includes ample examples of legal systems that contained illegal

provisions; in such cases, as observed by Gustav Radbruch, legal positivism has destroyed the legal professionals as a social class (Radbruch, 2007: 18). The fact is the one who is “disarmed” (by being forcefully deprived of critical consciousness, freedom of thought and action) can control anything and anyone. In effect, there is a lack of free intellectuals in “unfree” times. Quite often we speak about restraining the political power by legal provisions which should regulate politics as a social activity, thus imposing constraints and putting it under control. In the ontological sense, the missing component is an absolute confidence in the legislation, which is rather impossible even though it is often said that the legislation should be oriented towards the moral values (Zsifkovits, 1996: 36).

It is an indisputable fact that political activity is necessary, but it is also indisputable that it has to be limited and controlled, in order to justify the purpose of its existence and contribute to a more dignified human life. On the contrary, politics without moral and legal scrutiny becomes a source of legal voluntarism and absolute moral relativism, which jointly lay ground for the worst of crimes. These crimes are “enabled/made possible” by politics that is devoid of controls and the efficient use of political power; as noted by Radbruch, such power does not imply that the ruler is bound to abide by the law (Radbruch, 2007: 7). In his book *Rechtstaat oder Diktatur?* Hermann Heller noted that the control of politics must be sought outside the field of action of the “bloodless rationalists” and “bloodthirsty irrationalists” (Heller, 2011: 34). Only in this manner can the citizens avoid the concentric circles in which, progressively losing confidence in the “omnipotence” of justice, they “resort” to legal security.

The specific forms of control and restriction of political activity, as well as the mechanisms through which this control is exercised, have already been built and used, with certain amendments and modifications which are quite common in the development of human society. However, what is surprising is that after so many years that pre-legal and pre-political, ontological-axiological issue of control has not been resolved. Such control, which would start from examining the value of politics, cannot lead to justifying the government authority through morals. Moral values cannot become a point of reference which would be used by the political power to justify its existence. If that were to happen, the whole process of establishing an authoritarian government would be rounded off. This is most likely to happen primarily because the political power that creates the legislation will eventually enact and interpret the legal provisions in the course of their implementation as they find “suitable”; thus, the legal control of the political activity will be reduced to a pure tautological conclusion. If this tautological conclusion, which still does not have a moral justification, is accompanied by the moral justification provided by the government, the process is completed; as a result, there is a government in power which, in all its “splendor”, does not

allow any criticism simply because it acts "for the benefit of others" and it is, therefore, unacceptable and "rude" to be reprimanded for its actions. Thus, human morality is used as justification of even "brutal" powers that politics has at its disposal, given that the state has a monopoly of physical force as well as "the monopoly of political decision-making" (Schmitt, 2001: 8). The state is the only social organization which does not enter negotiations and social agreement with its citizens, and which finds the moral and ethical concepts irrelevant, unnecessary, and a kind of burden.

Now, we return to the question whether the control of politics is possible, i.e. to the question what it "*is*" and what is "*ought to be*". If the politics as an activity were to determine the direction of moral consideration, then the moral consideration would be subjected to the political "machinery" and, thus, it will become just another apologist for the system of political power. In terms of establishing moral control which stands above the law and politics, it is important at this point not to rush to conclusions, such as those that the political sphere is only determined by interests. Having no intention to mystify the state of affairs, it should be noted that the interests are completely legitimate in every part of human life and that they are pertinent to every single living human being; even upon one's death, they may even be specified in testamentary documents by deceased persons. Here, when it comes to moral considerations and value judgments, we agree with the statement that politicians are not required to accept the vow of poverty, but a dash of the spirit of St. Francis of Assisi would certainly cause no harm (Zsifkovits, 1996: 32).

Yet, things have been mystified by those who claim to be guided purely by the rational positivist approach. Considering the title of this article, we may be expected to provide a list of legal and social mechanisms for the control of politics; yet, we will not do that because the focal point of our consideration is a completely different phenomenon. Why do major abuses still occur in spite of these mechanisms? Moreover, the abuses seem to be prominent among those who are in charge of these control mechanisms. By doing so, do they actually eradicate all "dilemmas" and concerns (either personal or society-generated ones) by resorting to factual powers (Schmidt, 2003: 29)? Instead of being governed by the distant reflection on moral values, the politics is governed by reflections on power relations. However, in that case, there is no question of control because the power that is embodied in the monopoly of force (which the state has at its disposal) does not want any control. If another organization could control state politics, it would mean that there is a competitive public organization on the territory of this country, which is impossible, because in one place, at one time, there can only be one state. State politics does not allow for the presence of a competitor because, then, it would no longer personify a state. This tension

between the concepts of state, politics, law and morality can be remedied only by a valid holistic approach by using the axiological method that will be the critique of the governing power. It is a premise that speaks in favor of taking an axiological stance towards politics (Strauss, 2001: 82), which requires us to take a value-driven attitude towards politics as an activity which should comprise an aspect of accountability. This is quite contrary to the view that the governing powers should control those in power, because such a premise is similar to the case where a wolf safeguards a herd of livestock (Schmidt, 2001: 218).

The legal control based on ontological and axiological approach is a safeguard that the political activity shall not turn the legal system into an absurd charade/farce/travesty and make its application impracticable. Unstable parliamentary climate is a serious problem nowadays in the domain of political action, and when it is accompanied by a lack of confidence in the executive authorities, the legal order goes from bad to worse. For that reason, it is necessary to reject the first premise about the existence of value-neutral sciences and accept the need for the axiological assessment of the situation.

We fully agree with the postulate of Hans Kelsen that legal norms can only be violated by those who are obliged to apply them; thus, we discard the mysticism pertaining to the issue of responsibility for applying the law. However, the obligation to observe and apply the law equally refers to the citizens and the political authorities of a state. The role of control of the governing powers by the law and morality is based on the assumption that any conflict within a national system, as well as at the international level, is based on the conflict of powers and interests, which makes the control of those involved in conflict resolution necessary (Kelsen, 2001: 266). Conversely, the absence of legal and value-driven control of political activity marks the outset of the dissolution of the legal system of a state. For this reason, the process of assessing the reality from the axiological standpoint will include politics, particularly in terms of introducing the category of value-driven and rational assessment of political activity (Neumann, 2002: 48). It actually implies a correlation of faith and reason (*ratio*), in line with the teachings of St. Thomas Aquinas. This is the only way to avoid mystification coming from different sources. Neither the leader (or leaders) nor the state government are entitled to create, protect and control the application of laws; these undeniable rights and obligations are vested in the citizens; given the fact that the political power has been delegated, it does not ensue for its own sake (as those in power would like to believe). If perceived otherwise, it may lead to a conclusion that jurisprudential considerations (pertaining to legal science and philosophy of law) are abandoned in authoritarian systems simply because they pose essential questions, which are highly dangerous for authoritarian systems thriving on the lack of control.

Politics is too often stuck in the moral mire, which can only be prevented by ensuring the legal and value-driven control over political activities (in compliance with the legal and moral principles). In the process of control, *conscience* as a moral category is the embodiment of moral sensitivity (scruples), which is untouchable (Hegel, 1989: 329); only in this manner is it possible to avoid the legal-political situation "just votes for unjust laws" (Finnis, 2011: 436). However, politics has never rested on such frame of conscience but, rather, on the one in which the conscience is "vulnerable" and thus susceptible to manipulation, which above all implies political manipulation that gives rise to questioning the "objectivity of interpretation" (Strauss, 1992: 61). Thus, objectivity is discarded in favor of apologetic tendencies, which are supported by positive law and positive morality of a society put in the service of politics. Then, quite expectedly, the law becomes a tool of those who rule according to their will, reflected in the adopted legislative and regulatory acts. Such a system can certainly be called a "*pathocracy*" which can be defined as "a system of government thus created, where in a small pathological minority takes control over a society of normal people" (Lobaczewski, 1998: 193). However, such a system "of government has nowhere to go but down" (Lobaczewski, 1998: 194). The absence of control of the political activities of those in power slowly leads to a complete paralysis of the legal system, which is quite an expected result (Lobaczewski, 1998: 195).

Accordingly, it follows that the law in such systems will not be the defense from violation and abuse but a tool for the incessant commission of ample "crime". Hence, we agree with the statement that such legislation shall be subjected to no-confidence vote and that it shall not be applied, as a stance stemming from our moral perceptions of reality (Goldsworthy, 2011: 308). Thus, we further emphasize the need for moral-value assessment of the legal and political system as a society sub-system. Every legal and political process that is outside the axiological prism of observation often turns into the authoritarian actions which can never be critically assessed without being subjected to sanctions prescribed by these same governing authorities.

After all, the remaining question is whether politics is outside the sphere of control. If we observe this issue from the perspective of reality (what *is*), then it is definitely out of control; but, if we observe it from the perspective of what it shall be, then politics certainly ought to be subject to both legal and moral/value-oriented control. Therefore, instead of being given a choice between the authoritarian system and the rule of law, we should better pose a question about the situation in the state allegedly governed by the rule of law, which is very close to moral relativism and amoralism, as well as the question of possible control over politics in such a state. In such circumstances, politics shall ask itself the following metaphysical question: is it possible to serve two masters at once:

the sphere of interest and lucrative targets, or moral values? Such actions of all stakeholders, not only in political life but in the entire social reality, must lead “to the perfect life” (Fuller, 1964: 10).

3. Moral, law, politics

The immorality and illegality of politics started being challenged only in the modern age. In the antiquity, politics, morals and law were a comprehensive whole because it was self-evident that politics had to be moral and fair/just. The moral and social determinism was the fundamental determinant of the polis (political) community. The essence and the aim of politics was the exercise of individual virtue at the level of the global polis community. Throughout history, politics as a creation of the civilization has had different moral and legal character, contents, forms and functions, and therefore, different theoretical and practical meaning. In political science, there is a clear distinction between the classical and the new age (contemporary) meaning of the concept and practice of the politics, although each epoch includes various notions of politics. Here, we underscore two conceptions whose starting point is ethical and juridical.

Aristotle defined politics as a practical activity of a prudent and equitable management of the polis (political) community. As a property of politics, prudence refers to the conversion of potential into real, in conditions of variable social practices. Fairness (justice), as a feature of the ancient concept of the politics, refers to a fair judgment with the purpose of accomplishing the public and the common good. The blend of ethics and politics was the paradigm of the ancient public life. Ethics is the study of individual virtues, and politics means the effectuation of these virtues at the community level (the polis). Thus, ethics is a prerequisite for politics. People’s participation in the polis community life, as a prerequisite for obtaining the civil status, is equal and free for all; therefore, the political order is established as a horizontal relationship of the free and equal people (citizens) in the polis perceived as the sphere of freedom.

However, the ancient political thought and practice essentially did not depart from the slave-holding society. Thus, the civil status could be acquired only by specific population categories, whereas others who were by nature considered to be unsuitable for politics (slaves, foreigners and outcasts by ostracism practice) lived in the *oikos* (household) regime, as a sphere of necessity. Therefore, the classical politics had an exclusive character.

Machiavelli pioneered a different conception of politics as compared to the ancient one. Politics is not ethical and prudent conduct. Politics is the art or technique of governance. The political structure of the society consists of those who govern (the political elite) and those who obey (the people, the crowds),

and the relations between these two poles are expressed as a system of vertical supremacy and subordination. In order to be stable, the governing power must shape the loyalty of its subjects. Therefore, politics is the art of establishing (rising to power), strengthening, preservation and increase of power and authority, and the exercise of certain interests.

In the modern times, comprehensive politicization of social life creates a mass political society. An individual becomes a "mass human", which implies those characteristics of behavior contained in the so-called "common type" of personality. Politics becomes a way of uniting the isolated individuals in the unique setting of a sovereign state. The process of the politicization implies the socialization of politics and its expansion into the civil society. Hence, politics gets an inclusive character because it expands the circle of subjects to general and equal right to political participation and political engagement. In this way, the society becomes the object of propaganda and manipulation; thus, instead of ensuring the citizen's election will, the government and the state policies mostly provide for the hidden interests of the political power and capital.

The systemic-functional approach defines politics as the process of managing complex and variable subsystems of the society, with the aim to create conditions for the unimpeded stabilization and legitimacy of institutions and political decision-making in the context of a highly contradictory environment. Thus, politics becomes a professional activity of managing and decision-making in accordance with the prevailing political and interest orientations and expectations of the civil society. Politics is a governance decision-making activity, in variable circumstances, aimed at stabilizing or transforming the political system. The aim is not the moral correctness of aims and means but achieving stability of the governing authorities and repressiveness of the regime.

Politics is an activity through which people create, maintain and modify the general rules governing their lives. Politics is thus inseparably linked to the phenomena of conflict and cooperation. On the one hand, the existence of conflicting opinions, different desires, competing needs and opposing interests leads to disagreement around the rules governing people's lives. On the other hand, people recognize that they have to live and work with others in order to influence these rules and ensure that they are sustainable; hence, Hannah Arendt provides a definition of politics as "political action" (for joint communal well-being). Therefore, the essence of politics is often depicted as a process of *conflict resolution*, in which conflicting opinions or competing interests are reconciled. Nevertheless, it is better to observe politics in its broader sense, as a quest for the conflicts resolution, than as the achievement of conflict resolution because all the conflicts are not and cannot be resolved. The conflicting nature

of politics is exactly the reason to make it moral and establish its foundations on the good reasons of justice and fairness.

4. Moral relativity and legal limitations of the politics

Politics is increasingly opposing moral and legal imperatives. It has developed an entire system of political manipulation to conceal its immorality and unfairness, and to present itself as morally and legally justified action. The political will that is not controlled by good moral reasons and legal frameworks/standards does not create a fair, good and applicable law which is to control and moderate it.

Beyond the moral imperative of politics there lies a contradiction. The standard of the governance and public action that should be in the general interest is always opposed to the practice of real politics, which is characterized by interest particularism, selective representation of interests and possessive individualism. The standard of legal legitimacy and legal limitations of the authorities also hides one contradiction. Functioning of the political elites should be regulated, controlled and limited by the law.

Legal control of politics is subject to ethical skepticism: the government brings legal norms in order to control itself. If the ontology of politics is that political power, as a rule, has the tendency to be increased and to be uncontrollable, it raises a dilemma of how will those who create constitutional and legal norms in the legislative process limit themselves. Thus far, the political and social practice has shown that the phenomenon of control has always been apparent, manipulated and blurred. Thus, we encounter the phenomenon of quasi-legal controls. The capacity of self-control hides a problem of limiting the political actions. Any politics and its stakeholders in the form of political elites must have an internal moral compass in order to preserve themselves when faced with challenges and temptations of authority and power. The phenomenon of self-control has an individual-psychological aspect which stems from the mentality, general and legal culture of society, and is the product of the spirit of the specific time and the circumstances in which the politics is shaped and implemented.

The general *topos* of politics control can be expressed in a metaphorical style. The authority should have a "bridle", made of solid material and tailored to the needs of the political reality, but designed in such a way that the government would not break loose from the "bridle" strength. The less the politics is morally and legally grounded, the bigger the power it possesses and the less freedom it gives to people.

5. Relationship between ends and means in politics

The ethical foundation of politics, among other things, has always been measured by the relationship between the ends and means in politics, i.e. by the moral congruence of the aims and means of achieving political objectives (Čupić, 1990: 15). The nature of the relationship between morals and politics determines the morality of law and the common sense of politics. Politics is a form of public action aimed at achieving specific goals. Its driving force is the goal achievement. Every political action is taken in order to achieve certain goals. Like in any other kind of activity, the aim is internal energizing motive. The means and methods occur as instruments, tools for the practical achievement of the goals. Means and methods are similar concepts. Political means are specific factors for exerting influence of the subjects of political relations on objects: the election campaigns, strikes, military actions, etc. Political methods are typically characterized by methods of influence of its means. Methods of politics are, primarily, coercion and persuasion, violence and non-violence (Čorbić, Kovačević, 2014: 79).

An ancient question about the relation of ends and means is, essentially, the question about the moral content of political life. Thus, which means are considered to be morally justified for achieving political goals?

The saying that "the end justifies the means" is very popular nowadays. Its theoretical basis may be found in the works of Machiavelli. From the point of view of such orientation, every procedure, every political action is morally permissible if dictated by the set objective. Politicians, as a rule, rarely recognize the immorality of their goals. All criminal political acts, wars, mass terror, revolutions, manipulations and usurpation are concealed behind the noble goals, promising welfare and prosperity to the nations and, concurrently, appealing to universal values. Today's political life is abundant in amoral phenomena, such as the use of lies, mass consciousness manipulation, disinformation, terrorism etc. All of these factors are presented as the essential attributes in the political life. Hence comes the statement that the politics is the dirtiest job.

In political theory and practice, there is the opposite approach to the relationship between ends and means. From this point of view, the means must comply with the ends; the means are the moral criteria of politics. The application of means, rather than noble objectives, determines the future face of any community and government. A highly moral society cannot be built by means of violence, murder and terror. The ideology of non-violent action in politics was formed on such a platform, which was promoted by Mahatma Gandhi, the leader of the national-liberation movement in India, and Martin Luther King, the leader of the struggle for equality of races in the USA.

The ideology of non-violent action, which advocated for highly moral content of political activities, has been widespread in the modern world. It enables the political life to have a human character; it transforms the politics from *dirty work* to the *noble profession*. Yet, this approach is still not dominant in contemporary political life. A vast majority of political officials have a pragmatic approach to politics, arguing that it is necessary to establish commensurability (comparability) of goals and means.

This approach has the character of a compromise because it takes into account the moral meaning of both goals and means. Since the discrepancy between ends and means is inevitable in political life, the followers of such an approach tend to build a hierarchy system of moral values and use it to justify the application of some immoral means as a lesser evil. In modern society, there is a firm conviction that the basic criterion for the application of political means should be the fundamental principles of humanism which promote universal human values: the right to life, protection, freedom, development of the human personality.

When considering the relationship between ends and means in politics, we start from the nature of the goal and the nature of the specific means used for achieving the goal. Thus, it is possible to identify several models of relations between ends and means: (a) a covert goal and polished means; (b) a clear goal and invisible means (arcane practices); (c) an unrealistic goal and inadmissible means; (d) a correct realistic goal and impermissible/illegal means; (e) moral correctness of both ends and means.

The contemporary politics is growingly voided of morality, humanity and justice. It has become a real-politics. The objectives of politics are increasingly covert rather than transparent. The way goals are achieved is increasingly intolerable, arcane, immoral and contrary not only to the law but also to the concept of justice. The law has become an instrument of estranged and possessive political will. The general interest of the community has become more abstract, vague, manipulated and embodied in the guise of particular group interests. Violent means are increasingly justified as being necessary and essential for the common goal. Politics has no measure or boundaries in devising justifications and construing the rationale for instituting the politics of violence.

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МОРАЛНА И ПРАВНА КОНТРОЛА ПОЛИТИКЕ

Резиме

Савремена политика је у основи раздвојена од етике, а закони све мање утемељени на добрим разлозима моралности и правичности. Ако је морална и правна контрола политике претпоставка сваке одговорне и делотворне власти, онда неморална и неправична политика није одговорна и респонзивна. Пошто је политика постала главна одредница и чинилац, онда је јасно да се на тај начин друштво не само деморализује већ и губи битна својства моралности и осећаја за правду. Тако карактерисана, политика несумњиво доминантно утиче на све значајне токове друштва чиме се све друштвене области лишавају доброг и хуманог деловања.

Однос морала, политике и права је сложен, комплексан и противречан. Између права и политике увек је постојао и постоји напет и противречан однос. Са једне стране, политика је одлучујући фактор стварања и примене права, а са друге стране, право је нормативно санкциониран оквир политичког понашања. Политика је одувек тежила да инструментализује право и рационализује га према доминантном интересу економске и политичке моћи, а настојање права да ограничи и каналише политичку моћ увек је узмицало пред тоталитарном претензијом политике да себи подчини и право. Колико год морал и право настоје да ограниче и контролишу политику, толико се, с друге стране, политика аморализује и „узмиче“ праву. Политичка и идеолошка колонизација права и морала ствара аномично неурено аморално друштво које без моралног вредносног компаса партиципира у политичком животу.

Кључне речи: морал, вредности, право, политика, контрола.

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SOME INDICATIONS OF LEGAL CONTROL IN Kelsen's "PURE THEORY OF LAW"***

Abstract: *The essence of Kelsen's distinctive philosophy is normativism, specifically normativism of the formal character. Norms bind the ideal in the world of need, which is independent of the world of being. According to Kelsen, viewed from the normative law standpoint, a state is nothing but the law alone, its personification. This view is the foundation of Kelsen's specific understanding of legal control. He does not speak about legal control in the context of relations between the state and the law but rather within different norms of a single legal order. Kelsen makes several classifications of legal norms. However, not all of them are equally important for the clarification of legal control relations. Thus, for example, dividing norms into conditional and unconditional is of no great importance for these relations. Considering the relationship between primary norms, which contain sanctions and delicts, and secondary norms, which include legal obligations and authorities, legal control is logically being established by giving the primacy to the former over the latter. Another classification of paramount importance for the legal control issue is the relationship between higher and lower norms, and within these, the relationship between basic and specific norms. Here, every higher and more abstract legal norm is in control over a lower legal norm. When Kelsen reaches the highest level in this hierarchy of legal norms, he then assumes a basic norm. In fact, it is the only way to preserve the "purity" of his legal theoretical project. The basic norm resolves the issue of belonging of all legal norms to the positive law order. That is why it is the "Supreme Instance" of control in Kelsen's theory.*

Keywords: *legal norm, primary and secondary norms, higher and lower norms, basic norm.*

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1. Introduction

The choice of topic in his paper calls for clarifications in two or three directions. One of the clarifications is of personal nature, and the other two are related to the subject matter itself. Although Hans Kelsen lived and worked from the late 19th century to the 1980s, his scientific opus is worth revisiting in 21st century. Namely, he created a distinctive “Pure Theory of Law”, which, as a whole as well as in some specific thematic segments, has been drawing constant attention. Kelsen is considered to be the greatest legal philosopher and theorist of all time.

The first subject-related explanation deals with Kelsen’s indications in terms of possible potential of legal control. The second subject-related explanation takes into account the possibility of differentiating legal control from legal supervision. Although this distinction is usually linked to some administrative activity, it is not impossible and (more importantly) unproductive to extend it to the entire functioning of the state and the law.

In the broadest sense, *control* is a pre-regulated process of permanent monitoring and evaluation of other people’s work. As opposed to *supervision*, which involves internal control, *legal control* is of external character. Logically, when speaking about *legal supervision*, it takes place in the context of some state-specific legal activities: legislation, administration and the judiciary. The process of legal control runs through three phases. In the first phase, which is often referred to as the control in the narrower sense, the assessment of what has been done is conducted, as well as the forecasting and comparison of what has been realized and predicted. The second phase consists of the observance of the state of affairs after the control in the narrower sense has been exercised. The third phase implies an intervention for the purpose of correcting the established situation found in the previous phases.

In a legally regulated state, there are at least two subjects/entities involved in the control procedure, the subject who exercises control (controller) and the controlled entity. The procedure has to be legally regulated in terms of participants and instruments of control, the subject matter and control procedure, the controller’s authorities and the duties and mechanisms of legal protection of the controlled entity.

In line with these conceptions of legal control and supervision, which put this issue in a wider context of relations between the state and the law, Kelsen shows significant specificity. In his theory, the concept of the state is reduced to the personification of the legal order. In his “Pure Theory of Law” (*die Reine Rechtslehre*), the law is relieved of all non-legal elements. Kelsen applied the same principle to the state by removing from its concept all social elements and reducing it exclusively to a legal phenomenon (Mitrović, 2010: 260). Besides, for Kelsen,

legal supervision and legal control are delineated only within the normative framework, i.e. the legal order as their systemic unity. As for his specific understanding of secondary norms, control over them is conducted by primary norms, while the control over lower norms is performed by higher norms. Above them is the presumed basic norm (*Grundnorm*) which makes them part of the positive law order. For Kelsen, it is the benchmark of comprehensive legal control.

2. Kelsen's view of the concept, nature and elements of legal norms

Kelsen is one of the main founders of modern legal positivism, which leads to him from Thomas Hobbes and over John Austin. "In certain key categories and attitudes, we can discover that Austin follows Hobbes and uses his sentence constructions, while Kelsen, similarly, tends to repeat the entire sentences with the key positions taken from Austin" (Stanovčić, 1986: 930). The paradigmatic nature of Kelsen's legal positivism, "pure" and derived to the ultimate consequences, is indisputable. "The Pure Theory of Law" *recognizes that it is useful for the knowledge* if a distinction is made between the *world of being* and the *world of needs*, as well as if it is accepted that norms –including legal norms – inhabit the *world of needs*" (Walter, 1999: 11). "Natural laws usually explain what exists in reality (*is*), as opposed to *norms* which imply all other kinds of laws that impose some sort of need (*ought*), such as moral and legal laws, logical, grammatical and aesthetic laws" (Kelsen, 2001: 32). Kelsen's theory is free from sociological and political empiricism, as well as from any kind of evaluation - ethical, theological or ideological. In particular, "by separating the law from moral and criticizing natural law residues, "the Pure Theory" of law should make it possible to see the true contents of positive law" (Jablonec, 2001: 57).

When asked what a legal norm is, Kelsen replies that it is a command as "an expression of individual will (or desire), whose subject is the behavior of another individual" (Kelsen, 2010: 106). Thus, the *command* is used to express that someone else has to behave in a certain manner, and it differs from *request*, a simple "act of asking". However, according to Kelsen, every command is not an authoritative norm. The command is the norm only if it is obligatory for a person it has been addressed to, therefore, only if the person has to do what has been asked by the command. The command will be compulsory or not depending on whether the person issuing the command has necessary authorization for such an action or not. Provided that the person is authorized, the expression of one's will is mandatory, even if such person does not have any substantial power and even if the command has no imperative form. Addressing the problem of ideal linguistic form of legal regulation, Kelsen says that the task of legal science consists in the *construction* of legal norms from the existing legal materials (Vranjanac, Dajović, 2006: 60).

Kelsen particularly emphasizes that Austin's identification of "command" and "obligatory command" is incorrect. This is because every command given by a person of substantial authority is not an obligatory one. The author usually illustrates his argument by using an example of command given by a robber. Namely, such a command is not mandatory, even though the robber is really capable of forcing the execution of his will. The authorization to issue a mandatory command stems from the normative order, which is assumed to be mandatory. The binding force of the command is not derived from the command itself but rather from the conditions under which the command has been expressed. Assuming that the legal rules are mandatory commands, it is clear that they have the binding force, because they are issued by competent authorities.

Kelsen particularly insists on the distinction between norms and statements, due to their different connotations. "An act of will (*voluntary act*), whose meaning is embodied in a norm, must be distinguished from the *speech act*, which expresses the essence of a voluntary act" (Kelsen, 2003: 35). While a sentence whose meaning is embodied in a certain statement *describes* something, a sentence whose meaning is embodied in a certain norm *prescribes* something. The statement is the essence of the act of thinking. The norm is the essence of the act of will, aimed at regulating the behaviour of another. While a norm is neither true nor false, the statement on the validity of some norm may be either true or false. Since the validity of norm is its specific existence, and existence stands in time, the validity of norms can be determined by a time frame. The veracity of a statement, however, is not determined by time: "If it is true, it is always true, always has been true and always will be true" (Kelsen, 2003: 54).

For Kelsen, law is "a system of hypothetical judgments or norms, according to which certain conduct/consequences (*sanctions*) should follow certain conduct/conditions (*violations*)" (Visković, 1981: 28). The very order in which the author presents the basic concepts of legal science indicates that the most important term among these is *sanction*, and that the other terms are derived thereof. Indeed, the only element of a norm that can be ordered is sanction. In short, Kelsen equates the enforcement of a legal norm and application of a sanction which it prescribes.

Kelsen derives the concept of a *delict* from the concept of a sanction. Thus, he defines a *delict* as "the behavior of that individual against whom the sanction, as a consequence of his behavior, is directed" (Kelsen, 2010: 68). He criticizes definitions according to which a *delict* is described as "evil", "unlawful behavior", or "infringement", since it is irrelevant for the sanction as a legal term. From the standpoint of the theory whose only object is positive law, there are no other criteria for establishing a delict except for the fact that the behavior is a condition

for the sanction. With such understanding, Kelsen completely underestimates the role of legal obligation in constituting the concept of delict.

In accordance with his understanding of primary and secondary norms, Kelsen derives *legal obligation* (as the content of a secondary norm) from the elements of the primary norm: sanction and delict. Legal obligation is nothing independent and autonomous, but a term derived from the primary norm, which is the only true legal norm. Legal obligation is simply a legal norm pertaining to an individual whose behaviour is sanctioned by the legal norm. Delict is behaviour contrary to the legal obligation to observe the prescribed form of behavior. The legal necessity of imposing a sanction stems from the existence of a legal obligation, whereas the legal obligation becomes real only when a delict has been committed.

In Kelsen's theory, subjective (personal) right experiences even greater discrimination. Kelsen provides the so-called sanction-based definition of subjective law, according to which the subjective right is a legal possibility to be put sanctions in motion. Subjective law is the legal (primary) norm itself in its relation to the person who must declare their will in order for the sanction to be executed (potential prosecutor). All in all, it is obvious that this discrimination is a consequence of Kelsen's understanding of primary and secondary norms, understanding that reduces the norm on the obligation and authority to a copy of the primary norm, sanctioning norm and a tort norm.

2.1. Primary and Secondary Norms

Kelsen's understanding of primary and secondary norms and their relationship represents a complete turnaround as compared to understanding offered by the traditional theory. Not only did he not hesitate when claiming that norms about sanctions (norms aimed at state authorities) are more important than behavioral norms, but he also believed that the latter could be eliminated as redundant. In Kelsen's opinion, primary norms prescribe both the delict and the sanction. These are "the only true legal norms" (Kelsen, 2010: 71). These norms are fully sufficient when correctly interpreting the laws. Yet, Kelsen leaves space for a setting where there are norms prescribing legal obligations, norms "prescribing the posture that the state legal system is trying to provoke by stipulating sanctions" (Kelsen, 2010: 71), just for the practical reason of easier law interpretation. Those are secondary norms. They are dependent on primary norms and are derived from them. "A rule is not a legal rule because its efficiency is ensured by another rule representing sanction, but rather because it prescribes a sanction" (Kelsen, 2010: 41).

In civil law there is an exception from a relation of total assimilation and, therefore, complete feasibility of deriving the secondary norm (an obligation norm) from the primary norm (sanctioning norm). This exception is a consequence of a characteristic difference between the techniques in civil and criminal law. Namely, "in civil law, a true general primary norm prescribes individual legal obligations only indirectly, through legal transactions" (Kelsen, 2010: 141). In this case, secondary norm is a product of a legal transaction and cannot be directly derived from the general primary norm. This is a result of a special characteristic of civil law which implies that legal transaction may occur among the conditions of sanction.

Kelsen's understanding of primary and secondary norms cannot merely be reduced to a question of logical-semantic structure of legal norms. This understanding is the answer to the question of logical-semantic structure of the legal norm only as a reflection of an appropriate understanding of the essential nature of law. Kelsen's understanding of primary and secondary norms stems from his understanding of law as a *coercive order* which prescribes sanctions. It is therefore necessary, in order to understand the very source of Kelsen's classification of norms to primary and secondary, to see what it means that the law a coercive order.

Kelsen is a normativist since he finds the content of the law to be completely in the norms - the positive law norms. Thereby, in Kelsen's opinion, "a normative law element, as a mandatory rule of behavior, is not to be found within the world of real events (of what *is*) but rather within the world of ideal phenomena, the world of *ought*, which is essentially the world of logic" (Lukić, 1983: 497). Kelsen emphasizes that law is not an individual rule, but a set of rules perceived as one system. "It is never enough to insist on the fact that Kelsen has primarily directed the law theory towards the studying of the entire legal system, recognizing that a fundamental concept of a theoretical construction of the law field is not the concept of the norm anymore, but the concept of order, perceived as a system of norms" (Bobbio, 1988: 67).

Kelsen's system of norms, which he calls the legal order, is a system of dynamic type, since one norm belongs to the system "if it is created in a way that is, in the final analysis, determined by a certain basic norm" (Kelsen, 2010: 118). The concept of law as a dynamic system of norms is not enough. It only narrows the observation of all normative systems to a certain kind that is characterized by regulating its own formation and implementation. Further differentiation is allowed by Kelsen's static notion of law, which adds coercion to the dynamic order. In this sense, a norm from the framework of dynamic concept of law will be "a legal norm only if it is directed towards regulating human behavior and

if it regulates this behavior by prescribing coercive acts as sanctions” (Kelsen, 2010: 128).

According to the manner in which the required behavior in society is accomplished, there are different types of social order. Social orders, normative systems and rules use different incentives in order to achieve the desired behavior among individuals; these motivations can be direct or indirect. In his final analysis, “Kelsen distinguishes three types of normative systems: those that rely on the spontaneous adherence to norms and therefore show no need for sanctions; those that are based on positive sanctions; and those that resort to negative sanctions. As Kelsen claims, law undoubtedly belongs to the third type” (Bobbio, 1982: 206). In Kelsen’s opinion, sanctions which the law resorts to have a nature of enforcement measures, since “evil is applied to the one who violates the order...against his will” (Kelsen, 2010: 32). Thus, the law is a coercive order. It is its *differentia specifica*. Hence, it inevitably follows that legal norm is that norm which regulates human behavior by prescribing coercive acts as sanctions. Only such a norm does reflect the specificity of law as the coercive order, and is therefore declared by Kelsen to be the primary norm, the only real legal norm.

What led Kelsen to depart from the traditional understanding of a relationship between primary and secondary norms is the same driving force of his entire legal theory - the method. According to Kelsen, law is the order of norms which applies autonomously and is derived from itself; “the general theory is directed towards structural analysis of positive law, rather than psychological or economic explanation of its terms, moral or political assessment of its objectives” (Kelsen, 2010: 13). Kelsen advocates the so-called “pure legal method”, which means rejection of all that is beyond the scope of logical analysis of legal norms (i.e. the sociological, politicological, psychological and other treatments of law). So, Kelsen owes his distinction between primary and secondary norms to structural analysis of positive law, which represents a thought-processing of law with respect to the elements of legal concepts and links between them. “Kelsen was not the creator of large proportions. He was a subtle analyst of miniatures but, doing so, he was extraordinary thorough and versatile, almost unsurpassed. His work resembles fine filigree embroidery.” (Lukić, 1973: 777).

However, a certain impact of the functional analysis of law on Kelsen’s differentiation between the primary and secondary norms cannot be denied. Function is the “counterpart” of structure. In fact, in addition to its structural part that makes its “interior”, its composition built thanks to the existence of a certain number of elements incorporated into it, each phenomenon also has a functional side that constitutes its “exterior”, i.e. some links to other phenomena which it directly influences” (Vračar, 1965: 67). The totality of the rights that Kelsen

speaks about "shows itself more as a functional totality (defined through its function) than as a structural totality (defined through specific structures) (Bobbio, 1988: 114). According to Kelsen, the specific character and measures of functional analysis are embodied in the fact that there is "no doubt that the development of structural analysis of law was detrimental for functional analysis (functions of law, the aim of the legal order)" (Anzulović, 1974: 30). And when examining the functions of the law, he is primarily interested in the "internal functioning" of the legal order, the contribution of individual elements of the legal order to its core existence, and its effectiveness as a condition of its existence. Kelsen finds that the norm which contains the violation (delict) and sanction achieves a greater, if not exclusive, contribution.

The fact that Kelsen favors norms that include the offense and sanction, also finds its justification in his understanding of the external functioning, external dynamism of law, and production of appropriate effects in the society. It is absolutely logical and expected because, for Kelsen, the structure of law has primacy over the function, given that the structure is what determines and explains the function. If the structure of law is such that it is the coercive order, system of compulsion, then the function of law cannot be other than protective-repressive. Kelsen's functional analysis of law becomes exhausted rapidly" (Bobbio, 1988: 71) because his conception of law is purely instrumental. "Law is not a goal, but rather a means. The function of law is to enable the achievement of those social objectives that cannot be achieved by other (milder, less coercive) forms of social control. What the goals are - varies from society to society: it is a historical issue and the theory of law is not concerned with it" (Bobbio 1988: 71). Even when Kelsen seemingly engages in substantive definition of the objective of law, speaking of "social peace and collective security" (Kelsen, 2010: 34), he really speaks only about the minimum and intermediate goal that has an instrumental value, because it serves as a precondition for achieving other objectives.

2.1.1. Higher and Lower Norms

Relying on the findings of Merkl and Verdross, Kelsen defines law as a self-important ontological region based on the thesis of "dynamic organization of law by degrees (*Stufenbau*)" (Jakovljević, 2003: 11). The functioning of law is a dynamic process of producing and implementing legal norms on multiple hierarchical levels or degrees. A norm is valid because it is (or if it is) created in a manner determined by another norm. This second norm provides a basis for the validity of the first one. That norm which determines the formation is a higher norm, and the norm which has been created according to that determination is a lower norm. From here inevitably follows the conclusion that the legal system

is not a system of coordinated standards that stand next to each other, but a hierarchical order of various layers of legal norms.

Insight into the hierarchical order indicates that the contradiction between the creation of law (on the one hand) and the application of law (on the other hand) does not have that absolute character which the traditional theory of law associates with that contrast. "Most of the legal acts are also acts of creating laws and applying the law. With each of those legal acts one higher norm is being executed and one lower-level norm created" (Kelsen, 1998: 57). An overview of the hierarchy of the legal order begins from the constitution, as the highest legal act, which is reflected in the creation of basic norm through legislation, by creation of general norms that have to comply with the constitution; they are further embodied in administrative acts regulating individual norms and in court decisions and administrative orders which have the character of execution. Hence, everything that lies between the assumption of the basic norm and pure execution as borderline cases concurrently has the character of rights prescription and execution.

In the hierarchy of the legal order, and under the assumption of the basic norm in a positive law sense, constitution (taken in the material sense of the word) represents the highest level. The essential function of the constitution is to determine the content of future laws. Positive constitutions achieve that by prescribing certain contents and excluding others. "In the first case, there is usually only a promise of a law that should be adopted, because often sanctions cannot be validly bound to laws since there are already some legal and technical reasons for the absence of laws of certain prescribed content. In contrast, the constitution is more effective in prohibiting laws of certain content" (Kelsen, 1998: 53).

In addition to the statutory law, a legal order may also include elements of the common law. In that case, authorities that apply the law, courts in particular, should apply not only the general norms (laws), created by the legislative authority but also the general norms that were created by practice (custom). This scenario is possible only if practice is the constitutional institution, or if the constitution establishes practice just as it establishes legislation, as a process of law creation. However, as an act of the constitution itself may, fully or partially, be an unwritten common law, so can the practice determine itself as a source of law. "The law regulates its own creation and so does the common law, too" (Kelsen, 2010: 212).

Within the legal system, the basic norms created in the legislative process are the level closest to the constitution. The law which appears in the form of legislative acts is both substantive and formal-procedural law. Namely, in addition to criminal law, civil law, and administrative law, there are criminal procedure, civil

procedure and administrative procedure. The function of law is to determine not only the authority and procedure but, above all, the content of individual norms, which should typically be prescribed by judicial or administrative authorities. The relationship between the constitution and the legislation is essentially the same as the relationship between the legislation and the judiciary or administration. What is different is the relationship between formal-procedural and substantive determination of the lower level by the higher one. In fact, the constitution focuses on envisaging the procedures in which the laws are created but their content is determined only to a very small extent; the task of the legislation is to equally determine both the form and content of judicial and administrative acts.

Kelsen briefly refers to a term "source of law", which he considers to be "mostly inapplicable; instead of a misleading figurative expression, an expression that clearly and directly describes the phenomenon should be created" (Kelsen, 2010: 219). In Kelsen's opinion, this term usually implies customary and statutory law creation, whereby, in this context, the law typically implies only basic norms, without taking into account individual norms, which are as much a part of the law as are basic norms. The term "sources of law" is used to determine the basics of validity of the law and, in particular, the last basis. In this sense, the basic legal norm is also the "source of law". Kelsen notes that the term "source of law" is sometimes also used in an entirely non-juridical sense, when it implies some ideas, moral norms, political principles, legal studies, legal experts' opinions (etc.) which have impact on the authorities that create the laws.

As part of hierarchy of the legal order, Kelsen separates laws and regulations. This classification is important in cases where the constitution transmits the creation of general legal norms to the Parliament, and provides for a closer regulation through the enactment of general acts adopted by certain administrative authorities. General legal norms which are not enacted by parliament but by some administrative authority are called regulations (regulatory act), which are further divided into regulations implementing the law and those substituting the law (which have the legal force of the law).

Similarly to the legislation, a judicial function also represents the creation and application of law. The general rule that links certain abstractly determined consequences to some abstractly defined conditions should be individualized and specified in order to be implemented in reality. To this end, it should be established in the given case whether the conditions that are *in abstracto* defined in the basic norm exist *in concreto*, in order for the sanction (stipulated *in abstracto* in the basic norm) to be ordered and carried out *in concreto*. These are two essential elements of judicial function. This function in no way has a

clean, declarative character. However, the judgment applies a previously existing basic norm, where there is a certain consequence linked to certain conditions. However, in particular case, the existence of specific conditions related to the specific consequence is first determined by a court judgment. A single norm of the court judgment is a necessary individualization and concretization of the basic and abstract norm.

Like the judiciary, the administration also performs the function of individualization and concretization of administrative laws. Much of what is commonly referred to as state administration is functionally no different from what is called judiciary. The administrative apparatus technically accomplishes the state objective in the same manner as the judicial apparatus. What the legislator considers to be a socially desirable situation is accomplished by the state reaction to undesirable conduct, through an act of coercion, which should be prescribed by state authorities. The difference between the administration and the judiciary exists only in organizational terms, which is most often explained historically. It is about the independence of judicial authorities, which administrative bodies are mostly lacking.

In the context of civil law, Kelsen briefly refers to legal transaction. He highlights that legal transaction takes place between the law and the judgment; through legal transaction, “determined by the law, the parties create specific norms for their mutual behavior, norms that set forth mutual obligations which are, in the specific judgment, related to the non-legal consequence of execution” (Kelsen, 1998:57).

3. Basic Norm

According to Kelsen, when a question is raised about the validity of the constitution as the cornerstone of all legislative and regulatory acts adopted on the basis of these laws, we may go back to an even older constitutional norm and, ultimately, to the the historically first constitution, which was proclaimed by a single usurper or a *collegium*. The norm that was first historically proclaimed by the first constituent authority as an act of will, which should apply as the norm, is the basic premise that any knowledge of the legal order based on that constitution rests upon. A schematic formulation of the basic norm of a certain legal order states that coercion should be imposed under the conditions and in the manner established by the framer of the constitution or the instance he has delegated.

Kelsen's Pure Theory of Law uses basic norm as a hypothetical basis. Assuming that this norm is valid, the legal order, which rests on it, is valid too. The basic norm gives specific meaning to the concept of *ought*, a meaning where the legal

condition (requirement) is associated with the legal consequence provided in the legal provision, not only in the first act of the legislature but also in all other acts of the legal order that are based on the basic (*Grund*) norm. "In effect, the normative significance of all the factual conditions that constitute the legal order has its roots in the basic norm". Only under the presumption of the basic norm can empirical material, offered for legal interpretation, be construed as the law, i.e. a system of legal norms" (Kelsen, 1998: 48). For Kelsen, the basic legal norm is only an expression of the necessary presumption of every positivist inclusion of legal material. The basic norm is not created in the legal proceedings, and thus does not apply as a placed positive legal norm. Specifically, it is presupposed as a condition of every legal prescription, of every positive legal order.

Kelsen finds the difference between the basic norm and positive legal norms in the fact that the basic norm is not created by the authority that creates the law in the legally regulated procedure. Namely, the basic norm does not apply as a positive legal norm, because it is created in a specific way by means of a legal act. It is valid "because it is assumed to be valid; and it is presumed to be valid because, without this assumption, no human act can be perceived as a legal act, in particular - as an act which creates the law" (Kelsen, 2010: 202).

"All individual and specific norms originate from the basic norm, which means that all types of norms "are contained" in that hypothetical basic norm and make a consistent positive system of norms" (Vukadinović, Avramović, 2014: 165). Content analysis of the basic norm, which is the foundation of a specific legal order, shows that it has been governed by the factual grounds in which the order is created creates that order, and which, to some extent, corresponds to the real behavior of people to whom it applies. It is important, at the same time, that there is a possibility of discrepancy between the normative order and the reality. Otherwise, normative order would not make any sense at all. There is no need to order something that assumingly must happen as a matter of natural necessity. In that case, the basic norm should be as follows: What is really happening shall happen. Such an order would be just as meaningless as the one which refers to an event that in no way corresponds to but instead completely contradicts the order. Kelsen vividly denotes the relationship between the legal system (which regulates the behavior of certain people) and the fact that the people's real behavior matches that legal order (i.e. its effectiveness) as the tension between *what ought to be* and *what really is*. This tension is being determined by a single upper and one lower limit, whereby the possibility of correspondence must not go over a certain maximum and fall below a specified minimum.

Kelsen emphasizes that his formulation of the basic norm does not mean the introduction of a new method in the legal doctrine. It only makes explicit what all

lawyers accept when they consider positive law to be a valid system of norms and not only a complex of facts. At the same time, this attitude seems to drift away from and even reject any kind of natural law, from which positive law should receive its validity. A simple analysis of any real legal conclusion can lead to a conclusion that the basic norm actually exists in legal consciousness. "The basic norm is the answer to the question: how, and under what conditions, can be drawn all those legal conclusions concerning legal norms, subjective rights, legal obligations, etc.?"(Kelsen, 2010: 202)

According to Kelsen, the content of some positive norm is expressed only by the principle that the validity of the legal order rests on certain effectiveness. It does not apply to the legal order of some individual country, but in international law. The primacy of efficiency, as a principle of international law, functions as the basic norm in different legal systems of individual states. In that sense, the constitution provided by the first historical legislator is valid only under the assumption that it is effective. Even a government that came to power through revolution or coup should be considered the legitimate government in terms of international law, provided that it is able to ensure permanent obedience by means of the enacted norms. Starting from the primacy of international law, Kelsen concludes that the problem of the basic norm shifts and becomes the problem of the last basis of validity of one comprehensive legal order, which encompasses all the legal systems of individual countries.

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НЕКЕ НАЗНАКЕ О ПРАВНОЈ КОНТРОЛИ У КЕЛЗЕНОВОЈ „ЧИСТОЈ ТЕОРИЈИ ПРАВА“

Резиме

Специфичност Келзеновог правнотеоријског и филозофског схватања права присутна је у питању правне контроле односно надзора. Уопштено говорећи, ово се питање најчешће смешта у тематику односа државе и права и то у онај део који говори о утицају права на државу. У својој теорији очишћеног од социолошког „фундуса“ и вредносног „заноса“, Келзен изједначава државу са целином правног поретка. Она не постоји као нешто реално већ је „персонификација“ права. Ово је последица опште карактеристике Келзеновог монистичког схватања права по коме оно не припада свету битка, реалности, нужности у коме влада принцип каузалитета (Sein) већ свету духа, слободе, требања (Sollen) у коме влада принцип урачунавања. Свет права је аутономан, свет за себе. Утолико се и правна контрола одвија у његовом сопственом оквиру.

Келзен прихвата Мерклову тзв. теорију ступњева (Stufentheorie) по којој свака правна норма важи на основу одговарајуће више правне норме. И тако, од нормe до нормe долази се до устава на основу којег важе све остале ниже нормe. Као правник формално-нормативног „кова“ Келзен одбија да основ важења устава потражи у свету бивања и претпоставља једну пранорму као основ важења целокупног правног поретка. Посебан аспект правне контроле у Келзеновом схватању чини однос права и силе (Macht) будући да су по њему примарне нормe оне које одређују деликт и санкцију. По њему је сила битан материјални елемент права. Ако је структура права таква да је оно поредак принуде, систем присиле, онда и функција права не може бити друга до заштитно-репресивна. И када се наизглед упушта у садржинско одређење циља права, говорећи о „друштвеном миру“ и „колективној сигурности, Келзен говори о минималном и посредном циљу који има само инструменталну вредност.

Кључне речи: правна норма, примарне и секундарне нормe, више и ниже нормe, основна норма.

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CONSTITUTIONAL PROTECTION OF SOCIAL RIGHTS IN CONSTITUTIONAL REVIEW PROCEEDINGS IN THE REPUBLIC OF SERBIA: ANALYSIS OF SELECTED CONSTITUTIONAL COURT DECISIONS

Abstract: *Social rights are a category of constitutionally guaranteed rights exercised in accordance with law. Due to the multifaceted nature of social rights, the constitutional review of legality of legislative acts regulating this subject matter has demonstrated certain specificities. In this context, the subject matter of this paper is constitutional protection of social rights in the process of constitutional review, which will include the analysis of selected decisions of the Constitutional Court of Serbia in this field. The analysis will in particular include: defined constitutional issues that are relevant to resolving a particular constitutional dispute concerning regulatory control; the content of constitutional decisions; constitutional arguments set out in the reasoning and dissenting opinions on decisions, as well as other issues relevant to assessing the quality of constitutional decisions. The objective of the analysis is an attempt to define the boundaries of autonomous domain of the legislator when it comes to regulating the exercise of social rights as well as the scope of constitutional regulatory control over such laws.*

Keywords: *constitutional review, social rights, constitutional court, selected decisions.*

1. Introduction

In the past few years, several legislative acts have been passed in the Republic of Serbia that have reduced employee benefits in the public sector, as well as the amounts of pensions. The adoption of these laws followed as a response to the current financial crisis, and they were primarily aimed at mitigating its consequences and consolidating the state budget. However, given their legal

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nature, these laws have necessarily affected the exercise of social rights, as they are closely related to material benefits awarded from public funds to certain categories of citizens. Legally speaking, the reduction of these benefits, instituted by adopting and implementing these laws, has resulted in the limitation of specific social rights.

As the legal nature of social rights has not been completely defined in legal theory, the legislator's domain in prescribing the manner of exercising these rights has been brought into question. In other words, what is the extent of appropriateness of legal regularity of this matter? Another problem in this field is the issue of defining the boundaries of constitutional regulatory control of the laws that regulate the area of social rights. With respect to this, the question arises whether the proactive approach of the Constitutional Court in these cases is inevitable, and whether this affects the relationship between this judicial body and the legislator in the field of exercising and protecting the constitutionality of laws.

Taking into consideration the fact that the Constitutional Court of the Republic of Serbia has a corresponding practice in this area, the subject matter of this paper is based on a review and analysis of selected decisions from the field of regulatory control of the laws that regulate (or used to regulate) the issues of exercising social rights. This particularly refers to the decisions from the latest constitutional practice. All three selected decisions of the Serbian Constitutional Court are of procedural character; in two of these decisions, the Court rejected the initiative to institute proceedings to review the constitutionality of the disputed laws; in one decision, the Court decided to initiate such proceedings. Regardless of their procedural nature, the aforementioned decisions deserve thorough analysis due to the fact that the explanations in some of these decisions contain typical arguments for reaching decisions on the merits. In addition, the very nature of the challenged laws (that led to reaching these decisions), as well as the consequences (the reduction of salaries and pensions) caused by the aforementioned laws in the field of exercising social rights, is another good reason for scientists and experts to give due attention to this matter.

A number of initiatives have been submitted to the Constitutional Court of Serbia challenging the constitutionality of the corresponding provisions of the Act on Temporary Reduction of Wages, Earnings, Net Earnings and other Income in the State Administration and Public Sector¹, the Act on Reduction of Net Income in the Public Sector², as well as the Act on Temporary Methods of Payment of

1 Закон о привременом смањивању плата, односно зарада, нето зарада и других примања у државној администрацији и јавном сектору, *Сл. гласник РС*, 31/09.

2 Закон о умањењу нето прихода лица у јавном сектору, *Сл. гласник РС*, 108/13.

Pensions³. Acting upon the submitted initiatives, the Constitutional Court instituted the proceedings aimed at reviewing the constitutionality of only one of the disputed legislative acts. In terms of the two other disputed laws, the Court concluded that allegations presented in the initiatives do not justify the initiation of proceedings of their regulatory control and decision on the merits.

Thus, the Constitutional Court rejected the initiative to institute proceedings to review the constitutionality of the disputed provisions of the Act on Temporary Reduction of Wages, Earnings, Net Earnings and other Income in the State Administration and Public Sector⁴, as well as the initiative to institute proceedings to review the constitutionality of the Act on Temporary Methods of Payment of Pensions.⁵ On the other hand, the Court found the allegations presented in the initiatives to review the constitutionality of the Act on Reduction of Net Income in the Public Sector to be well-founded, and thus initiated proceedings to review the constitutionality of the this Act in its entirety.⁶

Taking into consideration the selected way of deciding on the submitted initiatives, the significance of social rights affected by disputed laws, as well as the legal consequences that such laws produce in the legal system (i.e. legal consequences they used to produce in the legal system at the time of their validity), we may raise several issues that are of importance for constitutional decision-making in these cases. In this context, the paper will examine: whether and in what way the Constitutional Court of the Republic of Serbia has defined the legal nature of social rights that are being limited by the measures prescribed by the disputed laws; whether and how the Court has defined the legal nature of the aforementioned measures; how the Court understood the institute of time validity of the prescribed measures, and whether it has properly considered the choice of subjects in accordance to which the following measures have been applied. The analysis will be based on the arguments laid out in the explanations of rendered decisions as well as on the individual opinions of the Constitutional Court judges.

The objective of this analysis is an attempt to define the boundaries of the autonomous domain of the legislator when it comes to regulating the exercise of social rights as well as the scope of constitutional regulatory control of laws dealing with this matter.

3 Закон о привременом уређивању начина исплата пензија, *Сл. гласник РС*, 116/14.

4 Решење Уставног суда IУз-97/2009.

5 Решење Уставног суда IУз-531/2014.

6 Решење Уставног суда IУз-60/2014.

2. Some disputable constitutional issues in constitutional decision-making

2.1. Legal nature of the measures prescribed by the disputed legislative acts

One of the significant issues from the standpoint of quality constitutional decision-making is the question of determining the legal nature of measures prescribed by the contested laws. It is indisputable that these measures are the measures of restrictive character, given that in terms of content they represent the reductions of the amounts of employees' income in the public sector and the reduction of the amount of pensions. However, a more thorough analysis of this issue demonstrates all the complexity and multifaceted nature of constitutional decisions in constitutional disputes of this type, as well as the fact that the very definition of the legal nature of the previously mentioned measures is the starting and ending point in the process of assessing the constitutionality of laws that prescribe these measures. This has been confirmed by the Constitutional Court decision to initiate proceedings to test the constitutionality of the Act on Reduction of Net Income in the Public Sector.⁷ To be more precise, by deciding to initiate the aforementioned procedure, the Constitutional Court gave special attention to the question of properly defining of the legal nature of measures of reduction in net income in the public sector, pointing out to a number of different directions of constitutional thinking in finding the answers.

To this effect, the Constitutional Court has marked a few significant questions:

- Does the legal measure of reduction of net income in the public sector represent a measure of financial consolidation of the budget of the Republic of Serbia, which refers to indirect reduction of budget expenses?
- Does the legal measure of reduction of net income in the public sector represent the introduction of a special type of tax (which would represent the budget income, legally speaking)? The Constitutional Court justifies such a way of thinking by the fact that: the funds provided in this way are public income; the reduction represents involuntary financial giving, which is the basic characteristic of every tax; the Tax Administration is involved in controlling the enforcement of disputed law, i.e. that the application of disputed law involves the application of laws that govern the tax procedure and tax administration.
- If the legal measure of reduction of net income in the public sector is defined as a special type of tax, does this constitute an infringement on the consti-

⁷ Решење Уставног суда IУз-60/2014.

tutional principle of the unity of legal system, bearing in mind the basic law in this field, the Act on Personal Income Tax, which stipulates that taxing personal income shall be exclusively governed by this Act.

Finally, if the legal measure of reduction of net income in the public sector is defined as a special type of tax, does this infringe the principle of prohibition of double taxation?

The Court considered all these questions import for a proper clarification of the disputed question concerning the legal nature of the measure of reducing net income in the public sector.

Yet, the same approach was not applied by the Constitutional Court when considering the initiatives for instituting proceedings to test the constitutionality of relevant provisions of the Act on Temporary Reductions of Wages, Earnings, Net Earnings and other Income in the State Administration and Public Sector. Even though the provisions of this Act prescribed the measure of reducing the employees' income, the Constitutional Court did not conduct a more thorough analysis of its legal nature. In the explanation of the decision rejecting the initiative to initiate a constitutional review of the disputed legal provisions, the Constitutional Court interpreted the measure of reducing the employees' income as a special temporary and intervention measure. However, the nature of this measure may be defined indirectly, by relying on the clarification provided by the Constitutional Court, which stated that *"the legislator passed the disputed law, and thus suggested a specific source of income for financing specific subjects and social activities which were obviously bound to be most affected in the given situation due to the world economic crisis."*⁸

The issue of legal nature of reduction of pensions was not taken into consideration by the Constitutional Court as an individual constitutional question. Yet, it could be said that it was done indirectly, by examining the restriction of the right to peaceful enjoyment of property, as guaranteed by the Protocol 1 with the European Convention for Human Rights and Fundamental Freedom Protection, apparently bypassing the constitutional provisions that regulate the subject area with a higher level of protection. Bearing this in mind, according to the Constitutional Court, the reduction of pensions could be labeled as a measure restricting the right to peaceful enjoyment of property.

2.2. Legal nature of social rights limited by disputed measures

It is indisputable that, by adopting the challenged laws, the legislator made an intervention in the matter of certain social rights. However, in order to determine

8 Решење Уставног суда IУз-97/2009.

whether the legislator thus respected the limits of his action set by the law, it is necessary to define the legal nature of social rights that have been affected by the enacted laws. The legal nature of social rights has not been completely clarified yet, either in theory or in practice. However, it is the clarification itself that defines the outcome of the constitutional dispute, bearing in mind that the role of the legislator in prescribing the manner of exercising legal and constitutional rights significantly differs.

The Constitutional Court barely addressed this issue in the decision that rejected the initiatives for instituting proceedings to test the constitutionality of the Act on Temporary Method of Payment of Pensions. Namely, the Court defined pension as a cash benefit that has a public law character, whereas the legal nature of the right to pension was addressed as follows: "*the right to pension cannot be equated with the right to pension insurance*"; "*in the Republic of Serbia, the right to pension from the mandatory pension insurance stems from the guaranteed right to pension insurance – that is the right from pension insurance*", yet, the content of this right "*is neither guaranteed nor defined by the Constitution*"; it is the right established by law. The Constitutional Court further stated that "*even in the most general way, the Constitution does not determine the content of guaranteed right; instead, under the provision of Article 70, paragraph 1, it states that the pension insurance which represents a type of social insurance, shall be determined by law*." The Constitutional Court concludes that "*pension is the right determined by law with all its elements, including the amount, also determined by law, which further indicates that the Constitution does not even guarantee the right to pension of certain amount, i.e. constitutional norms that refer to pension insurance do not provide the basis for the claim that once determined amount of pension is not subject to legal change throughout the overall period of enjoyment of pension right.*"⁹ On these grounds, it may be said that the Constitutional Court opts for determining the nature of pension right by classifying it as a social right.

This understanding of the nature of pension right as a social right has been strictly criticized in dissenting opinions of certain judges. With respect to this, judge Stojanović explicitly states that one of the biggest shortcomings of the decision in this case is the very failure to answer the question of "*whether there are and where are the limits of the legal measure that determines the reduction of lawfully acquired property rights, i.e. pensions.*" Assessing the quality of the constitutional decision in this case, judge Stojanović states that "*the constitutional analysis is significantly depleted due to the lack of clear and unbeatable attitudes of the Constitutional Court towards the basis of pension right, its social origin and function, its liberal legal nature and effect on the state government, as an asset acquired by previous work, the scope of its legal limitations, fulfillment of consti-*

9 Решење Уставног суда IУз-531/2014.

tutional grounds for the given limitation, as well as determining the limits of the scope within the pension right guaranteed by the Constitution.” The judge explicitly underlines that the efforts towards genuine protection of constitutionality shall not be stopped by the lack of specificity of constitutional norms. With respect to this, he states: *“It shall not be overlooked that the content of relatively vague constitutional terms is determined by an objective constitutional interpretation which is applied both in the procedure of legal concretization and constant jurisprudence of the Constitutional Court, as well as by attitudes of fundamental rights dogma, i.e. constitutional doctrine of social rights and their complex nature. This means that the right to pension, as one of the most significant social rights that has liberal defensive effect, cannot be observed outside the broader context of constitutional guarantees, exercise and limitation of social rights in general.”*¹⁰

Judge Stojanović offered his views on the legal nature of pension rights by stating that *“the pension insurance is an institutional guarantee of the Constitution which in its core contains the subjective right to pension, an asset acquired by previous work”*; that the content of this right is *“relatively vague, however, it can be accepted that, in its most general sense, it implies the existence of individual requirement of a pension insurance user for periodic material income from public pension funds in the amount that significantly depends on his/her personal merits (contributions), which thus ensures his/her personal safety.”* Given that the law determines how this right may be exercised, the judge concludes that *“the right to pension falls into the circle of rights guaranteed by the Constitution, which are mediated by law or approved according to law”*, thus determining its legal nature.

2.3. Entities in relation to which the prescribed measures are being applied

The matter of specified circle of entities that the measures of reduction of incomes/pensions refer to is another significant issue for testing the constitutionality of the disputed laws. The way in which the legislator regulated this issue touches upon the constitutional principle of equality, i.e. the prohibition of discrimination. It is interesting to see how the Constitutional Court approached and interpreted the content of disputed law provisions and their compliance with the Constitution.

The disputed provisions of the Act on Temporary Reductions of Wages, Earnings, Net Earnings and other Income in the State Administration and Public Sector listed the circle of public officials and other employees in the public sector affected by the prescribed measures (Article 1), whereas Article 2 of this Act listed the public officials and other employees that are excluded from the application

¹⁰ Издвојено мишљење судије Драгана М. Стојановића на Решење Уставног суда IVз-531/2014.

of the aforesaid measures.¹¹ The disputed provisions were not questioned by the Constitutional Court, which explained that (according to its understanding) the constitutional guarantee of equality before the law does not require equal contribution of every citizen in meeting public costs, and that *"when it comes to securing funds from other sources of income, for the purpose of creating a special budget fund for financing the most endangered subjects (individuals or entities) in extraordinary conditions of economic crisis, financial measures shall not be applied to all people, but only to a particular circle or group of people, and shall not be equal for everybody."*¹² With regards to this, the Constitutional Court defines the scope of constitutional testing of violation of the constitutional principle of equality before the law in terms of legal prescription of such obligations, stating that *"the Constitutional Court can check whether the difference between individuals and groups is based on arbitrary decisions as it lacks a just reason for equal or unequal treatment, however, according to the provisions of Article 167 of the Constitution, the Court cannot engage in questioning whether the legislator in this particular case has found the most appropriate, rational and just solution."* In this particular dispute, the Constitutional Court emphasizes that the submitted initiatives do not state the reasons that would reasonably indicate that the choice of subjects, to which the prescribed measure is being or not being applied, is arbitrary.

As opposed to this, in constitutional dispute launched in relation to the Act on Reduction of Net Income in the Public Sector, the Constitutional Court deemed justified to consider the matter of how the legislator opted for the circle of subjects this reduction measure is applied to. Namely, according to this Act, the application of prescribed measure was extended to all employees in the public sector, excluding those whose income does not exceed the lower limit prescribed by law.¹³ The legal grounds for this view of the Constitutional Court are based on the fact that the prescribed measure refers solely to the employees in the public (and not in the private) sector. Accordingly, the Constitutional Court concluded that *"it is reasonable to raise a question of whether the selectivity of this measure represents a violation of the constitutional principle of equality and non-discrimination."*¹⁴

Considering the same issue in relation to the Act on Temporary Methods of Payment of Pensions, the Court concluded that the circle of subjects defined by law is not incompatible with the constitutional principle of equality before the law

11 Чл. 1, ст. 1 и 2 Закона о привременом смањивању плата, односно зарада, нето зарада и других примања у државној администрацији и јавном сектору, *Сл. гласник РС*, 31/09.

12 Решење Уставног суда ИУз-97/2009.

13 Чл. 1 и 3 Закона о умањењу нето прихода лица у јавном сектору, *Сл. гласник РС*, 108/13.

14 Решење Уставног суда ИУз-60/2014.

and prohibition of discrimination. Considering the provision that defines different percentage of reduction depending on the amount of pension, as well as the minimal amount of pension that is subject to this reduction, the Constitutional Court came to the following conclusion: *“Starting from the fact that the disputed provisions of the Act treats different pension users in a different way, depending on the amount of pension, that the pensioners who receive lower pension (all of those whose pension does not exceed RSD 25,000) are excluded from the application of the prescribed measures, as the legislator classified them as entities that could not contribute to overcoming the negative consequences of the crisis, the Constitutional Court finds that all pension users have the same legal status; however, the very amount of pension they had received prior to the adoption of the Law, puts them in a significantly different (material) situation, which, furthermore, provides an objective and reasonable excuse to bear the consequences of world crisis in different ways and deal with the burden of fiscal consolidation measures. Accordingly, the Constitutional Court considers that the challenged measure which is based on the principle of proportionality cannot represent a violation of the principle of non-discrimination under Article 21 of the Constitution and Article 14 of the European Convention for Protection of Human Rights and Fundamental Freedom. Namely, a different arrangement of rights and obligations shall be considered discriminatory if prescribed distinction lacks objective and reasonable justification, that is, if this does not lead to a legitimate goal or if there is no proportionality between the prescribed measure and desired goal, which here, according to the understanding of the Constitutional Court, is not the case. Besides, the Constitutional Court points out that the initiator’s statement which claims that the disputed Law discriminates pensioners in comparison to public sector employees whose salaries that exceed RSD 25,000 have been linearly reduced by 10%, cannot be brought into constitutional connection with the principle of non-discrimination, precisely because pension beneficiaries and employees do not have the same legal status, nor is the same legal nature of benefits based on pension or based on salaries, i.e. wages, and therefore the legal measures taken towards these different subjects cannot be brought into mutual connection, no matter the fact that their goal (fiscal consolidation of public finances) is the same.”¹⁵*

In her dissenting opinion, judge Nenadić warns that the consideration of agreement of the challenged legal provisions with the constitutional principle of equality before the law and non-discrimination has been left partially on the surface. The judge rightly points out that the Act likewise addresses the disabled and war veterans, as well as the children of family pension beneficiaries, i.e. those categories of entities who, according to the letter of Constitution, shall enjoy

15 Решење Уставног суда IУз-531/2014.

special protection, and who are practically equal to the category of pensioners, by the disputed provisions.¹⁶

2.4. Time effect of the measures prescribed

Taking into consideration the restrictiveness of the measures introduced by the contested laws, the issue of time effect of the disputed legal provisions seems to be of great significance, particularly when observed from the standpoint of the constitutional principle of proportionality, which states that restrictions to rights shall be valid for as long as it is deemed necessary. We can also say that the Constitutional Court approached this question in different ways during the procedure, which shall be illustrated by referring to the selected decisions below.

The Act on Temporary Reduction of Wages, Earnings, Net Earnings and other Income in the State Administration and Public Sector includes precise time-limits. The provisions of this Act clearly define the time frame within which the aforesaid provisions should be applied.¹⁷ The Constitutional Court considered it was in compliance with the general principle of proportionality.

By contrast, the Act on Reduction of Net Income in the Public Sector included no time limits (within the period of its validity). Although this Act soon ceased to be valid as it was replaced by introducing a new legislative act,¹⁸ the issue of time uncertainty and validity of this Act remained. Time uncertainty in terms of validity and application of this Act was one of the reasons why the Constitutional Court initiated the process of judicial review on the constitutionality of this Act. The Court decided that it was necessary to clarify the issue of time effect of the previously discussed law (Act on Temporary Ways of Payment of Pensions) in order to reach proper decisions in this dispute.

However, the issue of time effect of the Act on Temporary Ways of Payment of Pensions caused most controversy in considerations of the Constitutional Court, as a whole, and certain judges. On the one hand, the Constitutional Court considered the Act time-limited, coming to this conclusion indirectly, by systematic analysis of challenged Act with appropriate provisions of the Act on Budget System. On the other hand, several dissenting opinions contradict this conclusion, underlining the fact that the disputed Act is not time-limited and that it is, thus,

16 Издвојено мишљење судије Босе Ненадић на Решење Уставног суда IУз -531/2014.

17 Чл. 10 Закона о привременом смањивању плата, односно зарада, нето зарада и других примања у државној администрацији и јавном сектору, *Сл. гласник РС*, 31/09.

18 Чл. 13, ст. 1 Закона о привременом уређивању основица за обрачун и исплату плата односно зарада и других сталних примања код корисника јавних средстава, *Сл. гласник РС*, 116/14.

contradictory in terms of content and name.¹⁹ The most convincing argument was given by judge Stojanović who considers the claim of temporary nature of the legal provision on pension reduction “*the weakest point of the adopted decision*”; he considers the statements provided in the decision counterproductive i.e. in opposition to their goal, which “*instead of confirming, actually negate the temporariness of the legal measure.*” In this regard, the judge points out: “*the explanation of character of the measure refers to the Act on Budget System, which could be understood as an attempt to indirectly, by joining two laws of different subjects, confirm, not the temporariness but the conditional validity of the measure. The reduction of pensions shall be valid, i.e. pensions shall not be increased for as long as its share in GDP does not go beyond 11%. The introduction of this argument completely overlooks the fact that conditional and temporary validity are similar but not conceptually the same categories; that is why their legal effect is different. Conditionality means that the measure shall be valid as long as some other unexpected future circumstance occurs, a breaching condition, when the pension share in GDP goes beyond 11%, which implies that conditional validity can practically mean (long-)lasting, completely time-indefinite, and what’s more, even long-term period of validity of one allegedly temporal law. It is not known when and how the condition shall be realized. A conditional measure is a time-indefinite measure. Temporariness, however, represents a precise time-limitation of a measure, in accordance with the rule *Dies certus an et certus quando*. It is certain that it shall occur and when it shall occur (completion of the measure).*”²⁰ With these clear and convincing arguments, judge Stojanović seems to have provided enough facts to consider the institute of time effect of the disputed law, and consequently the proportionality of restrictive measure prescribed by the law, from the right angle.

3. Conclusion

Consideration and clarification of selected constitutional questions seems to represent an inevitable basis for quality decision-making in the aforementioned procedures of regulatory control, taking into consideration relative similarity of law regulation subjects that have been challenged before the Constitutional Court. The reason for this is the fact that the previously mentioned issues are directly related to appropriate constitutional principles which have to comply with given laws.

19 Издвојено мишљење судија Катарине Манојловић Андрић, Оливере Вучић, Драгана М. Стојановића и Босе Ненадић на Решење Уставног суда ИУз-531/2014.

20 Издвојено мишљење судије Драгана М. Стојановића на Решење Уставног суда ИУз-531/2014.

Based on the analysis of the selected Constitutional Court decisions (where the procedure for judicial review of the constitutionality of law was initiated or where the initiative was rejected), we come to the following conclusions. Firstly, the Constitutional Court did not take into consideration all of the abovementioned issues in all analyzed decisions, as it is the case with the question of legal nature of measures prescribed by disputed laws, i.e. the question of legal nature of social rights affected by those measures. Secondly, in relation to certain issues that have been considered by the Constitutional Court, it seems that the adopted attitude has not been consistent and unique, which is particularly the case with the circle of subjects that the previously discussed measures refer to. Thirdly, consideration of certain issues has not been conducted in a comprehensive and thorough way, which furthermore caused 'retention on the surface', without more serious legal arguments, which is the case with the question of legal nature of the right to pension.

The analysis of three given questions can lead to the conclusion that the Constitutional Court has shown the most serious approach to testing constitutionality of the Act on Reduction of Net Income in the Public Sector. Such a conclusion has been imposed due to a great number, seriousness and importance of constitutional questions defined as relevant for clarification of the initiated dispute of regulatory control. Considering that the aforementioned procedure has not been completed, the answers to the questions raised have not been provided yet. Moreover, bearing in mind the arguments provided in the analyzed decisions rejecting the initiatives for reviewing the constitutionality of the challenged laws, it may be concluded that the existing constitutional practice does not provide enough space for the approximate regulation of limits of the autonomous domain of the legislator within the regulation on exercising social rights and the scope of constitutional regulatory control of laws regulating this matter.

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**УСТАВНОСУДСКА ЗАШТИТА СОЦИЈАЛНИХ ПРАВА У ПОСТУПКУ
ИСПИТИВАЊА УСТАВНОСТИ ЗАКОНА У РЕПУБЛИЦИ СРБИЈИ:
АНАЛИЗА ОДАБРАНИХ ОДЛУКА УСТАВНОГ СУДА**

Резиме

Социјална права представљају категорију уставом гарантованих права која се остварују уз придржај закона. Мешовита природа ове категорије права чини да уставносудско испитивање закона којима се она конкретизују показује извесне специфичности. У том смислу, предмет рада представља приказ и анализа одабраних одлука Уставног суда Србије из области уставносудског испитивања закона којима се прописује начин остваривања одређених социјалних права. Анализа нарочито обухвата: опредељена уставносудска питања релевантна за решавање конкретног уставног спора нормативне контроле; садржину уставносудских одлука; уставноправну аргументацију изложену у образложењу одлука и издвојеним мишљењима на одлуке, као и друга питања од значаја за оцену квалитета уставносудског одлучивања. Циљ извршене анализе је покушај дефинисања граница аутономног домена законодавца у регулисању остваривања социјалних права, као и обима уставносудске нормативне контроле закона који регулишу ову материју. Закључује се да постојећа уставносудска пракса не пружа довољан основ за поуздано дефинисање таквих граница.

Кључне речи: уставносудска контрола, социјална права, Уставни суд Србије, одабране одлуке.

INTERNATIONAL LAW

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THE CONTROL OF COMPLIANCE WITH THE JUDGEMENTS OF THE EU COURT OF JUSTICE***

Abstract: Before the *Maastricht Treaty* entered into force, the Commission had no authority to initiate judicial proceedings to compel a Member State to enforce a judgment of the EU Court of Justice. The *Maastricht Treaty* introduced the possibility of imposing financial sanctions on Member States that fail to comply with judgments of the Luxembourg Court. This mechanism was part of all subsequent founding treaties but it was significantly improved by the *Lisbon Treaty*. According to current rules, if a Member State fails to enforce the Court judgment, after the completion of the administrative phase, the Commission may submit a new infringement complaint to the Court of Justice and propose introducing financial sanctions in order to compel the Member State to comply with the judgment. The Court may accept the Commission's request and order the Member State to pay penalty and/or a lump sum. It is not bound by the amounts suggested by the Commission, and the Court may order the payment of any amount which is deemed to be appropriate in the given circumstances.

Key words: EU Court of Justice, Commission, Article 260(2) of the Lisbon Treaty, non-compliance with the judgment, penalty payment, lump sum.

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1. Introduction

After conducting the pre-litigation (administrative) procedure, the Commission or a Member State (hereinafter: MS) may initiate proceedings before the Court of Justice of the EU (hereinafter: the Court) if they consider that an MS has breached the obligations imposed by the law of the European Union (hereinafter: EU), pursuant to Articles 258 and 259 of Treaty on the Functioning of European Union, ex Articles 226 and 227,¹ i.e. Articles 169 and 170 of the EC Treaty). In this proceeding, the Court determines and adjudicates (whether there was in fact a violation of EU law by Member States (hereinafter: MSs). The Court judgments are declaratory in nature, where the Court only affirms that the conduct of the MS was incompatible with EU law.

According to the explicit wording of all founding treaties, should the Court find an infringement of EU law, the MS is obliged to take necessary measures in order to comply with the judgment of the Court. The founding treaties and secondary legislation do not define the time-frame in which an MS has to enforce the judgments of the Court, and the Court itself does not have this competence. However, the Court has emphasized that MSs must immediately commence the execution of the judgment and complete the process as soon as possible.²

The founding treaties established a mechanism to compel MSs to enforce the Court judgments in situations where they did not comply with them voluntarily. In the beginning, this mechanism was lenient because it was expected that MSs would voluntarily comply with all judgments. As the number of cases in which the MSs delayed the execution of judgments had increased, the Maastricht Treaty significantly advanced the mechanism for compelling MSs to give effect to the Court judgments. The Treaty of Lisbon made further improvements, shortening the procedure for imposing financial sanctions (penalties) on MSs which failed to enforce the Court judgments.

2. The legal framework before the Maastricht Treaty

Until the early 1990s, the EEC Treaty only required from the MSs to “take necessary measures to comply with the judgment of the Court”,³ without envisaging any sanctions for MSs which failed to act accordingly. In case of non-compliance with the judgment, the Commission could initiate a new infringement procedure under Article 169 of the EEC Treaty. If the Court determined that the MS did not execute a previous Court judgment, it could only deliver a new declaratory judg-

1 The Amsterdam Treaty and Treaty of Nice.

2 Joined cases 227-230/85, para. 11; Case 169/87, para. 14; Case C-328/90, para. 6.

3 Art. 171.

ment in which it ascertained such a situation. In case the MS failed to execute the original judgment after the delivery of the second judgment, the only legal option was to initiate a new proceeding before the Court under Art. 169 and to deliver a new declaratory judgment.

In the absence of a legal mechanism, the Commission could only exert political pressure induce the MS to enforce the judgment, hoping that the MS will fulfill the obligations for the sake of other MSs (Чавошки, Матић, 2011: 13) (Petrašević, Dadić, 2013: 79).⁴ A good example that shows the drawbacks of this original mechanism is a case concerning the restriction of imports of British meat into France at the end of the 1970s. Namely, France introduced a number of unlawful barriers aiming to protect its meat industry from imports of mutton and lamb from the United Kingdom. The Commission lodged an action before the Court under Art. 169 of the EEC Treaty. The Court found that France thereby violated Art. 12 and 30 of the EEC Treaty, but its government did not want to comply with the judgment.⁵ Thus, the Commission launched a new proceeding against France for breach of Art. 171 of the EEC Treaty. However, the judgment was never delivered since France removed the restrictions for British meat after striking a political deal (Theodossiou, 2002: 25-26).

The creators of the first EEC founding treaties did not prescribe sanctions for failure to comply with the Court judgments because they thought that such sanctions would undermine the MSs sovereignty (Andersen, 2012: 99). Furthermore, the authority of the Court and the principle of loyal cooperation were expected to exert sufficient impact on the MSs to voluntarily implement the judgment of the Court (Hedemann-Robinson, 2015: 155). It was also considered that the MSs would be additionally pressed to enforce the Court judgments by the mere fact that private actors were entitled to lodge individual complaints against their state seeking compensation for damage for non-compliance or wrongful application of EU law (Misita, 2002: 544).

However, practice has refuted these expectations. Hence, in the 1980s, the Commission started initiating new judicial proceedings against MSs for their failure to enforce a previous judgment of the Court (Wagenbaur, 1995: 940). There were cases where MSs failed to comply with the Courts initial judgment for years after being delivered the new ruling, which greatly weakened the rule of law in the EEC and infringed the equality of MSs.

For this reason, some scholars/academics, politicians and European institutions have been demanding for years that relevant sanctions should be introduced

4 Figuratively speaking, at that time, the enforcement of judgments was based on the method of being “shamed into compliance” (i.e. blamed for non-compliance by other states).

5 Case 232/78.

for MSs that failed to comply with the Court judgment (Koops, 2014: 126). As a result of these efforts, the Maastricht Treaty contributed to “giving more teeth” to this mechanism. (Çapeta, 2009: 116).

3. Control mechanism after the Maastricht Treaty

The Maastricht Treaty (1992) introduced an important novelty in Art. 171 by envisaging the possibility of imposing financial sanctions upon MSs which do not enforce the Court judgments. The Amsterdam Treaty and the Treaty of Nice simply renumbered Art. 171 of the EC Treaty into Art. 228 without any changes. In the Lisbon Treaty, i.e. the Treaty on the Functioning of the EU (hereinafter: the TFEU), Art. 228 of the EC Treaty became Art. 260 of the TFEU,⁶ wherein its content was modified in order to simplify the procedure for enforcing MSs to comply with the Court judgments.⁷

3.1. Procedure under Article 260 TFEU (ex 228, 171)

The control mechanism which has been in force since the adoption of the Maastricht Treaty is initiated by the Commission. This proceeding includes a pre-litigation (administrative) and a judicial phase. The pre-litigation phase involves only the Commission and the MS which allegedly failed to enforce the judgment; in this process, they try to reach a solution without the interference of external actors.

If this stage of proceedings is unsuccessful, the Commission may submit a new complaint, requesting from the Court to declare that the MS did not comply with the original judgment and concurrently claiming a lump sum or penalty payment for failure of the MS to enforce the judgment. Until the Lisbon Treaty,

⁶ Art. 260 TFEU is the same as Art. III-362 of the Treaty establishing a Constitution for Europe.

⁷ In addition to simplifying the administrative phase of the procedure for non-compliance with the judgment, Art. 260 TFEU (para. 3) introduces another significant novelty. It provides that where an MS has omitted to observe the notification about the measures taken for the transposition of a directive, the Commission (acting under Art. 258 TFEU) may immediately (upon filing the complaint) indicate the amount of the lump sum or penalty to be paid by the MS if the Court finds the alleged infringement. Yet, unlike Art. 260(2), where the Commission submits a second action against the MS that failed to comply with the previous Court judgment, under Art. 260(3) the Commission may request from the Court to impose financial sanctions for breach of EU law in the course of filing the first action under Art. 258 (for the MS failure to notify the Commission about the measures for the implementation of the directive). Thus, under Art. 260(2), the Court imposes sanctions for failure to enforce the judgment, whereas under Art. 260(3) sanctions are imposed because of the “ordinary” breach of EU law. It may be said that paragraph 3 of the Art. 260(3) essentially constitutes a revision of Art. 258 TFEU.

the pre-litigation phase under Art. 228 (ex Art. 171) was identical to the pre-litigation phase under Art. 226 (ex Art. 169), which was applied in case of any infringement of EU law.

Thus, if the Commission considered that the MS did not take the necessary measures to enforce the judgment, it had to officially notify the MS,⁸ leaving a time-limit for its reply to such allegations. At this stage, the MS had the opportunity to officially comment on the alleged infringement. If the negotiations at this stage did not lead to a positive outcome, the Commission issued a reasoned opinion which contained a more detailed explanation on the alleged non-compliance. In this opinion, the Commission had to specify the points on which the MS had not enforced the judgment and set out a deadline for compliance. If the MS fails to comply with the reasoned opinion within the given deadline, the Commission may refer the case to the Court, thereby starting the judicial phase of the proceedings.

The Lisbon Treaty simplified the administrative phase. Article 260(2) TFEU abolished the Commission's obligation to send a reasoned opinion to the non-compliant MS. Now, the Commission is only obliged to send a letter of formal notice to the non-compliant MS, thus giving it an opportunity to respond. In the letter of formal notice, the Commission lays down the time-frame for the defaulting MS to give effect to the previous judgment.

The procedure is significantly shortened and accelerated by omitting the reasoned opinion, without significantly reducing the MS's rights of defense (Arnull, 2012: 39). This shortening of procedure decreased the possibility for MSs to benefit from their failure to comply with EU law (Geiger, Khan, Kotzur, 2015: 870). However, it is not clear why the Lisbon Treaty omitted the Commission's obligation to specify the points on which the MS has not complied with the judgment. Although the reasoned opinion is not sent any more, the Commission may specify the points of non-compliance in the letter of formal notice.

If the Commission and the MS do not reach a solution in the administrative stage, Article 260(2) empowers the Commission to refer the case to the Court. It should be noted that the Commission is not required to do so, but has the discretionary right to decide whether it will initiate judicial proceedings or take other measures to ensure the execution of the judgment. It should be stressed that the Commission must leave sufficient time for the MS to enforce the original

⁸ In practice, prior to this formal step, the Commission and the MS have informal negotiations with the aim to harmonize views on the alleged failure to enforce judgments and on measures for the elimination of such situation. These negotiations are confidential and their aim is to clarify all outstanding issues and settle the dispute in a discreet manner, avoiding publicity and inconvenience that may arise for the MS (Радивојевић, Кнежевић-Предић, 2016: 162).

judgment. Otherwise, the Commission runs the risk that the Court rejects its subsequent action.⁹

Article 260(2) does not prescribe any time-limit for lodging an action before the Court. The Commission has a wide discretion in this regard as well. However, as with Art. 258, the MS is given the opportunity to refute the arguments of the Commission and exercise its right to defense but the Commission is expected not to delay the lodging of the complaint too much.

In the complaint, the Commission must provide the Court with the information necessary to determine whether and to what extent the MS has complied with the original judgment.¹⁰ If the Commission does not do so, the Court will dismiss the action.¹¹

Acting upon the complaint, the Court has to decide whether the MS enforced the previous judgment or failed to do so. If it finds that there was an infringement, the Court may impose pecuniary/compensatory damages (penalty payment and a lump sum). The part of the judgment establishing the infringement and non-compliance is of a declarative nature, while the part imposing sanctions is of a constitutive character.

3.2. Penalty payment or/and a lump sum

All founding treaties after the Maastricht Treaty empower the Commission to require from the Court to impose a lump sum or penalty payment upon the MS that failed to enforce a Court judgment. A lump sum is an amount of money determined by the Court in a fixed (unchangeable) amount which implies a single one-time payment. On the other hand, penalty payment is the sum of money which must be paid periodically, starting from the moment of its imposition up to the moment of execution of the Court judgment; moreover, the amount that the MS is obliged to pay within the provided time-limit is proportionally increased by charging the MS for each day of overdue payment. These sanctions are not of criminal law character and, thus, they are not subject to the basic principles of criminal law (Schermers, Waelbroeck, 2001: 639).

Initially, the Commission considered that penalty payment is a better instrument to coerce MSs to comply with the Court judgment. Having that in mind, the Commission sought that the Court only impose penalty payment, considering that the daily increase of sanctions would exert more pressure on the MS to enforce

9 Case C-278/01, paras. 27-31.

10 Case C-387/97, para. 73; Case C-369/07, para. 74.

11 Case C-457/07, paras. 97-101.

the judgment. Consequently, in 1996 and 1997, the Commission adopted only the rules for calculating the penalty payment but not for calculating the lump sum.

Until 2005, the Court had accepted the Commission's requests and imposed only penalty payment. However, the case C-304/02 (*Commission v. France*) made a major turn in this field because the Court departed from its previous practice and imposed both a penalty payment and a lump sum at the same time.¹² The Court acted in that way on its own initiative because the Commission requested only penalty payment, as before. For some authors, such an approach of the Court was not a surprise, given that in two previous cases it had already pointed out that the Commission's suggestions could not bind the Court, but merely serve as a useful point of reference (Schrauwen, 2006: 296).

France and 12 intervening MSs opposed the imposition of both sanctions. They asserted that the conjunction "or" in Art. 228(2) had a disjunctive meaning, and that the Court may not cumulate two sanctions. Further, they considered that the imposition of both sanctions was contrary to the principle *ne bis in idem*, which prohibits being punished twice for the same conduct. Also, these MSs argued that, in the absence of the Commission guidelines for calculation of the lump sum, imposition of such sanctions by the Court would be contrary to the principles of legal certainty and transparency.¹³ The respondent Government and a number of interveners argued that the Court could not impose a sanction that had not been proposed by the Commission because, thus, it would go beyond the parties' claim (*extra petita, ultra petita*).¹⁴

The Court rejected all of these arguments. It pointed out that the conjunction "or" could, linguistically, equally be understood in the cumulative and the alternative sense, and that the context and objective of Art. 228(2) require that it should be understood in a cumulative sense. In the Court's opinion, simultaneous application of both penalties is not contrary to the principle *ne bis in idem* since each penalty has its own function. The Court clearly stressed that the absence of Commission guidelines for calculating a lump sum is not an obstacle for the imposition of this sanction, given that "the exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which, in any event, cannot bind the Court".¹⁵ Finally, the Court dismissed the argument on the acting *extra petita*, giving the following explanation: "The procedure provided for in Article 228(2) EC is a special

12 The Court ordered France to pay 57,761,250 euros for each six-month period of delay and lump sum of 20 million euros.

13 Case C-304/02, paras. 78-79.

14 Ibid, para. 88.

15 Ibid, paras. 84-85, 94-97.

judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure. The order imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established".¹⁶

As a result of such an approach of the Court, the Commission supplemented its guidelines the same year, establishing the method for calculating the lump sum. From that point onwards, the Commission has started requesting the cumulative imposition of both financial sanctions.

The Court has frequently imposed both sanctions, justifying it by their different objectives. As the Court points out, the imposition of the penalty payment is intended to compel the MS to stop breaching EU law as soon as possible, i.e. to comply with the previous judgment (Dashwood, Dougan, Rodger, Spaventa, Wyatt, 2011: 152);¹⁷ it is the so-called *persuasive effect*.¹⁸ The aim of that penalty is to force the MS to comply with the Court judgment by exerting economic pressures on it. In contrast, the payment of a lump sum is imposed on a MS because of harmful effects of non-compliance with original judgment to public and private interests (Dashwood et al, 2011: 152);¹⁹ it is the so-called *dissuasive effect*.²⁰

The focal point of penalty payment focus is the future behavior of the MS (enforcement of judgments), while the lump sum is aimed at the MS's wrongful past behavior (non-enforcement of the judgment) (Wenneras, 2006: 62; Jack, 2013: 409). Penalty payment is a future-oriented coercive measure, while the lump sum is a deterrent tool.²¹ The lump sum may be considered as penalty in the true sense of the term, having the function to punish past inaction of MSs.²²

Having in mind their nature, penalty payment may be imposed only if the MS did not comply with the first judgment until the delivery of the second judgment, whereas a lump sum is always applicable when the MS is in default with the implementation of the initial judgment. That characteristic is the advantage of the lump sum because it may be imposed despite the fact that the MS had enforced the original Court decision at the moment of the delivery of the second judgment. The existence of this sanction allows the procedure under Art.

16 Ibid. para. 91.

17 Ibid, para. 81.

18 Case C-304/02, *Opinion of Advocate General*, 18 November 2004, para. 41.

19 Case C-304/02, para. 81.

20 Case C-304/02, *Opinion of Advocate General*, 18 November 2004, para. 41.

21 Case C-533/11, para. 61.

22 Case C-241/11, *Opinion of Advocate General*, 21 March 2013, para. 32.

260(2) to be continued, even if the MS complied with the Court judgment in the meantime. Thus, the likelihood of abuse has been substantially eradicated. Namely, in the earlier cases, MSs were waiting until the last moment to enforce the Court judgment, without bearing any consequences for being in default for years. MSs had procrastinated the execution of the judgment until the very end of the second (repeated) proceeding and, by employing this strategy, they often went unpunished. However, by ordering the payment of a lump sum, they could be sanctioned for delay in the execution of the original judgment, even though the MS may have already enforced the Court first judgment at the time when the second judgment was delivered.

The Court is not bound by the Commission's suggestions concerning sanctions. Thus, the Court may decide not to impose any sanction at all even though the Commission has requested their imposition. This discretion arises directly from Art. 260(2) which provides that the Court "may" impose a lump sum or a penalty payment, which clearly demonstrates that the Court, assessing the circumstances of the particular case, finally decides whether sanctions should be imposed on the MS or not. If the Commission (at any stage of the judicial proceedings) considers that the imposition of the proposed sanction is not necessary, it is not the reason for cessation of the proceedings.²³ In such a situation, the Court may continue the proceedings and impose monetary sanctions even though there is no such proposal from the Commission (Lenaerts, Maselis, Gutman, 2014: 213).

3.3. Calculating the amount of financial sanctions

Art. 260(2) TFEU (ex 228, 171) provides that the Commission is required to "specify the amount of the penalty payment or a lump sum to be paid by the Member State" in every case brought before the Court. Thereby, the founding treaties do not prescribe concrete criteria for determining these amounts, leaving it to the discretionary authority of the Commission to determine them on the merits of each individual case. Therefore, the Commission has full discretion to propose the amount of penalty payment and the lump sum, taking into account the circumstances of the case at issue. In order to make this assessment objective, the Commission has adopted guidelines for the application of this Article. The first guidelines were made in 1996 and 1997. The current version was adopted in 2005, which was first updated in 2010, and from then onwards it has been updated annually.

In the aforementioned documents, the Commission pointed out that the calculation of the financial sanctions should be based on three fundamental criteria: a) the seriousness of the infringement; b) duration of the infringement; and,

²³ Case C-503/04, para. 22.

c) the need to ensure that the penalty itself is a deterrent to further infringements. Besides, in the 2005 Communication, it is stressed that sanctions must be foreseeable and calculated respecting the principle of proportionality and principle of equal treatment of MSs.²⁴

The Commission has specified the above-mentioned general criteria and principles in terms of establishing methods for calculating the amounts of individual sanctions. In the 2005 Communication, the Commission identified a specific method for calculating the penalty payment and the lump sum. It should be noted that certain criteria are applied in the same way in both calculations.

The total amount of penalty payment is calculated when the amount of the daily penalty payment is multiplied by the number of days that have elapsed from the date of second judgment delivery until the date on which the MS brings the infringement to an end.²⁵

The daily amount of the penalty payment is calculated by multiplying the initial pre-determined basic flat-rate by a coefficient of seriousness of the infringement and a coefficient of delay in the execution of a judgment, and this result is then multiplied by the factor "n" which is determined individually for each MS.

Lately, the predetermined basic flat-rate has been set annually. In its communication, the Commission determines the fixed flat-rate amount and its annual fluctuations are insignificant (which was usually increased by 10 Euros).²⁶ The latest flat-rate determined in 2015 is 670 Euros.

The coefficient for seriousness is determined on the basis of the gravity of infringement. Although any failure to comply with the Court judgment is a serious breach of EU law,²⁷ it is still possible to make a certain gradation. When determining the seriousness of the infringement, the Commission takes into account two criteria: the importance of the breached rule, and the consequences of the infringement to general and particular interests.

24 Paras. 6-7.

25 For example, in the first case where the penalty payment was imposed, Greece paid penalty for the period between 4 July 2000 (date of the second judgment's delivery) and 26 February 2001 (day when Greece finally implemented EU directives and thereby complied with the original judgment).

26 The basic flat-rate was first established in 1997 and amounted 500 Euros. In 2014, it was 660 Euros.

27 When the MS does not comply with a judgment, there is a double breach of EU law, which consists of the "original" infringement of EU law followed by the failure of the MS to take necessary measures to remedy the previous infringement, which in itself constitutes the second breach (Bonnie, 2005: 45).

The Commission pointed out that the importance of the violated rule depends on its nature²⁸ rather than its standing in the hierarchy of norms. Also, seriousness will be higher if the MS has infringed rules that belong to the body of established case-law. When assessing the seriousness of the infringement, the Court also takes into account whether the MS has adopted the necessary measures at least partially or has been fully passive, as well as its cooperation with the Commission in the administrative phase.

The effects of the infringement on general and particular interests are assessed in each individual case, taking into account, *inter alia*, the following factors: the loss of EU own resources; damage/harm to human health or the environment; number of persons affected by the infringement; financial benefits to the defaulting MS.²⁹ This coefficient is measured on the 1 to 20 scale.

The Commission shall determine the coefficient of duration of the infringement, depending on the time that elapsed between the delivery of the initial judgment (issued according to Art. 258) and taking the case to the Court on the basis of Art. 260(2). However, the Court has not taken the date of launching a new proceeding as the final moment, but rather the date when the Court assessed the facts in the second proceeding. This coefficient is measured on the 1 to 3 scale.

The “n” factor is different for each MS, and it is determined on the basis of their gross national product as well as the number of votes they have in the Council.³⁰ Thus, the amount of penalty depends on the purchasing abilities of the MS, which is a good solution. It would not be fair if France and Cyprus had to pay the same penalties for the identical violation. Currently, the “n” factor is the smallest for Malta (0.35) and the highest for Germany (21.21).

Penalty payment is usually set on a daily basis, but it may also be set in different intervals (for example, semi-annually³¹ or annually³²). These longer time-frames are applied in cases when assessment of compliance require more time, thus pre-

28 The Commission noted that the infringement of principles of non-discrimination, human rights or the four fundamental freedoms has to be regarded as very serious; Communication from the Commission, Application of Article 228 of the EC Treaty, SEC (2005) 1658, [O.J. 2007, C 126], para. 16.1.

29 Ibid, para. 16.4.

30 Some scholars criticize this solution, pointing out that taking into account the number of votes in the Council when determining factor “n” draws a political element in calculating the amount of financial sanctions for non-compliance. (Jack, 2011: 90).

31 Case C-304/02.

32 Case C-278/01.

cluding the situation where the MS continues to pay penalty during the period in which the infringement has in fact ended, but this has not yet been ascertained.³³

The method of calculating the lump sum is similar to the method of calculating the penalty payment. The total amount of the lump sum is the result of multiplying the daily amount by the number of days of infringement (i.e the duration of the MS's delay in the execution of the Court first judgment). The daily amount for determining the lump sum is obtained by multiplying the pre-determined basic flat-rate by the coefficient of seriousness (from 1 to 20), and by the "n" factor. As stated above, this result is subsequently multiplied by the number of days for which the infringement persists, which ultimately yields the total lump sum which an MS has to pay.

The basic sum for calculating the lump sum is also determined annually. It is significantly lesser than the basic sum for determining the penalty payment, and it currently stands at 220 euro. By contrast, *the same* coefficient of seriousness of infringement and *the same* "n" factor are applied in calculating the lump sum. The coefficient of duration is not applied because the duration of infringement has been taken into account by multiplying the daily amount by the number of days the breach of EU law existed. Finally, the duration of delay in execution of obligations is also very important for calculating the total lump sum which an MS must pay. The number of days of delay is calculated starting from the date of delivery of the first judgment (under Art. 258) until the date of its enforcement, or in case of non-compliance with the first judgment, until the date of delivery of the second judgment (under Art. 260).

In cases involving a short-term delay, an MS may be obliged to pay a symbolic (insubstantial) amount for the infringement. In order to preclude the MSs' avoidance to pay this small amount, the Commission has determined a minimum lump sum for every MS, which is to be paid irrespective of the seriousness of violation or length of delay. For example, Malta may not pay less than 194.000 Euro, Croatia cannot pay less than 722.000, and Germany cannot pay less than 11.782.000 Euros. Therefore, the lump sum can by no means be lesser than the minimum lump sum established for each MS.

Yet, the Commission has a discretionary right to depart from the rules given above. The Communication of 2005 states that "the Commission reserves the right to use its discretion and to depart from these rules and general criteria giving detailed reasons, where appropriate in particular cases ..."³⁴

33 Communication from the Commission, Application of Article 228 of the EC Treaty, SEC (2005) 1658, [O.J. 2007, C 126], para. 13.3.

34 Ibid, para. 5.

The court has full discretionary authority to decide on the type and amount of sanction. Therefore, it is not bound to abide either by the Commission proposal on the type of sanction nor by the suggested amounts of sanctions. Wishing to retain full autonomy in determining the amount of penalties, the Court pointed out (in the very first case) that it is not bound by the Commission's proposals given in the complaint, nor by its guidelines for calculating penalties.³⁵ In the next case, the Court confirmed that approach, stressing that "...the Commission's suggestions cannot bind the Court and merely constitutes a useful point of reference. In exercising its discretion, it is for the Court to fix the lump sum or penalty payment that is appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the MS concerned".³⁶ Thus, the Court may impose higher or lower lump sums³⁷ and penalty payments³⁸ other than that suggested in the action of the Commission.³⁹

The Court noted in its judgments that, when determining the penalty payment and the lump sum, it takes into consideration all the circumstances of the individual case,⁴⁰ fixing the amount in order to induce the MS to comply with the judgment as swiftly as possible and preventing similar infringements of EU law in the future.⁴¹ When fixing the penalty payment, it considers three criteria identified by the Commission (seriousness of the infringement, its duration, and the ability of the MS to pay).⁴² In calculating the penalty payment, in some cases the Court applied the Commission's formula but in others it calculated the penalty payment without reference to it (Jack, 2013: 409). When applying the abovementioned three criteria, the Court takes into particular account the effects of the infringement on public and private interests, and urgency with

35 Case C-387/97, para. 89.

36 Case C-278/01, para. 41.

37 So far, the Court has often imposed a lump sum significantly lower than that proposed by the Commission. For example, in the case C-369/07, the Commission proposed that Greece pay 10.5 million Euros, but the Court determined 2 million (five times less), while in the case C-496/09, the Commission requested that Italy pay 75.8 million Euros, but the Court imposed 30 million (45.8 million Euros less). Even though it is authorized to do that, the Court has never imposed a higher lump sum from that proposed by the Commission.

38 In one case against France, the Court imposed a significantly higher amount of the daily penalty than that proposed by the Commission. The Commission's proposal was 13,715 Euros, but the Court imposed 31,650 Euros per day of delay; Case C-177/04.

39 In contrast, when acting under the new paragraph 3 of Article 260 TFEU, the Court is explicitly restricted, and it may not impose a higher amount of lump sum and penalty payment than that proposed by the Commission.

40 Case C-533/11, paras. 49, 68.

41 Case C-407/09, para. 29, Case C-496/09, para. 36.

42 Case C-533/11, para. 69; Case C-610/10, para. 119.

which the MS concerned must be compelled to fulfill its obligations,⁴³ setting the amount of penalty payment so that it is proportionate to the infringement established and the ability to pay of the MS concerned.⁴⁴ When fixing the lump sum, the Court considers the effects of the infringement on public and private interests, duration of infringement,⁴⁵ and conduct of the MS in the procedure initiated pursuant to Article 260 TFEU.⁴⁶

The financial means paid by the MSs for non-compliance with the Court judgments goes to the overall EU budget. There are proposals to change this, suggesting that these amounts be given to the MSs that duly enforce the judgments of the Court; thus, the paid amount may go towards reducing their contributions to the EU budget (Peers, 2012: 64).

3.4. Who determines whether the Member State complied with the judgment?

As already mentioned, the MS has to pay the penalty payment imposed by the Court until the date of full enforcement of the original judgment. Quite frequently, the non-compliance with the judgment is indisputable but sometimes it is difficult to determine. In this regard, it is questionable who is authorized to assess whether the MS complied with the judgment. The Commission has sought to seize this power for itself. By comparison, the General Court has refused to do the assessment, arguing that this is the exclusive power of the Court of Justice. The Court of Justice agreed with the General Court standpoint, retaining for itself the right to assess whether the MS complied with the judgment and establish that it was no longer obliged to pay the penalty. Such attitudes of these three bodies are best reflected in a case lodged against Portugal.

Namely, Portugal failed to implement Directive 89/665 concerning the non-contractual civil liability of the MS, which the Court of Justice determined by judgment delivered under Art. 226 of the EC Treaty.⁴⁷ In the opinion of the Commission, Portugal did not implement the judgment and the Commission initiated proceedings against it in accordance with Art. 228 of the EC Treaty. In 2008, the Court of Justice rendered a new judgment, stating that this MS did not enforce the original judgment and ordered Portugal to pay 19.392 Euros

43 Case C-304/02, para. 104; Case C-177/04, para. 62; Case C-70/06, para. 39.

44 Case C-369/07, para. 114; Case C-496/09, para. 56; Case C-533/11, para. 68; Case C-374/11, para. 36.

45 Case 304/02, para. 81.

46 Case C-610/10, para. 141.

47 Case C-275/03.

for each day of delay in the execution of the judgment.⁴⁸ At the end of November 2008, the Commission adopted a decision ordering Portugal to pay penalty payment amounting of 911.424 Euros for 47 days of delay in the enforcement of the judgment.⁴⁹ However, for Portugal the decision of the Commission was unacceptable because it considered that it complied with the Court judgment on time by adopting the Law 67/2007 (30 January 2008). So, Portugal submitted an action to the Court of First Instance (General Court) asking for annulment of the Commission decision.⁵⁰

As one of the arguments, Portugal stressed that the compatibility of the Law 67/2007 with EU law may only be assessed by the Court of Justice, and that the Commission can only submit a new action for infringement requesting the Court of Justice to assess whether Portuguese law is in conformity with the EU law. The General Court accepted this argument, pointing out that “the Commission was not entitled to decide, in the context of the enforcement of the 2008 judgment, that Law 67/2007 did not comply with Community law... In so far as it considered that the system of rules introduced by the new law did not constitute a correct transposition of Directive 89/665, the Commission should have initiated the procedure provided for in Article 226 EC”.⁵¹

Besides that, the General Court stressed that, when the Commission’s assessment goes beyond the actual terms of the operative part of the judgment of the Court of Justice, it itself does not have jurisdiction to assess compliance of national legislation with Community law, since this appraisal falls within the exclusive jurisdiction of the Court of Justice.⁵² These findings of the General Court were upheld by the Court of Justice in the appeal procedure.⁵³

4. Concluding remarks

The Maastricht Treaty amendment provided in Article 171 (later 228, 260) filled in an important legal gap in EU law. This amendment gave the Court of Justice the possibility to impose financial sanctions upon the MS which did not comply with the previous judgment. Such a new mechanism contributed to the enforcement of the Court judgments which the MSs had not been implementing for years.

48 Case C-70/06.

49 The Commission considered that Portugal complied with the judgment on 18 July 2008, when the amendments to the Law no. 67/2007 entered into force.

50 The founding treaties stipulate that the General Court has jurisdiction over all Member States’ actions against the Commission (except those relating to enhanced cooperation).

51 Case T-33/09, para. 89.

52 Ibid, para. 90.

53 Case C-292/11 P, paras. 50-51.

However, as is often the case with novelties, this mechanism demonstrated some drawbacks in practice and, hence, it had to undergo significant changes.

Most of these innovations were of informal nature, established by case law and by activities of the Commission. Certainly, the biggest step forward was made in 2005 when the Court cumulatively imposed a penalty payment and a lump sum. However, simplifying the procedure for making MSs comply with the judgment required a formal revision. The Lisbon Treaty did that by abolishing the obligation of the Commission to adopt a new reasoned opinion and enabled it to submit a new request to the Court; the non-compliant MS was formally notified about the infringement and given an opportunity to respond to allegations.

In the past twenty years, the Court has had a strong tendency to widen its autonomy when acting under Art. 260 (ex 228 and 171). Firstly, it interpreted the conjunction "or" (Art. 260) in a cumulative sense, thereby providing for the possibility to impose both financial sanctions simultaneously. The Court also proclaimed that it may impose sanctions not proposed by the Commission at all. Finally, the Court has persistently reiterated that it is not bound by the amounts of sanctions suggested by the Commission, and has often drastically deviated from them. In such a manner, the Court does not respect the pre-established criteria of the Commission, but rather determines the amounts of sanctions according to its own assessment in every individual case, which is rather non-transparent.

However, despite all these benefits available to the Court, it is the Commission that (in a way) plays the crucial role in imposing sanctions to the non-compliant MS. Only the Commission has *locus standi* to initiate a judicial proceeding pursuant to Art. 260. The Commission has full discretion to decide whether to lodge a complaint with the Court in the event of MSs' failure to comply with the previous Court judgments. In this procedure, as opposed to the original infringement procedure (Art. 258 and 259), other MSs may not bring an action before the Court. The Commission has often been rather tactical in deciding whether and when to initiate a judicial proceeding for the control of compliance with the Court judgments. It has endeavored to resolve disputes with the defaulting MSs by resorting to political means.

Finally, it should be noted that this mechanism is expected to give even better results in the future. During the first 15 years of its existence, the Court rendered only a few decisions on non-compliance with the Court judgments but, in recent years, the Court has much more frequently rendered judgments under Art. 260(2). The increasing number of judicial proceedings on non-compliance is certainly the result of a significant shortening of the administrative phase,

accomplished by abolishing the Commission's obligation to issue a reasoned opinion on all points of non-compliance.

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КОНТРОЛА ИЗВРШЕЊА ПРЕСУДА СУДА ПРАВДЕ ЕУ

Резиме

Пре ступања на снагу Уговора из Мастрихта није постојала реална могућност да Комисија принуди државу чланицу да изврши одлуку Суда правде ЕЗ. Комисија је једино могла поднети нову тужбу, захтевајући од Суда доношење декларативне пресуде којом би констатовао да држава чланица није предузела све потребне мере за извршење претходне пресуде. Комисија није могла захтевати, нити је Суд могао држави која није извршила пресуду наметнути било какве санкције. Користећи тај недостатак, неке државе су дуго избегавале да изврше донете пресуде. У циљу отклањања те непожељне ситуације, Уговор из Мастрихта уводи могућност санкционисања држава чланица које не извршавају пресуде. Лисабонски уговор, као и остали оснивачки уговори усвојени после Мастрихта, уређује процедуру која се примењује у случају непоштовања пресуда Суда правде ЕУ (чл. 260, ст. 2 УФЕУ).

Лисабонски уговор у ту процедуру уноси значајну новину јер укида обавезу Комисије да усваја образложено мишљење, захтевајући једино од ње да формално обавести државу о непоштовању пресуде и омогући јој изјашњење о тим наводима. Уколико ова административна фаза не буде успешна, Комисија је овлашћена да поднесе нову тужбу како би приморала државу да изврши ранију пресуду. Том приликом Комисија има овлашћење да предложи новчани износ који држава треба да плати због кашњења у извршењу пресуде. Новчане санкције могу бити одређене на два начина. Прва могућност је да се утврде пенали, који се одређују за сваки дан закашњења у извршавању пресуде, а друга је утврђивање фиксног паушалног износа. Суд правде ЕУ није везан предлозима Комисије. Он може одредити санкцију коју сматра адекватном, укључујући и њихову кумулацију, а исто тако, не мора прихватити ни предложени износ пенала и паушала.

Кључне речи: Суд правде ЕУ, Комисија, члан 260(2) Лисабонског споразума, непоштовање пресуде, пенали, паушални износ.

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INTEGRATED POLLUTION PREVENTION AND CONTROL IN EU AND SERBIAN LAW

Abstract: *The implementation process of the European Union Directive on Integrated Pollution Prevention and Control (IPPC) is a good example of unforeseeable and sometimes insurmountable obstacles to a workable transposition of European legal acquis into the Serbian legal system. A highly technical, costly and legally complicated procedure which presupposes coordination among many various bodies of the state administration came into life as a dead letter for most of its purposes. However, it seems that lessons have not been learnt and that the newly prescribed deadlines for the next round of implementation are again being formulated in the optimistic manner. In the course of this article, author is analyzing the contents and implications of the pollution control on the Union level, as well as the manner and success of the Republic of Serbia in its implementation. Author indicates that the results so far represent an underachievement but, at the same time, the question is whether they could have been any better regarding the level of legal and socio-economic development of the Republic of Serbia.*

Keywords: *Integrated control, environment, pollution, EU, Republic of Serbia.*

1. Introduction

Industrial activities play a very important role in the economic welfare of contemporary society since they contribute to sustainable economic growth. However, industrial activities have a serious impact upon the environment. The largest industrial plants share a great part of total atmospheric pollution level.

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Besides, the harmful emissions can finish inside water and soil. Furthermore, these plants produce constant waste and consume great quantities of energy. Therefore, on the European level, integrated pollution prevention and control (IPPC) policy and legislation requires industrial and agricultural activities with a high pollution potential to have a special permit. This permit can only be issued if certain environmental conditions are met, so that the companies themselves bear responsibility for preventing and reducing any pollution they may cause. This legislation has been duly transposed to Serbian law.

This article aims to analyse the contents of IPPC legislation in the Republic of Serbia, the problems of its implementation and to give a critique of the legislative response to these problems.¹ Suffice it to say for now that these problems were multiple and the legislative reaction was less than successful.

2. General international and European framework

Since the UN conference for environment and development in 1992, the cleaner production has been accepted as the road to the achievement of sustainable development.² Since then, cleaner production has been practised in a great number of states in various ways. The World Summit on Sustainable Development in Johannesburg, convened in 2002, identified the cleaner production as the preventive strategy of environmental protection and sustainable development, which includes methods of production, products and services, whose application can lead to reduced levels of emission and waste and more efficient usage of resources.³ In the last two decades, the activities of the UNEP and several international and national organisations and agencies, such as the UNIDO, steered the development of cleaner production in the world. The developing countries have created special programs aimed to spread the cleaner production awareness and to incite its application. The developed countries have paid special attention to the development and implementation of new legislation.⁴

1 Specifically, the recently adopted amendments and additions to the Act on Integrated Pollution Prevention and Control, *Official Gazette of the Republic of Serbia*, no. 25, 2015.

2 See the Agenda 21, action plan adopted at the Conference, which invites the state signatories to establish economic incentives, legislation, standards and focused state administration for the promotion of sustainable operation of companies with cleaner production, U.N. GAOR. 46th Sess. (1992). *Agenda Item 21, UN Doc A/Conf.151/26*, art. 30 „Business and Industry“, p. 11.

3 World Summit on Sustainable Development (2002) *Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development: The final text of agreements negotiated by governments at the World Summit on Sustainable Development*, 26, New York: United Nations Department of Public Information, p. 8.

4 The Republic of Serbia has been involved in this process actively during the last decade which culminated in the adoption of the Government document entitled „Strategy for the

However, prevention is not the only component of the strategy of cleaner production. Already extant industrial activities must be controlled so as not to breach the limits of harmful emissions. Therefore, the IPPC Directive of the EU,⁵ establishes the basic principles for the issuance of permits and control of plants on the basis of the integrated approach and the application of best available techniques (BAT), meaning the most efficient techniques for the achievement of high level environmental protection, on the basis of cost/benefit analysis. The main goal of this Directive is to decrease the pollution from various industrial sources across the EU. Operators of industrial facilities whose activities are covered by the Annex I of the Directive are obligated to acquire integrated permit from the authorities in EU countries. Around 50.000 facilities are covered by the Directive and this number is constantly rising.

The IPPC Directive requires the member countries to establish the system of permits which applies the general principles of IPPC to individual activities,⁶ while it demands from the IPPC facilities to apply certain preventive measures using BAT, efficient energy consumption, measures for the prevention of accidents and mitigation of their effects, evasion of additional pollution at the closure of facilities. Member states can impose additional activities or enlarge those already found in the Directive. The IPPC applies to energy sector, metallurgy, mineral and chemical industries, waste management and other activities including such activities as pulp, paper and wood production, textile colouring, foundries, slaughterhouses, food production etc. As for the dimensions of the IPPC activities, some categories relate to whole capacity activities (e.g. fertilizer production), while others include specific quantities (slaughterhouses with output larger than 50t/day).

Requirements of the IPPC Directive are: 1) Rational management of national resources in accordance with the “polluter pays” principle, including control over the polluting substances; 2) Intervention at the source of pollution by reducing the emission in accordance with the emission limit values (ELV); 3) Defining the emission limit values on the basis of BAT, taking into account technical characteristics of installations, their location and state of environment in the installation surroundings; 4) Control and mitigation of the accident risk; 5) Energy and raw materials savings; 6) The development of the process of information exchange

implementation of cleaner production in the Republic of Serbia”, *Official Gazette of the Republic of Serbia* no. 17, 2009.

5 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions, OJ L 334, 17. 12. 2010.

6 General principles being: (1) integrated approach, (2) best available techniques, (3) flexibility, (4) inspections and (5) public participation.

between EU member states, with the aim of improvement and application of BAT; 7) Public awareness of the plant operation.

3. Transposition into Serbian legal system

The IPPC Directive is one of the first directives that were completely transposed into the legal system of the Republic of Serbia, with the adoption of the Act on the Integrated Prevention and Control of Environmental Pollution back in 2004.⁷ The Act on the IPPC rests on fundamental principles of precaution, integration and coordination, sustainable development, waste management hierarchy, polluter pays, publicity, permit issuance and trans-border exchange of information, which are recognised as general principles in international environmental law.

The integrated permit, as the centerpiece of this Act, is a written authorisation to operate all or part of the installation, whose constituent part is the documentation with stated conditions that guarantee that such installation or activity meet the requirements of the Act on IPPC. Integrated permit is issued for the operation of new installations, operation and major changes in the operation of current installations; current installations were obligated to acquire integrated permit until 2015 in accordance with periods established by the „Act on the dynamics of submitting requests for the issuance of integrated permit.⁸ The permit can exceptionally be granted for the cessation of activities. Permit is valid for no longer than 10 years. The permit application must consist of the installation description and its activities, plan on the raw materials and energy usage in the production process, sources, nature, and quantity of emissions, serious consequences of the emissions for the environment, suggested technologies and techniques for the prevention and mitigation of emissions, measures for the prevention and recycling of waste, measures for the emissions monitoring.

The authorised bodies are the Ministry for the environment and respective regional and local authorities for the environment. The jurisdiction is vested in these authorities under the Construction and Planning Act and the respective competences of the bodies in charge of issuing permits or authorisation for the construction and start of activities.⁹ The permit should be revised if: 1) pollution, stemming from the operation, is such that the revision of existing ELV is necessary; 2) there is a danger that the pollution might cause harm to the

7 Act on the Integrated Prevention and Control of Environmental Pollution, *Official Gazette of the Republic of Serbia*, no. 135, 2004.

8 *Official Gazette of the Republic of Serbia*, no.108, 2008.

9 Planning and Construction Act, *Official Gazette of the Republic of Serbia*, no. 72/2009, 81/2009 - add, 64/2010 – CC decision, 24/2011, 121/2012, 42/2013 - CC decision, 50/2013 - CC decision, 98/2013 - CC decision, 132/2014 and 145/2014.

environment or human health; 3) BAT have been substantially changed, which enables the substantial emissions reduction; 4) safety requirements for the installations have changed; 5) environmental legislation has been changed.¹⁰

For the new installations, BAT application is obligatory. Existing installations, which at the time of the application for permit do not fulfill the BAT conditions, must provide programme of harmonisation of operation with prescribed conditions. BAT are an important categorical and functional, at the same time, target element of the IPPC permit. Best techniques are those that, when applied, reduce the levels of emission under the ELV and ensure the low consumption of natural resources, which implies such available techniques whose costs are acceptable.¹¹

The list of installations under the Act on the IPPC is made according to the category of activity in accordance with the Act nomenclature. The nomenclature consists of three parts: company name, city of operation, and capacity of installations. Sectors that can qualify for integrated permit are: gasification, liquefaction, oil refinement, mineral gas and oil refinement, energy, metalurgy, chemical industry, food production, agriculture, and so on. Under the Preliminary list of existing installations, there are 196 of them in the Republic of Serbia. A total of 166 of these have applied so far for the permit; however, until the end of 2015, only 10 permits have been issued.¹²

4. Problems in the application of the Act on the IPPC in Serbian socio-economic system

Serbia has without doubt adopted an all-encompassing and exhaustive legal framework starting with the adoption of the Act on the IPPC and a number of by-laws.¹³ However, having in mind that every legal framework exists inside the

10 *Ibid*, art. 89.

11 Cafaro, C. Ceci, P. De Giorgi, L. (2015). Effects of IPPC Permits on Ambient Air Quality. *International Journal of Environmental, Chemical, Ecological, Geological and Geophysical Engineering*. 9 (2). p. 96-98. See also comparative overview of the BAT application in the EU and USA, where it is stated that large variations exist among EU member states related to the process of standardization under BAT, which reflect in different emission levels, sometimes being up to 3 times higher than in USA, Gouldson, A., Carpentera, A., Afionisa, S., 2015. Environmental leadership? Comparing regulatory outcomes and industrial performance in the United States and the European Union, *Journal of Cleaner Production*, 100 (1), p. 278-285.

12 Preliminary list is regulated by the Regulation on the types of activities and installations for which the integrated permit is issued, *Official Gazette of the Republic of Serbia*, no. 84. 2005.

13 Besides the Act on Integrated Environmental Pollution Prevention and Control, (*Official Gazette of the Republic of Serbia* no. 135. 20004), the by-laws are: By-law on the contents and modality of registers for the issued integrated permits (*Official Gazette of the Republic of Serbia* no. 69. 2005); By-law on the contents and outlook of the integrated permit (*Official*

socio-economical system which it tends to regulate, the discrepancy between the socio-economic conditions and legal prescriptions is the biggest flaw of this legislation. Furthermore, it seems that the legislator did not take into account discordant relations between different regulations of the same legal system. The main challenges in this field, both for the state administration and for the industry, were the incomplete national legislation in the areas which overlap with this field, discordant legislation and the incomplete documentation submitted by the operators in the process of the application for the permit, as well as the lack of experience with usage of BREF documents,¹⁴ and the selection of BAT.

Specific sectoral problems depend on the specific socio-economic circumstances of the given industrial sector in the Republic of Serbia. Some sectors are shining examples, such as the cement industry which was the first to start the process of application for the integrated permit,¹⁵ while the energy sector is in bad need of further investments in the infrastructure, which would substantially reduce SO₂ emissions, as is the plan exposed in the Green book of the Serbian electro-industry.¹⁶ Steel industry is especially important since it produces large quantities of waste which is best dealt with by using cleaner technologies and BAT. Systemically still insoluble dilemma of the dangerous waste disposition plagues the chemical industry. The Waste Management Act was adopted in 2009,¹⁷ and the current National Waste Management Strategy (for the period 2010-2019) prescribes BAT application and the issuance of permit for waste management subjects.¹⁸

Gazette of the Republic of Serbia no. 30. 2006); By-law on the contents, outlook and form of filling the application for the integrated permit (*Official Gazette of the Republic of Serbia* no. 30. 2006), Regulation on the sorts of activities and installations for which the integrated permit is issued (*Official Gazette of the Republic of Serbia* no. 135. 2004), Regulation on criteria for the definition of the best available techniques, application of quality standards, and the definition of the emission limit values in the integrated permit (*Official Gazette of the Republic of Serbia* no. 84. 2005), Regulation on the contents of the program of measures for the accommodation of existing installation operations or activities to the prescribed conditions (*Official Gazette of the Republic of Serbia* no. 84. 2005), Regulation on the definition of the program of dynamics for the application for the integrated permit (*Official Gazette of the Republic of Serbia* no. 108. 2008).

14 BREF (or REF) is a shortcut for „BAT reference documents“, which means that the document is officially adopted by the European Commission according to the IED Directive, see more at <http://eippcb.jrc.ec.europa.eu/reference/>, 15. 8. 2016.

15 See the Preliminary List, Regulation on the types of activities and installations for which the integrated permit is issued, *Official Gazette of the Republic of Serbia*, no. 84. 2005.

16 PC Electro-industry Serbia. (2009) Green book of the Serbian electro-industry. Belgrade. p. 81-85.

17 *Official Gazette of the Republic of Serbia*, no. 36. 2009.

18 *Official Gazette of the Republic of Serbia*, no. 29. 2010.

The greatest problems strain the operators themselves. The procedure for the preparation of the permit application for one installation or factory complex is complicated itself to create numerous problems, even during the preparation of the application documentation. At the start of the IPPC Directive application in Serbia, the BAT application was at its inception because of lack of financial funds, caused by a long period of market isolation.¹⁹ Besides, the lack of competent cadre on all levels of jurisdiction for the issuance of permits made for the sore need of permanent training from foreign experts.²⁰ The Act did not prescribe the ELV for water and air; it neither accredited laboratories for the monitoring of the emissions into air, water and soil accredited nor did it establish the adequate cadaster of polluters. The legal periods of implementation were inadequately reduced; national legislation was in constant process of transformation due to the harmonisation with other parts of *acquis*; environmental awareness among the operators was low, and majority of plants were in the process of legalisation, privatisation or other real estate law complications, and thus without proper authorisations. It often happened that in the course of acquiring the documentation for the IPPC permit, the operator was lacking other licences, such as operational or water permits, since the procedures were not accorded, thus leading to “catch-22” situations.

At the beginning of the implementation period, there were few operators aware of the existence of the Act on IPPC, their obligations under the Act, and the necessity for them to apply for the integrated permit if they wished to continue the operation unperturbed. The Ministry for the Environment, with the help of the Chamber of Commerce and other state bodies, has conducted seminars and created other information channels to inform the operators from the preliminary list on their obligations.²¹ Therefore, the first information on the IPPC obligations was received in seminars but those operators that could not attend the seminars met greater obstacles when trying to independently meet the application requirements. Therefore, a preferable method of information dissemination was perhaps some sort of comprehensive guidebook distributable to every operator with detailed information and advice on their obligations.

19 Radisavljević, A. Isoski, Z. Spasić, S. (2015) Problems of the plants during the process of applying for the permit for the integrated environmental pollution prevention and control. <http://auroragreen.rs/wp-content/uploads/2012/06/Problemi-postrojenja-prilikom-izrada-zahteva-za-dozvolu-za-IPPC.pdf>, 15. 8. 2015, p. 4.

20 *Ibid.* p.4.

21 See more Stanković, Lj. Stokić, D. Božanić, V. Integrated system of prevention and control of environmental pollution – Implementation of the IPPC Directive in Serbia, 2nd International Scientific Conference on Waste Management, Tara, 14–17 September 2009, p. 1-4.

Furthermore, during the period of documentation procurement, new legislation was being adopted, not only in the field of environmental law but also in other fields (such as energy, water, planning and construction, security and fire protection), which in turn changed the procedure for the documentation procurement. Operators again turned for help to consulting experts, but that practice accrued great costs on some smaller businesses.

The author can claim from his own experience one such case. The point was that the late reaction of the particular company management to their legal obligation to prepare documentation for the IPPC application led to the discrepancy between the short term for documentation submission and sheer scope of documentation. Again, the blame was on the bad coordination between various levels of state administration since the republic and regional bodies in question were interpreting the same legal provision differently, which ultimately led to the confusion on the part of the management.

Another important obstacle was the definition of BAT. The problem lies in the linguistic barrier, given that the BREF documents were in English, and they are technical and complex in nature. The consultancy was crucial at this point since it was necessary to analyse the complete BREF document related to the industrial activities of the operator, review all the aspects of the technological process conducted by the operator, point to possible deficiencies, primarily on the basis of the measures done by accredited laboratories, and finally accept the recommendations of the respective BAT and frame all of this inside an action plan.²²

One of the greatest problems that had to do with discordant legislation was the acquirement or the renewal of the water permit. The water permit was among the documentation needed for the IPPC permit. Under the Act on Waters,²³ procedure for acquiring the water permit is lengthy and complicated. It requires the operator to research and elaborate on the reserves of ground water for the usage of its own wells. A lot of documents, which take time and resources, have to be submitted in addition – report of the commission on the technical check of the installation, a copy of the main project or the excerpt from the main project. Since the construction permit precedes the usage permit, in practice there were some quite confusing cases. There were instances in which existing objects (even hundred years old) that serve as places of production process, on which the reconstruction, renovation or refurbishment was duly done, still

22 Radisavljević, A. Isoski, Z. Spasić, S. (2015) Problems of the plants during the process of applying for the permit for the integrated environmental pollution prevention and control. <http://auroragreen.rs/wp-content/uploads/2012/06/Problemi-postrojenja-prilikom-izrada-zahteva-za-dozvolu-za-IPPC.pdf>, 15. 8. 2015, p.11.

23 *Official Gazette of the Republic of Serbia*, no. 30. 2010.

lacked the complete documentation from the privatisation process; moreover, in some cases it was necessary to file projects of the derivated object and start the legalisation of the object, whereas the real estate legal relations on some of the cadaster parcels were still unresolved. Funds and resources and additional periods are needed for all these instances. The compromise solution could be that an agreement with the Ministry is reached, whereupon the application is submitted, regardless of the water permit, but at the same time the security measure would be the proof that the installation has started the procedure for the issuance of water permit, considering that a similar time period is necessary for both the water and the IPPC permit.

Objective conditions, such as the economic crisis in Serbia, influence the situation from their own angle and further aggravate the problems. Among the active operators, a lot of them endure financial difficulties, which slows the project making.²⁴

5. Amendments and additions to the Act on the IPPC in light of given problems

The reason for amendments, given by the legislator, is the enforcement of harmonisation of some legislative measures with application in practice.²⁵ The legislator is aware of the fact that, in order to submit a neat application to the competent body during the procedure of acquiring the integrated permit for new installations, the operator is required to submit various types of documentation, such as: the results of the measurement of environmental pollution or other parameters during the trial period, report from the last technical survey, and so on.²⁶ That should mean that installations are supposed to have complete application at the time when they acquire usage permit. At the same time, their trial period of operation is finished. However, since the installation cannot be put into operation before it acquires the integrated permit, and given that the regular legal procedure for obtaining it takes 240 days, it means that the operator must stop his activities even in the case when the environmental pollution results are in accordance with the ELV.

Other changes that the amendments bring into play are: harmonisation of the Act on the IPPC with the Planning and Construction Act to ensure the continuity in

24 May 21st 2014 – Documentation submitted for obtaining an integrated permit for the dog pound "Energo-Zelena", <http://auroragreen.rs/en/21-05-2014-predata-dokumentacija-za-ishodovanje-integrirane-dozvole-kafileriji-energo-zelena/>, 15. 8. 2015.

25 Amendment proposal text, http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/236-15%20-%20lat.pdf, 15. 8. 2015, p. 3.

26 *Ibid*, p. 3.

operations; some guidance to the operators as to the documentation collection for the application; harmonisation of the dynamics of the competent administrative bodies in charge of issuing permits with the transitory negotiation periods with the EU; harmonisation with the General Administrative Procedure Act.²⁷

Amendments also prolong the periods for the applications to be submitted by existing plants.²⁸ These periods previously varied between November 2009 and March 2014. Now, the general prolonged period is 31st December 2020. As Serbia has acquired the candidacy status, the legislator's argument for prolonging the application period is justified by the requirement for filing the proposal motion; thus, in the legislator's view, the future negotiations require longer transitional periods for operators.²⁹ We can only agree with this point.

These amendments and additions no doubt have positive influence on the operators of new plants, since they precisely define the conditions of their operation during the period of the application consideration and the trial period, and even later, after the trial period, in the next 240 days until the issuance of the integrated permit. Positive impact is also exerted on the competent body, since the dynamics of issuing permits are now more rationally and justifiably posited.

Besides these positive characteristics, some objections can still be put forward. It is strange that the legislator did not take into account the discordance between the Act on the IPPC and the Act on Waters. The lack of legal security is still plaguing the procedure at its present shape. The competent body has the discretionary authority to act as it wishes. Secondly, in the conditions of still visible economic crisis, the lack of capacities on the part of the state administration for the application of such technically complex legislation, the lack of training for the operators in the application of BREF procedures as well as their general unawareness of their obligations under the IPPC, even the prolonged term until the year 2020 might not prove long enough to get the whole registration job done. It seems that the disposition of the *acquis* in this instance is in line with a more general trend that the law goes before the real socio-economic basis.

6. Conclusion

Integrated prevention and control of the environmental pollution is one of the essential instruments for the achievement of sustainable development goal, which is recognized on the international level, in comparative and EU legislation. The Republic of Serbia does not fall behind in the normative field since it

27 *Ibid*, p. 3.

28 *Ibid*, p. 5-6.

29 *Ibid*, p. 6.

has fully implemented the IPPC Directive by enacting an all-encompassing and well-written law as well as a related set of by-laws. What plagues the application of this institute in practice, however, is the discordance with other legislation necessary for its implementation, such as the Planning and Construction Act, the General Administrative Procedure Act and the Act on Waters. Secondly, the lack of capacities on the part of the state administration competent for implementing these legislations, combined with difficulties sustained by the addressees (the operators of installations) in times of deep economic crisis, as well as the general technical complexity of the legislation and the lack of awareness of the addressees about their obligations, along with short periods for the implementation which do not take into account real possibilities of the adaptation of national economy, all these factors taken together led to difficulties in reaching the aim of pollution prevention and control, and ultimately paralyze the application of the law. In that sense, new amendments and supplements are welcome when they eliminate this normative discordance; however, they have not covered it completely, leaving out of range the Act on Waters. On the other hand, prolonged periods of implementation will help to overcome some loopholes in the socio-economic basis of the application of the Act on the IPPC in the Republic of Serbia. However, the stark fact still stands that in the period from 2004 to 2014, before passing the Act on amendments and additions to this Act, the integrated permit was issued to only 10 companies from a total of 196 companies from the list. It took the administration 10 years to handle just 5.1% of applications. For thirty facilities, the applications have not even been submitted. Until the year 2020, there is less than 5 years to go. Can the proceedings realistically be expected to accelerate that much?

At the end, it is the opinion of this author that what could have been done on the normative level, concerning the implementation of the integrated pollution prevention and control, was done. There is still a minor problem of compliance with the Act on Waters, but it may be expected that the practice will find its own solution, however preferable it would be that the legislator had it in mind. What can in fact slow down the progress of the IPPC in practice is the discordance between real social-economic basis and the legal super structure. It seems that the Republic of Serbia puts its obligations towards the European legislation in front of the obligations towards realities of socio-economic life, which creates a paradoxical situation that the legislation which aims to give support to economic initiative, create new economic subjects on the market and strengthen the market competition, in turn confuses that same initiative, discourages the new subjects and eventually weakens the competition.

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ИНТЕГРИСАНО СПРЕЧАВАЊЕ И КОНТРОЛА ЗАГАЂИВАЊА У ПРАВУ ЕУ И РЕПУБЛИКЕ СРБИЈЕ

Резиме

Усвајање закона није једини а поготово не најважнији део имплементације. Много важније је обезбедити практичну примену закона. Закони који се усвајају зарад пуког заокруживања ставки на агенди европског интеграционог процеса, а не у циљу побољшања стања у пракси честа су појава у Републици Србији. Пример ове врсте проблема је имплементација Директиве ЕУ о интегрисаној контроли и спречавању загађивања. Адресати ове Директиве су оператери индустријских постројења која су потенцијални озбиљни загађивачи, те је за њихов рад потребна посебна дозвола, која условљава рад поштовањем граничних вредности емисија. Поступак издавања ове дозволе је довољно сложен да створи бројне практичне проблем. Такође, сам Закон о ИППЦ, заједно са уредбама и правилницима који га допуњују, поставља противречне услове пред оператере, с обзиром да не постоје правно одређене граничне вредности емисија за ваздух и воду, мањка акредитованих лабораторија за праћење емисија, а ни катастри загађивача нису уређени. На све то, економске тешкоће се надовезују. Имплементација ИППЦ зависи од праћења стандарда рада који се објављују у БАТ кодексима (најбоље доступне технологије). Примена ових стандарда скопчана је са повећањем трошкова производње, јер су оператери обавезни да прате високо техничке, често неразумљиве кодексе који у највећем броју случајева нису ни преведени на српски језик. Адресати Закона су некада несвесни својих обавеза на основу закона, јер се у овој области прописи доносе брзином и учесталашћу која је ретко праћена ваљаном припремом за имплементацију.

Кључне речи: интегрисана контрола, животна средина, загађивање, Европска унија, Република Србија.

CRIMINAL LAW

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PROTECTION AGAINST STALKING IN SERBIAN CRIMINAL LAW**

Abstract: *Unlike criminal legislations of most European countries, the Serbian criminal legislation does not envisage special provisions on stalking. In order to provide adequate protection to victims of stalking, there is a dilemma whether this form of social pathology shall be made punishable under the existing criminal legislation, or whether this issue deserves a more substantial legislative intervention. This issue is highly important because Serbia has signed and ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence. Inter alia, Serbia has accepted the obligation to take the necessary legislative or other measures that would ensure that “deliberate behaviour involving repeated threats against another person, causing fear for one’s safety, shall be incriminated”. In this context, particular attention is given to the crime of endangering safety of another envisaged in Article 138 of the Criminal Code. The focal point of this research is a detailed analysis of this Article, aimed at establishing the capacity of the state to respond to the problem of stalking. Considering that some public institutions may have a preventive role in this matter, the author focuses on the safety measure prohibiting access to and communication with the victim. The aim is to determine whether it is an adequate mechanism for controlling the stalker’s behaviour or whether the legislative framework shall be subject to further improvement.*

Keywords: *stalking, threats, safety measure, restraining order.*

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1. A Short Review of the Term "Stalking" and its Characteristics

Criminological theory offers various definitions of the term "stalking", which may be attributed to the combined operation of a number of factors, some of which stem from the characteristics of this complex phenomenon while others are a result of theoretical study. Given its diverse forms, it is sometimes difficult to distinguish stalking from other types of crime, such as: harassment, sexual harassment, domestic violence, workplace violence or peer violence. Besides, in the theoretical study of this social phenomenon, definitions often depend on the theorists' approach and focus on specific aspects rather than devising a general and comprehensive definition (Nikolić-Ristanović, Kovačević-Lepojević, 2007: 5-6). What has been a common thread in the criminological literature is the etymological explanation of the term "stalking", which entered into many languages (including Serbian) as a literal translation of English noun "stalking" (*proganjanje*). Notably, this term was originally used to denote actions used in hunting and tracking animals, and only at the end of the 20th and the beginning of the 21st century did it start being used to denote a specific behaviour towards people (Nikolić-Ristanović, Kovačević-Lepojević, 2007: 4). More precisely, it refers to any type of behaviour qualified to induce fear in an average reasonable person, and which practically encompasses: following and monitoring the victim, either directly physically or using concealed cameras or GPS; controlling phone calls and use of personal computers; collecting data on the victim from public records and services that are available on-line; spreading rumours about the victim; sending unwanted presents, letters, congratulation cards, e-mails; inflicting damage on the victim's property; threatening that the victim, persons close to them, or their pets will be hurt; and any other activity directed not only at intimidating the victim, but also at controlling them.¹

This brief introduction implies that stalking, perceived *per se*, always excludes physical violence, whereby it would be unwise to conclude that it is not a socially dangerous phenomenon. The research results reveal that stalking is certainly connected to violence, as it has the capacity to develop and turn into physical violence, particularly if the partner or an ex-partner is in the role of the stalker who, knowing the victim, possesses the most data about them and hesitates the least to contact them directly.² Additionally, the array of negative consequences it leaves testifies about the degree of inherent danger, some of which affect the physical and mental health of the victim (emotional numbness, feeling helpless,

1 See at: <http://www.victimsofcrime.org/our-programs/stalking-resource-center/stalking-information>, assessed on 25.02.2016.

2 On the risk factors for the occurrence of violence, see: James, Farnham, 2003: 432-438, Miller, 2012: 501, McEwan, Mullen, MacKenzie, Oglloff, 2009: 1469-1478, Norris, Huss, Palarea, 2011: 103-115, Viñas-Racionero, Raghavan, Soria-Verde, Prat-Santaolaria, 2015: 1-18 et al.

depression, anxiety, panic attacks, increased aggression, loss of sleep, chronic fatigue, feebleness, loss of weight and the like), while some affect their social life (forced change of life habits, place of residence, workplace, complete avoidance of social contacts, breaking up a relationship, worsening family relationships, etc.); in the worst cases, it can also result in a suicide attempt or a suicide.³ Therefore, it is understandable that stalking is criminalised in contemporary criminal law systems.

The criminalisation process started in the US in the 1990s, where it was proclaimed a criminal offence first in California and then in other federal states, and eventually at the federal level, with the passing of *The Model Stalking Code for States* with the aim to equalise legal solutions (more in: Mladinović-Stefanović, 2016: 145). Today, in the majority of the European Union member states, this criminal offence is most frequently contained in the primary legislative acts, and more rarely in special legislative, as in Great Britain and Ireland; yet, the solutions substantially vary in the domains of defining this criminal offence and the penal policy (for a comparative overview of the solutions see: Mladinović-Stefanović, 2016: 146-152). As the Criminal Code of the Republic of Serbia contains no such criminal offence,⁴ a question may be posed whether adequate criminal-law protection may be provided by using some of the existing provisions, primarily the provision on the endangerment of safety (Art. 138 of the CC), which first comes to mind in this context; therefore, it will be analysed in more detail further on in this paper. It should be also borne in mind that some general criminal law institutes can have a significant role in the suppression and prevention of stalking, which was also the reason for widening the subject of research to the safety measure of issuing a restraining order prohibiting the offender to access and communicate with the victim (Art. 89a of the CC), in order to determine its applicability.

3 There is much research on this topic and this overview has been made on the basis of some more recent ones: Dreßing, Bailer, Anders, Wagner, Gallas, 2014: 63-65, Sheridan, James, 2015: 11 and onward; Diette, Goldsmith, Hamilton, Darity Jr., McFarland, 2013: 6 and onward, Short, Guppy, Hart, Barnes, 2015: 28-30, Maclean, Reiss, Whyte, Christopherson, Petch, Penny, 2013: 193-199, Purcell, Pathe, Baksheev, MacKinnon, Mullen, 2012: 364-368

4 The Code contains the Serbian term "*proganjanje*", which denotes one of numerous alternative criminal acts against humanity – *persecution* or expulsion on political, racial, national, ethical, sexual or other grounds (Art. 371 of the Criminal Code, *Official Gazette of the RS*, no. 85/2005, 88/2005 – correction., 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/2013, and 108/2014). As the word "*proganjanje*" has a dual meaning in Serbian language, it has been noted in legal theory that the term denotes "persecution" but not "stalking". (Jovašević, 2011: 234 and Jovašević, 2013: 209).

2. Criminal Offence of Endangerment of Safety

The criminal offence of endangerment of safety implies jeopardizing the safety of another person by a threat to life and limb of that person or a person close to him/her. Domestic theory does not agree on the issue of the value protected by the incrimination of this offence; some authors underscore the personal safety (Jovašević, 2014; 55), while others point to the feeling of personal safety (Lazarević, 2007: 429, Stojanović, 2013: 1). The significance of the mentioned value almost need not be emphasised; one's perception of personal safety, implying that they can lead peaceful and tranquil life without being disturbed by others, is one of the fundamental assumptions without which it is difficult to imagine the exercise of other rights and freedoms.

The *actus reus* of this criminal offence is a qualified threat which implies a likelihood of assault on one's life or bodily integrity. Exposure to some other malicious act, irrespective of its weight or danger, could not be qualified as endangerment of safety, unless this other evil also necessarily implies assault on one's life or bodily integrity.⁵ The assault itself should be understood as encompassing both the injury and the endangerment of the respective values, meaning that it will be manifested as committing a criminal offence against life and limb, and in line with the aforesaid, it may include offences from some other group where these values enjoy subsidiary protection. Speaking about threat, it should be pointed out that, when defining some other offences, the syntagm "an treat of imminent danger to life and limb" implies that there is neither spatial distance nor time discontinuity between the threat itself and its realisation. The fulfilment of such requirements is not insisted on in relation to endangerment of safety; therefore, threats that will not be directly realised may be classified under the description. The manner of threatening itself is irrelevant; although it may be assumed that they are most frequently expressed verbally, neither a real threat nor a threat accompanied by clear conclusive action are excluded.⁶

5 For this reason, in one case, where the defendant passed a remark to the claimant in the corridor that she would "deal with her", the court found that there were no elements of endangerment of safety, since the term used does not necessarily refer to an assault on life and limb. *Judgement of the County Court of Čačak, no. Kž. 236/2007.*

6 "In the first instance decision, the two accused persons (defendants) were found guilty of having endangered the safety of person, as the first accused said to the injured party (victim): "I will dig out both your eyes" while the second accused was approaching him with a screwdriver in his hand. In the defendant's appeal it is unfoundedly stated that the second accused had not articulated any threat to the victim, as he had only approached him with a screwdriver in his hand, whereas a threat may only be verbally expressed[...] Yet, a threat may also be expressed with a clear conclusive action, not only verbally, which the second accused had done." Judgment of the County Court in Belgrade, no. Kž. 2856/05 and Judgement of the First Municipal Court in Belgrade, no. K. 276/05(Simić, Trešnjev, 2006: 89).

Furthermore, a threat should refer to the threatened person or a person close to the victim, which constitutes a difference between direct and indirect threat. In domestic theory and judicial practice, there is a stand that the term “a person close to the threatened person” should be interpreted restrictively, whereby it would encompass the first-line relatives: a brother, sister, spouse; a partner/co-habitant from an extramarital relations; adopter and adoptee, guardian and a person under guardianship (Lazarević, 2007: 430, Stojanović, 2012: 531). As it is specified who the threat may refer to, it should also be considered who should express the threat: whether it must be the subject who delivers it or whether it may be some other person. It is considered to be irrelevant who will inflict the evil contained in the threat, the person who makes the threat or some other person, but what matters is that the person does not threaten with some malicious act that actually does not rest within his/her domain of influence (Stojanović, 2013: 3).

Although it is not explicitly stated in the legal description, it is implied that the threat must be serious and feasible, in other words, adequate to create a feeling of fear and personal vulnerability and unsafety in a passive subject, as the consequence of this offence. Thus, the way the concrete victim experiences the threat is taken as relevant.⁷ In that sense, if, for instance, the means used to make a threat is such that the evil presented in the threat cannot be realised, the threat can still be characterised as serious, but only provided that the victim had a justified reason to believe that it is realisable. Or, when an overly superstitious person is threatened with endangering his/her life or limb by using magic, if the person is absolutely convinced that there is a possible causal link between the mentioned events and the offender knows and uses that, the offence will still exist, since there is a feeling of unsafety, irrespective that the described threat is funny and absurd for the majority of people (an example from F. Antolisei: *Manuale di diritto penale, Parte speciale I*, Milano, 2008, p. 154-155; cited from: Stojanović, 2013: 4). A series of parameters should be analysed to assess how a passive subject experiences a threat, starting from its content, the way it is expressed, the general context where it is placed, but also the character of the offender and his/her earlier life, personality of the victim/injured party, his/her attitudes, life circumstances, etc.⁸

7 If we observe this stand in the context of various conceptions on what the object of protection is, then it seems logical to opt for the understanding that the feeling of personal safety is considered as the object of protection.

8 See the Judgement of the County Court of Niš, no. Kž. 724/2004 and the Judgement of the County Court of Valjevo, no. K. 256/2003. From a theoretical standpoint, there is also a different approach, where the issue of seriousness tends to be objectified by using a legal standard of the so-called common/reasonable person; according to this approach, only a

Also, a passive subject must learn about the threat, either directly or indirectly, since without it, the threat cannot achieve any mental impact, even a feeling of unsafety and uneasiness. A logical elaboration of the previous stand leads to several conclusions. First, there can be no consequence of a criminal offence without learning about the threat, which means that the threat is left unfinished and is thus unpunishable, save for the gravest form. Second, if the threatened person has some kind of disability, which prevents him/her from observing or apprehending the threat through senses, there will be no offence of endangerment of safety. Third, due to the accepted subjective assessment of vulnerability, the court need not examine whether the passive subject has been really/objectively endangered. Fourth, in the event of indirect knowledge, the court should "determine the fate" of the person who delivers the threat, since he/she may or may not be an accomplice in endangering safety, which depends on his/her state of mind in terms of the action of delivering the threat.

Apart from the stated, the threat should meet another requirement: it has to be unconditional;⁹ it is emphasised in legal theory that this should not be insisted on at any cost since conditioned threats could also be serious and adequate to intimidate the victim (Stojanović, 2013: 6).

An offence is considered completed when a feeling of personal unsafety is created in the victim. For the offence to exist, it is not necessary that the offender has actually had an intention to realise the threat; if he/she has indeed realize the threat, there will be a criminal offence against life and limb according to the subsidiarity rules (Lazarević, 2007: 429, Stojanović, 2012: 531). Notably, because of the use of the term "endangering" in the description of the offence (which denotes an unfinished, continuous activity), a recurrent threat must be qualified as the same criminal act, rather than a concurrence, (of course) provided that all the threats refer to the same passive subject (Stojanović, 2012: 532). The offender may be any person, in which case premeditation is needed. As for the penal policy, fine and imprisonment up to one year are alternatively prescribed as the basic forms of punishment.

threat that would leave an impression of being serious to the majority of average citizens is considered to be a serious one (Memedović, 2008; 230 and Ćirić, 2011: 201).

9 "When the accused makes a threat to the injured that she will kill her when she sees her on her estate, this is a conditional threat, and there is no criminal offence." (Judgement of the County Court in Belgrade, no. Kž. 388/2004) or "[...] the Court established that the words that had been said as a conditional threat did not have the character of a serious threat, as no threat as a relevant element of this offence can be said as a conditional threat or in a general and a vague manner, but with precise and clear words that show the intention of the offender to assault the life or bodily integrity of the injured or a person close to him/her." (Judgement of the County Court in Niš, no. Kž. 684/2004).

The first qualified form of endangering safety occurs if the offence is committed against a number of persons, which (interpreted in linguistic terms) implies that the threat must be aimed at a minimum of two specific individuals, whereas it shall not necessarily be directly communicated to each of them individually.¹⁰ This raises a disputable question whether the threats directed to disproportionately high number of people may be subsumed under the respective qualified form. In this context, the latest case from Serbian judicial practice should be mentioned. Namely, one of the members of the Facebook group “*Gej parada bruka Srbije*” (Gay Parade, Shame of Serbia) made a threat to all the persons who intended to participate in the Pride Parade 2010 in Belgrade through this social network. Then, the first-instance and second-instance courts found that there were no elements of endangering safety in the act of the accused, that the provided description made it difficult to identify the persons injured by the commission of the described act, who were so indistinctive that they could not be individualised at all. However, this explanation was assessed as being unacceptable by the Supreme Court of Cassation, which reasoned that making a threat to general public through an electronic medium enables a wide circle of people to learn about the threat, as well as the potential participants of the mentioned event; thereupon, it was concluded that objectively a sense of anxiety, unsafety and fear for personal safety could have been formed with the followers of a certain circle of persons.¹¹

Causing anxiety in citizens or other grave consequences are also qualifying circumstances. The anxiety of citizens can occur, for example, if a certain person is threatened with some generally dangerous action or generally dangerous means, if the threat is made that the assault will be committed in the public space and the like. Grave consequences represent a practical question, so that the court renders a decision on the merits of each specific case. For example, it may be any thwarting or more significant disturbance of routine activities, such as performing business obligations, or any other activity causing a material or immaterial damage, or even self-isolation, and staying indoors because of the fear of threat. Some authors observe that legal nature of disturbance caused to citizens and serious (grave) consequences is not the same, which has practical

10 “[...] a threat does not have to be made directly to all, but also indirectly, when the injured is threatened that he and his wife and children will be killed. For the existence of the criminal offence of endangerment of safety, it is irrelevant whether the threats are expressed individually/ personally to every injured person, nor whether simultaneous presence of all the injured is required, i.e. the persons the threat is directed to; however, it is needed that the safety of a number of people is endangered by the threat.” Judgement of the County Court of Belgrade, no. Kž. 2110/2004.

11 Judgement of the Court of Cassation, no. Kzz. 59/2011, taken from <http://www.vk.sud.rs/sr-lat/kzz-5911-povrede-krivi%C4%8Dnog-zakona-ugro%C5%BEavanje-sigurnosti>, visited on 25.02.2016.

implications when assessing the guilt of the offender. Thus, disturbance is not perceived as a consequence but as an objective condition for criminalisation, meaning that it does not have to be included in the offender's intent, whereas, according to common theoretical opinion, negligence must exist in relation to grave consequences (Lazarević, 2007: 431, Stojanović, 2012: 352). The envisaged punishment, for either of these offences, is imprisonment ranging from 3 months to 3 years.

The most serious form of criminal act of endangering safety is qualified by the nature of the passive subject, particularly when it implies a holder of state and public offices: the president of the Republic, a member of parliament, the prime minister, a member of the Government, a judge of the Constitutional Court, a judge, a public prosecutor and a deputy public prosecutor, an attorney-at-law, a police officer and persons engaged in a profession of public importance in the field of information regarding the work they perform. The introduction of the qualified form of this offence by the 2009 amendments caused justifiable criticism, which was accompanied by proposals for its abolishment "as it reminds of verbal delict and is very convenient for political manipulations" (Stojanović, 2013: 11, Ćirić, 2011: 210). Also, endangerment of safety should be envisaged as a general criminal offence; a sense of personal safety shall be guaranteed to all citizens, so there is no need to single out individual categories. If additional criminal-law protection was needed, it could have been achieved with specific criminalisation, not with the offence that should have a universal character. When the lawmaker has opted to give prominence to certain subjects by enacting a qualified form of a criminal offence, the question may be posed why only the field of public information is singled out, neglecting any other profession or duty entailing an increased risk for persons involved in the field of people's health, education or public transportation.¹² The criticism was only effective in relation to penal policy because the originally envisaged punishment of imprisonment of one to eight years was replaced by the term of imprisonment ranging from 6 months to 5 years.

Criminal prosecution for endangerment of safety is instituted *ex officio*. This is a significant change in relation to the solution from the previous Criminal Code, where the prosecution was initiated upon filing a private prosecution complaint.¹³ Contrary to some other interventions, this might be assessed as

12 See Art.: 112 para 32 of the Criminal Code.

13 See Art. 67 of the Criminal Code of the Republic of Serbia, Official Gazette of the SRS, no, 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90, Official Gazette of the RS, no. 6/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 80/02, 39/03 and 67/03.

positive because of the assumption that in some cases the victims are so intimidated that they hesitate to instigate private prosecution.¹⁴

3. Safety Measure: Restraining orders prohibiting access to and communication with the injured party

Restraining orders prohibiting access to and communication with the injured party are a novelty in the catalogue of safety measures. This order was introduced by the 2009 amendments with the aim to suppress family violence even though, judging by the way of envisaging the conditions for its application, it is clear that this order is not strictly linked to this the offence of stalking; practically, it may be applied in relation to the offences against life and limb, rights and freedoms, honour and dignity, sexual freedom and the like. It is a criminal sanction with a complex content and legal effect; it is obvious from its designation, as it includes a number of bans: prohibition from coming in proximity of the injured party within a certain distance, prohibition of accessing the area around the place of residence or workplace, prohibition of further harassment, and prohibition of further communication with the victim. Depending on the circumstances of the specific case, the court may order all or some of the stated bans, but only if it justifiably deems that further commission of the respective actions of coming into proximity or communicating would be dangerous for the victim.

In domestic theory, it has been observed that this measure has an array of defects, starting from the insufficiently precisely formulated content (Ćorović, 2015: 226, Djordjević, 2011:433). The established rules are indeed a framework and many issues have remained unresolved and incomplete. For instance, how the distance for a restraining order is determined and expressed; what to do in a situation when the offender and the injured are spatially linked due to life circumstances (they live in the same block of apartments or street, work at the same place, etc.), in which case it is likely to expect accidental encounter(s) for purposes other than harassment; how to interpret the concept of space surrounding the place of residence or work: whether it includes the apartment, office, surgery, or the entire building where they live or work, or even a wider area of restriction that would also exclude entering the yard or the parking lot of the building where the victim lives or works. The prohibition of further harassment is also problematic because of the scope of the term “harassment” which may be

14 It is assumed that endangerment of safety, even in the mentioned regime of prosecution, has a high dark number. The analysis of statistical data shows that there were 900 convictions for this offence in 2014, which constitutes 2.54% of the convicted out of the total number of the convicted (35,376). Statistical Office of the Republic of Serbia, 2015: 8.

interpreted in different ways. Thus, according to one approach, one should take into consideration whether something is disturbing, according to the standards of an average reasonable person; according to another approach, it is essential to take into account the individual mental/psychological characteristics of the victim who may be more or less vulnerable as compared to the hypothetical average reasonable person. Further critical remarks may be made on the issue of prohibition of further communication. It is unclear whether it includes every aspect of communication or specific ones (e.g. via e-mail, if it has already been abused and there is a justifiable risk that it will be used again to commit the offence), and whether it refers only to communication that can upset a passive subject or to any kind of communication.

Besides the content of this safety measure, the Criminal Code also provides for its duration; so, it cannot be shorter than six months or longer than three years, from the date the court decision becomes final, whereby the time spent in prison or in medical institution where the safety measure was executed is not credited against the total period of imposed measure (Art. 89a para 2 CC). Although this provision seems to be rational, viewed from the aspect of a systematic interpretation, the previous rule has no sense or legal logic in one segment. Namely, if the lawmaker prescribed that this safety measure may only be accompanied by a fine, community service work, suspension of the driving licence, suspended sentence or judicial admonition (see Art. 80 para. 6 CC), the question arises why it was specified that the time spent in prison or in a medical institution is not credited against a total period of awarded penalty, when this measure cannot be ordered in conjunction with any imprisonment penalty or compulsory psychiatric treatment and confinement in a medical institution anyway. Moreover, we may reasonably pose the question whether there is criminal and political justification for the exclusion of ordering this measure alongside with imprisonment penalty; namely, in some cases, the real danger for the victim occurs at the moment when the convicted person, who had victimized the injured party, serves the imprisonment term and comes out of prison. There is another curiosity that may be added to this commentary; at the time when this security measure was introduced, the minimal penalty term was not stipulated, which was later corrected in the amendments in 2012. A further source of astonishment is Serbian judicial practice; in spite of the incomplete and inadequate regulation, the courts did not hesitate to order this measure meanwhile, to the extent that certainly cannot be considered negligible.¹⁵

Apart from the vagueness of the content of this measure, another very significant problem is the lack of any mechanism for exercising the control over its enforcement. Actually, there are very few rules pertaining to the enforcement

¹⁵ It was ordered in a total number of 1402 cases in 2011 (Stojanović 2013a: 126).

procedure for this measure. The Act on Enforcement of Criminal Sanctions¹⁶ contains no provisions thereof, and the void is only partially filled in by the Act on the Enforcement of Non-Custodial Sanctions and Measures¹⁷. The latter Act obliges the court to deliver the decision on issuing this safety measure and serve it to the Commissioner's office; then, Commissioner is obliged to draw up the programme of conduct (within a three-day period from the date of receiving the decision), and to present it to the convicted person; in case of any violation of this obligation, there is the duty to promptly inform the court, police and commissioner's office (Art. 19 CC). Briefly, as there is no envisaged supervision mechanism, the injured party (victim) may report that the imposed safety measure has been violated.

From a theoretical standpoint, it is possible to come up with an efficient control for some of the bans envisaged in this safety measure. First of all, the execution of this measure may be monitored by using electronic surveillance, in which case significant funds must be allocated to purchase the supporting equipment. Moreover, an efficient control also assumes that the issue of legal consequences for non-execution of this measure is resolved, which has not been done yet in Serbian positive law. It is only clear what to do in the event of violating the prohibition ordered along with the suspended sentence, which may then be treated as the basis for revocation (Djordjević, 2011; 431-442). There are indications that the stated disputable issue might be solved by introducing a new criminal offence concerning the violation of the prohibition imposed by the safety measure.¹⁸ Yet, there are opinions in the domestic theory that this solution is also not the most adequate one (Ćorović, 2010: 195-196).

4. Concluding Remarks

The previous elaboration leads to a conclusion that there are arguments supporting the introduction of a separate criminal offence of stalking. First, it is evident that endangerment of safety is rather limited in the domain of legal protection against stalking, as it is exhausted only in the threat of assault to life or limb; thus, many typical stalking "tactics" are beyond reach of criminal law, such as: threatening the victim with some other evil, for example, destruction of property, killing a pet, as well as different acts of controlling and following a

16 Act on the Execution of Criminal Sanctions, *Official Gazette of the RS*, no. 55/14.

17 Act on the Execution of Non-Custodial Sanctions and Measures, *Official Gazette of the RS*, no. 55/14.

18 "Any person who violates the prohibition determined with the ordered security measure shall be punished with a fine or a term of imprisonment of up to six months." Art. 25 of the Draft Law on Amendments to the Criminal Code Available at: <http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php>, visited on 30.02.2016.

person, establishing an undesired contact or communication with the victim, abuse of personal data, and all other actions that can induce fear and anxiety. In addition, endangerment of safety belongs to criminal offences (based on the legal consequences/effects of the committed offence), while in comparative law there are stalking offences that can be based on intent, which moves criminal-law protection a step forward, and makes it easier and more efficient (Miladinović-Stefanović, 2016: 149).

We should not neglect the fact that Serbia signed and ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, thus assuming the obligation to undertake necessary legislative and other measures to ensure the protection against stalking.¹⁹ Besides all the aforementioned, it should be noted that the occurrence of stalking is factually present in Serbian society, although it is rather difficult to assess its actual proportions. The data on this matter can be sporadically found in research on violence against women, which show that it occurs either initially, as a form of mental violence in the family or partner relations, or as a response to any activity of a woman to stop the violence. One of the latest surveys revealed that approximately 18.6% of women were exposed to stalking, including physical stalking, cyberstalking, establishing an undesired contact, spreading false information on the Internet and the like (more in: Petrović, 2010: 25-54). There is a growing concern about the occurrence of stalking within the framework of peer violence, usually in a form of threats and intimidation or spreading lies to limit one's social contacts (more in: Popadić, Plut, 2007: 319). Finally, from the criminal and political standpoint, the criminal offence of "stalking" could, in a number of cases, serve as a preventive mechanism, which entails deterrence from committing a more serious violent crime.

Unlike the Special Part of the Criminal Code, which provides no adequate protection against the occurrence of stalking through the existing provisions, the General Part contains a mechanism that might be useful, provided that it is regulated more comprehensively. Therefore, it is necessary to amend the current legislative framework concerning the restraining order prohibiting access to and communication with the injured party (victim) and, above all, to more precisely envisage its content, execution procedure, and legal consequences underlying the violation of the imposed restraining order.

19 See Art.: 34 of the The Law on the Ratification of Council of Europe Convention on preventing and combating violence against women and domestic violence, *Official Gazette of the RS – International Agreements*, no. 12/2013.

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КРИВИЧНО ЗАКОНОДАВСТВО СРБИЈЕ И МОГУЋНОСТИ ЗАШТИТЕ ОД ПРОГАЊАЊА

Резиме

Криминалитет прогањања представља веома комплексну појаву, почевши од варијабилности облика у којима се може остварити, преко читавог низа негативних последица које оставља по психичко и физичко здравље жртве, али и на њен друштвени живот и животне навике, до чињенице да у једном делу случајева лако ескалира и прогредира у насиље, иако *per se* уопште не подразумева примену насиља. Кривично законодавство Србије, за разлику од законодавстава већине европских земаља, не садржи посебно дело прогањања, што отвара дилему да ли се неком од постојећих инкриминација може пружити адекватна заштита од овог облика социјалне патологије или је потребан неки вид интервенције законодавца. Ово питање је од изузетног значаја и због тога што је Србија потписала и ратификовала Конвенцију Савета Европе о спречавању и борби против насиља над женама и насиља у породици чиме је, између осталог, прихватила обавезу да предузме неопходне законодавне или друге мере којим би обезбедила да „намерно понашање понављањем претњи упућених другом лицу, које узрокују да се лице плаши за своју безбедност, буде инкриминисано“.

У том смислу, посебну пажњу привлачи кривично дело угрожавања сигурности из члана 138. Кривичног законика, тако да окосницу истраживања чини његова детаљна анализа, усмерена на утврђивање капацитета да одговори на проблем прогањања. Како превентивну улогу могу имати и поједини институти општег дела, у овом контексту предмет проучавања представља и мера безбедности забране приближавања и комуникације са оштећеним, не би ли се утврдило да ли је у питању добро постављен механизам за контролу прогонитеља или и даље постоји простор за побољшање начина на који је нормативно уобличен.

Кључне речи: прогањање, угрожавање сигурности, забрана приближавања и комуникације са оштећеним.

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LABOR EXPLOITATION AS THE MOST COMMON FORM OF THE CRIME OF TRAFFICKING IN HUMAN BEINGS IN SPITE OF THE STATE BORDER CONTROL AND THE LABOR MARKET**

Abstract: Labor exploitation is the most common form of the crime of trafficking in human beings, second most prominent form of exploitation of victims, immediately after human trafficking for sexual exploitation. This paper provides an overview of the international legal framework and the national legal framework of the Republic of Croatia, which prohibits forced labor and trafficking in human beings for labor exploitation. It explores and analyzes all possible forms of labor exploitation: forced labor and servitude, debt bondage, and forced labor and servitude of children. It also examines final court decisions in order to obtain information on the accused and convicted offenders, and the sentences imposed. Reference has been made to the victims of labor exploitation, according to sex, age, citizenship, as well as the sectors in which the victims were exploited. In conclusion, based on the current situation, the author provides some proposals *de lege ferenda*.

Keywords: labor exploitation, trafficking in human beings, victims of forced labor, human rights violations.

1. Introduction

Trafficking in persons, which is part of organized crime, is one of the worst possible crimes against humanity and basic human dignity because victims, through various forms of abuse, have their basic human rights violated. Victims are deliberately abused because of their poverty and difficult financial situation

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from which they wanted to escape in order to ensure themselves a better life, by being deprived of freedom, with deep and sustained violation of their human dignity, without the ability to move freely or communicate with other people.

Originally, the Republic of Croatia was considered to be a transit country for trafficking in persons, and the victims were mostly girls and young women from Eastern Europe who would be sexually exploited and forced into prostitution in the countries of destination. However, over time, changes have been observed regarding other forms of exploitation, victims of other sex, and in the end, victims from other countries of origin. Thus, in recent years more and more victims of trafficking are men who are being exploited for labor. They are becoming one of the leaders on the scale of human trafficking for labor exploitation. The exposure of people to exploitation and abuse increases with systematic discrimination of people, inequality, human rights violations, increasing poverty in the country of origin, corrupt practices, war and violent conflict, lack of education, lack of jobs or inadequate employment.

Today Croatia is a country of final destination, i.e., a destination country, country of origin, but also a transit country for trafficking in women and children for sexual exploitation and trafficking of men, women and children for labor exploitation through a form of forced labor.¹

According to the UN Office on Drugs and Crime (UNODC) on Trafficking in Persons from 2014², women and girls represent 70% of the total number of victims. Furthermore, among the identified victims of sexual exploitation women are represented with 79% or with 53% of the recognized forms of exploitation on a global scale, while men account for 83% of the total number of identified victims of forced labor and 40% of the recognized forms of exploitation globally. Along with the illegal trade in drugs and weapons trafficking, it is one of the highest-paid forms of organized crime on a global level. According to the latest estimates of the ILO, illegal annual earnings from forced labor, which also include the earnings from money laundering, are around 150 billion USD, while it is estimated that about 90% of the victims are exploited in the private sector and that two-thirds of earnings comes from commercial sexual exploitation, which is considered the most profitable form of exploitation.³

1 Trafficking in persons report, June 2016, p.144., retrieved 20 Aug 2016, from <http://www.state.gov/documents/organization/258876.pdf>

2 Global Report on Trafficking in Persons 2014, United nations New York, 2014, retrieved 22 Aug 2016, from https://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf

3 Report on the fight against trafficking in human beings in the EU's external relations (2015/2340 (INI)) of 13/06/2016, retrieved 22 Aug 2016, from <http://www.europarl.europa>.

An estimated 21 million victims are trapped in modern-day slavery. Of these, 14.2 million (68%) were exploited for labor, 4.5 million (22%) were sexually exploited, and 2.2 million (10%) were exploited in state-imposed forced labor.⁴ Forced labor takes place in many different industries. Of the 14.2 million trafficking victims exploited for labor: 7.1 million (50%) forced labor victims work in construction, manufacturing, mining, or utilities 3.4 million (24%) forced labor victims are domestic workers, 3.5 million (25%) forced labor victims work in agriculture.⁵

2. Concept and elements of labor exploitation as a form trafficking in persons

In legal doctrine and practice, there is still no single definition of the concept of labor exploitation, but it is considered to be a form of forced labor. According to the ILO Convention against forced labor⁶, the term forced or compulsory labor is defined as any form of work or service by a person who is under the influence of coercion and who has not agreed to that work voluntarily. In other words, the realization of two assumptions is needed: work has to be done under threat and that it is not voluntary. The threat may also relate to the mental and physical side of the personality. Consent of the person that was obtained under the influence of fraud or deception is irrelevant.

The concept of forced labor has the characteristics of trafficking due to the large number of victims of trafficking being abused for labor; however, victims of forced labor need not be exclusively the victims of the criminal act of trafficking in persons. Slavery is a form of forced labor where one person has absolute control over another. Child labor implies child forced labor if a child's work is carried out under duress by a third party or his or her parents, or if the child labor is a direct result of forced labor of parents.⁷

The International Labour Organization (ILO) has identified several indicators that can serve for identifying cases of labor exploitation.⁸

eu/sites/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0205+0+DOC+XML+V0//HR#title2

4 Human Trafficking by the Numbers, Fact Sheet: January 2016, Report from the International Labor Organization (ILO), According to a May 2014, retrieved 15 Aug 2016, from <http://www.humanrightsfirst.org/sites/default/files/TraffickingbytheNumbers.pdf>

5 *Ibid.*

6 Art.2/1; Trafficking for Forced Labour: How to Monitor the Recruitment of Migrant Workers, ILO, 2005

7 Forced Labour and Human Trafficking: Estimating the Profits, ILO, 2005

8 A global alliance against forced labour, International labour office, Geneva, p.6., retrieved 25 Aug 2016, from http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/

Table1. Identifying forced labour in practice

IDENTIFYING FORCED LABOUR IN PRACTICE	
Lack of consent to (involuntary nature of) work	Menace of a penalty (the means of keeping someone in forced labour) Actual presence or credible threat of
Birth/descent into “slave” or bonded status	Physical violence against worker or family or close associates
Physical abduction or kidnapping	Sexual violence
Sale of person into the ownership of another	(Threat of) supernatural retaliation
Physical confinement in the work location – in prison or in private detention	Imprisonment or other physical confinement
Psychological compulsion, i.e. an order to work, backed up by a credible threat of a <u>penalty for non-compliance</u>	Financial penalties
Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.)	Denunciation to authorities (police, immigration, etc.) and deportation
Deception or false promises about types and terms of work	Dismissal from current employment
Withholding and non-payment of wages	Exclusion from future employment
Retention of identity documents or other valuable personal possessions	<u>Exclusion from community and social life</u>
	<u>Removal of rights or privileges</u>
	<u>Deprivation of food, shelter or other necessities</u>
	<u>Shift to even worse working conditions</u>
	<u>Loss of social status</u>

There is no doubt that in the world there is a need for the performance of work activities involving the least possible cost, and in this respect, the need to reduce the pay of the workforce in order to ultimately have less expensive products. This is precisely the main reason for labor exploitation used to achieve the maximum profit of employers in virtually all types of industries. In such an economic environment, unfortunately, socially vulnerable groups consisting of unemployed, migrants, adolescents and children suffer the most. However, in recent years, the number and labor exploitation of men and women is increasing.

3. International legal framework

The Universal Declaration of Human Rights contains provisions relating to the prohibition of slavery and human trafficking. The declaration was adopted and

proclaimed⁹ by General Assembly resolution of the United Nations 217A (III) of 10/12/1948.¹⁰ The provisions of the Declaration relevant to the prohibition of human trafficking and slavery are the following: Everyone has the right to life, liberty and security of person.¹¹ No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.¹² Everyone has the right to freedom of movement and residence within the borders of each state and everyone has the right to leave any country, including his own, and to return to his country.¹³ Everyone has the right to seek and to enjoy in other countries asylum from persecution.¹⁴

The international legal framework relating to fighting and combating trafficking in persons is quite extensive. Historically, the most significant among the first international documents adopted in the first half of the 20th century are: the 1926 *Slavery Convention*,¹⁵ the 1930 *Forced Labour Convention*,¹⁶ and the 1949 *Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others*.¹⁷ The preamble to the 1949 Convention states that prostitution and the accompanying evil of human trafficking for the purpose of prostitution are incompatible with the dignity and worth of human beings and that they threaten the well-being of individuals, families and communities. The following important international documents were adopted in the second half of the 20th century: the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*,¹⁸ the

9 The Universal Declaration of Human Rights, Official Gazette, No. 7/1971.

10 Decision on the Publication of the Universal Declaration of Human Rights, OG, Inter. Agreements 12/09

11 Art.3.The Universal Declaration of Human Rights, retrieved 15 Aug 2016, from <http://www.un.org/en/universal-declaration-human-rights/>

12 Art.4. *Ibid.*

13 Art.13. *Ibid.*

14 Art.14/1 *Ibid.*

15 Slavery Convention, Geneva, 25 September 1926, retrieved 25 Aug 2016, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>

16 ILO Forced Labour Convention, 1930 (No. 29), retrieved 25 Aug 2016, from http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/genericdocument/wcms_346435.pdf

17 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Approved by General Assembly resolution 317 (IV) of 2 December 1949, retrieved 20 Aug 2016, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

18 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Adopted by a Conference of Plenipotentiaries convened by Economic

1957 *Convention on the Elimination of forced Labor*,¹⁹ the 1966 *International Covenant on Civil and Political Rights*,²⁰ the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*,²¹ the 1989 *Convention on the Rights of the Child*,²² the 1996 *Resolution on Combating Trafficking in Persons*,²³ the 1997 *Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation*,²⁴ and the 1999 *Copnvention on the Worst Forms of Child Labor*.²⁵

*The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation*²⁶ underscores a multidisciplinary approach in the fight against trafficking in persons, as required by the need for countries to introduce the independent National Reporter to combat trafficking in persons who would supervise the work of state institutions in the fight against trafficking in persons and is committed to psychosocial protection of trafficking victims who are in shelters (Mađerić, 2008: 9-20). However, the disadvantage of this Declaration is its focus exclusively on trafficking in women.

and Social Council resolution 608(XXI) of 30 April 1956, retrieved 25 Aug 2016, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>

19 C105 - Abolition of Forced Labour Convention, 1957 (No. 105), retrieved 20 Aug 2016, from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105

20 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, retrieved 25 Aug 2016, from <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

21 Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, retrieved 25 Aug 2016, from <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

22 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, retrieved 25 Aug 2016, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

23 Resolution on trafficking in human beings, OG C032P.0088, retrieved 25 Aug 2016, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51995IP0326:EN:HTML>

24 Ministerial Conference under the Presidency of the European Union, The Hague, 24-26 April 1997, retrieved 25 Aug 2016, from <http://legislationline.org/documents/action/popup/id/8747>

25 C182 - Worst Forms of Child Labour Convention, 1999, (No. 182), retrieved 25 Aug 2016, from http://www.victorproject.eu/media/uploads_file/2014/05/05/p18n5qjk611p9fi8rs121vq31d0625.pdf

26 *Ibid. fd. 23.*

The (SECI Agreement) Agreement on Cooperation to Prevent and Combat Trans-Border Crime was signed in Bucharest in 1999, which provides for cooperation between the countries of South Eastern Europe, members of the SECI, in the fight against trafficking in persons and all forms of cross-border crime.²⁷ The former SECI Center has since grown into the SELEC, an organization for coordination and joint action in the fight against organized crime in South Eastern Europe.

At the beginning of the 21st century, two Optional Protocols were adopted in the field of combating trafficking in persons: *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* in 2000,²⁸ and the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* in 2000.²⁹

The Brussels Declaration, signed at the European Conference on Preventing and Combating Trafficking in Human Beings, is the first document that fully regulates the problem of trafficking in human beings,³⁰ which is in favor of strengthening international cooperation in the fight against trafficking in persons both in the field of combating and in the field of preventing this crime.

The UN Convention against Transnational Organized Crime was signed in Palermo on 13/12/2000, with two related protocols: *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, and *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the UN Convention against Transnational Organized Crime,³¹ a particularly significant document which stipulates the obligation to criminalize trafficking in people in the national legislation of the signatory countries. *Protocol to Prevent, Suppress*

27 The agreement was ratified 27/08/ 2000, retrieved 27 Aug 2016, from <http://www.mup.hr/31.aspx>

28 *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, retrieved 27 Aug 2016, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCR.C.aspx>

29 *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, retrieved 27 Aug 2016, from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCR.C.aspx>

30 Brussels Declaration on preventing and combating trafficking in human beings, retrieved 27 Aug 2016, from <http://www.belgium.iom.int/STOPConference/Conference%20Papers/brudeclaration.pdf>

The Republic of Croatia has signed the Declaration in 2002.

31 *The Act on Ratification of UN Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, Act, OG, IA No 14/02, 13/03, 11/04*

and Punish Trafficking in Persons, Especially Women and Children has replaced the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution from 1949. The UN convention is significant in that it represents a complete document that lists all forms of transnational organized crime and prescribes their punishment. Protocol I defines the notion of trafficking in persons³² and prescribes the various forms of exploitation of people where there is no division between men and women, and the victim may be exploited within the borders of its own country.

Of particular importance is the *Council of Europe Convention on Action against Trafficking in Human Beings*,³³ which applies to all forms of trafficking in persons within a state, but also across borders. It perceives trafficking in persons both as a violation of criminal law and as a violation of fundamental human rights, and provides its signatories a comprehensive legal framework to combat trafficking in persons: prevention, prosecution, and assistance and protection to victims of trafficking in persons. (Derenčinović, 2010: 53-72)

Finally, it is also worth mentioning the *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victim*, which replaces the Framework Decision of the Council of the European Union for the Suppression of Trafficking in Human Beings from 19/07/2002 (2002/629/JHA).³⁴ The Directive provides for stronger sanctioning of the crime of trafficking in human beings and the seizure

32 "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs, art. 3.a. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, UN Convention Against Transnational Organized Crime and the Protocols thereto, United Nations, New York, 2004, p. 42.

33 Council of Europe Convention on Action against Trafficking in Human Beings, retrieved 27 Aug 2016, from https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp

The Republic of Croatia ratified the Convention of the Council of Europe in June 2007.

34 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; retrieved 20 Aug 2016, from <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

of illegally acquired assets from convicted persons for the crime of trafficking in human beings.³⁵

4. National legal framework of the Republic of Croatia

The Republic of Croatia actively participates in the fight against trafficking in persons by creating a coherent system, and has ratified the most important international documents listed in the previous section, which are incorporated in the Croatian regulatory legal framework. Since 2002, statistics on the number of victims of trafficking in persons are being recorded. The national legislative framework related to trafficking in persons includes the Criminal Code,³⁶ the Social Welfare Act,³⁷ the Foreigners Act,³⁸ the Criminal Procedure Act,³⁹ the Act on the Agency for Combating Corruption and Organized Crime,⁴⁰ the Act on the Liability of Legal persons for Criminal Offenses,⁴¹ the Act on International Legal Assistance in Criminal Matters,⁴² the Witness Protection Act,⁴³ the Act on Compensation to Crime Victims,⁴⁴ the Act on Compulsory Health Insurance and Health Care of Foreigners in the Republic of Croatia⁴⁵ and the Family Act.⁴⁶ The national framework of the Republic of Croatia includes a National Plan to combat trafficking in persons for the period from 2012 to 2015,⁴⁷ the Protocol

35 See more: Croatian Government - National Plan for Combating Trafficking in Persons for the period from 2012 to 2015, retrieved 27 Aug 2016, from https://www.mup.hr/UserDocsImages/nacionalni_programi/trgovanje_ljudima/2012/NACIONALNI%20PLAN%20FINALNO.pdf

36 Criminal Code, OG. No 125/11, 144/12, 56/15 and 61/15

37 Social Welfare Act, OG No. 157/13, 152/14 and 99/15

38 Foreigners Act, OG No 130/11 and 74/13

39 Criminal Procedure Act, OG No 121/11, 143/12, 56/13, 145/13 and 152/14

40 Act on the Office for Combating Corruption and Organized Crime, OG No. 76/09, 116/10, 57/11, 136/12, 148/13, 116/10, 57/11, 136/12, 148/13

41 Act on Liability of Legal Persons for Criminal Offenses, OG No. 151/03, 110/07, 45/11, 145/12

42 Act on International Legal Assistance in Criminal Matters, OG No 178/04

43 Act on Witness Protection, OG No. 163/03, 163/03

44 Act on Compensation to Crime Victims, OG No. 80/08, 27/11

45 Act on Compulsory Health Insurance and Health Care of Foreigners in the Republic of Croatia, OG No. 80/13

46 Family Act, OG No. 103/15

47 National Plan for Combating Trafficking in Persons for the period 2012-2015, retrieved 27 Aug 2016, from https://www.mup.hr/UserDocsImages/nacionalni_programi/trgovanje_ljudima/2012/NACIONALNI%20PLAN%20FINALNO.pdf

for the identification, assistance and protection of victims of trafficking,⁴⁸ the Protocol on the integration/reintegration of victims of trafficking,⁴⁹ the Code of Conduct for the voluntary return of victims of trafficking,⁵⁰ and Standard operating procedures of the Ministry of social policy and youth for victims of trafficking in persons.

The Croatian Criminal Code (Article 106) criminalizes trafficking in people and includes multiple forms of exploitation. Criminalized are offenses of trafficking in persons for sexual exploitation (prostitution or other forms of sexual exploitation and pornography), the conclusion of unauthorized or forced marriage, labor exploitation (forced labor or servitude), establishing slavery or similar status, taking body parts, use in armed conflicts or committing unlawful acts. The prison sentence of 1-10 years⁵¹ shall be imposed on anyone who by force or threat, deception, fraud, kidnapping, abuse of power or difficult situation or dependant relationship, giving or receiving financial compensation or benefits to achieve the consent of a person having control over another person, or otherwise recruits, transports, transfers, harbors or receives a person or exchanges or transfers control of the person for the purpose of exploitation. The same penalty shall be imposed on anyone who recruits, transports, transfers, harbors or receives a child, or exchanges or transfers control of the child for the sake of their exploitation⁵² and who, knowing that the person is a victim of trafficking in persons, uses their services, which are a result of one of the forms of their exploitation.⁵³ Consent of a victim to exploitation has no effect on the perpetration of the offense.⁵⁴ A qualified form, carrying punishment of imprisonment of 3-15 years,⁵⁵ is envisaged in case where the offense is committed against a child, when the offense is committed by an official in the course of practice, when the offense is committed against a larger number of persons or the life of one or more persons has been deliberately endangered. Criminalized acts also include retain-

48 Protocol for the identification, assistance and protection of trafficking in persons, retrieved 27 Aug 2016, from https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//54_09.pdf

49 Protocol on the integration / reintegration of victims of trafficking, retrieved 20 Aug 2016, from https://www.mup.hr/UserDocsImages/nacionalni_programi/trgovanje_ljudima/2012/PROTOKOL%20%20INTEGRACIJI%20-%20konacno.pdf

50 Rules of Procedure for the Voluntary Return of Victims of Trafficking, retrieved 27 Aug 2016, from https://www.mup.hr/UserDocsImages/nacionalni_programi/trgovanje_ljudima/2012/Protokol%20povratak.pdf

51 Art.106/1 Criminal Code (CC) of the Republic of Croatia

52 Art.106/2 CC

53 Art.106/4 CC

54 Art.106/7 CC

55 Art.106/3 CC

ing, concealing, damaging or destroying travel documents or identity document of another person, which are punishable by imprisonment up to three years.⁵⁶

Trafficking in persons for labor exploitation is very closely related to the phenomena of labor migration, both legal and illegal. The Labor Act, entitled the fundamental obligations and rights arising from employment,⁵⁷ lays down the conditions governing the employment relationship in a way that prohibits the possibility of labor exploitation. The obligation of the employer in the employment relationship is to give the employee work and to arrange the payment of a salary for that work, while the employee is obliged to personally perform the work according to the instructions of the employer.⁵⁸ The employer has the right to specify the place and manner of performing the work, but the employer must respect the rights and dignity of the employees,⁵⁹ and the employer is obliged to ensure safe working conditions that do not endanger their health.⁶⁰ Any direct or indirect discrimination in the field of labor and working conditions, including selection criteria and conditions for employment, promotion, vocational guidance, vocational training and training and retraining, is prohibited by law.⁶¹ The Labor Act refers to the complementary provisions of other laws such as the Act on Prevention of Discrimination⁶² and the Gender Equality Act,⁶³ which protect the dignity of workers and prohibit any kind of discrimination.

Given the above, it can be concluded that the national legal framework complies with international instruments in this matter. On the other hand, one should consider simplifying the legal framework because of the clear presence of a number of legislative solutions that can lead to problems of their application in practice and make the procedure of protecting the rights of victims of trafficking in persons more difficult.

5. Trafficking in persons for labor exploitation

When talking about trafficking in persons for labor exploitation it is appropriate to initially clarify the distinction between the concepts of *labor exploitation* and *forced labor*. The concept of *forced labor* implies coercion and consequently,

56 Art.106/5 CC

57 Art.7. Labor Act, OG No. 93/14

58 Art.7/1 *Ibid.*

59 Art.7/2 *Ibid.*

60 Art.7/3 *Ibid.*

61 Art.7/4 *Ibid.*

62 Anti-Discrimination Act, OG No.85/08

63 Gender Equality Act, OG No. 82/08

the labor is executed under duress, i.e. it is not voluntary. Thus defined concept of forced labor might be more appropriate in the context of human trafficking than the concept of labor exploitation given that, in accordance with the adopted international documents, it includes an element of coercion. However, *labor exploitation* is not synonymous with the concept of forced labor, namely, the worker can work more than the legal maximum of 40 hours a week while being exploited for labor so that the employer does not need to hire another worker for the remaining work hours; therefore, such a worker has voluntarily agreed to such a workload, so we cannot talk about forced labor. Accordingly, we can say that labor exploitation is just one mutual segment with forced labor, so labor exploitation is a much more specific concept than forced labor. On the other hand, trafficking in persons for labor exploitation also refers to just one part of the concept of forced labor. It would be practical to opt for a unique concept especially as in practice both are used depending on how it is interpreted by the laws of individual states.

People who have been trafficked for labor exploitation are typically made to work in sectors such as: agriculture, construction, entertainment, service industry and manufacturing.⁶⁴

Common features of trafficking in persons for labor exploitation are the following: they live in groups in the same place where they work and leave those premises infrequently, if at all; they live in degraded, unsuitable places, such as agricultural or industrial buildings; they are not dressed adequately for the work they do (they may lack protective equipment or warm clothing); they are given only leftovers to eat; they have no access to their earnings; they have no labor contract, work excessively long hours, have no choice of accommodation; they never leave the work premises without their employer and are unable to move freely; they are subject to security measures designed to keep them on the work premises; they are disciplined through fines, subjected to insults, abuse, threats or violence; they lack basic training and professional licenses.⁶⁵

The UNODC states the following circumstances as indicators that may serve for identifying cases of trafficking for the purpose of labor exploitation: notices have been posted in languages other than the local language; there are no health and safety notices; the employer or manager is unable to show the documents required for employing workers from other countries; the employer or manager is unable to show records of wages paid to workers; the health and safety equipment is of poor quality or is missing; the equipment is designed or has

64 United Nations Office on Drugs and Crime: Human trafficking indicators, retrieved 20 Aug 2016, from https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf

65 *Ibid.*

been modified so that it can be operated by children; there is evidence that labor laws are being breached; there is evidence that workers must pay for tools, food or accommodation, or that those costs are being deducted from their wages.⁶⁶

5.1. Forced labor

Forced labor is prohibited by law. Any form of forced labor is first of all in violation of the basic human rights guaranteed by the constitution, and then the rights in the field of labor law. The victim is usually forced to perform labor in poor working conditions that endanger their health and can be life-threatening. The definition of forced labor contained in the 1930 Convention of the International Labor Organization (ILO), no. 29, defines forced labor *as all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered themselves voluntarily*.⁶⁷ Forced labor is, therefore, any voluntary work that is done under the threat of punishment. According to *Abolition of Forced Labor Convention, 1957 (No. 105)*, each Member of the International Labor Organization undertakes to suppress and not to make use of any form of forced or compulsory labor as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system, as a method of mobilizing and using labor for purposes of economic development, as a means of labor discipline, as a punishment for having participated in strikes, as a means of racial, social, national or religious discrimination.⁶⁸ The 1957 Convention also completely prohibits forced labor in some exceptional circumstances. It should be noted that the 1930 Convention laid down certain exceptions relating to compulsory military service, normal civic obligations, lesser social labor, prison labor and work in the event of an emergency of war, calamity or threatened calamity (fire, flood, famine, earthquake, epidemic, invasion by animals, insects or vegetable pests), and any other circumstances that could endanger the life or well-being of the population.⁶⁹

Table 2 shows the typology of forced labor, which cites two divisions of forced labor by private companies: commercial sexual exploitation and forced economic exploitation of which a number of people are victims of trafficking.

66 *Ibid.*

67 Art.2/1 ILO Forced Labour Convention, 1930 (No. 29)

68 Art.1. C105 - Abolition of Forced Labour Convention, 1957 (No. 105), retrieved 20 Aug 2016, from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312250

69 Art.2/2 ILO Convention No. 29.

Table 2. A typology of forced labour for statistical estimation⁷⁰

FORCED LABOR	
State-imposed	
Private-imposed	For commercial sexual exploitation
	For economic exploitation
	<i>of whom victims of trafficking in persons</i>

The UNODC specifies indicators that can be used for identifying persons trafficked for begging and petty theft: children, elderly persons or disabled migrants who tend to beg in public places and on public transport; children carrying and/or selling illicit drugs, have physical impairments that appear to be the result of mutilation; children of the same nationality or ethnicity who move in large groups with only a few adults; unaccompanied minors who have been “found” by an adult of the same nationality or ethnicity, move in groups while traveling on public transport: for example, they may walk up and down the length of trains, participate in the activities of organized criminal gangs; large groups of children who have the same adult guardian, who are punished if they do not collect or steal enough, who live with members of their gang, travel with members of their gang to the country of destination, live as gang members with adults who are not their parents, move daily in large groups and over considerable distances.⁷¹ The following can serve as an added criteria in detection of human trafficking for the purpose of begging: new forms of gang-related crime appear; there is evidence that the group of suspected victims has moved, over a period of time, through a number of countries; there is evidence that suspected victims have been involved in begging or in committing petty crimes in another country.⁷²

Trafficking in children and coercion of a child to voluntary and forced labor is one of the worst forms of child exploitation. Indicators that point to forced labor of children relate to situations in which the child is under the care of a person who is not a member of the family, but to whom a child contributes financially and is not able to leave that person.

5.2. Servitude

Forced labor is very often associated with certain households in which the victim is trapped and, therefore, forced to work and live. This form of forced

⁷⁰ Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005, p.10.,retrieved 20 Aug 2016, from <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>

⁷¹ United Nations Office on Drugs and Crime: Human trafficking indicators, retrieved 20 Aug 2016, from https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf

⁷² *Ibid.*

labor is called servitude. The downside of this kind of exploitation in terms of its disclosure relates to the inability to inspect and control private property as it is done with business premises. Subordinate victims in such private households are reduced to servants who perform all types of jobs and it is very difficult from their home position to seek help, given the omnipresent fear and physical restraint by the employer which is often accompanied by confiscation of identity and travel documents. Therefore, this form of exploitation requires special protection of victims who are *de facto* imprisoned and exploited for work as servants on private properties.

The common characteristics of people who have been trafficked for the purpose of domestic servitude are as follows: they live with a family but do not eat with the rest of the family, have no private space, sleep in a shared or inappropriate space; they are reported missing by the employer even though they are still living in the employer's house; they never or rarely leave the house for social reasons, they never leave the house without the employer; they are given only leftovers to eat; they are subjected to insults, abuse, threats or violence.⁷³

5.3. Debt bondage

Debt bondage is one of the forms of labor exploitation by using coercion and the existence of the debt with the aim of keeping a person in a subordinate position. Debt bondage or bonded labor is a common situation in which the workers are recruited in such a way that they borrow from their employer and accept the initial debt as part of the conditions of employment. The initial debt refers to given accommodation, food and other opportunities that the employer indicates as secured. Costs incurred by lending to people who work do not mean intrinsically debt bondage, but the growing high costs are a binding element of the obligation to return, which leads to exploitation. In most cases, persons who are subjected to debt bondage are workers who have emigrated to another country. This is due to: abuse of contracts, inadequate laws on hiring and employment of migrant workers, intentional infliction of exploitative and often illegal costs and debts to workers in the country of origin (OSCE, 2011:23). Misuse of the contract is not an indicator that this is forced labor; however, the use of threats, force or restrictions with the intention of keeping certain persons as workers is a form of forced labor.

73 *Ibid.*

6. Court practice - research and analysis

6.1. Perpetrators of a criminal act of trafficking in persons

Table 3 shows the number of charged, indicted and convicted persons for the crime of trafficking in persons in 2015 and 2014. In 2015, there was a slightly fewer number of charged persons (14) as compared to those charged (17) in 2014, but there was a larger number of indicted persons (7) in 2015 than in 2014 (5). However, more convicted persons were recorded in 2014 (4) relative to those convicted in 2015 (2).

Table 3. Criminal charges, indictments and convictions for a criminal offense under Article 106. CC RH⁷⁴

Art.105 CC RH TRAFFICKING IN PERSONS		
	2014	2015
CHARGES	17	14
INDICTMENTS	5	7
CONVICTIONS	4	2

6.2. Victims of trafficking in persons for the purpose of labor exploitation

Victims of trafficking in persons for the purpose of labor exploitation are mainly used in factories, manufactures, mines, plantations and for the work to private households (Božić, 2012: 115). Working conditions can often endanger the life of workers, such as: work with dangerous machinery or tools; work with dangerous chemicals; work underground, under water, works on huge heights or in confined spaces; work with heavy loads; work in an unhealthy environments with noise, high or low temperatures.⁷⁵ Labor exploitation of men refers to *Dirty, Difficult and Dangerous Jobs*.⁷⁶

Table 4 presents (strong, medium and weak) indicators pointing to labor exploitation.⁷⁷

74 Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2014, retrieved 20 Aug 2016, from http://www.dzs.hr/Hrv_Eng/publication/2015/SI-1551.pdf, Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2015, retrieved 20 Aug 2016, from http://www.dzs.hr/Hrv_Eng/publication/2016/SI-1576.pdf

75 Questions and answers on Children in hazardous work retrieved 20 Aug 2016, from http://www.ilo.org/ipec/Informationresources/WCMS_155246/lang--en/index.htm

76 Combating Trafficking in Women and Children: A Gender and Human Rights Framework retrieved 20 Aug 2016, from http://www.childtrafficking.org/pdf/user/unifem_gender_and_human_rights_framework.pdf

77 Trafficking in human beings for the purpose of labour exploitation, OSCE, retrieved 15 Aug 2016, from <http://www.osce.org/bih/106977?download=true>

Table 4. Indicators of exploitation

STRONG	MEDIUM	WEAK
Excessive number of work days or hours	Poor living conditions	No access to education
	Hazards at work	
	Low or no wage	
	Failure to comply with the law or the signed contract	
	Absence of social protection (contract, social security)	
	Very poor working conditions	
	Manipulation of compensations	

In the Republic of Croatia, in the period from 2002 until today, there were a total of 222 registered victims of trafficking, 148 of whom were Croatian citizens.

Table 5 Number of victims of human trafficking from 2002 to 2015⁷⁸

YEAR	NUMBER OF VICTIMS OF TRAFFICKING IN PERSONS
2002	8
2003	8
2004	19
2005	6
2006	13
2007	15
2008	9
2009	8
2010	7
2011	14
2012	11
2013	29
2014	37
2015	38
Total	222

Table 5 shows the number of victims of trafficking in the past 14 years. If we look at the last year, 2015, there were 38 identified victims of trafficking, while 35 victims were Croatian citizens, which supports the theory of human trafficking within the state. In 2014, almost half of the identified victims were minors, while in 2015 the situation was completely different given that only 4 minors were identified.

⁷⁸ From: Ministry of Interior, retrieved 15 Aug 2016, from available on: <http://www.policija.hr/31.aspx> Trafficking in persons in Republic of Croatia from 2014 to 2015, http://www.hck.hr/upload_data/txt_editor/Azil%20i%20migracije/Trgovanje%20ljudima/Sazetak.pdf,

Table 6 shows the number of identified victims of human trafficking according to the country of origin in 2014 and 2015. There was an equal number of victims of trafficking recorded in 2014 (37) and 2015 (38). Most victims were from Croatia, while there was also a small number of Hungarian and Romanian citizens.

Table 6. Number of identified victims of human trafficking according to the country of origin in 2014 and 2015⁷⁹

Number of victims - 2014	Country of origin	Number of victims - 2015	Country of origin
3	Bosnia and Herzegovina	2	Bosnia and Herzegovina
33	Croatia	35	Croatia
1	Romania	1	Hungary
TOTAL 37		TOTAL 38	

Table 7 shows the identified victims of trafficking by type of exploitation and by gender in 2014 and 2015. In Croatia, the first place is taken by victims of sexual exploitation, while the victims of labor exploitation are second. Accordingly, the increasing number of victims are women.

Table 7. Identified victims of trafficking by type of exploitation and by gender in 2014 and 2015⁸⁰

Form of exploitation in 2014	M	F	Form of exploitation in 2015	M	F
Labor	4	3	Labor	-	-
Sexual	4	27	Sexual	-	38
Transit	1	2	Transit	-	-
TOTAL	9	32	TOTAL	-	38

Table 8 shows the number of identified victims of trafficking in persons according to age and sex in 2014 and 2015. Most of the victims were in the age group of up to 30 years; however, in 2014 most of the victims were women aged up to 18 years, while in 2015 most of the victims were women aged 19-30.

79 From: Ministry of Interior of Republic of Croatia

80 *Ibid.*

Table 8. Number of identified victims of trafficking in persons by age and sex in 2014 and 2015⁸¹

Age 2014	M	F	Age 2015	M	F
0 - 18	4	18	0-18	-	4
19 - 30	5	3	19-30	-	17
31-40	1	2	31-40	-	9
41-50	-	-	41-50	-	6
Other	2	2	Other	-	2
TOTAL	12	25	TOTAL	-	38

7. International cooperation of states in the combat against trafficking in persons and labor exploitation

Crime as the most dangerous negative social phenomenon has not been eradicated; in fact, it has survived all evolutions and revolutions, adapted to the changed circumstances and developed into new and more dangerous forms. Contemporary forms of crime are characterized by great diversity and mobility because this phenomenon knows no boundaries and physical barriers. And beyond that, criminals and criminal organizations connect and unite for easy operation and acquiring illegal material benefits. This is especially true for organized crime which has a transnational character, while the mafia organizations get linked to achieve extra profits and easy money. A particularly illustrative example from the recent past is the war in former Yugoslavia, which was no obstacle for criminals to continue their criminal activities and to take advantage of war conditions for joint action.

The international community has long been aware that an effective fight against organized and other forms of crime cannot only take place within national borders but also on a wider international scale, with the common commitment of the countries and international organizations. In addition to the measures and actions that countries are taking at the national level, measures at the international level are also very important, which according to their character and nature are normative and operational. (Nikač Ž, 2015: 65-78) The identical approach is used when it comes to human trafficking and labor exploitation as a specific form of this crime. These are activities, measures and actions that are established at the multilateral, regional and bilateral level.

81 *Ibid.*

At the multilateral level, a number of international documents were adopted relevant to the suppression of human trafficking and labor exploitation. In addition to the "parent" documents, undoubtedly the most important act is the Palermo Convention,⁸² which is the main software for the operation of the judicial authorities, the police and the specialized agencies in the fight against transnational organized crime. The Convention is a revolutionary current document since it establishes special investigative techniques and methods, special bodies trained for the fight against organized crime, multi-agency approach and is committed to the harmonization of national legislation and harmonization of court practice.⁸³

At the regional level, of special importance in the fight against transnational organized crime and its forms, embodied in the Police Cooperation Convention for Southeast Europe (PCC SEE) and the SELEC Convention (Southeast European Law Enforcement Center).⁸⁴ The main objective of these documents is to facilitate communication between states and their specialized services, the harmonization of national legislation and the harmonization of court practice. This also applies to trafficking in persons and labor exploitation as a specific form of this offense.

At the bilateral level, countries are mainly opting for the conclusion of popular cooperation agreements that are in the function of implementation of multilateral agreements, but they can be independent international legal documents. Such is the case with all the republics of the former Yugoslavia which have concluded agreements on mutual police and criminal judicial cooperation, which especially emphasize the cooperation of states and their authorities in the fight against organized crime. (Nikač, Juras: 2015: 283-302)

Operational measures to fight organized crime include cooperation of states and their bodies and specialized international organizations. The best-known types and forms of cooperation are related to the exchange of information, the joint police operations and joint investigation teams as well as liaison officers. In the case of trafficking for labor exploitation, there is a great significance of the activities of border police, specialized international organizations (e.g. FRONTEX in the EU) and the specific national agencies (e.g. labor inspectorates) because they exercise control and supervision of migrant flows and migrants at the border and within the territory of a country. Another significant development is the cooperation of judicial authorities of the state, especially the attorney's office

82 Op.cit. in note 32.

83 Op.cit. in note 29.

84 Božić V, Nikač Ž, *Criminal incriminations based on the United Nations Convention Against Transnational Organized Crime in the Criminal Legislation of the Republic of Croatia and the Republic of Serbia*, Proceedings of the international conference, Faculty of Security in Skopje, 2016, retrieved 25 Sep 2016, from <http://www.fb.uklo.edu.mk/>

for organized crime and criminal courts, which cooperate during the extradition proceedings and certain procedural legal actions (delivery of files, requests, witness hearings, hearings of injured parties, expertise, etc.).

In combating organized crime, a special role is played by specialized international organizations; the leading agency is undoubtedly the International Criminal Police Organization (INTERPOL). Member States shall participate in the work of the organization through its bodies and forms of work, including in particular the National Central Bureau (NCB) in order to perform the daily exchange of information. The organization has specialized operational departments to combat all forms of transnational organized crime, trafficking in human beings and all its modalities (sexual exploitation, labor exploitation, forced labor, etc.). On the Continent, the most significant is the European Police Office (EUROPOL), which is organized at the EU level but has significant cooperation with non-EU countries, with which periodic meetings are held for the purpose of establishing joint actions against organized crime. There are also several non-governmental international organizations that have a supporting role in the formation of joint actions, measures and actions in combating emerging forms of crime (SEPCA - Southeast Europe Police Chiefs Association, MARRI - Migration, Asylum, Refugees Regional Initiative, PF - Police Forum).⁸⁵

Therefore, because of the weight and the actuality of the problem of human trafficking for the purpose of all forms of exploitation, international cooperation is imperative for the survival of the international system, and hence it imposes obligations on the states. Croatia, as a full member of the EU, has specific obligations to the organs and bodies of the EU, as well as in the implementation of a common foreign policy set out in the work relating to illegal immigration. This means a significantly better control of government (Croatia) and external borders (EU) in cooperation with all agencies and services at national, regional and EU level.

8. Conclusion

Trafficking in persons with the intention of labor exploitation represents the crudest violation of fundamental human rights and as such must be rated and qualified. It should not be treated only through non-compliance with labor law or viewed in the context of illegal migration. Putting the aforesaid into practice requires increased activity of the country in the field of justice and prosecution of this type of crime, as well as adequate assistance and protection of victims of labor exploitation as a form of human trafficking. It is necessary to provide a complete support system for the victims of trafficking for labor exploitation,

⁸⁵ Op.cit. in note 51.

which includes the right to information, the right to medical and psychological care, the right to legal assistance and the protection of privacy. Consequently, first of all, it is necessary to strengthen and improve the methods to ensure timely identification of victims of trafficking for labor exploitation. Second, it is necessary to conduct public campaigns and education of potential migrants on labor exploitation as a possible form of human trafficking.

Given that labor exploitation is related to black labor market, it is necessary to reinforce the Labor Inspectorate control of employment agencies who mediate in finding jobs for both legal and natural persons. It is necessary to impose and monitor the flow of money that is gained through this type of criminal activity in order to prevent its legalization. Trafficking in persons for labor exploitation affects the labor market and all activities; therefore, it is necessary to impose daily monitoring and control of the labor market to avoid the black market economy as much as possible.

In combating human trafficking for the purpose of labor exploitation, an important role is played by specialized bodies, the police, the prosecution and the court, which must cooperate with each other impeccably. In addition to the multi-agency approach, a versatile international cooperation with neighboring countries, as well as cooperation at the EU level, is needed at the national level. The Republic of Croatia has a special responsibility because its territory is, on the one hand, on the eastern external border of the EU and, on the other hand, it borders with the countries of former Yugoslavia and resists the current migrant crisis, which has seriously threatened the system of the states of the old continent.

Finally, it is certain that the harmonization of legal standards and uniform legal practice greatly contributes to combating this form of human trafficking. In that respect, it equally combats other related crimes such as forgery of documents, illegal entry, movement and stay in Croatia, another Member State of EU or signatories of the Schengen Agreement, crimes of fraud and other crimes.

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**RADNA EKSPLOATACIJA KAO NAJČEŠĆI OBLIK KAZNENOG
DJELA TRGOVANJA LJUDIMA UNATOČ KONTROLI
DRŽAVNIH GRANICA I TRŽIŠTA RADA**

Rezime

Radna eksploatacija najčešći je oblik kaznenog djela trgovanja ljudima, drugi po redu oblik iskorištavanja žrtava, odmah poslije trgovanja ljudima u svrhu seksualnog iskorištavanja. U radu će se dati pregled međunarodnog pravnog okvira i nacionalnog zakonodavnog okvira Republike Hrvatske kojima je zabranjen prisilan rad i trgovanje ljudima u svrhu radnog iskorištavanja. Istražit će se i analizirati svi mogući oblici radne eksploatacije: prisilni rad islužjenje, dužničko ropstvo te prisilni rad i služenje djece. Istražit će se i pravomoćne sudske odluke kako bi se dobili podaci o optuženim i osuđenim počiniteljima i izrečenim kaznama. Ukazat će se na žrtve radnog iskorištavanja, prema spolu, dobi, državljanstvu kao i prema grani u kojoj su žrtve iskorištavane. Zaključno, na temelju utvrđenog postojećeg stanja pokušat će se navesti prijedlozi de lege ferenda.

Ključne riječi: *radna eksploatacija, trgovanje ljudima, žrtve prisilnog rada, kršenje ljudskih prava.*

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TEMPORAL VALIDITY AND MANDATORY APPLICATION OF A MORE LENIENT CRIMINAL LAW (LEX MITIOR)

Abstract: *Considering that criminal legislation includes specific rules governing the time limits of validity of criminal law provisions, in this article, the author discusses the temporal validity and obligatory application of a more lenient criminal law (lex mitior). The Serbian Criminal Code provides a general rule that “the law in force at the time of committing the offense shall apply to the offender” (Art. 5), which further implies that this provision is a necessary result of applying the principle of legality. However, an important exception to this general rule is a mandatory retroactive application of the law that is more lenient for the offender (Art. 5, par. 2) in case the offense was committed during the validity of a legislative act which was amended once or several times after the commission of the offense and before the moment of issuing the final judgment. If the new law is more stringent, it cannot be applied retroactively in any case. Therefore, when assessing which law is more lenient and thus more favourable for the criminal offender, it is necessary to take into account the interim laws, i.e. the law which was in force at the time of commission of a criminal offence and the law which was in effect in the course of trial proceedings.*

Keywords: *criminal law, principle of legality, temporal validity, more lenient law, criminal sanctions.*

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1. Introduction

Temporal validity of the criminal law is functionally linked to a principle of legality in determining a criminal offense and a sentence. By assessing which law is applicable to an offender, the legislator practically determines which law the assessment will be based on, whether certain behavior constitutes a criminal offense, and which sanctions may be imposed for the commission of the specific offense. The importance of time limits pertaining to the validity of law is underscored in the constitutional framework. The Constitution of the Republic of Serbia provides that "laws and other general acts may not have a retroactive effect" (Article 197, par. 1), whereas Article 197 par. 3 stipulates that "a provision of criminal law may have a retroactive effect only if it is more favourable for the perpetrator."¹ Thus, the constitutional provisions explicitly supported the retroactive effect of criminal law provisions which are deemed to be more favourable for the offender; these provisions ensure that the offender shall be subjected to the application of the law which was in effect at the time when the criminal act was committed. This is the basic rule on application of criminal law, and it is in compliance with the principle of legality, which implies that the lawfulness or unlawfulness of an act is assessed by taking into account the time when it occurred and on the basis of legal provisions in force at that time (Лазаревић, 2006: 18).

When criminal law enters into force, it represents a specific issue for a field of criminal law. When it comes to a complete criminal code, that period is by rule longer than in case of other laws. The reason is a need to have citizens acquainted with the new criminal legislation. The legislator may prescribe that certain legal provisions come into force later than the entire law (e.g. the time needed to create conditions for the execution of some new criminal sanctions). Therefore, in the legislative practice in the field of criminal law, there are cases where this period lasts longer than one year (Стојановић, 2009: 36). Unless the date of entry into force of the criminal law is expressly stipulated, the general rule applies, i.e. law comes into force 8 days after its publication in the Official Gazette of the Republic of Serbia. According to the constitutional provisions, the law shall enter into force not earlier than on the eighth day from the date of publication. For justified reasons, the same provision may stipulate a period shorter than 8 days for the law to enter into force (Art. 196 of the Constitution). Due to the complexity of criminal laws and the nature of the subject matter, it would not be justified to envisage a period shorter than 8 days from the date of publication.

Article 1 of the Criminal Code provides for the principle of legality, which implies that there is no criminal offense and criminal sanction if they are not explicitly

1 Устав Републике Србије; *Службени гласник РС*, бр. 35/06

provided by the criminal law before the offense was committed (*nullum crimen sine lege praevia*). Therefore, law in force at the time of the offense will be applied. In order to have this rule applied, it is necessary to determine the time when the offense was committed, as well as which criminal law was in force at that time. The significance of this policy is indisputable, as it consistently implements the principle of legality with regard to the fact that the offender can be held liable only for the offense which was envisaged as a criminal offense under the law which was in effect at the time the offender committed the offense.

In criminal law, there are specific rules on the temporal validity of a criminal code. The Serbian Criminal Code (CC) ² provides a general rule that “the law in force at the time of committing the offense shall apply to the offender” (Art. 5 CC), which further implies that this provision is a necessary consequence of applying the principle of legality (Стојановић, 2006: 5). However, an important exception to this general rule is a mandatory retroactive application of the law that is more lenient for the offender (Art. 5, par. 2 CC) in case the offense was committed during the validity of a legislative act which was amended once or several times after the commission of the offense and before the moment of issuing the final judgment. If the new law is more stringent, it cannot be applied retroactively in any case. Therefore, when assessing which law is more lenient and thus more favourable for the criminal offender, it is necessary to take into account the interim laws, i.e. the law which was in force at the time of commission of a criminal offence and the law which was in effect in the course of trial proceedings (Стојановић, 2006: 5).

2. The application of a more lenient law as an exception to the principle of non-retroactivity of the law

The rule contained in Article 5 (par. 1) of the Serbian Criminal Code (CC) is the basic principle concerning the temporal validity of the criminal law, according to which the law in force at the time of the offense is applied against the offender (*nullum poena sine lege praevia*). This means that the time when the offence was committed is a relevant factor for the choice of criminal law which will be applied. The time of committing a crime is considered to be the time when the criminal act was performed, regardless of when the consequence occurred; in establishing the time of committing an act of complicity, the relevant factor is the time when this action was taken (Art. 16 CC) (Стојановић, 2009: 81).³ Consider-

² Krivični zakonik Republike Srbije (Criminal Code of Republic of Serbia), *Službeni glasnik* RS, br. 85/2005, 88/2005, 107/2005, amended in Dec.2009 and Dec. 2012

³ Stojanović emphasizes that the CC accepted the action theory, which implies that the time when the criminal offender took action is considered to the time of commission of the

ing that Article 5 par. 1 of the CC is about the time of undertaking the offense (Бачић, 1998: 87-88; Бабић, Марковић, 2008: 94)⁴ and not about the time when the offense was committed, it may be disputable whether the law in force at the time when the action was undertaken is applicable to accomplices, regardless of when the act of complicity was taken, i.e. whether the law also applies in cases where another law was in force at the time when the action of complicity was taken. A plain linguistic interpretation could lead to such a conclusion.

However, starting from the spirit of the principle of legality (the provisions on the temporal validity of law are in some sense the concretization of this principle), the same rules must apply to accomplices as for the offender (Стојановић, 2009: 37-38). Thus, the act of complicity in a crime should be envisaged as punishable before it was taken, and if not, the law where it was provided cannot be retroactively applied. Therefore, in case of an act of complicity, the applicable law is the law that was in force at the time when the action was taken, regardless of when the act was committed. This further means that it is possible that in one case an accomplice remains unpunished, because the act he/she incited or assisted in, at the time of undertaking the action of complicity, was not a criminal offense; yet, the offender may be convicted of a criminal offense of complicity because, after taking the action of complicity (and before the offense was committed) the behavior in question was defined as a criminal offense by the new law (Стојановић, 2009: 37).

A significant issue that arises regarding the prohibition of retroactivity (retroactive effect of the Criminal Code) are certainly exceptions to the principle of non-retroactivity. Namely, when the offense was committed during the validity of the old law, and the offender is on trial at the time when the new law was in force, the dilemma is which law shall be applied in such case: whether to apply a law that is no longer valid, or the law which was not in force at the time of the offense? In this regard, the criminal law theory contains different views when it comes to whether the law can work retroactively.

According to one view, which is supported by the classical concept of strict application of the principle of legality, the application of the new law is prohibited. Retroactive application of the law violates the principle of legality, introduces legal uncertainty and allows the punishment even for actions that do not have the character of criminal offenses. According to this doctrine, the so-called

criminal offence.

4 Ваџић thinks that three categories should be differentiated: the time of the commission of the criminal offense (Art. 16. CC), time validity of the criminal law (the exact period when to when the law is in force), and time limits of the criminal law (Art. 5. CC). Notably, time limits of the criminal law it should not be confused with the time validity of the law, as those are two different terms.

absolute prohibition of retroactivity, new law cannot be applied even when it is more favorable for the offender. In line with this theory, only the law that was in force at the time of the offense should be and may justifiably be applied (Бачић, 1988: 88).

The proponents of the opposite view advocate that the retroactive application of the new law is normal and logical. This logic stems from the fact that the new criminal code reflects modern living conditions, real social needs, aspirations, and does not distinguish whether the law is more lenient or more stringent for the offender. One of the theorists who supports this view is S. Frank, who advocates the so-called “*unconditional absolute retroactivity of criminal laws*,” which allows for a more stringent punishment than the one prescribed by the law which was in force at the time of the offense (for more, see: Франк, 1955: 79-85; Бачић, 1988: 89; Златарић, 1997: 102).⁵

The third view is based on the principle of legality and its possible exemption, the prohibition of retroactivity, and justification in certain situations, if the new law is more lenient (favourable) for the offender. That is the prevailing view that best suits the goals of criminal law, but also the legal security of the system (Златарић, 1997: 103). This view is now accepted in theory and legislation. The accepted general rule, which is provided in Article 5 of the Serbian CC, prescribes that the law that was in force at the time of the offense is applied against the offender; an exception to the general rule is provided in Article 5 par. 2 of the CC, which provides for the mandatory retroactive application of the law that is more lenient (favourable) for the offender. This is also the principle of international law which is envisaged in the most important international documents: Art. 7 of the European Convention on Human Rights and Freedoms, Art. 15 of the Covenant on Civil and Human Rights, and Art. 24 of the Rome Statute of the Permanent International Court (where this principle is strictly prescribed and defined as: prohibition of retroactivity - *ratione personae*).

3. The rules for establishing the more lenient (favourable) law

The question of a more lenient law (*lex mitior*) occurs in those situations where the offense was committed during the validity of a law and where the law was amended one or more times before rendering the final judgment. It is a (manda-

⁵ In contrast to this view, Bačić and Zlatarić emphasize the arguments against this doctrine. Firstly, doctrine creates a possibility, based on different motives (including political), that a new law is adopted in order to punish some offenders for acts which were not punishable when committed. Secondly, it may entail a punishment against an offender who undertook an action knowing that it was not punishable; because of that, punishment would lose any meaning and it would remain a bare repression.

tory) retroactive application of the more lenient law if it is deemed to be most favorable for the offender. In order to decide which law shall be applied, it is first necessary to clarify two issues: the time when the criminal offence was committed, and the law which was in force at that time, i.e. which is most lenient and thus most favorable to the offender (Бабић, Марковић, 2008: 101-103).

The basic starting point is that the issue of selection of the most favorable law is not resolved *in abstracto* but *in concreto*, i.e. not by general comparison of the old and the new law (or new laws) but rather by comparing them in light of the specific circumstances of the concrete individual case. In that course, it is necessary to establish all circumstances which may be relevant for evaluation and to make an assessment on the following issues: which law would be more favorable for the offender, and which law provides better opportunities for a favorable decision in a particular case (principle of specificity). Simple comparison of laws in a particular case may provide a conclusive answer only if the new law decriminalizes an act which was envisaged as a criminal offense in the old law, because the new law is obviously more lenient than (Златарић, 1997: 103-104; Новоселец, 2007:82-84). In all other cases, when the offense is punishable under both laws, the solution is not simple at all and, then, it is necessary to establish all the circumstances that may be relevant in choosing of a more lenient law which is the most favorable for the offender. Only by comparing the laws in this way is it possible to examine all possibilities offered by the application of one or another law; eventually, the court will have to apply the law that is most favorable for the specific case. This clearly stems from the provision of Article 5 par. 2 of the CC, which specifies: "If, after the commission of a criminal offence, the law was amended once or more times, the law most lenient for the offender shall apply."

Given the fact that the CC provides for a huge number of new solutions as compared to the earlier criminal legislation, it may be expected that the judicial practice will encounter even more complex issues related to temporal validity of criminal laws. In case it is impossible to determine which law is more lenient/favourable for the offender, the basic rule shall remain (Art. 5 para. 1 CC) to apply the law which was in force at the time of the offense (Jescheck/Weigend, 1996: 140-141; Стојановић, 2006: 5-6) ⁶ In the process of comparing the laws, there is no dispute that the criminal provision shall be assessed as a whole, i.e. comparison cannot include only part of the provision. As a rule, it should also take into account the entire Criminal Code, i.e. all the provisions relevant to the particular case (Златарић, 1997: 103).

6 Stojanović claims that the previous GCC in Art. 4 para.2 provided that the *more lenient* law for the offender is applied; in contrast, the current CC in Art. 5 para. 2 provides for the application of the *most lenient* law. In this way, court practice is enabled to get familiar with the new solutions and apply the most lenient law for offender.

In theory and jurisprudence, the prevailing view is that only one law can be applied on the individual case as a whole, the one that is determined to be more favorable for a given factual situation (principle of specificity). Thus, the possibility of using a combination of laws is excluded (e.g.: the old may be more favorable in terms of minimum sentence and the new one may be more favourable in terms of maximum sentence), because it would mean that the court applies a law that does not exist; a combination of laws, some of which are no longer in force, cannot lead to establishing a legally valid and applicable law (Бачић, 1988: 89; Чејовић, 2008: 91; Марјановић, 1989:7; Ambrož, 2008, 128-129).

In contrast to this view, in the theory of criminal law there are different views. Zlatarić holds the position according to which the combination of laws is allowed, i.e. the application of both the old and the new law, which depends on the required minimum and maximum.⁷ Delibašić further believes that such a combination may lead to a complete negation of the principle of alternative application of competing laws of different temporal validity. The acceptance of a combination of laws, in situations which practically imply the creation of a new judge-made law, should be accepted with caution because it brings into question the observance of the principle of legality (Делибашић, 1995: 44).

Some representatives of the classical school (especially Binding) in Germany advocated the view that the more lenient law cannot be judged by the amount of penalty provided by the law, if the elements of act remained unchanged even under the new law. Relying on the fundamental difference between laws and norms, Binding claims that the offender does not violate criminal law (whose sanction cannot be violated by a criminal offense) but the norm, i.e. the legislator's prescription which declares that the act is prohibited and punishable. If the norm remained unchanged, i.e. if the offense was punishable before and remains punishable in the new law as well, the new law shall be applied, regardless of whether it is more stringent or more lenient. For a criminal offender, no right can be derived from the law whose norm has been violated; he/she has only *obligationes ex delicto* and, above all, an obligation to bear punishment, which

7 The new law may provide the same type of punishment for the same criminal offense but, unlike the old law, provides a higher general maximum penalty and a lower minimum punishment. In that case, the new law shall be applied as it enables a more favorable judgment than the old law, but the application of the new law shall not lead to a sentence above the maximum which is provided by the old law. Čubinski allows a combination of laws if the new law abolishes the punishment provided by the old law violated by the offender: "a judge will order more severe punishment provided by the new law, but will reduce the term of punishment and alleviate it so that it corresponds to the punishment contained in provisions of the *old law*". Novoselec is of the opinion that a combination of new and old law should not be excluded at all costs, as it can call into question the *ratio* of the provision on mandatory application of the lenient law; therefore, certain exceptions should be allowed.

corresponds to the legislator's opinion, expressed in the new law (Binding, 1922: 166).⁸

3.1. Criteria for determining a more lenient (favourable) law

Determining which law is the most lenient for the offender is a very complex issue. First of all, there are some guidelines and rules, as well as the certain circumstances, which may be relevant for the application of a more lenient law in a given case. When assessing whether a law is more lenient, it can lead to multiple situations, which may be linked either to a criminal offense or to a criminal sanction (including those measures and institutes that are not formally designated as a criminal sanction, but they are closely related to it). (Стојановић, 2006: 5). Thus, in criminal law theory, there are several generally accepted rules on determining which law is more lenient for the offender.

When it comes to the offender, it is definitely the best when the new law, unlike the old law, does not envisage the committed act as a criminal offense, i.e. when it was decriminalized. In modern criminal legislation, the question of decriminalization is not as frequent⁹ because the Criminal Code contains more new formulations of criminal offenses than cases when certain behavior as a whole ceases to be a criminal offense. A change of a boundary of the criminal zone in the legal description of a criminal offense can create very serious problems in terms of temporal validity of criminal legislation. Except for narrowing the criminal zone (partial decriminalization), a change of these limits may lead to the fact that the two incriminations (the old and the new) are so different that it is very difficult to compare them and come to the conclusion which law is more lenient for the offender. If the new incrimination is substantially different from the old one, to the extent that it can be argued that it is a different criminal offense, there has been a discontinuity with the old incrimination, in which case it shall be accepted that the comparison in terms of determining which law is more lenient cannot be performed (Стојановић, 2006: 6).¹⁰ In this situation,

8 He is one of the few theorists who opposed the admissibility of the retroactive effect of the more lenient law.

9 In the Supreme Court decision Кж. I 2300/05, the Court found that the criminal offence of unnatural sexual intercourse (Art. 110 of the Criminal Act of RS) was not decriminalized but the actions envisaged in this criminal offence are included in the criminal act of rape (Art. 178 par.1 of the Serbian Criminal Code).

10 Although recently introduced, some criminal offenses provided by the Criminal Act (CA) of Republic of Serbia were not included in the Serbian Criminal Code (CC), such as the criminal offense of vehicle theft (which was problematic in every aspect, including the provided punishment) as well as the acts of corruption (which contained criminal offenses whose legal description corresponded with the existing one). Consequently, Stojanović

the law in force at the time of the offense shall be applied. In addition to the decriminalization (Стојановић, 1991: 62-65),¹¹ or narrowing of the criminal zone so that it no longer includes the committed act, the application of the general rule also affects the process of determining the existence of a criminal offense. Thus, the Criminal Code provides for new *grounds for exclusion of criminal offense* (such as: irreversible *error iuris*). The Criminal Code (Article 29, par. 1) states that “*an act shall not be considered a criminal offense if it was committed as a result of irreversible legal error.*” In effect, according to the psychological-normative theory of guilt, in case of irreversible legal error, the guilt is excluded and so is the criminal offense (Делић, 2009: 65).

4. The applicatioin of a more lenient law in relation to criminal sanctions

The principle of legality, in its segment *nullum poena sine lege praevia*, provides not only the criminal offense but also criminal sanctions which must be prescribed by criminal law before the offense is committed. So, it implies a retroactive validity of the criminal code, where that rule equally applies to the offense and penalties, and other criminal sanctions.

In the area of criminal sanctions, a new law is more lenient when it provides new grounds for exemption from punishment (Art. 59 of the CC, which refers to the settlement agreement between the offender and the victim, and showing real remorse), as well as when it provides for more favorable conditions in terms of the type and amount of punishment. If a new ground for exemption is provided, it does not *per se* mean that the new law is more lenient. It is essential to ensure the conditions for applying the new law in a particular case.

However, it is questionable whether the new law should be considered more lenient *only* if the new ground for exemption was applied in this particular

thinks that their exclusion does not mean decriminalization. They are atypical in a negative sense, and should thus be cited as an example for the fact that the CC avoided the so-called symbolic incriminations, as pseudo-resolution of problems through provision of new criminal offenses, whose substance includes what has already been covered by the substance of other criminal offenses.

11 Decriminalization can be divided into *de iure* decriminalization and *de facto* decriminalization. The first requires a legislative act, i.e. amendment of the criminal norm, and it can be perceived as a decriminalization in a narrow sense. Factual decriminalization comes as a result of not applying certain incrimination in court practice. Furthermore, one can speak about *complete* and *partial* decriminalization. Complete decriminalization is when certain behavior ceases to be a criminal offense in its entirety; partial decriminalization means that certain behavior under particular conditions ceases to be a criminal offense or, in other words, it remains a criminal offense under certain conditions. Actually, partial decriminalization implies narrowing the criminal zone.

case, or whether it suffices that there is an abstract possibility of applying the exemption from punishments which, otherwise, would not have happened in the particular case (Стојановић, 2006: 6-9; Ambrož, 2008: 129-131). Does the mere possibility of applying the new grounds for exemption from punishment, which the court considers not to be justifiable to be applied in the particular case, obliges the court to apply the new law? This question should be answered **NEGATIVELY**, especially because it is not of particular practical importance. Both views ultimately lead to the same consequences for the offender. When the appellate court, unlike the first instance court, finds that there are reasons to apply a new ground for exemption from punishment, it may be done on the grounds that it is justified in this particular case, and therefore that the new law is more lenient for the offender. Things are similar also with the new grounds for mitigation of punishment or expanding the existing ones (Стојановић, 2009: 38)

Apart from the exemption from punishment and mitigation of punishment, comparison should be first conducted at the level of types of criminal sanctions, where punishment is the most severe type of criminal sanction. In the process of assessment, criminal provision must be viewed in its entirety, i.e. comparison cannot include only part of the provision (Стојановић, 2008: 86).¹² Then, within the framework of punishment, it is possible to compare particular forms of punishment, where imprisonment is certainly the most severe one. Generally, the next one in line is the community service (work in the public interest). When it comes to the revocation of driver's licenses and fines, they are difficult to compare *in abstracto* due to their heterogeneous nature; but, generally, fine is considered to be a more lenient form of punishment than the revocation of driver's license (although it may not always be so in a particular case) (Стојановић, 2006:6). If we compare punishment and a suspended sentence, it is not difficult to accept the view that the punishment is a more severe type of criminal sanction. Given the fact that the CC expanded the application of fines (Art. 51 CC) and somewhat narrowed the application of suspended sentence (Art. 66, par. 3 and 4 CC), we may pose a question which of these two penalties is milder; for example,

12 Thus, a *more lenient law* is the one which provides the sentence of 40 years' imprisonment of instead of death penalty, given that the earlier legislation included a provision that death penalty could have been commuted by the sentence of 20 years' imprisonment, which was abolished at the same time as the capital punishment. In 2003, the legislator amended the provisions concerning temporal validity (Art. 4 of the Basic Criminal Act of FRY) by introducing a new paragraph 3, which reads: "If the sentence of death penalty had been prescribed for a criminal offense at the time of its commission, the offender may be sentenced to a term of 40 years' imprisonment". In this regard, Stojanovic believes that if there had been a need for such a provision, it should not have been placed within the framework of provisions on time limits, which are provisions of permanent and general character; it should have been included in the transitional and final provisions. The current CC no longer includes that provision.

in case of an insult or defamation committed before 01. 01. 2006, should a fine be awarded under the current Criminal Code, or a suspended sentence (which would establish a prison sentence) under the previously applicable criminal law? In this case, we should start from a systematic and teleological interpretation, i.e. we should bear in mind the nature of these two types of sanctions. Fine is still a form of punishment, while a suspended sentence is a warning measure aimed at avoiding the application of punishment (imprisonment); thus, it can be said that a suspended sentence as a kind of sanction is milder than a fine.

The adoption of a new criminal code often brings changes concerning the sentencing range for certain criminal offenses. In other words, the legislator may change the previously prescribed *minimum* (special) or *maximum* (special) sentence, or both the minimum and the maximum sentence. The new criminal law is more lenient if *both the special minimum and the special maximum sentences are lower*, i.e. when it provides for milder punishment ranges. Of course, this applies if the incrimination has not been changed, and especially if the new qualified forms are not prescribed, for which reason a more lenient punishment was provided. If both laws include the same legal description of the offense, it is clear that the new law is more lenient when a lower specific maximum is provided (while the minimum remains the same), or vice versa, when a lower special minimum is provided (while the maximum remains the same). Where the law does not provide for specific minimum and/or a specific maximum, the court shall consider the general maximum and general minimum sentence. Also, the court will take into account the expanded penal framework obtained by applying the provisions on mitigating the sentence but only if the court determines on the merits of the particular case that there are justifiable reasons for reducing the sentence, as prescribed in Article 57 CC.

Particular difficulties arise if the new law provided a lower specific minimum sentence and a higher specific maximum sentence as compared to the previous solution, or vice versa, if it provided a higher minimum sentence but a lower maximum sentence. In the criminal law theory and judicial practice, there are different views on this matter. Some domestic scholars are of the opinion that *the principle of alternative application* of competing laws should be sacrificed and the new law providing a lower minimum sentence shall be applied, under the restriction that the court must not exceed *the favorable maximum from the old law*, or vice versa (Новоселец, 2007: 86, Златарић, 1997:104, Бабић, 2004: 15).¹³ In further considerations, there is an opinion advocated by Delibašić who

13 Novoselec believes that there is a possibility of deviation from the principle of specificity (*in concreto*), i.e. that in certain situations a combination of the old and the new law is allowed. Babić argues that the sentencing rules will influence the choice of a more lenient law; thus, if a lighter form of a criminal offense is committed, the punishment should move towards

argues that a more lenient law is always the one which provides a lower minimum sentence, irrespective of having a higher maximum sentence (Делибашић, 1995: 143). In contrast, Stojanović argues that, in determining the severity of a criminal offence, the special minimum sentence is of equal importance as the special maximum sentence; the opinion that the specific minimum is always decisive factor regardless of the prescribed specific maximum sentence is unacceptable. So, if the new law is more lenient in terms of the special maximum sentence and stricter in terms of the special minimum sentence (or vice versa), the question of a more lenient and favourable law can be answered only after the prescribed penalty range is applied to the circumstances of a specific case. It is disputable though whether this question can be addressed at the abstract level in cases where the differences between the previous and the new maximum sentences are far more prominent than in terms of the minimum sentences, or vice versa (Стојановић, 2006: 8). The question of applying of a more lenient is extremely significant for judicial practice; namely, if both laws prescribe the same punishment, the courts have to decide which law shall apply: the one that prescribes a lower minimum sentence or the one that prescribes a lower maximum sentence.

For example, this problem appeared with the criminal offense of rape. Art. 103 par. 1 of the former Criminal Act (CA) of the Republic of Serbia envisaged a sentence of imprisonment ranging from at least one year to a general maximum of up to 15 years; according to Art. 178 par. 1 of the current Criminal Code (CC), the sentence of imprisonment ranges from 2 to 10 years.¹⁴ So, the question arises which law is more lenient, i.e. which punishment prescribed for this offense is more lenient: the one envisaged in the former CA or the one envisaged in the new CC. In the Supreme Court decision (Kz. I 611/06), the Court took a stand that the new law (CC) is more lenient in the given case (Стојановић, 2006: 8).¹⁵

the minimum sentence; therefore, the more lenient law will be the one which provides for a lower minimum sentence.

14 Meanwhile, Art. 178 para 1 CC was amended and, under the amendments to the Criminal Code (*Official Gazette RS*, 72/09. of 31. 08. 2009.), the provided sentence is from 3 to 12 years of imprisonment.

15 The Supreme Court *reasoning*: "By the first instance decision, the defendant was found guilty of the criminal offense of rape under Art. 103. 1 the Criminal Act (CA) of RS and sentenced to imprisonment of one year and eight months. The Criminal Code was adopted after the first instance judgment was delivered and before the decision on appeal was rendered; In the Criminal Code, which entered into force on 1 January 2006, the criminal offense of rape (originally provided in Art. 103 para. 1 CA) was prescribed in Art. 178 para 1 of CC but the Code provided a different sentencing range: a minimum sentence of 2 years and the maximum sentence of 10 years. In this particular case, respecting the rule on applying the more lenient law (Art. 5 par. 2 CC), the Supreme Court applied the new CC, providing a term of 2 to 10 years of imprisonment for the crime of rape, which is a more lenient punishment as compared to the earlier CA, which prescribed a term of imprisonment

The application of a more lenient law also refers to security measures, as provided for in Art. 5. of the CC. Thus, Article 1 of the CC specifically stipulates that no one can be sentenced or imposed a criminal sanction (including security measures and corrective measures) (Foregger, Foregger, 2004: 15)¹⁶ for an offence that did not constitute a criminal offence at the time it was committed, nor may he/she be punished or imposed other criminal sanction that was not applicable at the time the offence was committed. Thus, the provision of Art. 5 par. 2 of the CC applies to safety measures, i.e. the rule of the more lenient law is applicable. However, in some modern criminal codes (Schönke/Schröder, 2006: 67; Wessels/Beulke, 2007: 13; Stratenwerth, 2000: 51-52)¹⁷, a starting point is a specific character of security measures which, unlike the punishments, have retributive function. Therefore, they are primarily used for correction and re-socialization of the offender; therefore, they are imposed for his benefit, which stands out as the reason that the prohibition of retroactivity should not apply to security measures.

Given the nature of security measures and their purpose as criminal sanctions, it can be said that the provision of Art. 5 par. 2 CC has a limited scope. When the Criminal Code provides for imposing security measures along with the punishment, in this case a question arises which law is more lenient in terms of the prescribed punishment. Thus, for example, it should be taken that the provisions

of minimum one year.” (The judgment of the Supreme Court of Serbia Kz. I 611/06 dated 15 June 2006 and the judgment of the District Court in Negotin K. no. 53/05 of 22 November 2005.) This example shows that, in resolving the issue of a more lenient law (i.e. the gravity of the offense), the legislator respected *the special maximum* of the provided penalty range. It remains controversial whether it was a justifiable to apply the specific maximum (and why) rather than a special minimum penalty prescribed range. In this regard, Stojanović points out that abstract comparison of strictness of individual criminal laws is incorrect; instead, a concrete comparison in relation to the specific criminal offense and the offender is needed. Thus, the legislator recognizes the special maximum more than the special minimum penalty prescribed range.

16 The Criminal Code of Austria (Art. 1 par. 2) expressly provides that the application of a more lenient law applies to educational measures. Also, the Criminal Code of Montenegro (Art. 133 par. 5) provides that the security and corrective measures prescribed by the new law can be applied to the offender, if they are more favourable than those that could be applied under the law in force at the time of the offense.

17 According to Art. 2. para 6 of the German Criminal Code, the security measures (unless otherwise specified) will be determined according to the law in force at the time of the trial. The provision is explained by the fact that security measures do not include establishing guilt, but they are intended to be a reaction to an individual threat to the society from the specific offender. Notably, Stratenwerth points out that this is not the best solution; namely, given the specific nature of security measures, the application of a more lenient law should be enabled because the essence and justification of security measures is based on the risk from the offender.

of Art. 297 par. 1 to 3 of the current Criminal Code (CC) are more lenient with regard to the prescribed punishment (regardless of the prescribed mandatory imposition of security measure - prohibition of driving a motor vehicle) than the provision of Art. 201 of the previous Criminal Act (CA), which did not stipulate a mandatory imposition of this measure.¹⁸

When comparing laws, the court first compares the amount of provided punishments and then the conditions for the application of security measures. Having in mind the purpose of security measures (at least theoretically), one can hardly speak of stringency of security measures, given that they are aimed at eliminating certain hazardous situation and conditions which may lead to recidivism. In this sense, the new law is more lenient (Стојановић, 2009: 662). If we bear in mind that the upper part of the range of prescribed punishment is rarely used in sentencing, and that offenders often perceive the ban on driving a motor vehicle as punishment, we cannot be quite sure about such a conclusion. Generally speaking, the old and the new law may be difficult to compare *in abstracto* and this can only be done successfully in some clear cases. In most cases, the starting point in comparing the old and the new law should be to compare the legal provisions that apply to the particular case; hence, the issue of selection of the most favorable law shall not be resolved *in abstracto*, by comparing the general abstract norms, but *in concreto*, by looking into the specific circumstance of the case at issue. This means that the new law will be more lenient if the court imposes a security measure in a particular case, even if it is not mandatory.

18 The national jurisprudence stands on the position that the currently applicable CC is more lenient; for example the judgment of the Supreme Court of Serbia (SCS), Kž. I 756/059. Here is the Supreme Court *explanation*: By the verdict of the District court in Novi Sad K. no. 207/01 of 04. 02. 2005, the defendant was found guilty for the commission of a grave criminal offense against public traffic safety, under Art. 201 para. 2 CA in conjunction with Art. 195 para. 1 CA, and sentenced to imprisonment of 3 years and six months. The new Criminal Code was adopted on 01. 01. 2006, after the first instance decision was delivered and before the judgment was rendered in the appellate procedure. Consequently, the defendant's actions were qualified under the provisions of Art. 297 para 2. of the Criminal Code (CC) in connection with Art. 289 para 1 (CC), and pursuant to Art. 5 para. 2 of the same Code. The Supreme Court respected the rule on the more lenient law, given that the new Criminal Code provides that the amount of the provided punishment for this offense (2 – 12 years), as compared to the former CA, which (in Art. 201 para 2) provided for a minimum of 3 years and a general maximum of 15 years. Also, pursuant to Art. 297 para. 5, the Supreme Court of Serbia imposed a security measure prohibiting the defendant to drive a "B" category motor vehicle as prescribed in Art. 86 CC.

5. Conclusion

The issue of lenient law (*lex mitior*) occurs in those situations where the offense was committed during the validity of a law which was amended one or more times before rendering the final judgment. It implies a (mandatory) retroactive application of a more lenient if it is determined to be the most lenient (favourable) for the criminal offender.

In order to determine which law will be applied, it is first necessary to clarify two issues: the time of the offense, which law was in force at the time, and which law is most lenient (favorable) for the offender. The basic starting point is that the issue of selection of the most favorable law is not resolved *in abstracto* (by a generalized comparison of the old and the new law or laws) but *in concreto* (by comparing how they apply to the specific case). Thereby, it is necessary to identify all circumstances that may be relevant for this evaluation and make the assessment accordingly: which law would be more favorable for the offender, and which law gives greater opportunities for a more favorable decision in a given case (the principle of specificity).

Simple comparison of legal provisions pertaining to a particular case may be appropriate only in case the new law has decriminalized an act which was prescribed as a criminal offense in the old law; in such a case, it is obvious that the new law is more lenient than the old one. In all other cases, when a criminal offense is punishable by both laws, a solution is not simple at all. Therefore, it is necessary to establish all circumstances which may be relevant for the selection of a more lenient law, which would be most favorable for the offender. Only by comparing the two laws in such manner is it possible to observe all the possibilities offered by the application of one or another law; ultimately, after looking into the specific circumstances of the case at issue, the court will have to opt for the law which is most lenient for a concrete case. This clearly stems from the provision of Article 5 par. 2 of the CC which reads: "If the law is amended one or more times after the commission of the criminal offense, the law that is the most lenient for the offender shall apply."

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ВРЕМЕНСКО ВАЖЕЊЕ И ОБАВЕЗНА ПРИМЕНА БЛАЖЕГ КРИВИЧНОГ ЗАКОНА

Резиме

Питање блажег закона (*lex mitior*) јавља се у оним ситуацијама када је кривично дело извршено за време важења једног закона, а до доношења правоснажне пресуде закон је измењен једном или више пута. Реч је о (обавезној) ретроактивној примени блажег закона уколико се утврди да је он најблажи (најповољнији) за учиниоца кривичног дела. Који ће се закон применити, потребно је прво разјаснити два питања: време извршења кривичног дела и закон који је у то време био на снази, односно који је најблажи (најповољнији) за учиниоца. Основно полазиште је да се питање избора најповољнијег закона не решава *in abstracto*, већ *in concreto*, тј. не уопштеним упоређивањем старог и новог или нових закона, већ упоређивањем у односу на дати конкретни случај. При томе је потребно утврдити све околности које могу бити релевантне за наведену оцену, па сходно томе извршити процену: који би закон био повољнији за учиниоца, који закон даје веће могућности за повољнију одлуку у конкретном случају (начело конкретности).

Једноставно упоређивање текстова закона на конкретни случај може дати сигуран одговор само у случају ако је нови закон декриминисао нешто што је по старом било кривично дело, јер је тада нови закон очигледно блажи. У свим другим случајевима, када је кривично дело кажњиво по оба закона, решење није нимало једноставно, па је стога тада потребно утврдити све околности које могу бити релевантне у избору блажег закона, закона који је (нај)повољнији за учиниоца. Тек упоређивањем закона на тај начин могуће је сагледати све могућности које пружа примена једног или другог закона, па ће се суд морати одлучити за онај закон који је (нај)блажи за конкретни случај. То јасно произлази из одредбе члана 5. став 2. КЗ која предвиђа: да ако је после извршења кривичног дела измењен закон, једном или више пута, примениће се закон који је најблажи за учиниоца.

Кључне речи: кривично право, начело законитости, временско важење, блажи закон, кривичне санкције.

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CONTROL OF POLICE WORK IN THE REPUBLIC OF SERBIA**

Abstract: *Modern democratic society assumes the state governed by the rule of law and respect for civil rights and freedoms. Control of police work and its officials is necessary for the protection of human rights and freedoms, and it contributes to the affirmation of the police as a public service. The importance of control of the police stems from its highly sensitive role in the system of government, especially because of the possibility of applying legal coercion, as well as specific powers to take measures relating to deprivation of liberty, the search of persons and premises, seizure of objects, wiretapping and others. In everyday use of powers in practice, there are possibilities for exceeding or abusing the power, violating the citizen's equality of before the law and other rights. The paper presents the external and internal control mechanisms of police work, with special emphasis on internal control. Tasks and powers of the Internal Control Sector of the police are described as well as its methodology of work. In the second part of the paper, the authors analyze the effectiveness of internal control of police through the presentation of emerging problems in this area of police work.*

Keywords: *Ministry of Interior of Serbia, police, work control, Internal Control Sector, powers.*

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1. Introduction

The growing global wave of crime in new organized and professional forms poses a constant threat to the security of citizens and society as a whole. All over the world, countries are under pressure to deal with this social evil and threats to national and international security, including threats arising from international terrorism. A democratically organized state assumes the existence of modern police as a public service that respects civil liberties and protect the rule of law, and which is able to effectively fight against all forms of crime. A well-structured system of external and internal control aiming to police service operating in accordance with the law is a fundamental prerequisite of professional, reliable and efficient police service.

The importance of control of the police stems from its role as a highly sensitive organ of state power, especially because of the possibility of legal use of force, as well as authorization to take measures relating to deprivation of liberty, the search of persons and premises, seizure of objects and, in extreme circumstances, the use of lethal force (OEBC, 1990:16). In everyday use of powers in practice, there is a possibility that police officers exceed or abuse their power, violate equality of citizens before the law and other citizens' rights. This phenomenon is particularly expressed in transitional societies, as it often happens that the illegal activities of the police directly cause an increase in crime. This further leads to an increasing distrust against the police, which is usually instrumentalized by the authorities for political purposes; thus, the police are deprived of the function of being a service for the citizens. In the police, there is often resistance to establishing a mechanism of democratic and civilian control. We can conclude that further positive change in the legislation should be accompanied with a change of awareness of police employees and citizens alike.

The effective control of the police in detection and prevention of all forms of abuse, irregularities in police work and exceeding authorities also provides for the protection of fundamental human rights and freedoms guaranteed by the Constitution, legislation and international conventions on human rights and freedoms. The aim of control is to ensure that the police service operates in line with its purpose, which results in enhancing the reputation of the police and having more efficient and accountable officers (Bajramspahić, 2014:7).

Democratic control of the police as a body of state power in the Republic of Serbia is a constitutional and international legal standard, which is regulated by the Police Act. Many facts indicate to the importance of this issue, the most prominent among which are the powers vested in the police and its officers as well as the known practices of the security services and the potential possibil-

ity of abuse of authority. Accordingly, the Police Act provides for external and internal control mechanisms of police work.¹

2. The external mechanisms of control of the police in the Republic of Serbia

The system of external control of the police in the Republic of Serbia consists of a set of various control instruments of certain authorities, NGOs and citizens.² Article 221 of the Police Act exhaustively lists who exactly can perform external control of the work of the Ministry of Interior (MoI), which primarily includes the National Assembly as the highest legislative body, the Assembly of AP Vojvodina, City Assembly and Municipalities (municipality and city), the court, the prosecution, the Ombudsman (Protector of citizens), commissioners, the State Audit Institution, the Anti-corruption Agency, as well as the competent inspection authorities (budget, labour, sanitation inspection) (Nikač, Leštanin, 2016: 431). Finally, there are the citizens and the general public as a generic term by means of which the legislator allows each individual to use instruments that are prescribed by law and institute supervision of the Ministry of Interior and the police. This is primarily because the citizens are the ones who pay taxes through the services of public security and, therefore, have the right to control the work not only of the MoI but of all other state authorities.

The mechanisms of external control are: regular and special reports which are submitted by the Ministry of the Interior to a certain control authorities; considering the state of security in committee meetings, councils and other control bodies; providing information of public importance in written form; ensuring the participation of the public in the work of certain MoI bodies; submitting complaints and petitions of citizens and using other instruments to controls the work of MoI employees.

The Ministry of Interior has an obligation to inform the Ombudsman when there is an abuse of powers by a police officer, which triggers a process of external control of police work. In this way, a double-check of the control of police work is secured because the Ombudsman initiates the procedure of control of administrative authorities (in this case, the police) and, on the basis of established facts, suggests relevant measures aimed at providing for a more efficient exercise and protection of human and minority rights and freedoms.

Another very important segment of democratic control over the work of the MoI is the National Mechanism for the Prevention of Torture, which was established

1 Art. 219- 243. of the Police Act, "Official Gazette of RS", no. 6/2016.

2 Art. 221. of the Police Act, "Official Gazette of RS", no. 6/2016.

on the basis of the European Convention and involves the participation of many non-governmental organizations primarily concerned with the rights and freedoms of man and citizen.

We must note an inconsistency considering that the legislator has not included, at least declaratively, the Government of the Republic of Serbia as the highest executive authority into the list of authorities which supervise the work of the Ministry of Interior.

2.1. Parliamentary control of police work

Parliamentary control of the work of the MoI is the most important form of external control in a democratic society, which is exercised directly and indirectly. In the exercise of its control functions, the National Assembly supervises the work of all security services, including the police.³ Deputies (MPs) consider complaints and suggestions of citizens against the police and other state bodies, and hold meetings with citizens in the National Assembly and the offices outside the headquarters. (Nikač, Simić, Blagojevic, 2011: 6).

A significant authorization of the National Assembly in the control of police work is approval of funds for its work, budget, budget control, through the State Audit Institution⁴. (Plačkov, Vukadinovic, 2015: 226). However, the problem of financial control of the police is caused by a relatively poor functioning of the audit system at the state level, which is still being developed. The auditors' work is quite aggravated by the insufficiently modernized way of keeping financial documentation, which should be simplified and made more accessible for public scrutiny.

In accordance with the Rules of Procedure of the National Assembly,⁵ the Committee on Defense and Internal Affairs was formed, which comprises 17 members and, among other things, discusses draft law or other legal act in the field of maintenance of public order, public gatherings; security of the state border and control of crossing borders and movement and residence within the border zone; stay of foreigners; traffic and transportation of weapons, ammunition, explosives and other hazardous materials from the scope of the ministry responsible for internal affairs; fire protection; citizenship; issues in the field of public and state security; as well as other issues related to defense and internal affairs.

3 Art. 15 st. 3 of the the National Assembly Act, "Official. Gazette of RS", no. 9/2010.

4 The Act on State Audit Institution, "Official. Gazette of RS", no. 101/2005, 54/2007 and 36/2010..

5 Art. 46. Rules of Procedure of the National Assembly, "Official. Gazette of RS", no. 52/10, 13/11.

The Minister of the Interior is obliged to inform the competent Committee on the work of the ministry in regular three-month periods. Members of the competent committee and a representative of the parliamentary group can submit questions to the Minister.⁶ The authorized representative of the parliamentary group may pose a question to the Minister only after the questions of the authorized committee members are exhausted. The Committee shall report to the National Assembly about the conclusions regarding the submitted information.

In exercising parliamentary control over the MoI, the Committee shall supervise the legality of the implementation of special evidentiary actions defined in the Criminal Procedure Code, such as measures involving targeted search and test of integrity, and control over the observance of political, ideological and interest neutrality in the work of the police, which are related to the objections raised in public about the alleged inability to control the implementation of special evidentiary actions in the police. The Minister is also obliged to submit a semi-annual report to the Committee on the security situation in the RS, as well as regular reports on the work of the MoI. These reports are independent of each other because they do not address the same issues. In preparing these reports, the Minister is assisted by the MoI analytical department. In special circumstances, the Ministry may submit special reports to the competent Committee if necessary, which is done either at the request of the Committee or as a result of the MoI assessment of the given situation or specific problem that the Committee is obliged or willing to discuss or resolve.

Article 27 of the National Assembly Act stipulates that the National Assembly shall establish permanent working bodies, and may establish temporary working bodies. The standing working bodies are competent committees (in charge of specific areas) and *ad hoc* working bodies shall be inquiry committees and commissions. Committees are formed for the purpose of: 1) discussing draft laws and other acts submitted to the National Assembly; 2) discussing policies pursued by the Government; 3) monitoring the implementation of laws and other general acts of the Government and other state bodies; and 4) considering other issues within the competence of the National Assembly. The competent Committee is authorized to monitor the work of the Government and other authorities and bodies whose work is overseen by the National Assembly, in accordance with the Constitution and the law. The competent committee considers reports of agencies, organizations and bodies, which are based on the law submitted to the National Assembly.

⁶ Art. 229. Rules of Procedure of the National Assembly, "Official. Gazette of RS", no. 52/10, 13/11.

In addition to the competent committee as a permanent working body, the National Assembly may also establish temporary bodies, inquiry committees and commissions to order to monitor the situation in a particular field and establish facts about certain issues and events, as prescribed in Article 68 of the Rules of Procedure of the National Assembly. This Article stipulates that inquiry committees or commissions cannot carry out investigative or other judicial activities, but they can be given the authority to ask the state authorities and organizations for data, documents and information, and they can take statements from individuals as needed. Such bodies existed in the former legislation but, bearing in mind the method of their work and results, the survey committees and independent commissions established by the National Assembly proved to be ineffective. As their activities were often subject to political influence in the past, the mode of establishing such bodies should be defined more precisely, considering that they have to be independent from political factors.

In general, given the political influence and functioning of the control of police by the National Assembly of the Republic of Serbia, there are opinions that the National Assembly is not sufficiently strong corrective to the executive power and that it does not hold the executive power under real control (Orlović, Spasojević, Radojević, 2012:52).

2.2. The role of local government units in control of police work

To fulfill the right and the duty of control over the work of the MOI, local governments have the possibility of establishing advisory bodies.⁷ The establishment of the advisory bodies on the topic of security was introduced by the adoption of the 2005 Police Act, which was later supported by the Local Government Act 2007.

The 2005 Police Act regulated the duty of the Head of the organizational unit of the Police to cooperate with the territorial autonomy and local self-government, to provide information on the security situation and to ensure the representative cooperation of members of national minorities and different ethnic, cultural, religious and other groups in the field of organizational units of the police. In decision-making, Head of the competent organizational units of the police is also obliged to consider and take into account the views on priorities for the safety of people and property, as adopted by the units of territorial autonomy and local self-government. Given that the current Police Act does not contain this provision, the future modifications and amendments to the Police Act should consider prescribing these obligations because this peremptory norm obliges the police officials to inform, cooperate with and coordinate with the local community.

⁷ Art. 223. of the Police Act, "Official Gazette of RS", no. 6/2016.

In practice, security councils of local governments are facing many problems considering the fact that in some local communities they have not been established or have been established but do not function properly. The reasons are diverse but the responsibility for this lies with the local government and the police (Nikač, Leštanin, 2016: 436). Local government bodies have better knowledge of the concrete problems in their communities and are better informed about the work of the police authority than the central government; so, it is essential that this mechanism of external control of police work comes to life in full.

2.3. The public and citizens in control of police work

Once a year and no later than three months after the end of the calendar year, the Ministry of Interior is obliged to publish a report on the security situation, which transparently shows the results of the Ministry of Interior, as well as the report on the work of the Ministry, which aims to inform the public on the development of the police, statistics and results. The Ministry of Interior is also required to regularly update its Website especially with quarterly work reports.⁸ By providing public information, the police affirm the positive results, and receive feedback and criticism if something is not done well.⁹ The public and the police are interdependent and need each other because the public has an interest and the right to know how the police provide for public safety and what results are achieved in this area. On the other hand, by giving timely and accurate notification to the public, the police can preclude unfounded complaints about the police work and obtain support for specific activities, thus increasing the efficiency of the Ministry of Interior, the state administration and the state as a whole.

An issue of special significance is the control of the police concerning the citizens' complaints against police work. In that respect, the Police Act defines the procedure for resolving complaints submitted by citizens who consider to have been denied their rights and freedoms by the improper action of police officers. These complaints also serve as a source of information to the police about how citizens, representatives of legal entities, representatives of other state bodies, representatives of international organizations and non-governmental organizations perceive the quality of performed police duties.¹⁰ Due to their distrust, citizens often submit the same complaints to multiple addresses (Cabinet

8 Art. 6. of the Police Act, "Official Gazette of RS", no. 6/2016.

9 Through publicity, the police promote and enhance the model of community policing as well as other models such as: problem-oriented policing, the police intelligence model (Intelligence Led Policing - ILP) and the like.

10 Art. 234-243. of the Police Act, "Official Gazette of RS", no. 6/2016.

Minister, Department of Internal Control, Directorate of the Police, etc.); in this case, all complaints are submitted to the Head of the organizational unit where the defendant police officer works.

Even the case of unfounded accusations about the actions of specific police officers show how citizens perceive and evaluate the work of the police. The activities related to checking the allegations contained in the petitions are one of the most important segments of the work of the Department of Internal control, and other organizational units within the MoI. In the Constitution of the Republic of Serbia, the citizens' right to submit complaints is designated as *the right to petition*.

3. The internal control mechanisms of the police work in the Republic of Serbia

Internal control of police work can be defined as a set of measures and actions that are implemented within the MoI by the organizational authority which is outside of police but which is aimed at verifying the compliance with the legislation and ethical rules in the work of police officers and other MoI employees.¹¹

The activities of the Internal Control Sector (ICS)¹² include the observance and protection of human and minority rights and freedoms in the performance of police and internal affairs activities, combating crimes of corruption and other forms of corrupt behavior (Božić, Kesić, 2016:455-482), as well as other criminal offenses committed by police officers. This sector was established by the 2005 Police Act and it was a novelty at the time, but it was a very important step because it provided for the continuity of internal control functions. The ICS tasks and powers have been updated in the new Police Act (2016), which has also brought a new methodology of work.

Under the new Police Act, the Internal Control Sector (ICS) has jurisdiction over all MoI employees and, being vested with wider powers, it is the main mechanism for combating corruption within the Ministry of the Interior. The ICS is led by the Chief who is also the Deputy Minister, appointed by the Government for a period of five years.¹³ The Chief of the ICS is accountable for his work and results to the Minister, as well as to the Government which appoints him to the position.

11 The concept '*internal control*' is different from the concept of *self-control* or *internal hierarchical control* that is carried out within the police by officers who are in charge of the legal, professional and ethical conduct of police officers and other employees.

12 Art. 224. of the Police Act, "*Official Gazette of RS*", no. 6/2016.

13 Art. 25 of the Civil Servants Act "*Official Gazette of RS*", no. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009 and 99/2014.

Thus, the Chief of ICS is in no way linked to the police, which is very important for effective internal control of the police and other MoI employees in terms of ensuring a sufficient degree of autonomy and independence in the ICS work.

The process of reporting and informing is an integral part of the institutional and democratic control of the police and the Interior Ministry. In terms of accountability, the ICS Chief is obliged to regularly and periodically submit reports to the Minister of the Interior, while the Minister has to submit reports to the Government and the Committee on Defense and Internal Affairs of the National Assembly. The ICS is also obliged to publish a report, within a period of 3 months from the end of the calendar year, including the basic statistical data on implemented activities and results achieved in the previous year.

The control of legality of police officers' work is carried out within the line of work although this type of control is not completely defined by the law. At the headquarters of the Ministry of the Interior, the Police Directorate established the Department for control of legality in police work, which also includes the Department for monitoring and control of legality of police activities. Among other things, the responsibility of this Department is to monitor the correctness of the use of force, discipline and behavior of police officers along the lines of the general jurisdiction of the police, which is the largest service of the Ministry. (Plačkov, Vukadinovic, 2015: 232).

3.1. Methodology of work of the Internal Control Sector

The methodology of work of the Sector of internal control and other issues in this regard are more closely regulated in Articles 227-231 of the Police Act. The ICS police officers have equal employment right and duties as other authorized officers in the police, the only difference being that the authorized police officers apply their powers towards citizens who are outside the Ministry of the Interior, while the ICS operative officers primarily apply their powers towards MoI employees. In performing the internal control of the police, the ICS operative officers can apply all police powers regulated by Articles 64 - 128 of the Police Act, or other powers, and all police employees are required to enable them to carry out the control and provide them with necessary expert assistance.

The Internal Control Sector acts on its own initiative, at the request of the public prosecutor, on the basis of collected notifications and other information, the written notices of police officers and other MoI employees, as well as complaints of individual citizens and legal entities.¹⁴ Accordingly, the ICS operative officers are authorized to collect information and other findings relating

14 Art. 227. of the Police Act, "Official Gazette of RS", no. 6/2016.

to the legality of the police work and the Interior Ministry. If in the process of collecting information and other findings they obtain information that there are reasonable grounds to believe that there was illegality in the police work, violation of the rights and freedoms of man and citizen, or some other illegal and unethical actions, the ICS initiates the procedure of internal control.

All organizational units of the MoI are obliged to inform the competent public prosecutor and the ICS without delay, no later than 24 hours, if they find out or gain some information during their work that an employee has committed a criminal offense at work or in relation to work.

If a police officer or employee is present at the moment of commission of some illicit act, he/she is obliged to report the case to his/her superior, the ICS and the bodies of external civilian control over the police work. The police officer/employee may report it to the ICS either orally or in writing, by e-mail or in any other appropriate manner that transfers information and data. Correspondence of police officers/employees with the ICS is free, which gives a chance to all MoI employees to communicate with the ICS without any repercussions.

Last but not least, any natural or legal person may submit to various suggestions to the ICS, as well as complaints, relating to the work of the police and other MoI employees.

Police officers and other employees of the Ministry are obliged to enable the ICS operative officers to carry out the control and provide them with the necessary expertise and technical assistance, which the ICS does not have.¹⁵ In the course of internal control, the ICS officers have the right and duty to gain insight into the case data, case files, information and other case-related documents, to take statements from police officers and require submission of other data and information from their competencies that are necessary for the internal control purposes.

Expert assistance includes any type of help related to police work (forensics, collecting information, and other measures), while technical assistance implies the use of material-technical resources (vehicles, buildings, IT equipment, etc.). Yet, the provided assistance is limited to those resources that the ICS does not have at its disposal, which is very important protection in terms of delegating certain ICS obligations to the police and other MoI organizational units. If the employee fails to enable the performance of internal control, he/she can be subject to disciplinary liability for violation of professional duty.

The ICS operative officers may also request urgent and necessary measures and actions in case the delay of such measures/action is likely to result in a violation

15 Art. 228. of the Police Act, "Official Gazette of RS", no. 6/2016.

of human rights and freedoms in the course of using police powers or performing other police tasks. Under this provision, the ICS has been granted additional powers in the process of internal control work which are aimed exclusively at the MoI employees. The ICS officers may issue an order either orally or in writing, which may be aimed at the police officers who directly perform the police duties and used the police powers as well as at the police officer's immediate superior or head of the organizational unit. If they do not obey the order, they may be subject to disciplinary liability for violation of professional duty.

Article 229 of the Police Act includes a safety clause which explicitly and completely excludes any possibility that the ICS police officers interfere with the work of the police or police actions that are underway. This Article also provides a possibility for a police officer and another MoI employee to temporarily refuse to comply with some activities within the scope of internal control, such as: inspection of the documentation, inspection of premises, and submitting certain data and information, whereas they must not refuse to comply with some other actions in the internal control procedure. Some activities of internal control may be temporarily refused only if there is a risk that the performance of the internal control activity over the use of police powers (stipulated in the Police Act or some other regulation) would actually make it impossible or substantially hinder the application of police powers or endanger the lives and health of people who apply them. This provision has strengthened the operational autonomy and independence of the Police in taking measures/actions and performing the police duties.

Internal control, among other things, includes measures and actions needed to meet the goal of internal control. These measures and actions are regulated by the Police Act (Articles 47 - 63) and the Criminal Procedure Code (eg. collecting notices, suspect interrogation, arrest, retention, taking of evidence or special evidence actions, etc.). In the author's opinion, the phrase "measures and actions" may include the police powers envisaged in the Police Act. By applying these measures and actions, the ICS police officers obtain all relevant facts that may serve as evidence in the instituted criminal, misdemeanour or disciplinary proceedings, or relevant facts that prove the legality and regularity of the treatment of employees. The ultimate goal of internal control and the implementation of measures and actions is to determine the facts and, if necessary, take action. The wording "other measures in accordance with the law" gives a lot of maneuver space to the ICS (Nikač, Leštanin, 2016: 455).

3.2. Preventive control of the Internal Control Sector

The Police Act provides for preventive control which includes conducting integrity tests, corruption risk analysis and submitting property records on financial standing of MoI officials, including the possibility of checking other employees.¹⁶ Test integrity involves solving a test in the form of specific tasks, where the test result is influenced by many subjective and objective circumstances that the candidate has no influence on. The test simulates the real situation, identical to the real-life work activities, in order to assess the employee's reactions and actions in a particular situation. The MoI employees are required to solve a test, and the ICS has no obligation to notify the organizational units where the employee works prior to testing.

Risk assessment analysis is a written document containing an estimate of the likelihood of occurrence of certain corruptive behaviors, an assessment of vulnerability of the Ministry of Interior and its organizational units to corruption, and the proposal of measures for reducing this probability and vulnerability. The process of risk analysis includes the following activities and measures:

- 1) risk identification (determining whether true risks or dangers of corruption exist or are yet to come; determining their characteristics; the timing and possible outcomes),
- 2) making a risk register (a database of different risks),
- 3) developing preventive measures/action plans for eliminating risks (a clear and precise action plan aimed at preventing the causes of identified corrupt practices).

Control of changes in the financial standing and property records of the MoI employees involves comparing the recorded data with the actual situation or real property that employees possess. The ICS has the authority to keep records of financial situation of MoI employees but it applies only to the officials in higher managerial or other positions which are estimated in the risk analysis to involve a high corruption risk. These are primarily undercover agents, police officers involved in combating organized crime, criminal intelligence services, etc. What is particularly important in the process of this control is the process of "cross-referencing the property data", which implies comparing the employee's property data on acquired property and the (lawful) income from regular working activities.

16 Art. 230. of the Police Act, "Official Gazette of RS", no. 6/2016.

4. Conclusion

The initiated reform process in the Ministry of Internal Affairs of the Republic of Serbia is aimed at establishing a democratic course of change and ensuring that the police in their work consistently observe human rights and freedoms in compliance with the best practices and contemporary standards, in order to increase public confidence in policing. One of the most important ways of establishing and maintaining that trust is transparent work of the police, especially in terms of exercising the police function in the society. Modernization of the control mechanism, legality, professionalism and accountability of police officers are the imperatives of the initiated reforms as part of efforts to bring police closer to citizens.

In this context, mechanisms of the newly established external and internal control of the police envisaged in the Police Act of the Republic of Serbia are extremely important. The solutions introduced in the new Police Act (2016) are identical to the solutions in Western European jurisdictions. However, in practice, there is a distortion of these solutions. Parliamentary control over the work of the MoI as the most important form of external control is not a sufficiently strong corrective, and it really does not keep the Ministry of the Interior under control in view of the political influence and the *modus operandi*.

Given that local government bodies are much more aware of the specific problems in their communities and are better informed about the work of the police, the practice of countries where decentralization has been implemented and where the powers are delegated to the local level shows that there have been significant results in promoting the relationship between the police and the citizens. In the Republic of Serbia, security councils of local governments are facing a lot of problems in their work; however, in some local communities, they have not been established or, if established, they do not function properly.

The mechanisms for internal control of the police work are reduced to the operation of the Internal Control Sector (ICS). The tasks and powers of the ICS operative officers have been updated in the new Police Act. Although the new ICS methodology has yielded positive results, it is necessary to expand its human resources and material capacities in order to ensure a better operation of the ICS.

Analysis of the efficiency of internal control of the police work indicates that it is necessary to further build mutual trust between the police and the citizens, which should serve as the grounds for reducing potential conflict, providing better access to justice and ensuring an adequate response to the security needs and citizens' requirements in exchange for their support to the police activities.

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КОНТРОЛА РАДА ПОЛИЦИЈЕ У РЕПУБЛИЦИ СРБИЈИ

Резиме

Савремено демократско друштво претпоставља државу у којој постоји владавина права, поштовање грађанских права и слобода. Контрола рада полиције и њених службеника неопходна је управо ради заштите људских права и слобода, а са друге стране доприноси афирмацији саме полиције као сервиса која служи грађанима. Значај контроле рада полиције проистиче из њене веома осетљиве улоге као органа у систему државне власти, посебно због могућности легалне примене принуде, као и специфичности овлашћења за предузимање мера које се односе на лишење слободе, претресање лица и просторија, одузимање предмета, прислушкивање и др. У свакодневној примени овлашћења у пракси постоје могућности за прекорачење или злоупотребу овлашћења, нарушавање једнакости грађана пред законом и друге повреде грађанских права. С тим у вези, у раду су приказани спољни и унутрашњи механизми контроле рада полиције, са посебним освртом на унутрашњу контролу.

Систем спољашње контроле састоји се од скупа разних контролних инструмената одређених органа власти, невладиног сектора и грађана. На првом месту је Народна скупштина као највиши законодавни орган, онда Скупштина АП Војводина, скупштине града и општина, суд, тужилаштво, Заштитник грађана, повереници, Државна ревизорска институција, Агенција за борбу против корупције, надлежне инспекције као и грађани и јавност. У механизме спољне контроле спадају редовни и ванредни извештаји који се подnose од стране МУП-а одређеним контролним органима; разматрање стања безбедности кроз састанке одбора, савета и других контролних тела; путем писмених обраћања за доставу информација од јавног значаја; учешћем представника јавности у раду одређених тела у МУП-у; подношењем притужби и представки и на сваки други начин којим се контролише рад запослених у МУП-у. Сектор унутрашње контроле формиран је доношењем старог ЗОП-а 2005. године и представљао је новину али и веома битан корак

јер је на тај начин обезбеђења сталност функције унутрашње контроле рада. Задаци и овлашћења Сектора унутрашње контроле полиције новелирани су доношењем новог Закона о полицији (2016), док је усвојена и нова методологија рада. Анализа ефикасности унутрашње контроле полиције показује да је неопходна даља изградња међусобног поверења полиције и грађана на основу чега се смањују потенцијални конфликти, обезбеђује боља доступност правде и пружа адекватан одговор на безбедносне потребе и захтеве грађана у замену за њихову подршку полицијском раду.

Кључне речи: МУП РС, полиција, контрола рада, Сектор унутрашње контроле, овлашћења.

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**DIFFERENT LEVELS OF FORENSIC PSYCHIATRIC
EXPERTISE AS A CONTROL MECHANISM IN
ESTABLISHING PSYCHIATRIC FACTS RELEVANT FOR
RENDERING OBJECTIVE JUDICIAL DECISIONS**

Abstract: *Under the former legislation, psychiatric expertise was ordered by the competent court, whereas the current legislation provides that it may be conducted upon the initiative of the parties in the proceedings. In lege artis forensic-psychiatric work, forensic-psychiatric experts' observations may lead to serious confrontations, which is ultimately a good presumption for the court to better understand the facts and establish relevant psychiatric circumstances which are important in the decision-making processes. Notwithstanding the level of psychiatric expertise and who has initiated it, it is essential to ensure that the following requirements have been satisfied: a) to provide all the necessary conditions for psychiatric expertise, including the examination of the person, relevant medical and other documentation, and other sources to ensure a comprehensive insight and qualitative evaluation; b) to precisely define the subject matter of expertise by asking questions on the psychiatric issues which are important for making a judicial decision in the specific legal case; etc. In case a psychiatric expertise is ordered by the court due to insufficiently compelling prior expertise, control may be exercised by instituting a new secondary expertise of new psychiatric experts, by ensuring that the expert witnesses have come to a common agreement, or by seeking a supreme expertise of forensic-psychiatric committees at the Faculties of Medicine. In addition, control over the evidence presented by forensic-psychiatric expertise is significantly enhanced by the opportunity to engage a forensic-psychiatric expert as a professional adviser of the defence, which clearly improves the prospects of reaching a most objective judicial decision.*

Keywords: *forensic psychiatry, medical expertise, forensic-psychiatric expert.*

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1. Introduction

In legal proceedings, forensic psychiatric expertise is evidence-based activity, where psychiatrists consider and evaluate psychiatric issues which are correlated with some legal norm (Kovačević, 2000: 19). In other words, forensic psychiatrists consider one's psychiatric and psychological state of mind and address related issues which are important for professionals involved in legal proceedings. They usually consider and give opinion about psychiatric and psychological competence of the person who is subject to court expertise, most frequently including the capacity to understand their acts and/or to control their action. Forensic psychiatric expertise is applied in different legal proceedings but they are most commonly used in criminal or civil law procedures.

Forensic psychiatric expertise is sometimes crucial evidence for legal assessment of the case at issue or very important evidence for delivering the judgment. Obviously, psychiatric expertise is highly important for reaching the most objective judicial decision in criminal and civil procedures. It is therefore necessary to make the forensic psychiatric expertise proceedings as objective as possible and to take adequate measures of control over these proceedings.

The development and modernization of law has brought about significant innovations and improvement in procedural legislation, which have contributed to instituting more objective rules of evidence and procedure ultimately aimed at reaching a lawful and impartial judgment. In the field of forensic psychiatric expertise procedure and action, there are some novelties concerning the control of objectivity of experts' work and opinions. The new rules of procedure envisaged in the contemporary legislation have significantly improved the evidentiary procedure, where psychiatric expertise may have an important place.

This paper discusses some issues and ideas how to control the work of forensic psychiatrist and the process of forensic psychiatric expertise, and what actions to initiate in this field in order to provide for a more objective expertise. The author also provides a critical analysis and a personal standpoint on the new legal provision concerning "contradictory expertise" (counter-expertise). The main purpose of this paper is to analyse and consider the current situation in this field in order to inform and create conditions for a further development of control and objectivity of forensic psychiatric expertise.

To that effect, this article will discuss the following issues: some postulates of the Court Experts Act; criminal and civil law procedure rules on forensic psychiatrist expertise; some optimal attributes for being forensic psychiatric court expert; and other important issues for control of work of forensic psychiatric court experts. These issues will be analysed and considered in line with the relevant scientific methodology. At the end, the author will present his point

of view on the issue, and propose some ideas for innovating and improving the control of forensic psychiatric expertise.

2. The legal requirements for becoming a forensic psychiatric court expert

The most important legal provisions on court experts are contained in the 2010 Court Experts Act of Republic Serbia.¹ Article 6 of this Act explicitly stipulates the conditions for being a court expert: 1) to have appropriate higher education degree in the particular area of expertise (undergraduate academic studies, graduate academic/master studies, specialist academic studies, specialist professional studies); 2) to have at least five years' of professional experience in the specific field; 3) to have professional knowledge and practical experience in the specific field of expertise; and 4) to be morally worthy of performing the expertise. Article 7 of this Act envisages that "Professional knowledge and practical experience for a particular area of expertise have to be proved by published professional or scientific papers, certificates of participation in conferences organized by professional associations, as well as the statements or recommendation of courts or other government agencies, professional associations, scientific or other institutions or legal entities that the candidate for a court expert has been professionally associated with."

In the area of forensic psychiatry, the first condition for being a court expert is to have appropriate higher education. The key question is whether it suffices that the candidate for a court expert be a (general) psychiatrist, or whether he/she should have sub-specialization in the field of forensic psychiatry? Considering the fact that all psychiatrists do not have the relevant knowledge and experience in forensic court expertise, it may be concluded that a court expert should be a specialist in forensic psychiatry. But, given the fact that forensic psychiatrists are not involved in the field of expertise known as clinical diagnosis, the answer to this question could be that all psychiatrists could be court experts. Truth is probably somewhere in the middle; so, a good clinical psychiatrist with elementary knowledge of law and decent experience in forensic psychiatric expertise could be a court expert in field of forensic psychiatry.

The author of this paper does not agree with the stipulated condition "to have at least 5 years' professional experience in a particular field". Why? Being a psychiatrist for 5 years' time does not ensure that the psychiatrist will attain minimum knowledge about what forensic psychiatric expertise entails, nor does it ensure that in the five-year period the psychiatrist will develop some perception about the legal issues involved in this kind of expertise. This condition has to

1 Zakon o sudskim veštacima (Court Experts Act), *Sl. glasnik RS* 44/2010

be changed by introducing a minimum of three years' professional experience in the field of forensic expertise, performed either alone or under the supervision of an experienced forensic psychiatric court expert (which is a much better solution). This stance is closely related to the third condition "to have professional knowledge and practical experience in the specific field of expertise", but how can it be attained? In my opinion, it could be done by applying the model used in the advancement of the judiciary, whose professional development implies three distinctive stages: the judicial assistant, the expert-associate, and the judge. A similar model could be applied to psychiatrists who want to become court experts. As for those candidates who do not have relevant education and sub-specialization in forensic psychiatry, the law could prescribe professional training under close supervision of forensic psychiatric court expert for a period of 2 years, which would be followed by one-year period of practice (an obligation to make expertise with an experienced court expert); only then, if the evaluation of the candidate's work is positive, one could become an independent court expert in field of forensic psychiatry.

If we analyze the professional and scientific papers that are submitted by candidates who want to become court experts, we find that most of them do not cover the field of forensic psychiatry. It may be adequate in terms of being a general psychiatry expert, but it is certainly quite inadequate for becoming a court expert in the field of forensic psychiatry.

The next important issue in the process of becoming a court expert is who is eligible to decide whether the candidate has enough qualities to become a court expert. Unfortunately, it is usually done by some public officer/employee in the Ministry of Justice, who is authorized to propose the candidates who can be entered in the official list of court experts (to the Minister). Here, the major issue is that the conditions for becoming a court expert are actually assessed by a person who is far-removed from the professional and scientific field of work of court experts. It is also highly disputable considering the fact that court expertise is very important in terms of providing some crucial evidence in legal proceedings.

Speaking from the standpoint of forensic psychiatry, I consider it necessary that the evaluation of the candidates' professional knowledge and practical experience should be conducted by eminent forensic psychiatric court experts, who would sit as a panel (commission); the evaluation should be conducted in the form of an interview, where the candidates should be given a specific problem to solve and asked to provide their expert opinion; after that, the commission should make a professional proposal to the authority in charge of making a decision on the most eligible candidates for court experts in this field. This form of assessment has ample benefits, which will be discussed further on in this paper.

3. The control of forensic psychiatric expertise in criminal cases

This control of forensic psychiatric expertise could be done at several levels, and most of them are present in criminal procedure. The control of psychiatric expertise shall be exercised by the authority conducting the specific criminal proceeding (a judge or a prosecutor). The court should clearly instruct the court expert about the specific matter or question that should be addressed in the psychiatric expertise (Bowden, 2001: 107). Thus, the expert has no doubt what to do and his professional knowledge is fully efficient; lawyers may obtain the necessary information from them, while avoiding some unnecessarily forensic psychiatric elaboration which may occur if the subject of expertise is not clearly defined.

After obtaining *the primary expertise* (of an individual court expert or an institution), the authority in charge of managing the criminal procedure can exercise control by considering whether all the issues are elaborated according to the given instructions. If the responses are not quite well-elaborated, made in a highly technical and professional language that cannot be understood by lay (non-medical) persons, or if some questions have not been answered, lawyers may ask for clarification or more specific answers understandable to people outside the fields of medicine and psychiatry. This is *additional expertise* which is made by the same expert who made the primary expertise. After that, if lawyers cannot understand the answers to suggested questions, they may pursue the so-called *repeated expertise*, which has to be done by another court expert or institution. This expertise can be controlled by lawyers in the same way as the primary one. This expertise may have several possible outcomes. The first and most logical one is to accept the expertise which has provided clearer answers and explanations of relevant issues. However, if the primary and the repeated expertise contain different medical (psychiatric) facts, lawyers are not in a position to evaluate which is "more appropriate" in psychiatric terms, simply because they do not have professional knowledge about it. In that case, lawyers have to call experts who have done the primary and the repeated expertise to try to agree on these conflicting parts of their expertise, after which they apply these facts to the legal case at issue. If the experts fail to agree on the disputable matter, the competent authority in charge of criminal procedure is required to order the *supreme expertise* of the Forensic Psychiatry Committee of forensic psychiatric associates at the Faculty of Medicine. This is the final level of expertise and the expert opinion of the Forensic Psychiatric Committee does not have to be aligned with the formerly provided expert opinions (Goreta, Peko-Covic, Buzina. 2004: 710).

The institute of the expert advisor (professional consultant) of the defense is another instrument for exercising control over the forensic psychiatric expertise in criminal cases. Article 125 of the Criminal Procedure Code² explicitly defines who is entitled to be an expert advisor of the defense: "a professional consultant is a person possessing professional knowledge in the field in which expert examination has been ordered". This person is chosen by the defendant to help him/her with the issues related to the subject matter of forensic psychiatric court expertise, as neither the defendant nor his attorney has professional knowledge about forensic psychiatry.

According to the Criminal Procedure Code (Art. 126), the expert advisor (professional consultant) of the defense is entitled to be informed about the date, time and place of the expert examination, to attend the expert examination procedure, to have access to court evidences and be informed about the subject matter of forensic psychiatric court expertise. Moreover, the expert advisor has the right to propose some activities to be performed in the expertise procedure, to make remarks on the court expertise findings, to ask the forensic psychiatric court expert about content of expertise, and to give opinion about psychiatric issues which are subject of expertise. Any activity of the expert adviser of defense shall be performed in accordance with the highest professional and ethical standards.

Before the institute of expert adviser of the defense was introduced, defendant and his attorney had no opportunity to exercise control over the psychiatric expert court expertise because of the lack of adequate knowledge about psychiatry, especially forensic psychiatry. This new institute provides a better opportunity to the defense to objectify the psychiatric evaluation, and it also precludes "the exclusive right" of designated court experts to provide forensic psychiatric assessment in criminal law proceedings.

Yet, this opportunity to provide for better defense has some drawbacks, which have to be addressed. In my opinion, the expert advisor of the defense cannot be just any psychiatrist, but only the psychiatrist who is a subspecialist in forensic psychiatry or a court expert for forensic psychiatry. In that way, the defendant will be provided high quality advice on forensic psychiatry issues, which can be of greater assistance than the engagement of a psychiatrist who is not a specialist in the field of forensic psychiatry. Another important issue is to declare that the expert advisor of the defense cannot be a person from the same psychiatric institution where the court expert is employed, because it may give rise to a conflict of interest. Also, the engagement of the expert advisor (professional consultant) of the defense has to be based on contractual grounds, which would

2 Čl. 125 Zakonika o krivičnom postupku RS (Criminal Procedure Code of the Republic of Serbia), *Sl. glasnik RS* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014.

ultimately preclude the possible malpractice embodied in the defense request for the advisor to act in unprofessional and unethical manner.

Another drawback of the legal provisions on the expert advisor of the defense (particularly in the field of forensic psychiatry) is that law does not allow the expert advisor (professional consultant of the defense) to personally examine the defendant or other participants in the proceedings. The advisor may be present during the examination performed by the court expert, examine the court documents and propose to the court expert what to do or ask, but he is not allowed to ask questions himself. It is really beyond comprehension why the expert advisor cannot do forensic psychiatric examination, when he may do all these things during the examination conducted by the designated court expert. This implies an unequal legal standing of parties in court procedure, because the public prosecutor is entitled to order the appointment of a forensic/psychiatric expert who performs his expert examination before the court expertise, whereas the defense expert advisor cannot do the same. It raises the question whether the expert advisor, acting in full capacity, may give his opinion about the subject matter of expertise if he has not had the opportunity to personally examine the defendant as the primary subject of the court-ordered psychiatric expertise.

Despite all, involving an expert advisor (professional consultant) in the field of forensic psychiatry is a huge step towards providing a more objective forensic psychiatric evaluation and a significant improvement in terms of control of court expert's forensic psychiatric expertise. It is also a step forward towards the model of "contradictory expertise" (counter-expertise) which is present in the Anglo-Saxon criminal law, where each party in criminal procedure may engage its own forensic psychiatric expert, and the court or the jury are required to estimate (after cross-examination) which expertise is more reasonable, more understandable and more objective.

4. The control of forensic psychiatric expertise in civil law cases

In civil law cases, there are several levels of control of forensic psychiatric expertise. The first one is similar to the control envisaged in criminal procedure, when the authority in charge of conducting the civil procedure may appoint a court expert in the field of forensic psychiatry. The forensic psychiatric expertise may be conducted as: *primary expertise*, *additional expertise*, *repeated expertise*, and *supreme expertise*. These forms/levels of expertise are fully explained in the previous part of this paper. The only difference is that the court psychiatric

expertise in civil cases is governed by the rules of the Civil Procedure (contentious proceedings) Act³ or the Non-contentious Proceedings Act.⁴

Another level of control is a novelty in civil procedure which allows the parties in court proceedings to engage forensic psychiatric experts to give their opinion and expertise about psychiatric issues which are important for the final decision. Before this novelty was introduced, only the court-appointed forensic psychiatric court experts were allowed to give psychiatric expertise, and it was only the results of the court-ordered psychiatric expertise that were admissible as relevant evidence in civil cases. This novelty is a positive development in terms of instituting a more objective approach to examination psychiatric issues which may be crucial evidence in the decision making processes.

5. Some other activities for exercising control over psychiatric expertise

The court practice has shown the need to take some other activities for the purpose of exercising better control over psychiatric expertise and improving the situation in this area.

First, it is important to improve the way of preparing medical documents and keeping medical records (Curran, Mc Garry, Shah, 1986:18), which are often the base for medical and psychiatric expertise. In the education of medical staff, especially doctors of medicine, it is necessary to call attention to good medical practice in preparing and keeping medical documents. In some cases, it is done very well but in most cases we encounter inadequately kept medical documentation, which is either invalid or incomplete, or both.

Another important assumption is better education of psychiatrists (Craft, Craft, 1984:19), particularly those who want to be psychiatric court experts, by providing them with broad theoretical and practical knowledge in the field of forensic psychiatry, at all levels of academic and professional education. In legal education, there is a need to provide more extensive instruction on forensic psychiatry at the undergraduate, graduate and post-graduate level of studies. It is necessary in the education of lawyers because it will enable them to better understand and exercise control over the psychiatric expertise explanations in practice.

3 Čl. 192 i čl. 261 Zakona o parničnom postupku RS (Civil Procedure Act of the Republic of Serbia), *Sl. glasnik RS* 72/2011, 49/2013-odluka UC, 74/2013-odluka US i 55/2014.

4 Čl. 38 Zakona o vanparničnom postupku RS (Non-contentious Proceedings Act of the Republic of Serbia), *Sl. Glasnik SRS* 25/82 и 48/88 i *Sl. Glasnik RS* 46/95-dr.zakon, 85/2012, 45/2013-dr.zakon, 55/2014, 6/2015 i 106/2015-dr.zakon.

Last but not least, we shall note some important characteristics of forensic psychiatric court experts and expert advisors, who optimally need to possess these qualities (Ćirić, 2013:17):

- to have solid clinical knowledge and experience;
- to be truly committed to providing good quality and multi-dimensional evaluation of different facts;
- to have a tolerant attitude towards the person subjected to psychiatric examination;
- to present psychiatric arguments clearly and ensure their better understanding by persons who are not in the medical profession;
- to be thorough in the assessment of different issues and details during the forensic psychiatric expertise;
- to be a well-organized and energetic person, capable of finishing the forensic expertise in adequate and timely manner;
- to be able to work in professional teams and act as a team leader, and to critically analyze various statements of different professionals;
- to have good professional relations with other colleagues, and to be ready to hear opposite opinions and approaches;
- to resist different forms of pressure, to preserve personal honesty and professional reputation, to be incorruptible; etc.

At the end, a comprehensive approach to the issue of exercising better control over the forensic psychiatric expertise is a topic which has to be addressed in a serious debate between lawyers, psychiatrist, psychologist (Ćirić, Dimitrijević 2009: 87) as well other experts from related disciplines who participate in legal proceedings. They should all do their best to contribute to finding a more functional and efficient model of control over the forensic psychiatric expertise in legal proceedings.

6. Conclusion

Forensic psychiatric expertise is medical evidence which is sometimes of crucial importance for reaching decisions in different court proceedings. This kind of expertise includes diverse issues and evaluation of psychiatric circumstances which are significant in terms of considering and deliberating on important legal matters in both criminal and civil law, such as: legal capacity, mental in-

competence, medical security measures, mental pain and suffering, contractual or testamentary capacity, working capacity, etc.

Given the importance of forensic psychiatric expertise in legal cases, and particularly considering that the engagement of psychiatrists is essential as lawyers do not have relevant professional knowledge in this field, it is necessary to find the best possible model for exercising control over forensic psychiatric expertise and the work of court experts in this field. To achieve the most objective efficient control of forensic psychiatric expertise, it is necessary to consolidate several factors.

First, it is essential to create the best possible conditions for the selection of high-quality psychiatrists to be forensic psychiatric court experts. It means that the candidates have to be psychiatrists with high-quality clinical psychiatric knowledge and experience, practical experience in court expertise, as well as the basic knowledge about legal institutes and issues they are to give professional opinion about. It also implies the need to change the standards for their selection (as envisaged in the Court Experts Act of the Republic of Serbia) as well as the competent authority for their selection. The new legal provisions should envisage that the candidates for court experts should be assessed and interviewed by a committee of eminent professionals in the particular field, who shall make a proposal to the competent Ministry of Justice on the best candidates for the position of court experts in the field of forensic psychiatry.

Second, it is essential to ensure several levels of control over forensic psychiatric court expertise in both criminal and civil law cases, including: *primary expertise, additional expertise, repeated expertise and supreme expertise*. A significant novelty in criminal procedure is the institute of an *expert advisor of the defense*, which is a huge step forward in exercising control over the expertise of court-appointed experts, particularly in the field of forensic psychiatry. This development may contribute to introducing a model of *'contradictory expertise'* (counter-expertise), where each party in criminal procedure would be entitled to engage its own forensic psychiatric expert.

Third, the civil procedure rules provide a possibility for each party to engage its own forensic psychiatric expert, which ultimately ensures a higher-quality control of court expertise. Court experts shall perform their activities in line with the highest professional and ethical standards; they shall not be an instrument of parties involved in a particular case but an instrument for achieving a higher degree of objectivity and professionalism.

Fourth, it is essential to ensure relevant education and further training of court experts from the field of forensic psychiatry, who need to constantly expand their professional knowledge and experience. Last, but not least, court experts

for forensic psychiatry need to have relevant personal and professional characteristics, which have been noted earlier in this paper.

On the whole, all those who participate in legal proceedings have to do their best to contribute to exercising a most functional and efficient control over the forensic psychiatric expertise. The issue has to be addressed in a comprehensive debate involving legal theorists and practitioners, psychiatrists, psychologist and other experts from related disciplines, which only confirms the multidisciplinary nature of forensic psychiatric expertise.

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**РАЗЛИЧИТИ НИВОИ СУДСКО-ПСИХИЈАТРИЈСКИХ ВЕШТАЧЕЊА КАО
КОНТРОЛНИ МЕХАНИЗАМ У УТВРЂИВАЊУ ПСИХИЈАТРИЈСКИХ
ОКОЛНОСТИ ОД ЗНАЧАЈА ЗА ВЕЋУ ОБЈЕКТИВНОСТ ПРЕСУДЕ**

Резиме

Савремено право, у склопу нових прописа процесног карактера, је у знатној мери иновирало и побољшало доказни поступак, у оквиру кога медицинска вештачења имају своје, некада, значајно место. Раније се медицинско вештачење обављало по налагу суда, док актуелно законодавство омогућава њихово обављање без налога суда, на иницијативу странака у поступку. У парничном поступку се све више користи могућност да се уз тужбу прилажу сви докази који је аргументују, па није ретко и психијатријско вештачење које иницира сама тужилачка страна. Међутим, веома брзо следи и могућност за контролу те експертизе, могућношћу да овај доказ приложи и супротна страна. У *lege artis* судско-психијатријском раду, могу настати озбиљна сучељавања стручних опсервација, конфронтације ставова, што је добра претпоставка суду да боље спозна околности психијатријског квалитета. Нови механизам за контролу, ако нема сагласја међу вештацима странака, је од суда одређено вештачење, којим се у принципу постиже додатна објективност у евалуацији ових околностима.

Без обзира о ком нивоу вештачења се ради (и по чијем захтеву) треба имати на уму следеће околности: а) обезбедити све неопходно за обављање психијатријског вештачења (преглед лица које се вештачи, медицинску и пратећу докуменатацију, како би извори за експертизу били свеобухватни), б) прецизна дефиниција предмета вештачења, кроз питања о психијатријским околностима од значаја за одлучивање у конкретној правној ствари; и др. Уколико вештачења одређује суд, након недовољног првобитног вештачења контрола истог се може оставрити поновним вештачењем (обављају га нови вештачи), путем усаглашавања вештака или обављањем врховних вештачења преко психијатријских одбора Медицинских факултета.

Ако овоме додамо могућност да се у кривичном поступку ангажује стручни саветник одбране-психијатар, јасно је да се могућност контроле доказа у виду судско-психијатријског вештачења повећава, а тиме и неопходна већа могућност за што објективнију судску одлуку.

Кључне речи: судска психијатрија, медицинске експертизе, судско-психијатријски вештак.

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JUDICIAL CONTROL OVER THE PLEA BARGAINING AGREEMENT

Abstract: *The authors deal with the control over the plea bargaining agreement. Despite numerous objections, this kind of settlement in criminal proceedings has found its place in the Serbian criminal procedure legislation. One of the most important objections refers to the control over the plea bargaining agreement, primarily because it has been noticed that courts often accept this agreement without undertaking a detailed examination of facts. The court examines and approves a plea bargaining agreement. The control is necessary for many reasons, but above all, a court has to be convinced that the defendant has confessed to committing a felony knowingly and voluntarily; moreover, control is necessary given the fact that the very act of accepting a plea bargaining agreement implies that the defendant relinquishes numerous rights which are guaranteed in the ordinary criminal procedure. Considering that the legislator has bypassed this issue, the authors emphasize that a plea bargaining agreement may only be subject to judicial control of the competent court, which has subject matter and territorial jurisdiction to decide on this matter. However, the answer is more than logical. According to the Serbian Criminal Procedure Code, the court can accept, reject or dismissed a plea bargaining agreement. Before the termination of trial proceedings, both the prosecutor and the defendant may submit the plea bargaining agreement to the first instance court as well as to a higher court (in case a higher court ordered a new trial before the first instance court). Finally, the authors' observations are confirmed by referring to a survey conducted among the prosecutors, defense lawyers and judges.*

Keywords: *plea bargaining, plea agreement, judicial control, accepting the agreement, court.*

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1. Introduction

For many years throughout the European continent, there have been numerous debates regarding the effectiveness of the criminal proceedings,¹ and criminal procedure systems around the world are faced with the overloaded courts. It could not bypass Serbia. The last decade of the XX century was marked by the strong legislative activity of the European countries in this field, where the legislators acted under the influence of the external factors, which are primarily reflected in the attitudes of the European Court of Human Rights and Freedoms, and then the national jurisprudence and theoretical conceptions (Krapac, 2008: 119). In that period, the European criminal procedure systems were divided into several groups. On the one side, there were former socialist countries, starting from the USSR, whose influence spread to other socialist countries. On the other side, there were the old western countries that had a common historical thread in their development. Some western countries, like the United Kingdom, had an independent development course (Pavišić, 2008: 491; Bupalović, 2010: 9-10). In some countries of the Anglo-Saxon legal system, consensual ways of solving criminal cases were not uncommon, but this type of procedure was unsustainable in the countries of the European-continental legal system. However, this situation gradually started to change after World War II (Simović and Simović, 2011: 148).

In all jurisdictions, the key component of the criminal procedure was efficiency. Since the volume of this work allows just a brief overview, we will mention the most important reasons for increasing the efficiency in the criminal procedure. Before that, we have to note that it took courage to enter into the process of legislative change. This is especially true for the conservative systems, less inclined to change. But, the Serbian legislator has embarked on the reforms, taking huge steps. In the recent time, it has been reflected in the great willingness for legislative change in all areas. Literature cites several reasons for the underscoring the efficiency of the criminal procedure as the most significant component of reform, but we draw attention to two basic reasons. First, only effective criminal proceeding can be a successful instrument for combating crime, which corresponds to the objectives of the general and special prevention. Second, only a trial within a reasonable period can contribute to the protection of human right and freedoms (Bejatović, 2009: 85-86). Observed from the criminal procedure law perspective, the efficiency gives us the answer to question whether the criminal procedure is conducted in every case where it is required under the law, and whether relevant provisions and sanctions are applied in the event of non-compliance with the mentioned provisions (Brkić, 2009: 163;

1 On efficiency and effectiveness as the key components of the criminal procedure see: (Brkić, 2004).

Cigler, 2009). Only an effective criminal proceeding can achieve the purpose of the criminal procedure and punishment of the perpetrator. In the connection with this, the logical question that occupied attention of the legal and lay public was the purpose of punishing the perpetrator after a lapse of the several years from the felony.² The legislator was looking for a new and better solution that would gradually overcome the problem. For now, the implemented provisions have created a normative basis for a better and more efficient procedure.

It is believed that an effective criminal proceeding has basically two interrelated and inseparable components. The first one is the length of criminal proceedings. Only efficient and expedient criminal proceedings completed within a relatively short time may be effective; thus, they provide for accomplishing the purpose of the punishment. Yet, the expediency and completion of criminal procedure must not be at the detriment of the defendant's rights. The defendant is entitled to all the rights guaranteed by the law and international documents. This leads us to legality as the second component of the effective criminal procedure. Only a legal criminal proceeding, within a reasonable time, can be considered effective. Hence, the efficient criminal proceeding is a process where the court brings a final judgment in a reasonable time frame from the proceeding outset to its completion (Radulović, 1997: 187; Bejatović, 2002: 209).

In 2001, the Serbian legislator has begun to create a strong normative basis for instituting an effective criminal procedure, leaving space for expanding the application of the existing proceedings and implementation of the new proceedings. Some proceedings have not fully justified the expectations of their introduction, but some have been brought to life in practice. Since our jurists were educated and matured on the traditional criminal procedure, we believe that it will take time to change the traditional mindset. By adopting the new Criminal Procedure Code, Serbia left the established procedural tradition, in pursuit of "the global pattern", which may be compared with the legislative changes in 1948 – not so much because of the need for improvement but rather due to the desire to strengthen the governing capacity of the state (Ilić, 2013: 98). There is a growing number of countries where regular criminal proceedings are on the decline. Instead, the legislators implement new model that mainly comprise prosecutorial benefits offered to the defendants in exchange of pleading guilty. This new model occurs in two forms: the first one is embodied in the "take it or leave it" offer, while the second one is more interesting as it entails negotiations for the guilty pleas (Damaška, 2004: 1019). Comparative legislation contains many ex-

² According to Marcus Felson, efficient criminal procedure can be compared to a hot stove. Simply, if we put a hand on the stove, the pain, even the slightest, occurs immediately, but if the pain occur only once in 500 times, after several months, such stove is not effective (Felson, 2011: 32).

amples of negotiation (plea bargaining) proceedings. As a result of interplay of various factors, plea bargaining occupies a more important place in the national legislations (Tulkens, 2002: 645). The decisive impetus for this came from the Council of Europe which, by *Recommendation R (87) 18* of 17 September 1987, proposed plea bargaining as a method for accelerating the criminal procedure.

After being seen for a long time as a luxury in which some scientists indulged, comparative law finally had its momentum (Weigend, 1980: 382), and outgrew the infancy stage in its development (Damaška, 1973: 507) in which it lived in the 1970s. It may be useful to everyone: the legislators, because it is a source of different approaches to problems-solving or initiating legislative reform, as well as the judges, who can find solution for specific problems arising from the implementation of a foreign legal institute into the domestic legislation (Heller and Dubber, 2011: 1). In the "triumphant march of consensual procedures" (Thaman, 2006: 469; Jimeno-Bulnes, 2013: 452)³, plea bargaining is one of the most famous legal transplants which has been implemented with certain modifications and adjustments in almost all European countries. Legal provisions that regulate plea bargaining vary from one country to another.⁴ Today, plea agreement constitutes a "typical example of the convergence of the two great world criminal procedure systems" (Radulović, 2009: 290-291). This legal institute had existed in Germany for many years before it was transformed into the legal rule in the 2009. Italy was the first European country that officially introduced and implemented plea bargaining. Their examples were followed by many countries, including Serbia.⁵ Unlike the traditional conceptions, in the modern legal

3 The consensus in the criminal procedure implies possible agreement between the parties prior or during the criminal proceeding, on the avoiding or terminating the criminal proceeding (Tomašević, 2009: 154).

4 It is believed that the transfer of legal solutions from one country to another is classified into three categories. The first category includes situations of the nation migrations to a new uninhabited territory and making it own laws (which was mainly the feature of the previous times although it is impossible today). The second category implies migrations to the inhabited territory with civilization comparable with that of a specific nation. The third category, which is perhaps most common today, implies situations where the people voluntary accept part of the system of the other nation or nations (Watson, 2010: 63). However, we can open question of the voluntariness in the course of accepting the solution accepting, which entails pressure of the larger and economically more powerful countries.

5 Plea bargaining had existed in the international criminal law even before the tribunals for the former Yugoslavia and Rwanda were established. In Nuremberg, the plea agreement was offered to the several high-ranking officials, but not to those in the highest positions. For example, Erich von Bach, who was responsible for the deaths of more than 200.000 civilians in Warsaw and mass executions in Belarus, Estonia and Poland, testified against responsible persons and he was never charged or extradited to the interested countries (Kaminski and Nalepa, 2006: 401).

systems justice can be achieved through negotiations (Damaška, 2004: 1022). As we see, in the last thirty years, the solutions from the common law countries started to penetrate into the European civil law based on the mixed inquisitorial-adversarial system⁶. Thus, the sharp distinction between these two systems, where the civil law more and more gravitates towards adversarial model, has been disappearing.⁷ The fights against crime and overloaded courts in almost all European countries have led to the implementation of various forms of the consensual procedures (Tak, 1999: 428). The process of legal transplantation from one system to another is more uni-directional because European legislators took solutions that originate in the Anglo-Saxon, or more correctly, American law. However, this process of taking legal transplants⁸ entails great difficulties. Among them, we may underscore the incompatibility of foreign procedural rules with the national legal culture, which necessarily calls for great caution in the transplantation process considering that legal transplants may represent a Trojan horse for the national legislation (Montana, 2012: 101). Therefore, it is necessary to institute measure to preserve domestic legal culture as much as possible, rather than “skillfully graft the dominant elements of the other type of criminal procedure, because that could lead to practical problems, disorientation in the new criminal procedure environment, and inefficient and unfair criminal procedure” (Radulović, 2013: 261; Škulić, 2010: 66).

2. Legal framework

The plea bargaining is regulated by Articles 313-319 of the Serbian Criminal Procedure Code (SCPC). The required condition for plea bargaining is initiative of relevant subjects. The provisions regulating the rights and duties of the public prosecutor envisage his authority to conclude the plea agreement (as well as two types of testimony agreements). In case of the plea agreement, an initiative can be viewed in two ways. First, a prosecutor may a prosecutor may submit a proposal for such an agreement to the defendant or his legal; the offer stipulates specific terms of agreement where criminal sanction certainly take

6 It is not always easy to determine whether a system belongs to the accusatorial or the inquisitorial system of criminal procedure. European criminal procedure legislations are a mixture of these two different types of procedures. Today, the countries mainly turn to the adversarial type, where each party is responsible for handling the case, starting from the evidence gathering to the witness examination (Elliot and Quinn, 2010: 425).

7 For more on interference between the adversarial and the inquisitorial procedure, see: Damaška, 1997: 381-394.

8 The term “legal transplant” was first used by Alan Watson, who under this term implies the transfer of rules or legal system from one country to another or from one nation to another (Watson 2010: 53).

a central place.⁹ Second, a prosecutor may submit a plea bargaining proposal to the defendant only. Of course, plea bargaining may be initiated by the defendant as well, but it is less likely. In practice, the problem can be the refraining of each party from initiating the plea bargaining process because of the fear that it could be interpreted as a weakness, which would undermine its negotiation position (Kadiev, 2013: 221). In practice, an initiative may apply to minor crimes; defendant and legal counsel may run the initiative, which is the case in the neighboring countries (primarily in Bosnia). In the Croatia, defense lawyers usually initiate pre-trial negotiations in cases where there is a likelihood of a long-term or a medium-term sentence of imprisonment (Cambj, 2013: 676).

The plea bargaining process begins at the moment when the other party accepts the negotiation proposals. At this point, it should be noted that legal theory identifies two distinctive tracks of negotiation: the first one is reflected in the prescriptive advice how to negotiate successfully, and the second is embodied in the descriptive analysis of the negotiation process (Maynard, 2010: 126). The parties are required to negotiate in the public prosecutor's office, which seems logical as there is no other place where negotiations could be carried out in accordance with the law. The manner and place where negotiations are initiated are irrelevant, given that the negotiations have to be carried out in the prosecution office. On this occasion, the public prosecutor will instruct the defendant that he has the right to be represented by a counsel, and inform him/her about the rights and obligations arising from the possible plea bargaining agreement, as well as about the right to withdraw from the negotiation process.

The subject matter of the plea bargaining agreement is regulated by Article 314 of the SCPC, which prescribes elements that must be included in the plea bargaining agreement as well as some optional elements. In other words, this agreement has its mandatory and optional elements. Every plea bargaining agreement must contain six mandatory elements:

1. Factual description of the felony¹⁰;

⁹ In legal theory, there is a conception that the public prosecutor should have the option to propose criminal sanction in the ordinary criminal procedure. Today, this is a legal rule anyway (Nedić, 1999: 139).

¹⁰ The legislator primarily prescribes that plea bargaining agreement should contain factual description of the felony that is subject of the plea agreement (Article 314 SCPC). All circumstances can be evaluated and illuminated only provided that there is a comprehensive factual description. The question is what *factual description of the crime* means; is it the description given by defendant or prosecutor? This is an important issue because in plea bargaining the process of proving is either not completed or is essentially shortened. The defendant always has his own view on crime, including the explanation of the motives, conditions and circumstances that existed at the time of the crime (or preceded or followed

2. Confession of the felony¹¹;

3. Agreement on the type, extent and range of the criminal sanction¹²;

the crime), as well as actions of other individuals (victims, accomplices, witnesses, etc.). The public prosecutor has quite a different view on the facts. Their views may sometimes be significantly different. If the defendant is actually the perpetrator, it does not mean that he knows all the circumstances that should be in the *description*. For example, he may have committed the offence in the heat of passion, or under the influence of drugs or alcohol. On the other hand, as the prosecutor was not present during the crime, he/she can understand the criminal event only on the basis of the defendant's confession and available evidence. If he concludes the plea bargaining agreement in the earlier investigation phase, he will have less evidence for building his view of the criminal event. Thus, he will be under the greater influence of the defendant's confession and presented facts.

11 The basic element that must be contained in every plea bargaining agreement is a confession for one or more felonies. The defendant's decision to confess or not to confess is one of the most important decisions 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 (Epp, 2001: 46). The confession must be full, complete and comprehensive. It is *full* if it essentially and substantially corresponds to the charges or to the prosecutor's stance in the concrete indictment or indictment about to be filed (Škulić, 2009: 937). It must be complete and comprehensive, refer to the factual ground, and contain all circumstances of the crime, motives, means, and any circumstance that may be known only to the defendant. The confession has to be reasoned; it must be given knowingly and voluntary, and it should exclude any possibility of error; every required element should be clearly separated and described, which is particularly emphasized for this segment (Nikolić, 2012: 135).

12 One of the mandatory elements of every plea bargaining agreement is the agreement on criminal sentence or more precisely, agreement on the type, extent and range of punishment or other criminal sanction. Many sentencing rules originate from Roman times: *nulla poena sine lege*, *poena debet commensurari delicta*, and *indicum est actum trium personarum: actoris, rei, iudicis*. In the plea bargaining agreement, there are two basic rules related to sentencing. First, the sentence could be determined in absolute terms, in case when the prosecutor and defendant strictly determine the sentence that will be imposed if the defendant accepts the agreement. This is a system of *absolute sentence determination*. The second is the system of *relative sentencing determination*, where the prosecutor and the defendant determine the range within which the court may specify the sentence in the process of sentence verification. Both solutions have their advantages and proponents. The legislator did not explicitly favor any solution; theoretically, this could cause problems in practice and lead to different plea agreements. In the comparative law, we may find both solutions. The system of relative sentence determination implies establishing the limits within which the court will determine the sentence. In the agreement, the prosecutor and the defendant specify the upper and lower limits for the sentence, but the court determines the precise length of the sentence. Thus, the court has a significant control over the plea bargaining agreement because it does not allow to parties to specify the sentence length. However, the the solution provided by the Serbian legislator is very problematic. In the Serbian legal system, the court has no obligation to collect and present evidences. So, we cannot expect from the court to individualize the

4. Agreement on the criminal proceeding costs, on confiscation of proceeds of crime and on 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 bargaining agreement, except in case where the legislator envisages a possibility of lodging an appeal;
6. Signature of the parties and the legal counsels.

In addition to these compulsory elements, plea bargaining agreements may also contain three optional elements:

1. The statement of the public prosecutor to abandon prosecution for felonies that are not covered by the plea bargaining agreement;
2. The defendant's statement about accepting obligations imposed by the opportunity principle (Article 283 CPC), if the obligation can be enforced before filing the plea agreement;
3. Agreement on confiscation of assets derived from the crime.

The plea bargaining agreement has to be accepted by the court in the process of judicial control. The control is necessary for many reasons but, above all, the court has to establish that the defendant has knowingly and voluntarily confessed to committing the crime, given the fact that the defendant's confession implies that he waives the guaranteed rights in the ordinary criminal procedure (Miller et al, 1980: 25). After the prosecutor and the defendant with his legal counsel reach the agreement on every mandatory element, the prosecutor will draw up the plea bargaining agreement in writing. The prosecutor, defendant and counsel have to sign the document. In addition, if a victim was one of the negotiation subjects, he should also sign the agreement. The signed agreement has to be submitted to the competent court. It is necessary to emphasize that only the competent court with relevant subject matter jurisdiction can decide on the plea bargaining agreement; (namely, the CPC contains an inaccurate provision 'court' because the legislator failed to specify 'competent court'). Yet, it is quite a logical conclusion which court will decide on the agreement.

sentence in better ways than the prosecutor and defendant. In the negotiations, the parties will determine the limits for sentence. In this model of determining the sentence, the legislator must find better ways to protect the defendant's rights. This model should be applied in extremely limited scope and circumstances, usually when parties are unable to agree on the sentence, when the main hearing is in the advanced stage and most of the evidence has been presented. The system of determining absolute sentence implies establishing the precise length of the sentence. Many comparative legislations are 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 evidence. As the parties are most competent to agree on the sentence, the court should just accept or reject their agreement.

The plea bargaining agreement may be submitted during the trial proceedings, but not later than the end of the trial, to the first instance court and as well as to the higher court (in case that court ordered a new trial before the first instance court). The competent court shall schedule a new hearing at which it will decide on the plea agreement. The court may decide in the preliminary hearing. The hearing will be ordered like any other hearing in the criminal procedure but it has to be emphasized that it is the hearing for deciding on the plea bargaining agreement (Đurđić, 2009: 98). The court will summon the public prosecutor, the defendant and his defense counsel to this hearing (Article 315 para. 2 SCPC). The question of publicity is a very important issue. This provision has been subject to many changes. Under the current provision, the preliminary hearing is held without public (Article 315 para. 3 SCPC).

The permanent critique of the preliminary hearing in the Serbian legislation, including the solution that the court may decide on plea bargaining agreement in this hearing, has given rise to one question, which was asked in the survey conducted in Serbian courts. The question was: In practice, does the court decide on the plea bargaining agreement in the preliminary hearing or in a special hearing ordered just for that purpose?

Table 1 shows that 91% of the respondents answered that the court shall order a new special hearing, while just 9% answered that it should decide on the matter in the preliminary hearing. Although the preliminary hearing is envisaged as a useful instrument for increasing efficiency in the criminal procedure, considering how it is conducted in practice, it does not yield positive results. When it comes to plea bargaining, the conclusion is more than clear.

Table 1: *The court shall decide on the plea bargaining agreement in the course of:*

		<i>Frequency</i>	<i>Percent</i>	<i>Valid Percent</i>	<i>Cumulative Percent</i>
Valid	Preliminary hearing	7	7,8	9,0	9,0
	Special hearing	71	78,9	91,0	100,0
	Total	78	86,7	100,0	
Missing	System	12	13,3		
	Total	90	100,0		

There are three court decisions on the submitted plea bargaining agreement. The court adopts the agreement, rejects or refuses it. This actually implies that there is one procedural decision and two decisions on merits. The procedural decision will be the decision on rejecting the agreement, while the decisions on merits will be decisions on adopting and refusing the agreement. The court shall issue each of these decisions after considering the specific situation and circumstances of each case. When the court takes the agreement in consideration, it will first check whether all the necessary legal requirements for further

examination have been fulfilled, in order to ensure that the agreement does not contain some shortcomings for which it shall be discarded. The court will discard the agreement for three reasons (two of which are provided by law and the third is drawn from the spirit of the provisions):

1. If the agreement does not contain data required by Article 314 par. 1 CPC;
2. If the defendant, duly summoned, does not attend the hearing and does not justify his absence, and
3. If the parties abandon the agreement until the end of the hearing.

The other two decisions are rendered on the merits of a specific case. Before adopting the decision, the court has to establish the following facts:

1. That the defendant knowingly and voluntarily confessed to committing the crime(s) that are the legal issue 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 the limited right to appeal;
3. That there is other evidence that is not inconsistent with the confession;
4. That a criminal sanction is in accordance with the criminal law or some other law (Article 317 paragraph 1 CPC).

The court checks the above facts first by looking into the plea bargaining agreement and, then, by examining the subjects involved in the proceeding: the defendant, the prosecutor, the defense counsel, the victim and his/her legal counsel.

The court may also decide to reject the agreement. This decision will be brought if the court determines as follows:

1. There are reasons as prescribed in Article 338 paragraph 1 Serbian CPC;
2. If one or more conditions for accepting the agreement have not been fulfilled.

The plea bargaining agreement will be rejected if the court finds that:

1. the act the defendant is charged with is not a crime, and there are no conditions for imposing security measures;
2. the prosecution of a specific felony is outdated due to the expiry of the statute of limitations, or is subject to amnesty or pardon, or there are other circumstances that permanently preclude prosecution;
3. there is insufficient evidence for reasonable suspicion that the defendant committed the felony.

If the court finds these shortcomings, it will bring a reasoned decision to reject the agreement. If we look at all these decisions, we should note that the court adopts the plea agreement in the form of a judgment, as the most important decision in the criminal procedure.

The right to appeal is allowed but in a limited form. The public prosecutor, the defendant and his legal counsel may file an appeal against the court decision on adopting the plea agreement within a period of eight days from the date of issuing the decision, if:

1. the act the defendant is charged with is not a crime, and there are no conditions for imposing security measures;
2. the prosecution of a specific felony is outdated due to the expiry of the statute of limitations, or is subject to amnesty or pardon, or there are other circumstances that permanently preclude prosecution;
3. there is insufficient evidence for reasonable suspicion that defendant committed the felony, and
4. the judgment does not refer to the subject of the agreement (Article 319 para. 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 whether these remedies will be successful.

3. Results of the survey

In the next part of this article, we will show the results of the survey conducted in the year 2015 among the judges, prosecutor and lawyers. The questions on the plea bargaining agreement were just one part of the extensive survey. The findings are presented in nine tables provided below. First, we asked the question about the court's control over the plea agreement.

Table 2: *When deciding on the plea bargaining agreement, does the court examine awareness and voluntariness in the process of concluding the agreement?*

		<i>Frequency</i>	<i>Percent</i>	<i>Valid Percent</i>	<i>Cumulative Percent</i>
Valid	YES	73	81,1	94,8	94,8
	NO	4	4,4	5,2	100,0
	Total	77	85,6	100,0	
Missing	System	13	14,4		
Total		90	100,0		

The findings (**Table 2**) show that the court is not passive during this hearing. While examining the defendant, the court tries to come to the subjective and objective conditions under which the agreement is concluded. Although the vast majority of the respondents (94,8%) answered that the court examines the awareness and voluntariness at the moment of entering the plea bargaining agreement, the remaining 5,2% cannot be considered negligible, no matter how high or low that percentage may be. When we talk about establishing this institute and avoiding the negative consequences, we have to take into account every single element.

Table 3: *When deciding on the plea agreement, does the court examine the defendant's awareness of consequences of the concluded agreement?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	67	74,4	90,5	90,5
	NO	7	7,8	9,5	100,0
	Total	74	82,2	100,0	
Missing	System	16	17,8		
Total		90	100,0		

In terms of examining the defendant's awareness of the consequences of the concluded plea bargaining agreement (**Table 3**), we note that the percentage of positive answers still remains high (90, 5%), but it is lower than in the previous question, which suggests that the courts deal with this element in less detail. While observing some trial proceedings, we noticed that some courts consult the defense counsel about these elements, which is very useful and proper treatment. For this reason, we included this question in the survey.

Table 4: *Does the court examine the defendant's counsel on whether the defendant's confession was given voluntarily and knowingly ?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	48	53,3	66,7	66,7
	NO	24	26,7	33,3	100,0
	Total	72	80,0	100,0	
Missing	System	18	20,0		
Total		90	100,0		

The answer to this question (**Table 4**) indicates a positive trend considering that 66,7% of the respondents indicated that courts examine the defendant's counsel. We believe that other courts should follow this example. However, as 33,3% of the respondents indicated that courts do not do that, we consider that it is not an example of good practice and that courts should examine counsels on this legal issue.

In the next two questions, we tried to obtain data on the respondents' attitudes about the incriminating evidence. The legislator has provided a bad solution, which states that the court shall accept the plea agreement if the case file contains other evidence that is consistent with the confession. It does not mean that the other evidence is incriminating evidence. It may simply be evidence that is completely unrelated to the confession or may even be in favor of defense.

Table 5: *While deciding on plea agreement, does the court examine evidence (other than confession) that the defendant has committed the felony?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	48	53,3	64,0	64,0
	NO	27	30,0	36,0	100,0
	Total	75	83,3	100,0	
Missing	System	15	16,7		
Total		90	100,0		

The answer to this question (**Table 5**) shows that the courts follow a dictum that the judges will correct the legislator's mistakes in practice, so 64% respondents answered that the courts check the existence of the evidences that support a thesis that the defendant committed the felony. However, we must not neglect 36% respondents who took an opposite view.

Table 6: *Would you accept plea agreement in case where you do not have any other evidence against the defendant, except his confession?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	35	38,9	46,1	46,1
	NO	41	45,6	53,9	100,0
	Total	76	84,4	100,0	
Missing	System	14	15,6		
Total		90	100,0		

There is an even greater problem reflected in the answers to the question presented in **Table 6**, where 46,1% respondents said they would accept the agreement although there is no other evidence against the defendant except his/her confession. The remaining 53,9% of respondents had the proper point of view; however, given the fact that almost half of the respondents would accept this agreement without other evidences except for the defendant's confession, it can lead to great problems and improper application of the provisions that regulate plea bargaining.

One of the most important issues and probably the one that causes most controversy in public is the agreed criminal sanction. We have hypothesized that this is the element which the courts pay greatest attention to when deciding

on the plea bargaining agreement. Despite all others conditions and elements for accepting the plea bargaining agreement, the survey results show that the courts still pay most attention to the criminal sanction (*Table 7*).

Table 7: *While deciding on plea agreement, the court pays greatest attention to the criminal sanction.*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	51	56,7	71,8	71,8
	NO	20	22,2	28,2	100,0
	Total	71	78,9	100,0	
Missing	System	19	21,1		
Total		90	100,0		

Table 7 shows that 71, 8% of respondents provided positive answers to this question.

Table 8: *Did you participate in the plea negotiation where the court has rejected the plea bargaining agreement?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	3	3,3	4,5	4,5
	NO	64	71,1	95,5	100,0
	Total	67	74,4	100,0	
Missing	System	23	25,6		
Total		90	100,0		

As expected, the results show that courts have rejected and refused plea bargaining agreement in a very small number of the cases. **Table 8** shows that only 4, 5% of plea bargaining agreements were rejected, while **Table 9** shows that 7, 8% of these agreements were refused.

Table 9: *Did you participate in the plea negotiation where the court has refused the plea bargaining agreement?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	5	5,6	7,8	7,8
	NO	59	65,6	92,2	100,0
	Total	64	71,1	100,0	
Missing	System	26	28,9		
Total		90	100,0		

4. Conclusion

Plea bargaining is a modern legal institute that has entered Serbian legislation only recently. It is well known in the comparative legal theory and practice. In the regional countries (e.g. in Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, Slovenia, Romania), this type of proceeding is present in very different forms. In Serbia, we had several legal solutions on this matter: in the 2006 Criminal Procedure Code (which never entered into force), in the amendments to the 2009 Criminal Procedure Code, and in the 2011 Criminal Procedure Code. After all these legal changes, we expected a very good legal solution on plea bargaining. As the legal provision is far from being ideal, we had to check how it works in the practice.

During the 2015, we conducted a survey asking judges, prosecutors and defense lawyers how satisfied they are with the new institute of plea bargaining. In this paper, the results of the conducted survey are presented in nine tables provided above. The findings show that the respondents are essentially satisfied with the plea bargaining. However, as it is emphasized in this paper, the legal provision that the court decides about the plea bargaining in the preliminary hearing should be changed because in practice, in most cases, it is a special hearing for deciding on the plea agreement. There are examples of good practice considering that the court takes into account all the elements from the plea agreement but special attention is given to the agreement on the criminal sentence. Another problem arises from the fact that a significant number of respondents would accept a plea bargaining agreement even in case when there is no other evidence against the defendant in the case files, except his confession. This is not good practice and such plea bargaining agreements should not be accepted because the prosecutor has to provide other evidences for the indictment. Finally, the cases when the court does not accept the concluded plea bargaining agreement are very rare; the courts reject or refuse the agreement in a small number of cases. However, some provisions governing the plea bargaining agreement should be changed and improved. It is not a perfect legal transplant but, in our opinion, it is better to have an imperfect legal instrument than none.

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КОНТРОЛА СПОРАЗУМА О ПРИЗНАЊУ КРИВИЧНОГ ДЕЛА

Резиме

Аутори у раду образлажу контролу споразума о признању кривичног дела. Нагодба је, од свог увођења до данас, пронашла своје место у кривичном процесном законодавству Републике Србије, упркос мноштву примедби. Једна од најбитнијих се односи на контролу споразума, јер је запажено да судови често усвајају нагодбу без претходне детаљне провере. Контролу споразума обавља суд. Она је неопходна због низа разлога, а пре свега, суд мора бити уверен да је окривљени признао извршење кривичног дела свесно и добровољно, као и због тога што се одриче мноштва загарантованих права која има у редовном кривичном поступку. Аутори наглашавају да о споразуму одлучује искључиво стварно и месно надлежан суд, будући да је то законодавац испустио из вида, мада је закључак о том питању и више него логичан. Према Законнику о кривичном поступку, о споразуму одлучује суд, који га може одбацити, усвојити или одбити. Споразум о признању кривичног дела може се поднети најкасније до завршетка главног претреса, и то како пред првостепеним судом, тако и у случају да је виши суд укидајући пресуду наредио одржавање новог главног претреса пред овим судом. На крају, аутори своја запажања потврђују спроведеним истраживањем међу тужиоцима, браниоцима и судијама.

Кључне речи: споразум о признању кривичног дела, контрола споразума, усвајање нагодбе, суд.

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NEW CRIMINOLOGY AND CRIME PREVENTION

Abstract: *The modern criminal justice system has proven in many cases to be ineffective in the field of general and special prevention. Recidivism, understood in criminological sense, is the best indicator of this assertion. Therefore, it is necessary to find new theoretical and practical concepts which would contribute to more effective crime prevention, suppression and control. The authors analyze the basic principles and characteristics of new criminology and observe crime prevention not only as a criminal justice phenomenon but also as a socially conditioned phenomenon. The paper also examines the influence of the concept of new criminology on victimology and restorative justice. If this concept is adopted, there is a possibility for establishing an effective system of prevention of recidivism, which would entail applying different mechanisms of restorative justice and social control through the criminal justice system but also outside this system. Only a constant search for new theoretical responses to crime may lead us to effective and applicable solutions in practice. Criminology as a science only makes sense when it contributes to a comprehensive study of crime, constantly developing new directions and conceptions through verification of already applicable solutions. New criminology is the meeting point of the criminological theory and practice aimed at accomplishing the same goal: crime prevention.*

Keywords: *new criminology, radical criminology, critical criminology, restorative justice, crime prevention, victimology.*

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1. Introduction

Criminology, as an independent, distinctive and comprehensive area of science, has a specific subject matter, method and theoretical foundation for research. All these theoretical grounds are usually classified according to their historical genesis, in full observance of the order of their occurrence, or according to geographic or spatial criteria, whereby the classification into strictly European and American criminology frequently carries a risk of insufficient understanding of their mutual interdependence.

Observing in the course of a long-term pedagogical practice the ways in which the academic community approaches the study of criminological theories (on the one hand) and considering the ongoing insistence on the collection of statistical data and indicators of criminological and victimological phenomena (on the other hand), the thread of sociological reflection on uncovering the causes of crime and proposing adequate measures for their control seems to have been lost.

Textbooks in the field of criminology invariably include one particular part, or even a number of separate parts, dedicated to the issues of causality of criminal behavior as an individual occurrence or crime as a widespread social phenomenon.

Looking into the first textbooks (published in the former SFRY) on the genesis and development of criminology as an independent science, the Marxist-oriented criminologists (such as M. Milutinović, for example), relevantly noted that the development of criminology in the United States, England and Germany in the 1970s was marked by the emergence of a group of young criminologists (such as J. Taylor, P. Walton, J. Young, W. Chambliss and others) who were the first to voice serious criticism on the European and American studies of crime and classical/traditional theories of crime. They sought to provide new explanations of crime and deviance by relying on the Marxist theory of deviance (Milutinović, 1988: 155).

The recognition of the concept involving the impact of social environment as a primary criminogenic factor significantly contributed to shifting the focus of criminological research from the study of the offender's personality onto the criminal activity; thus, the focus was shifted from the anthropological conceptions of crime to the sociological and psycho-social explanations. Developing as an autonomous scientific discipline, the sociology of crime engendered an anti-traditionalistic concept of criminological research in the West. In that context, M. Milutinović singles out the primary trends in its development: the criminology of social reaction and a new radical/critical criminology. It is worth noting that Milutinović, as the founder of criminological doctrines in the former SFRY, designates these trends as "contributory developments", arguing that "crimi-

nology as a comprehensive scientific discipline did not exist on these grounds” (Milutinović 1988: 155).

Even though, in historical perspective, this point of view may be placed in the context of the Marxists ideology underlying the scientific opus of M. Milutinović, it is certainly not an isolated opinion. Critical undertones may be observed in the first decade of the 21st century, in some discussions on the New Criminology, when criminologists discussed the eclectic approach engendered in the 1970s by joining the elements of the Interactionists’ ideas underlying the American liberal sociology and the neo-Marxism prevalent in many UK university departments in the late 1960s. The eclectic theory underlying these two developmental trends was originally developed by Taylor, Walton and Young, who are the creators of *the New Criminology*, which is also known as the “Robin Hood criminological theory”. Simplifying their ideas to some extent, the critical remarks start from the premise that these authors perceived the offender as a victim of the system, whose criminal act is an attempt to fight back against the injustices of capitalism and redistribute some of the wealth from the rich to the poor, whereas the committed crime *per se* is perceived as a political act. However, applying the ideas of Interactionism, the New Criminology has enabled sociologists to explore the meaning of the criminal act of individuals, as well as to study the importance of social reaction and its consequences in the process of labeling¹ or, as Willis noted, to enable the children of the working-class do the jobs commonly performed by the working class (Willis, 1977).

Crime prevention is an inevitable issue and the ultimate reason for creating criminological theories. Being aimed at uncovering the cause of crime, all criminological theories provide appropriate recommendation for crime prevention with the purpose of combating crime. In many cases, the criminal justice system has proved to be inefficient in the field of general and special prevention. The best support for this assertion is recidivism, viewed in criminological sense. It is, therefore, necessary to find new theoretical and practical concepts that would contribute to more effective crime prevention, suppression and control. In this paper, the authors analyze the basic principles and characteristics of the *New Criminology* and crime prevention are viewed not only as a criminal justice phenomenon but also as a socially conditioned phenomenon. If this concept is widely recognized, there is a possibility for establishing an effective system for the prevention of recidivism by applying different mechanisms of restorative justice and social control, both within and outside the criminal justice system.

1 What is New Criminology, 2009. Retrieved: 24.7.2016. from: <http://loretosoc.blogspot.rs/2009/02/new-criminology.html>

Criminology as a science only makes sense when it contributes to a comprehensive study of crime, by constantly questioning the existing concepts and developing new theories and directions, mostly through the verification of already applied solutions. The New (critical) Criminology is the meeting point of theory and practice, primarily aimed at crime prevention.

The theory of new criminology critically reexamines the predominant positivist conceptions and emphasizes that crime is a socially conditioned phenomenon. The proponents of the New Criminology point to a new, political dimension of the crime scene, concurrently underscoring the need to analyze the social dimension of crime alongside with its positive law aspects. Every crime has its psychological dynamics. Within these theoretical assumptions, the New Criminology seeks to build a general theory on social deviation through a critique of the existing theories and teachings. As a direct result of this new critical criminology, there is the concept of peacekeeping criminology and restorative justice, aimed at restoring the balance between the offender, the victim and the community, the balance which has been violated by the commission of the criminal offence.

In this paper, the authors endeavour to pinpoint that new critical criminology has an important role in crime prevention because crime is explained by taking into account the social dimension and multiple factors that contribute to criminal or deviant behavior. Such an approach opens the possibility for creating effective measures of primary, secondary and tertiary crime prevention.

2. The basic concept of the new criminology

In extensive criminological literature of the English-speaking world, the New Criminology (often referred to as critical or radical criminology) falls into the group of sociologically oriented criminological theories. Notably, some criminologists perceived the new critical criminology as a "continuity of criminological theory" (Meier, 1977), while others warned that "modern criminology is at risk of being enslaved by its own emancipation" (Allen, 1974). The emancipation refers to the links between Criminology and Behaviorism whereas subjugation is what currently connects the New Criminology and political expectations (Allen, 1974). Various referred to as "critical", "radical" or "new criminology", this theoretical approach rejects clearly established paradigms, which are said to be incompatible with one acceptable social and humanistic view on crime and crime control (Meier, 1977: 461).

Meier clearly defines why the new criminology is associated with the continuity of criminological theory, stating that "there was never a time when there was not a new criminology, and then a time when there was" (Meier, 1977: 461). The gradual development of the new criminology culminated in the 1970s, when a

group of young criminologists launched a specialized journal edition, a cadre of identifiable members and relatively clear boundaries of their criminological research (Meier, 1977: 461).

This concept of criminology developed in the late 1960s (more specifically, after the year 1968), when the world was “turned upside down”, as noted by the creators of the new critical criminology: Taylor, Walton and Young (Taylor, Walton, Young, 2013: XII). It was a time of great changes in politics, in terms of political leadership and politicians turning to the left, towards Marxism, anarchism, situationism, as well as to radical social democratic ideas (Taylor, Walton, Young, 2013: XII).

These authors state that the new critical criminology stems from two fundamental sources from the 1950s: the book “*Sociological Imagination*” written by C. Wright Mills, and the new sociological theory on deviance created in the USA (Taylor, Walton, Young, 2013: XIII). Taylor, Walton and Young point out that the key part of sociological imagination (according to Mills) is to locate the individual biography through the historical and social structure. The role of imagination is to bridge the gap between the inner life of the people and the historical and social settings in which they find themselves. This is the fundamental triangle in which an individual is placed in the social structure, in a particular place and in a particular time. It is the essence of Mills’ definition of sociological imagination (Taylor, Walton, Young, 2013: XIV).

The period from 1955 to 1965 was the most productive period in the history of American sociological thought on deviance. The post-war period of conformism and socially acceptable behavior had been over and done with, and now the general public was involved in an intensive public debate not only on the exclusion of certain population groups from the mainstream society (intense struggle for civil rights) but also on the meaning of inclusion, from a critical perspective of women (the second wave of feminism) and youth. Such circumstances yielded two distinct sub-theories: Merton’s subculture theory, and the labeling theory (Taylor, Walton, Young, 2013: XVIII).

The proponents of critical criminology provided a detailed critique of the positivist criminology, by placing crime in the social context that influences an individual to commit criminal acts. In particular, they emphasize the impact of structural relationships related to production and consumption, patriarchy, neo-liberalism and neo-colonialism. Critical criminologists questioned the positivists’ attitude that criminal behavior is significantly shaped by individual and social pathology. Unlike positivists, they analyze the impact of different social factors and find that people are active subjects, who create their own biographies; it implies that humans have free will, but limited choice. Therefore, these

authors reject positivist determinism and speak about the factors rather than the causes of crime (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2012: 320-321).

The representatives of the new criminology endeavor to perceive crime to in a completely new way and offer a new theoretical explanation of criminal behavior. Critical criminologists want to reexamine all existing criminological theories and teachings. In an attempt to build an alternative to all existing theories, critical criminologists postulate several formal and substantive requirements that are to be satisfied by a "fully social theory of deviance". These requirements pertain to: 1) the political economy of crime; 2) the social psychology of crime; 3) the social dynamics of crime; 4) the social psychology of social reaction; 5) the political economy of social reaction; 6) the impact of social reaction on deviant behavior, and 7) the objective of theoretical analysis (Ignjatović, 2006: 40).

Through a comprehensive social theory of deviance, which was an important attempt to explain crime by joining structures and processes, critical criminologists identified seven important aspects of crime: 1) "the wider origins of the deviant act": a capitalist class society; 2) "the immediate origins of the deviant act": the social context in which the crime is committed; 3) "the actual deviant act": what are the actual subjective meanings of the deviant act to the individual; 4) "the immediate origins of social reaction": how others (family, partners, police) respond; 5) "the wider origins of deviant reaction": the reaction in terms of who has the power and sets the rules; 6) "the consequences of societal reaction on the deviant's future action": the labeling process; 7) "the nature of the deviant process as a whole": the relationship of the above six aspects need to be considered as "a fully social theory of deviance".²

By pointing to the varied areas that have to be taken into account in the process of developing a comprehensive theory of criminology, which will free Criminology of its own shackles (due to which it remains confined within self-imposed artificial boundaries instead of putting the fragmented parts together into a whole), these authors notably specified the elements of the social theory of deviance but failed to formulate the theory itself. In their later works, these authors suggest that they overcame the stage of dealing with the crime itself and the deviation, and concluded that they should focus on the issues of change (in social and production relations) that are essential in the process of solving the problem of crime (Ignjatović, 2006: 40-41). This primarily refers to the study of the criminal justice system.

The representatives of the New Criminology believe that criminology studies the genesis of criminal laws and their violation, as well as the societal reaction

² What is the New Criminology", Retrieved 27.7.2016. from <http://www.14-19nw.org.uk/mod/page/view.php?id=8788>

to unlawful conduct. In this regard, critical/radical criminology seeks to analyze the phenomenon of crime and deviance within the economic and political context of capitalism. The capitalist society is viewed in the context of its legacy of inequality and fundamental injustice because it is based on relations of class exploitation and criminogenic environment (Tierney, 2009: 57).

Stemming directly from the basic tenets of the labeling theory, some of the key points of critical criminology directly reflect the main criticism commonly addressed to the labeling theory: 1) the critical criminology has failed to examine the role of the powerful in society as rule-makers, whereby the categories “crime” and “deviance” are defined; 2) it has failed to give attention to the powerful in society as major rule-breakers; 3) it is prone to presenting a deviant person as a victim of the labeling process rather than observing deviance as a form of resistance, primarily political one (Tierney, 2009: 57).

In the early developmental stage of critical (radical) criminology in the United States, the most prominent authors were Chambliss, Quinney and Turk. They all dealt with issues concerning the failure of the labeling theory to examine the role of those who hold power and act as rule-makers, whereby the categories “crime” and “deviance” are defined. Drawing upon the non-Marxist theory of conflict, specifically based on Weber’s concept of power, Turk pointed to the deep inequality in American society, arising from the unequal distribution of governing authorities, and the power went along with it. Those powerful elites who are in possession of authority use the criminal law to protect their own interests by criminalizing the least powerful, which primarily includes young men, members of the African American population. This instrumental view of the law may be contrasted to the conception that the law is a neutral instrument of universal benefit. The work of Chambliss and Quinney is based on a similar line of thought. (Tierney, 2009: 58).

Inter alia, critical criminologists pursue the study of crime committed by the ruling class. In that context, critical criminology particularly focuses on the political action whose proponents are not only (social) groups in direct contact with the criminal justice system but also criminologists themselves. The ultimate aim of this political action is a revolutionary transformation of the existing society and the creation of socialist system. The types of political action are diverse, and one of the most important forms is aimed at changing the political awareness of the people, for the purpose of introducing change in the practice of social control authorities (Konstantinović-Vilić, Nikolic-Ristanović, Kostić, 2009: 332).

Robert Merton is probably the most famous proponent of the functionalist approach to criminology. Both Merton and the critical criminologists consider that crime is the result of the position of social classes. Merton believes that

frustration over the inability to achieve the legitimate objectives is not randomly distributed; in fact, it is concentrated among the lower social strata. Whereas Merton sees the concentration of crime among the lower social classes as a problem that requires further elaboration, the new critical criminologists perceive it as a natural and politically inevitable process. This does not mean that official crime statistics are not necessarily accurate (although such understanding is not necessarily incompatible with New Criminology). Instead of providing specific crime-related data on the actual state of affairs in this area of social life, statistics provide information about the activities of public agencies dealing with crime control, offering a class-based definition of crimes and painting a picture of what crime should be rather than what it actually is. The political background of crime statistics is revealed only by attaining knowledge of its hidden functions (Meier, 1977).

Like any other theoretical concept in criminology, critical criminology has its advantages and disadvantages. The representatives of critical (radical) criminology are inclined to socialism, but it is not clear what that socialism should look like. Bearing in mind the repressive nature of some socialist societies, the critics of radical criminology request from its proponents to more accurately formulate their vision of socialism and criticize them for not doing so (Konstantinović-Vilić, Nikolić-Ristanović, 2003: 266).

From the standpoint of political subcultures, critical criminology is based on the study of crime and deviant behavior of marginal groups. Regardless of the observed drawbacks, critical criminology has a number of advantages. First of all, it has contributed to expanding the subject matter of criminology as a science to the unlawful behavior of the ruling class; second, it has made way for the application of restorative justice by pointing out that crime prevention does not necessarily rest exclusively on the operation of the formal criminal justice system; third, it has contributed to the development of a new theoretical and practical stream in criminology – *the peacekeeping criminology*.

In peacekeeping criminology, a criminal act is seen as a conflict arising between the perpetrator and the victim. The primary aim of peacekeeping criminology is to resolve the conflict without the intervention of the formal criminal justice system. The pivotal point in peacekeeping criminology is the concept of restorative justice. The restorative justice approach is embodied in organizing strategic meetings and discussions within the local community; it is community-oriented approach aimed at satisfying individual needs and it may easily be applied even within a larger social context. The aim is to come to common solutions that may be used in specific circumstances taking into account the interests of the governed as well as of those in power. Over time, in theoretical discussions and

practical application, the concept and the process of restorative justice (as the concept as well as the process) has been recognized as the key element of social justice (Kostić, 2016: 13).

The concept of New Criminology can be of great importance in defining the basic principles of crime prevention and developing mechanisms for their effective implementation. This aspect of the New Criminology will be discussed further on in this paper.

3. New Criminology in the context of crime prevention

Crime prevention implies a set of measures and actions, taken by various social actors at different levels, which are aimed at eliminating the conditions and circumstances (of both objective and subjective nature) which may contribute to the emergence, commission and/or expansion of crime. These actions and activities are undertaken by the state authorities (bodies in charge of the criminal justice system: courts, the police other law-enforcement bodies, public prosecutor's office, authorities for the execution of criminal sanctions), educational institutions, social welfare authorities, the media, the family, various youth, sports, humanitarian and other social organizations acting within the policy for combating crime (Jovašević, 2006: 550).

At this point, it would be useful to point out to some of the possible areas of application of the concept of critical criminology in the process of crime prevention. The question is how the new criminology may affect the development of effective crime prevention measures. Bearing in mind that representatives of the New Criminology primarily want to investigate the social dimension of crime, the impact of this theory is most evident in the area of primary prevention. As a reminder, primary prevention measures are aimed at deterring potential offenders from the commission of crime. Furthermore, the New Criminology specifically analyzes the impact of the holders of political power on the occurrence of crime; thus, its postulates can be used in the process of counteracting the most sophisticated forms of political crime, in all those spheres where the perpetrators of crime are the holders of public authorities.

Finally, the theory of peacekeeping criminology may be used to relieve the judiciary of the extensive caseload, through various types of diversion proceedings. The concept of diversion is most widespread and effective when it comes to social and legal response to juvenile crime and juvenile delinquency. Although the representatives of the New Criminology (as one of the sociologically oriented directions in criminology) do not directly deal with crime prevention but use the theory of social deviance to examine and explain the causes of crime, their learning can serve as a theoretical basis for the creation of policy measures

for combating crime, Certainly, the most important part of that policy is crime prevention, whose impact is particularly prominent in the development of victimology (as a new scientific discipline) as well as in the development of the concept of restorative justice.

The origins of victimology may be traced back to 1948, when the publication of the book "*The criminal and his victim*", written by Hans von Henting, resulted in a more comprehensive perception of the victims of crime. Since then, victimology has been rapidly developing within the academic and scientific framework. In the development of victimology, we can distinguish two periods: the first (early) period in victimology and the second (developmental) period in victimology. The "early victimology" covers the period from its inception to the end of the 1970s, when this new discipline mainly focused on the issues related to determining the role of the victim in the occurrence of crime. The period of "the second victimology" mainly tackles the issue related to providing assistance to victims and improving the victim's status and treatment in criminal law (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2012).

The concept of restorative justice has emerged as a result of the development of victimology. It is a kind of critique of the retributive criminal justice system, but without excluding it altogether. In fact, the elements of restorative justice may be used to remedy the shortcomings of the criminal justice system. While the formal criminal justice system mainly focuses on punishing the offender, the concept of restorative justice aims to remove the harmful consequences caused by a criminal act and to re-establish the disrupted social relations between the victim, the perpetrator and the society as a whole. Thus, the system of restorative justice has a strong impact on general crime prevention. Restorative justice is a response to an act undertaken by man; it is reactive in its nature, which does not make it much different from the classical criminal justice system. However, unlike the traditional criminal law and criminal justice system, restorative justice is much more forward-looking (Ćopić, 2007: 33).

In the end, instead of a conclusion, it is important to emphasize once again that the new critical (radical) criminology is a modern criminological theory, whose conceptions may be used in the course of developing relevant measures for crime prevention and combating crime in general, by taking into account the contemporary knowledge of victimology.

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НОВА КРИМИНОЛОГИЈА И ПРЕВЕНЦИЈА КРИМИНАЛИТЕТА

Резиме

Савремени кривичноправни систем се у многим случајевима показао као неделотворан у области генералне и специјалне превенције. Поврат, схваћен у криминолошком смислу, најбољи је показатељ овог тврђења. Због тога је неопходно пронаћи нове теоријске и практичне концепте који би допринели ефикаснијој превенцији криминалитета, његовом сузбијању и контроли. Аутори у раду анализирају основне принципе и карактеристике нове криминологије, а превенцију криминалитета посматрају као социјално условљен, а не само као кривичноправни феномен. Ако се усвоји овакав концепт, отвара се могућност за успостављање ефикасног система превенције рецидивизма, кроз примену различитих механизма ресторативне правде и друштвене контроле, кроз кривичноправни систем, али и ван њега. Само сталним трагањем за новим теоријским одговорима на криминалитет може се доћи до делотворних и у пракси применљивих решења. Криминологија као наука има смисла само онда када доприноси свеобухватном проучавању криминалитета, стално развијајући нове правце и учења, а кроз верификацију већ примењиваних решења. Нова криминологија је место сусрета теорије и праксе усмерене ка једном циљу- превенцији криминалитета.

Кључне речи: *нова криминологија, радикална криминологија, критичка криминологија, ресторативна правда, превенција, виктимологија.*

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MECHANISMS OF STATE CONTROL IN PROVIDING ASSISTANCE TO VICTIMS OF DOMESTIC VIOLENCE***

Abstract: Domestic violence as a form of criminal violence leads to violations of fundamental human rights and freedom of family members. Until the end of the 1960s, domestic violence had been perceived as a matter of private relations between family members, which significantly aggravated any reaction or interference of the state. Domestic violence was incriminated as a criminal offense owing to the activism of the women's movement as well as the movement for the protection of domestic violence victims' rights. Today, the role of the state government is irreplaceable in preventing domestic violence. Violence against women, as the most common form of domestic violence, is concurrently a cause and the consequence of economic gender inequality. It implies a violation of human rights but it is also a medical and economic issue. For these reasons, the state strives to envisage various social protection policies and programs in an effort to prevent this type of violence and to provide financial, counseling and other kinds of assistance to victims of domestic violence. The first known efforts aimed at estimating the economic costs of violence against women were recorded in the late 1980s. Although theorists in this field generally disagree on methodology of approaching this issue, the assessment of economic costs involves the inclusion of all financial costs pertaining to violence against women, such as: medical costs, costs of placing them in safe houses, maintenance costs, the costs ensuing from the victim's absence from work, cost-efficiency in

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terms of time consumed by the police, the prosecutor's office and courts in resolving domestic violence issues, donations as a form of direct victim assistance, etc. In this paper, the authors point to the importance of state aid in the prevention of domestic violence and suppression of the existing family violence. The paper also includes an overview of state prevention and intervention programs, including the incurred costs and benefits derived thereof.

Keywords: *domestic violence, victims of violence, state aid, costs.*

1. Introduction

Domestic violence is one of the greatest threats to global health and violation of human rights.¹ It is an abuse of power and control of other family members who are economically or physically weaker.

In most societies, especially in the traditional and patriarchal communities, men have significantly more power, not only physical but also economic and social power.² For this reason, the most common perpetrators of domestic violence are men, and the most common victims are women and children (Radford, Hame, 2008: 17).

The consequences of domestic violence are far-reaching, ranging from direct physical injury and mental harm inflicted to family members to the economic losses at the national level. In victims of domestic violence, physical violence is reflected in impaired health, symptoms of depression, substance abuse, the development of chronic mental illnesses, etc. Women are isolated, unable to work, earn, participate in daily activities, and prevented from taking care of themselves and their children. In children exposed to domestic violence, the consequences are reflected in a lower intelligence coefficient, emotional and behavioral problems, and weak academic achievement results during their schooling.

Domestic violence as such produces numerous social and economic costs. They can be observed via various social protection expenditures, as well as through lower productivity of victims of domestic violence. Opportunity costs in terms of women's lower earnings, the unsatisfactory level of qualification of children which is reflected in their underperformance (etc.) may not be easily determined with due precision. In addition to these indirect costs, direct costs of the state budget allocations in the form of various programs of assistance and support to

1 The World Health Organization, 2012, Retrieved 01, September 2013, from <http://www.who.int>

2 The National Strategy for preventing and combating violence against women in the family and in partnership relations, Official Gazette of RS, no. 27/2011, p. 8

victims of domestic violence are high on the national and local levels (Hidroboa, Fernald, 2013: 304). However, despite the undisputed costs, the value of state aid is reflected in the prevention of violence, which ultimately contributes to precluding further emergence of violence costs, increasing the victims' productivity and, in the long-term, has a positive impact on economic growth of the country.

2. Prevalence of domestic violence

domestic violence is one of the aspects of family life which is not a private matter of the family members; namely, the engagement of feminist and other non-governmental organizations has significantly contributed to making violence between family members socially visible. The crime of family violence can be defined as the application of physical and psychological force among family members, which leads to endangering and/or violation of family members' safety and their relationship of trust, and gives rise to diverse demonstrations of control and power among family members, regardless of whether domestic legislation has defined this socially unacceptable behavior as a crime and whether the perpetrator of violence has been reported to the prosecuting authorities (Konstantinović Vilić, Nikolić Ristanović, Kostić, 2012: 115-116). Such a definition of domestic violence in criminological literature ensures the social visibility of family violence, regardless of whether it is officially prohibited or not.

Data on the prevalence of domestic violence is very difficult to obtain. However, criminological research shows that domestic violence is extremely widespread. According to the report of the United Nations Agency for Gender Equality and the Empowerment of Women, 35% of women worldwide are victims of domestic violence.³ Violence against women in family relations has the largest volume in Africa, the Eastern Mediterranean and South-East Asia, where 37% of women are facing violence, while it is least presented in countries of high economic status, such as European and the Western Pacific countries, where 25% of them have been victims of domestic violence at some point in their lives.⁴

Studies in individual countries have shown different results. So, for example, in the United States, according to the data issued by the Ministry of Justice in 2013, 25% of women were victims of domestic violence, while the annual statistics is about 960,000 cases of domestic violence. Women are victims of domestic violence in approximately 85% of cases, while men were victimized in 15% of cases. The highest victimogenic risk is sustained by women aged 20 to 24. The number

3 Facts and Figures: Ending Violence against Women, 2013, Retrieved 31, March 2014, from <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>

4 Global and regional estimates of violence against women, 2013, Retrieved 31, March 2014, from http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf

of murders among family members is such that the average daily murder rate is 3 women and 1 man; thus, in 1998, 11% of homicides in the United States were a result of domestic violence. Providing health services to victims of domestic violence annually costs taxpayers about 5.8 billion US dollars. Domestic violence is associated with other forms of violence, such as the crime of stalking. Their interaction is best illustrated by the fact that over 503,000 women were stalked and harassed by their intimate partners. Data on the prevalence of violence in intimate relationships among high school students are even more alarming. In particular, 32% of high school students are involved in relations that imply the presence of violence. A total of 40% of high school students know another female person of their age who was a victim of violence by her intimate partner.⁵

According to the research results of the National Institute of Justice and Centers for Disease Control and Prevention (which many domestic violence researchers consider to be the most accurate), it is estimated, on the basis of a research sample of 16,000 persons, that 1.5 million females are victims of family violence, while the total number of men exposed to domestic violence is around 830,000. This study also shows that one quarter of respondents claimed to have been a victim of assault or rape in their lifetime (Roberts, 2002: 25).

The Republic of Serbia is not 'lagging behind' in family violence when compared to other countries. The first quantitative study on the prevalence of domestic violence in the Republic of Serbia was conducted by the Victimology Society of Serbia in 2001, when domestic violence was not envisaged in Serbian legislation as a criminal offense. The results of the research conducted on a sample of 700 adult women show that one in three women has experienced physical assault, while one in two women has been the victim of a psychological attack (Dimovski, 2014: 159-160). Ever since domestic violence was criminalized in Serbian legislation as a criminal act in 2002, the number of criminal offences envisaged in Chapter XIX, titled "Offenses against marriage and family", increased in the coming years three times. In 2004, there was a total number of 1,009 adults reported for committing the crime of domestic violence, while in 2012 the number of reported adults increased to 3,624 persons.⁶ It should also be noted that the state was unable to provide adequate protection to victims of domestic violence (especially women as a group that sustains the highest risk of becoming victims of this type of crime), primarily because certain forms of violence (such

5 Domestic Violence / Abuse Statistics, 2013, Retrieved 30 March 2014, from <http://www.statisticbrain.com/domestic-violence-abuse-stats/>

6 Republic Bureau of Statistics, 2013, Retrieved 31 March 2014, from <http://webrzs.stat.gov.rs/WebSite/Public/ReportResultView.aspx?rptKey=indId%3d140202IND01%2635%3d6%2657%3d0%2c01%2c02%2c03%2c04%2c2%262%3d%23all%23%266%3d1%2c2%26sAreaId%3d140202%26dType%3dName%26lType%3dSerbianCyrilic>

as sexual violence against married women) could not be subsumed under any of the envisaged criminal offences. In cases where the physical violence occurred, bullies were prosecuted under the provisions regulating the infliction of minor or severe bodily injuries, whereas psychological violence (mental abuse) was treated as the criminal offense of insult or slander (Konstantinović Vilić et al., 2012: 119). Upon a subsequent amendment of the Criminal Code (CC), physical and psychological violence was envisaged as a criminal offense of domestic violence under Article 194 CC, while sexual violence among spouses was subsumed under the provisions regulating the criminal act of rape.

3. Assistance to victims of domestic violence

Organized assistance to victims of domestic violence, especially women, by state authorities has started being provided only recently. In the mid-20th century, given the absence of state assistance, it was mostly women (acting as individual or in groups) who provided practical aid, support and protection to those who sustained some form of domestic violence. This aid primarily included taking care of the children, providing transport, hospital visits, staying overnight in the homes of female victims for protection purposes, providing accommodation in houses that were safer to stay in, etc. These practices were the first forms of informal assistance to victims of domestic violence. They were aimed at raising awareness about this social problem.

One of the reasons for ignoring domestic violence as a public issue for such a long time is, among other things, the absence of a precise definition of domestic violence. However, the process of defining a phenomenon is not an exact science but a matter of assessment. The perception of what constitutes acceptable or unacceptable behavior is influenced by the culture of the specific people, and it is constantly subject to change due to the evolving social norms. For generations, physical violence of men over women in marriage was part of everyday life; today, such conduct is punishable under criminal legislation.

The proper definition of domestic violence is essential in order to monitor its occurrence and to take adequate prevention and protection measures. Domestic violence is just one of the possible forms of violence. *Figure 1* shows types of violence, classified into groups and subgroups; thus, domestic violence falls into the category of interpersonal violence which may be committed against children, partners or elderly people in the family.

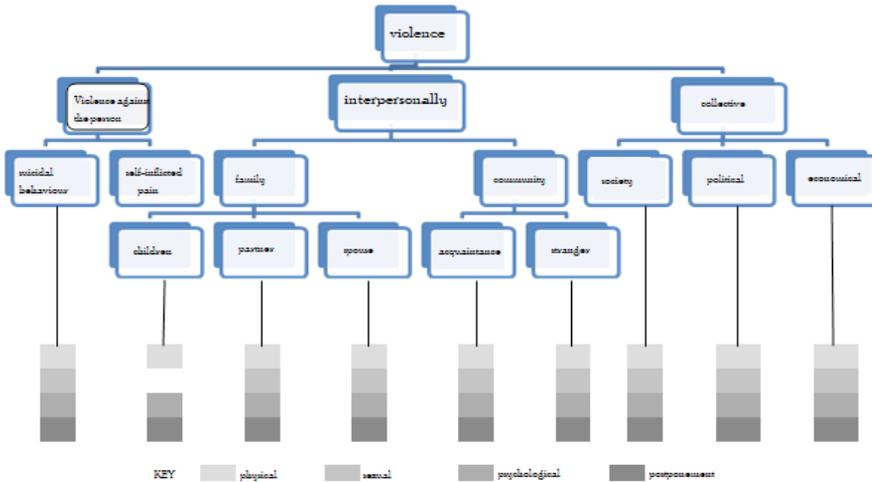


Figure 1. Typology of violence

Source: Dahlberg, K., Mercy, L., James A.(2002) *World Report on Violence and Health: Summary*

The definition of domestic violence provided by the World Health organization (WHO) specifies: “Domestic violence is any gender-based act that results in or is likely to result in physical, sexual or psychological suffering, including the threat to make such acts, in the deprivation of liberty, whether occurring in public or in private life.”⁷

Recent studies conducted under the auspices of the World Health Organization in a number of primarily developing countries show great presence of physical and sexual violence against women by their husbands or partners. Thus, 15% of women in Japan and 71% of women in Ethiopia (aged 15 to 49) bear witness to have been victims of physical and/or sexual violence by their partners. World-wide, a total of 0.3 to 11.5% of women over the age of 15 have been victims of sexual violence by non-spouses. In many cases, the first sexual experience has been recorded as a violent one: 17% in rural Tanzania, 24% in rural Peru and 30% in rural Bangladesh. Sexual abuse of children has been sustained by boys and girls alike. International studies show that approximately 20% of women and 5-10% of men confirmed to have been victims of sexual abuse as children.⁸

⁷ World Health Organization, 2015, Retrieved 01, September 2015, from <http://www.who.int>

⁸ *Ibidem*

Today, assistance to the victims of violence is much more organized and state authorities (at the national and local level) play a significant role in that process. The assistance is provided at three levels (Radford et al., 2008: 117):

- *Protection* (through policy and practice that applies to all levels of government),
- *Prevention* (through raising awareness and the development and improvement of educational programs),
- *Providing direct assistance* to victims of domestic violence (including material/financial assistance or the use of various counseling services, etc.).

“Participants in organizing protection and support to women victims of domestic violence in partner relations are institutions, agencies and organizations which, acting within their jurisdiction as provided by the law or their programs of activity, are obliged to implement activities aimed at identifying cases of domestic violence, preventing such violence, ensuring security, support and empowerment of victims, rehabilitation of victims of domestic violence, and sanctioning the perpetrators of violence.”⁹

Assistance to the victims of violence is complex and it includes (Radford et al., 2008: 117):

- raising awareness and encouraging victims who have suffered domestic violence,
- responding to their needs in order to continue a normal life,
- provision of services by women, including (particularly in the initial phase) listening to the victims and providing moral support,
- resolving any problems arising from previously experienced violence,
- providing support without discrimination and providing equal opportunities to all,
- improving the work of services dealing with this problem and working on establishing or strengthening their partnership.

In Serbia, the Republic Institute for Social Protection has implemented numerous programs aimed at assisting victims of domestic violence and social workers who deal with them.¹⁰ Some of these programs are as follows:

⁹ The Ministry of Labour, Employment and Social Policy. General protocol on proceedings and cooperation of institutions, bodies and organizations in cases of violence against women in the family and in partner relations, Belgrade,

¹⁰ Republic Institute for Social Protection, 2013, Retrieved 28, August 2013, from <http://www.zavodsz.gov.rs>

- Domestic violence and institutional protection;
- Safe house – the center providing assistance to victims of domestic violence;
- Organizing case study conferences on protection against domestic violence;
- Providing assistance to victims of domestic violence in social welfare centers;
- Coordinated action of the local community on prevention and protection from domestic violence;
- Preventive program for improving partner relations;
- Systemic intervention program to stop violence in the family;
- Domestic violence and intervention system.

The objectives of these programs are: to acquire contemporary professional knowledge, skills and attitudes, to develop motivation and empathy for the comprehensive work on domestic violence issues, to improve the operation of social services, to acquire knowledge on the prevalence and consequences of domestic violence, to acquire skills in identifying violence, to educate professional social workers, to have a greater impact in the local community and raise public awareness about the importance of each individual in a democratic society, etc.

4. Different approaches to prevention and intervention in cases of domestic violence

Domestic violence is a multifaceted problem which has ample psychological, social, economic and other consequences. There is no single solution and the problem needs to be addressed at different levels and by different social sectors. Therefore, there are different classifications concerning the prevention of domestic violence.

According to one of these classifications, prevention may be divided into: primary, secondary and tertiary (Burges, Wolbert, 1996: 93). The aim of *primary prevention* is to reduce the number of new cases of domestic violence. The aim of *secondary intervention* is to reduce the incidences of domestic violence. The aim of *tertiary prevention* is to reduce disability as a result of domestic violence.

Prevention can also be sub-divided into: universal, selective and goal-oriented intervention. *Universal prevention measures* are aimed at the general population. *Selective prevention measures* are aimed at those who stand above-the-average risk of committing a crime. Goal-oriented measures are intended for individuals who have already committed acts of violence. However, criminological literature

includes a third classification which is a combination of the previous two; thus, prevention is divided into: *preventive intervention* (which is sub-divided into three categories: universal, selective and goal-oriented prevention measures), *intervention treatment* (which includes treatments for identifying disorders/disorder treatments and standard treatments), and *maintenance intervention* (aimed at reducing the possibility of recidivism and repetition of violence and promoting rehabilitation).

Prevention programs aimed at combating domestic violence are diverse all over the world. Regardless of their classification, they can be aimed at individuals, relations between individuals, communities and entire societies. They are usually organized and delivered in cooperation with various government sectors, in schools, at workplaces, in judicial bodies and in other institutions. Prevention of violence will be successful if it is comprehensive and scientifically based. In principle, the prevention which is undertaken in the course of childhood and its continuous provision over time is likely to be more effective than short-term programs (Dahlberg et al., 2002: 25).

4.1. Individual approach

Prevention of domestic violence at the individual level has two primary objectives. First, it aims to encourage healthy attitudes and behavior in children and young people in order to protect them as they grow up. Second, it aims to change attitudes and behavior of those who have already sustained or are at risk of sustaining violence. In essence, the goal is for people to resolve conflicts and disagreements without resorting to violence.

The approaches and programs focusing on individual behavior and attitudes are as follows (Dahlberg et al., 2002: 25):

- Educational programs,
- Social development programs,
- Therapeutic programs,
- Treatments

Their effectiveness depends on many factors. For example, social development programs are more effective when they are implemented to preschool children or elementary school children, whereas they are less effective when implemented to young people in high school. Programs for counseling men who abuse women are quite successful but it largely depends on whether the perpetrators regularly attend sessions or not.

4.2. Approaches and programs focusing on victim-offender relations between family members

This approach focuses mainly on the impact of different kinds of relations between the victim and the perpetrator within the family. These are usually marital conflicts, lack of emotional bonding between parents and children, etc. These programs may include (Dahlberg et al., 2002: 26):

- Parent training programs
- Mentor training programs
- Family therapy programs
- Home visits
- Training in interpersonal communication skills.

Each of these programs is effective in its own way. Thus, for example, in developed and developing countries, home visits have proved to be effective in the prevention of child abuse. Parent training programs and family therapy programs also have positive long-term effects in reducing violence and, in the long run, they produce lower costs when compared to other programs involving other kinds of therapy.

4.3. Local community programs

The main objective of these programs is to raise public awareness about the problem of domestic violence, encourage community action, discuss the social and material consequences of violence in the local community, and provide protection and support to victims of violence.

Types of programs organized by the community are as follows (Dahlberg et al., 2002: 26):

- Public education campaigns
- Development and improvement of local infrastructure
- Additional activities (sports, drama, etc.)
- Professional training in health care institutions, police, court
- Cooperation between different state institutions dealing with this matter.

Public education campaigns have produced good results in certain circumstances, such as the multimedia campaign 'Soul City' in South Africa (2002-2007) aimed at promoting positive behavior change in concerning health care

and social development.¹¹The evaluation of the campaign showed an increase in awareness of violence, a change in behavior and attitudes when it comes to domestic violence, especially violence between partners. There was a significant increase in the determination to put an end to gender-based violence aimed at men and women alike, both in urban and in rural areas.

4.4. Social approach

This approach focuses on the cultural, social and economic factors that are essential in the process of combating domestic violence, given that these factors shape the entire community in the long run. The approaches focusing on introducing change in the state i.e. the society as a whole include (Dahlberg et al., 2002: 27):

- National normative framework
- International treaties and agreements,
- National strategy to reduce poverty and inequality in society, particularly among family members,
- Efforts to change social and cultural norms,

Implementation of the disarmament program in post-conflict countries, including the possibility of rapid employment of former combatants.

It is believed that the rate of child abuse and neglect may be significantly reduced by launching successful campaigns for combating poverty, improving their education opportunities and providing job opportunities. Studies from several countries have shown that high-quality early childhood programs may offset social and economic inequalities and improve the children's performance and success in school. As a matter of fact, these preventive measures would concurrently preclude other forms of violence that these children might commit later on in their lives.

5. Cost efficiency of state aid to victims of domestic violence

Delineation of costs caused by domestic violence stems from the purpose of calculating the cost efficiency of different violence prevention and intervention programs in cases that have already occurred. Problems, however, arise in cases when it is very difficult to accurately determine the specific types of costs and benefits that are not of material nature and cannot be expressed in financial terms.

11 Retrieved 30, March 2014 from <http://www.soulcity.org.za/projects/regional-project/zimbabwe>

Prevention has tremendous value, particularly in preventing violence. It is a systematic process that reduces the incidence or severity of different types of violence, promotes healthy living environment and focuses on preventing problems before they develop into symptoms. The value of prevention may be assessed in several ways (Patel, Taylor, 2012: 113-120):

- *direct costs* of failed prevention of violence (in the US, domestic violence charges exceed \$ 5.8 billion, including: \$ 319 million for rape, \$ 4.2 million for physical violence, \$ 1,75 million for lost earnings and productivity; in the US, one person in prison costs \$ 240 per day, which amounts to almost \$ 88,000 per year);
- *indirect costs* of failed prevention of violence (ill health, lost opportunities of doing business in the public or private sector, and as a result lost earnings of the state through taxes, etc.);
- *savings through prevention* (African-American children, who had participated in the preschool program for children aged 3 and 4, were far less likely to be involved in violence by the age of 40, and they spent less time in jail as compared to those who did not participate in such programs);
- *the benefits of preventive approaches* (investments are lower than intervention costs),
- *multi-sectoral partnership and cooperation* (integrated strategic plans and joint efforts of all sectors),
- *the multiplier effect* (proportional increase in final national income arising from consumption);
- the efficient Government;
- prevention decreases suffering and save lives.

On the other hand, the estimate of the cost of domestic violence has two purposes: to demonstrate the negative impact that violence has on health and development, and to emphasize the importance of early investment in prevention that is more cost-effective in the long run. Intervention aimed at preventing violence also precludes the occurrence of violence costs. The primary intervention may be directly related to specific forms of violence or aimed at strengthening the public awareness about this social problem. It can mitigate the effects of violence, prevent its recurrence and long-term consequences of its occurrence. Secondary and tertiary interventions can bring about significant financial benefits to the state, indirectly contributing to productivity and economic growth as well as improving health and well-being (Patel et al., 2012: 26).

Although it is very difficult to enumerate all the costs caused by domestic violence, some of these costs may still be assessed. They can be broadly divided into: *direct costs* that occur immediately or shortly after the occurrence of the event, and *indirect costs* which arise as a result of externalities or lost opportunity. Direct costs are measurable and belong to the group of traditional medical and non-medical costs, productivity and cost. Indirect costs indicate the costs beyond the direct relationship between the victim and the perpetrator and often include indirect victims and the wider community. However, some costs can be classified into both categories, indicating that the exact line between them does not exist (Patel et al., 2012: 33).

There are methodological difficulties in establishing the economic impact of domestic violence. Most indicators of this violence largely go unrecorded. With regard to cultural diversity and social taboos when replying to questions about the violence sustained by victims, it is rather difficult to make a comparison between countries (Table 1).

Table 1. *Costs of family violence (between partners)*

Research	Location of research	Categories of costs	Total annual costs in \$
Coker, 2004	USA, Huston	Direct medical costs (doctor, medicines, hospital)	1,2 billion \$
Day, 1995	Canada	Direct medical costs (including dentistry), lost earnings, other financial costs, psychological costs	1,2 billion \$
Mansingh and Ramphal, 1993	Jamaica	Costs of treating victims of domestic violence, direct costs	454.000 \$
New and Berliner, 2000	USA, Washington, 1994	Direct medical costs (costs of mental health treatment)	1,5 million \$
Snively, 1994	New Zealand	Direct medical costs, social assistance, court and police costs	1,5 million \$
Stanko, 1998	Great Britain	Only the public sector, the costs of health care, courts and police, other financial expenses (housing, shelters, social assistance)	717.000 \$
Wisner, 1999	USA, Minnesota, 1992-1994	Direct medical costs	547.000 \$

Source: Patel, Taylor (2012). *Social and Economic Costs of Violence: Workshop Summary*

By organizing various social protection programs, the state seeks to help those who need help to overcome difficult periods in life. Social protection is provided in the form of material aid (monetary or in kind, e.g. food, clothing, etc.) or in the form of various services (expert advice, placement in specialized institutions, shelters, etc.).¹²

The task of the state is to ensure efficient protection against violence, abuse and neglect to all those who are exposed to it. In Serbia, victims of domestic violence can contact the following state bodies and institutions in order to obtain adequate assistance:

- Social welfare institutions and other service providers in the social security system,
- Health care institutions,
- the Police,
- Educational and correctional institutions,
- the Public Prosecutor's Office,
- municipal/district courts and misdemeanor courts.

Given that in many cases domestic violence involves psychological, emotional and economic abuse, it is necessary to coordinate the work of the police, psychologists and social workers in social welfare centers and other social institutions. When it comes to physical or sexual violence, the aforementioned experts deal with the psychological and social consequences sustained by the victim of such violence. Quite frequently, victims have to be temporarily removed from the environment in which they previously lived but in that case they have to be provided adequate housing. Later on, victims should be provided relevant assistance in order to create a living environment in which violence will not reoccur.

Such assistance and related services are provided primarily in social welfare centers. Sometimes, good professional advice is sufficient to avoid adverse situations, but there are also specialized family, psychological and legal counseling services.

Within the counseling services organized in each social welfare center, interested parties may be given advice on any problem related to marriage and family (parents, children, partner, family violence). In addition to providing relevant information to users of social services, these counseling services are also involved in the prevention of disruptive family relations or unruly behavior of children.

¹² *Social Protection System – general information*, Retrieved 01. September 2013 from <http://upravusi.rs>

However, the most important part of their job is the psychotherapeutic work. Generally, they generally provide immediate and long-term counseling services to families, couples and individuals, but, when needed, they organize group therapies with particular groups of people, such as parents and adolescents.

According to the Social Protection Act, counseling is considered to be a special service of social protection; thus, a social welfare center has the authority to refer a user of social services to a special institution which provides relevant counseling and therapeutic services.¹³

The level of social protection depends on the economic strength of the country. Although the social spending is on the increase in relation to the total expenditure in the budget of the Republic of Serbia, in the year 2013 social protection spending accounted for only 2 to 8% of total expenditure, or less than 1% of gross domestic product (GDP).

Table 2. Social protection in absolute (in millions of dinars), relative to the total expenditure from the budget of the Republic of Serbia as a % of GDP in the period from 2007 to 2013

	2007	2008	2009	2010	2011	2012	2013
Social protection Total expenditure	9.487	10.663	12.500	15.553	19.292	27.606	30.546
%	1.593%	1.629%	1.670%	2.039%	2.278%	2.672%	2.809%
GDP	2.276.900	2.661.400	2.720.100	2.881.900	3.175.000	3.267.100	/
Social protection as % of GDP	0.42%	0.40%	0.46%	0.54%	0.61%	0.84%	0.42%

Source: Budget of the Republic of Serbia 2007-2013, Ministry of Finance RS

By comparison, at the level of the European Union, funds allocated for social protection in 2011 were 28% of GDP (Freysson, Wahrig, 2013: 4). Among the European countries, most funds for social protection purposes are allocated by Denmark (33.6%), France (32.2%) and Finland (31.5%).

The funds allocated for assistance to victims of domestic violence are generally insufficient to meet the needs. Every year, institutions and organizations dealing with this issue seek funds to ensure the continuation of their activities and provision of services to those in need.

The funds allocated for social welfare in Serbia are clearly insufficient, particularly taking into account that the number of victims of domestic violence has

¹³ *Ibid*

increased and that these assets are *inter alia* used for meeting their needs. In particular, given the fact that some victims of domestic violence are still reluctant to report violence fearing further victimization, it should be noted that a number of domestic violence victims has not been recorded at all. Consequently, it may be reasonably expected that the number of those who will be seeking social support and assistance from official institutions will significantly increase in the period to come.

Table 3. Number of registered victims of domestic violence in the Republic of Serbia

Serbia	2006	2007	2008	2009	2010	2011
Central Serbia	1930	2479	3416	3534	3528	4319
Vojvodina	1163	1704	1851	1988	1846	2032
Kosovo	73	84	49	30	73	102
Belgrade	275	436	956	2323	2193	2028
Serbia total	3441	4703	6272	7875	7807	8481

Source: The Ministry of Labour, Employment and Social Policy (2013), Special Protocol on proceedings in social welfare centers (the guardianship authority in cases of domestic violence and violence against women in partner relations), Belgrade, p. 4

Figure 2 shows that the largest number of victims of domestic violence is recorded in Central Serbia, but the numbers are certainly on the increase in all the monitored regions.

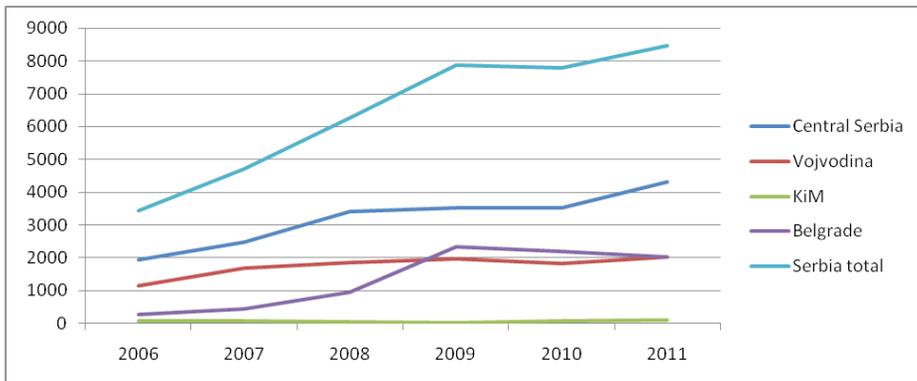


Figure 2. Number of registered victims of domestic violence in the Republic of Serbia

In addition to the social protection services provided at the national level, local authorities have an important role in providing assistance to victims. Their role is primarily reflected in financing safe houses and shelters. In Serbia, safe houses are located mainly in larger cities: Belgrade, Niš, Kragujevac, Smederevo, Valjevo, Pančevo, Novi Sad, Zrenjanin and Sombor.

In the last ten years, more than 1,500 women and almost as many children have been temporarily placed in safe houses and shelters; currently, they have the capacity to accommodate about 150 women and children.¹⁴

Safe houses are funded by the local government and financially supported through donations, mostly given by successful socially-responsible companies. In terms of costs, a daily stay of an adult person in a safe house ranges from 650 to 1,500 RSD (Serbian dinars). In June 2013, the City of Belgrade issued a decision on the provision of financial assistance to victims of domestic violence accommodated in safe houses/shelters, thus allocating the amount exceeding 28.5 million RSD for a period of three years.¹⁵ These funds are further distributed for multiple purposes, which implies that they may be used for providing the security service for victims of violence, paying utility costs and telephone bills, purchasing food and clothing, sanitation products and hygiene accessories, etc.

In addition to accommodation and security provided by the safe houses/shelters, victims of domestic violence are given the opportunity to attend various courses aimed at their training and retraining, acquiring new knowledge and skills. Thus, after leaving the institution, they are given the opportunity to live an independent life, to find a job more easily and to be financially independent (considering that their financial dependence on the offender is most frequently the reason for sustaining domestic violence in the first place).¹⁶ The aim of the program is to encourage women to be “fighters” rather than victims. By providing only material assistance to victims, the state would practically uphold a society that constantly engenders new victims. However, in the long run, this kind of empowering support and assistance to victims of domestic violence ensures their higher productivity and greater contribution to the economic prosperity of the country.

6. Conclusion

Domestic violence is a set of abusive behaviour patterns which are aimed at imposing control over other persons by using force, intimidation and manipulation. It necessarily involves economic or physical abuse of power in interpersonal relations commonly based on inequality on different grounds. Given that men are dominant family members in patriarchal communities, they are most

14 The newspaper *Večernje Novosti*, Retrieved 14, September 2013, from <http://www.novosti.rs>

15 City of Belgrade, Retrieved 14, September 2013, from www.beograd.rs

16 Magazine *Vreme*, Education for victims of family violence, Retrieved 14, September 2013, from <http://www.vreme.rs>

frequently the perpetrators of this kind of violence, while women and children are the most common victims.

Violence in the family and, above all, violence against women is a global social problem that calls into question the basic human values. For this reason, many international organizations have been involved in pursuing solutions to this problem. At the national level, the authority to deal with these issues has been vested in the social welfare services.

The state assistance to victims of domestic violence is of paramount importance. It may be multifaceted, including the provision of material assistance to victims of domestic violence, counseling services, and accommodation in safe houses/shelters. The training and retraining programs organized by the social protection services and members of the Chamber of Commerce are particularly significant for victims of domestic violence (especially women). Given the fact that one of the main causes of violence against women is their economic dependence on their partners, these programs promote women self-reliance and empowered them to carry on living an independent life after leaving the safe house.

Despite huge expenditures that domestic violence incurs to the state budget (which largely depends on the economic stability of the country), there is no doubt about the positive long-term effects of domestic violence prevention. First, violence prevention precludes direct and indirect costs that the state would sustain in case of failing to prevent identified cases of violence. Second, it promotes the development of public awareness of this social problem and the necessity of taking adequate preventive action. Third, it contributes to increasing the overall productivity by raising the level of qualification and education of women and children, victims of violence. In the long run, all these benefits indirectly contribute to the economic growth of the country.

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КОНТРОЛНА УЛОГА ДРЖАВЕ У ПРУЖАЊУ ПОМОЋИ ЖРТВАМА НАСИЉА У ПОРОДИЦИ

Резиме

Насиље у породици, као облик криминалитета насиља, доводи до кршења основних људских права и слободе чланова породице. Све до краја шездесетих година XX века, насиље у породици је сматрано за приватну ствар чланова породице, што је онемогућавало реакцију државе. Активизмом женског покрета, као и покрета за права жртва насиља у породици, дошло је до инкриминације насиља у породици као кривичног дела. Данас је улога државе незаменљива у превенцији насиља у породици. Насиље над женама, као најчешћи вид насиља у породици, је истовремено узрок и последица економске неједнакости мушкарца и жене. Оно представља повреду људских права, али истовремено и здравствени и економски проблем. Стога, држава путем различитих политика и програма социјалне заштите настоји да превентивно делује на овај вид насиља, односно пружи материјалну, саветодавну и друге врсте помоћи жртвама насиља. Први познати напори да се процене економски трошкови насиља над женама забележени су крајем осамдесетих година XX века. Иако међу теоретичарима из ове области нема јединственог става у погледу методологије, процена економских трошкова подразумева обухватање свих финансијских трошкова насиља над женама, попут трошкова пружања медицинске помоћи, трошкова одржавања сигурних кућа, одсуствовања са посла жртва, времена утрошеног од стране полиције, судова и тужилаштва у решавању проблема насиља, донације као директна помоћ жртвама, итд. У раду се указује на значај који државна помоћ има у спречавању појаве, као и сузбијању насиља у породици. Такође, дат је осврт на програме превенције и интервенције, и трошкове и вредности који произилазе из истих.

Кључне речи: насиље у породици, жртве насиља, државна помоћ, трошкови.

CIVIL LAW

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THE CONSTITUTIONALIZATION OF PRIVATE LAW: THE EFFECTS OF CONSTITUTIONAL RULES ON PRIVATE LAW RELATIONSHIPS**

Abstract: *In this paper the author analyzes the so-called Millennium issue of private law concerning the effect of human rights and liberties on private law relations. The phenomenon of applying the constitutional rules in relations between private parties (not just in citizen-state relations) is becoming increasingly interesting for study. This paper focuses on the following issues: how can human rights and liberties affect private law relations (direct or indirect horizontal effect); is it justified to apply them in all or just in some of fields of private law (such as labour or contract law); what will be the future relationship between public/constitutional law and private law (the relation of subordination of private law to public law, or coordination and complementarity between the two)? Settlement of civil law disputes by reference to the guaranteed rights and freedoms (direct horizontal effect) or standing by civil law rules and standards, which are to be interpreted within the spirit of enshrined constitutional values (indirect horizontal effect), is far from being sporadic. It raises the question whether private law can still be regarded as being totally autonomous and separated from public and, therefore, constitutional law as well. Are we on the way of transforming civil law concepts to a mere tools by which human rights and freedoms will be directly applied in private law relations? Or, should the boundary stay untouched, is private law expected to radiate constitutional values and contribute to distributive justice?*

Keywords: *constitutionalization, horizontal effect, human rights and liberties, civil/private law.*

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1. Introduction

Constitutionalization is an important theme in European legal literature. Simultaneously, conceived in the judicial practice of the German Federal Constitutional Court after the WWII, it is a process that was transferred to the European Union courts, particularly the Court of Justice. The object of particular attention is the possibility that constitutional guarantees of human rights and freedoms, besides their vertical effects towards a state, also exercise the effects in private law relationships of individuals. The practice of these courts shows that invoking human rights and freedoms in relationships between subjects of private law (*horizontal effect*) has ceased to be an isolated phenomenon, an excess in judging civil law disputes, and that it may be used in exercising diverse policies¹ implemented or advocated by society at a specific moment of its development. Hence, we agree with the statement that one should not ask whether the constitutionalization of private (civil) law has begun but, rather, where it has arrived and to what limit it can further go (Micklitz, 2014: 20), without any danger to the already established (yet changeable) limits between public and private laws. On the other hand, it may be time to overcome this division and to pursue a more substantial contribution of private law to distributive justice, instead of its sole contribution to commutative (correctional) justice thus far.

A civilist of a traditional provenience might challenge the meaningfulness of the questions posed. Do the proclamations from international declarations on human rights and national constitutions address a person in his/her legal relationships regulated by private law and not a citizen provided with political, economical and social rights and liberties? Why would the abolition of slavery and torture, equality before the law, the right to a fair trial before impartial court, the prohibition of discrimination, the freedom of speech and press be important to civil law relationships established for the sake of satisfying individual interests and needs? (Collins, 2014: 26). Human freedoms and rights act as a shield, defending an individual from the oppression of the state (as the stronger party, having the monopoly on power); in civil law relationships, one starts from equal positions and the rule on balancing individual interests, where the weaker party does not yield to the stronger one. The relationships of civil law are the relationships of coordination (of individual wills), not of subordination and subjection.

Unfortunately, the reality confuted this amazement. Since the World War II until now, we have witnessed having legal transplants taken from constitutional and human rights laws in civil law (Collins, 2014: 26). This process had been initiated in constitutional courts practices of the European states with totalitarian

1 "Arguments of policy justify a ... decision by showing that the decision advances or protects some collective goal of the community as a whole." (Dworkin, 1977: 82)

regimes experience, particularly in Germany, and soon it became a subject of theoretical processing: Will civil law accept these legal transplants or reject them as foreign bodies, irreconcilable with its principles and concepts? The concerned civilists point out to the unacceptability of mixing public and private law; they fear new limitations on private autonomy and forcing the subjects of private law to look after the general/public interests (instead of their own private interests) to a greater extent than the one that had been determined by the limits of the autonomy of will (imperative regulations, public order, good faith and fair dealing). A source of legal insecurity and danger for the separation of powers between the legislative and the judicial authorities can be observed in the courts' self-imposed authority to ensure that the autonomy of will is not limited, or that constitutional rights and freedoms are not abolished in any civil law dispute. Finally, constitutional and legal discourse in civil law dislocates decision-making in civil law disputes from the jurisdiction of regular courts to the jurisdiction of constitutional courts (Gerstenber, 2004: 766, 769)

In our legal literature, there are not enough papers on constitutionalization. The term *constitutionalization* (the Serbian term used in this paper is "*poustavljenje*") is mentioned only sporadically within a broader study of **Europeanisation** of private law (Vukadinović, 2002: 395–408) or as an independent theme (Tratar, 2008: 101-112) including references to English law and judicial practice, which we do not consider to be the best choice. In order to understand the concept of constitutionalization and critically analyse this phenomenon, examples from German constitutional law practice are more referential (because the *Grundgesetz* provides for a broader (horizontal) effects of fundamental rights and freedoms), as well as the practice of the European Court of Justice and (to some extent) the European Court for Human Rights. German experience turns out to be precious here because the Federal Constitutional Court of Germany has made a step forward by rendering several daring decisions (was it justifiable?) and making it possible for the rights and freedoms from the *Grundgesetz* (particularly the right to free development of personality referred to in art. 2 para. 1) to be directly invoked in mutual relationships of private individuals, similar to the one in state-citizen relations. Considering the stands taken by the German and EU courts, it seems that civil law is not fully autonomous and the goals and policies traditionally exercised by means of public law can be added to its goals in that sphere, too.

Constitutionalization of civil law has a ring of political correctness, which is to be found in the public arena, public speeches, as well as in the implementation of public policies. Civil law is a model for regulating private law relationships, where an individual is the owner, creditor or debtor, a family member or a member of a larger collective of people gathered around the same goal and bound by common

interests. Civil relationships are established by individuals and their associations voluntarily, on the basis of equivalence (equality of wills), freedoms and security (Kovačević, Kuštrimović, Lazić, 2008: 1), in pursuit of their property and non-property interests, which are certainly not deprived of any social scruple. Sanctioning unlawful, immoral or usurious contracts, in which the will is not expressed or formed freely, but fraudulently or forcibly enforced, sanctioning of fraudulent behaviour and abuse of law are just some of numerous instruments used by civil law to make the private interest consistent with the public one. Is it worth reminding that the principles of honesty, fairness, good faith and fair dealing, equality between performance and counter-performance, restitution of the unjustified gain, *culpa in contrahendo* are a moral call and a mandatory legal request to execute subjective rights correctly (and *civiliter*), an incentive not to violate or abolish the rights of others, and to preserve the harmony of social relationships? If constitutional law aspect is added to solving civil law disputes, would that in any way enrich the civil law institutes that already express the ideas of socialization and moralization of law, and its principles and sanctions?

Before making an attempt to answer the posed questions, we will clarify the terms "constitutionalization" and "horizontal effect", and point to referential judicial cases where civil law dispute is also (or primarily) observed as arising from the violation or limitation of the claimant's constitutional rights.

2. Definitions of the term "constitutionalization" in legal theory

There is not a single generally accepted definition of the the term "constitutionalization". Definitions usually start with the statement that human rights, owing to their role in the post-war world, became a significant factor in the regulation of legal relations between public and private laws, and in their mutual approximation, for which reason they cannot be said to be completely autonomous legal areas any longer (Cherednychenko, 2014: 172). Constitutional guarantees to human rights and freedoms and the prohibition of their violation or limitation have become a means of evaluating a proper exercise of civil subjective rights and obligations, which may be even more important than the instruments used for that purpose by civil law.

National civil laws can be constitutionalized, as well as private law of a broader regional community, such as the European Union.² Viewed from this aspect, constitutionalization then becomes a process where one higher legal order

2 The term "EU private law" was first used by a German scholar Müller-Graff in 1987 to denote "the rules of private law, based on the *acquis communautaire*, that have the same contents and binding effect on the entire territory of the Community." (Basedow, 2012: 539-540). The EU private law is a positive law; it is binding but most often it has no direct

(the one of the European Union, and above all, the primary law of this community) shapes its private law³, but also changes its system in the member states (Comparato, Micklitz, 2013: 122). Such effect is achieved by implementing the treaties (particularly the fundamental freedoms of movement of people, goods, services, and capital), the guaranteed rights and freedoms from the EU Charter of Fundamental Rights and the European Convention on Human Rights and Freedoms, but also by applying the general principles of law having the status of constitutional rules of the EU primary law, acquired through the practice of the European Court for Human Rights.

When explaining constitutionalization, the technique of passing the highest legal act - constitution is the starting point. (Bell, 2014: 137). The legislator separates specific principles and rules and assigns them a higher legal importance in relation to all other legal rules envisaged in public and private laws. Designating a rule as an expression of particularly important social or moral values (e.g. equality, freedom, dignity, justice and fairness) gives it hierarchically the most important place in the legal order, makes its abolition or amending difficult, and calls for harmonizing lower rules with it; in case of non-compliance, their legal effect is to be taken away.

Constitutional rules and principles have the highest rank. In the legal order of the European Union, those are the founding treaties by which the EU was established. The European Court of Justice called them the Constitutional Charter⁴,

effect; thus, it is transferred to national private laws by undertaking the guidelines that are its basic formal legal source.

3 The EU private law and European private law are not synonyms. The term "European private law" was made in 1980 when the Europeanisation of private law became an important link of a closer legal affiliation of the member states and building of common political culture and identity in Europe. On the one hand, European private law is a political and academic project where, on the basis of the call of the European Commission and the Council of Europe (*Common Frame of Reference*), the model rules of the future Civil Code for Europe are drafted. On the other hand, these are also regulations passed in the European institutions, within the framework of the Union's jurisdiction to regulate specific areas of private law. European private law is, therefore, both the *acquis commun* – common legal legacy of the member states – and *acquis communautaire* – the binding EU private law based on: regulations, guidelines, individual provisions of the treaties (particularly on the fundamental freedoms/pillars of the Union) and the stands of the ESP on the conditions of the EU primary law effect (also implying the general EU principles, as the prohibition of discrimination) on private law relationships. More: Jansen, 2012: 1577- 580.

4 Opinion 1/91 on the draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I-6079, Rec. of judgement. Cit. according to: Bell, 2014: 137.

given the fact that they serve as the grounds for developing EU legislation and its further development.

The rules of lower legal acts may also be constitutionalized if they are an expression of generally accepted values or policies that the community follows or advocates at a certain moment. Formally and originally, they do not have a constitutional rank but they may gain it in a procedure before a court-of-law: if they are challenged by a rule regulating the disputed legal relationship, the court may replace the constitutionalized rule or interpret it in such a way to match the value-based system of the latter. When this takes place in a private law relationship, we speak about the constitutionalization of private law. Therefore, whether a constitutional guarantee becomes a replacement for a civil law rule regulating the disputed relationship or only a valuable benchmark for interpreting and application of that rule or principles and legal standards of civil law applicable to a given case, we speak about an indirect or direct effect of constitutionalization or a horizontal effect on civil law relationships.

3. The enigma called the “horizontal effect”⁵

The vertical effect of constitutional guarantees of human rights and freedoms is a familiar concept to any jurist of public and private law alike. The fundamental rights and freedoms’ guarantees depict a circle of freedoms in relation to the state, where a person is invested with rights and freedoms (which may be freely exercised and enjoyed) whereas the state has a negative obligation (to abstain from interference with these rights and freedoms). We are just getting used to the “*horizontal effect*” which implies the effect between individuals, in their private relations; this effect proves that constitutionalization as a phenomenon can change the fundamental paradigms of civil law and its primary task to satisfy individual needs and interests on the bases of equality, freedom and autonomy. The horizontal effect may be either direct or indirect.

3.1. Direct horizontal effect

Direct horizontal effect enables the claimants to base their request for resolving a civil law dispute directly on the constitutional rule that guarantees them the (allegedly violated) human right. The plaintiff may claim that the civil law

5 The title is a paraphrase of the dilemma posed by professor Collins in his paper *On the (In)compatibility of Human Rights Discourse and Private Law* (published in 2014, in the collection of works *Constitutionalization of European Private Law*). In the subtitle *The puzzle of horizontality*, he examined the reasons of transferring the public law discourse, particularly human rights, to private law, and the possible risks of upsetting the existing delineation between public law and private law (see p. 34 -36).

relationship (involving the claimant and the defendant) violates his/her constitutional right. As the claim is directly based on a fundamental right, there is no need to refer to specific civil law rule (Collins, 2014: 38). Although the dispute is a matter of civil law, it will be resolved on the basis of constitutional provisions on human rights. The court is merely obliged to find an appropriate instrument in civil law in order to provide for the consequences (e.g. by interpreting a civil law principle of good faith and fair dealing court should affirm the protection of the violated constitutional right and declare the contract null and void on the grounds of illegality or immorality). Civil law is subjected to the constitutional law; litigants are no longer parties of a specific civil law relation, but the bearers of human rights and freedoms (Cherednychenko, 2008: 55-56).

3.2. Indirect horizontal effect

Contrary to the previous case, where constitutional rules are directly applied as the basis of the parties' requests and the court decision, in the indirect effect the claimant is required to specify the violation of the subjective right stemming from the civil law relationship with the defendant. The constitutional guarantee of the claimant's rights or freedom is not the basis of a statement of claim. It is introduced in the decision-making process in an indirect manner, by examining the possible implications of the disputed civil law relationship to the claimant's constitutional right, and as a measure for assessing whether the statement of claim is well-founded.

In both horizontal effect aspects, the civil law relationship is under the influence of constitutional rights and freedoms: their influence is stronger in the direct horizontal effect, since the existence of dispute in a civil law relationship is only a motive for their protection; in the indirect effect, subjective rights and obligations are still discussed but their compliance with constitutional guarantees of the rights and freedoms is checked, alongside with the common assessment of their compliance with the civil law rules regulating these subjective rights.

The indirect horizontal effect can be weaker or stronger (Cherednychenko, 2008: 56-57). In the event of a *stronger indirect horizontal effect*, the decision is rendered on the basis of a civil law rule regulating the disputed relationship, but it must be interpreted in the manner securing the outcome that fully complies with constitutional rights and freedoms. The assessment whether the court adequately responded to this task is performed according to the value-based system of constitutional principles, not on the grounds of the civil law principles.

The influence of constitutional law upon a civil law relationship is minimal if the constitutional rules have a *weak indirect horizontal effect*, since the solutions is exclusively sought in civil law. This effect is only visible in the phase of interpret-

ing the civil law rule, when constitutional principles and guarantees of human rights become additional, complementary means for reaching a fair solution. Save for the disputed relationship of the civil law rule in force, the court is not obliged to apply any other rule but it is obliged to take into account its possible influence upon the guaranteed constitutional rights of the parties thereof.⁶ Such an effect enables a fruitful cooperation of civil and constitutional laws, where they complement and enrich each other (Cherednychenko, 2008: 57-59).

The aforementioned clarification between an indirect and a direct horizontal effect indicates that the difference is visible when the court chooses the rule for decision making on the statement of claim.⁷ The constitutional rule is not the upper premise of judicial syllogism in the indirect effect (as it is in the direct one); the civil law rule applies but needs to be interpreted in the spirit of value embodied in the violated constitutional right, which the court will call upon in the rationale of the decision. Legal principles of civil law are particularly adequate for such an interpretation since their contents should be determined in any concrete case and according to the circumstances of that case.⁸ Even when the constitutional rule has not been formally invoked and when it is only an in-

6 It ends there. There is no obligatory “adjustment” (as with a strong direct effect) and subjecting the civil law principles to the values that inspire constitutional guarantees of rights and freedoms, provided that we can speak about different value based systems at all. To our mind, there is no difference: constitutional and civil law rules were written to express freedom, equality, dignity, and autonomy as the highest social values; only the method and goals of attaining these ideals are different.

7 In the introduction, the aforesaid constitutionalization of the EU private law deserves a special analysis, and it goes beyond the framework of the given topic. In relation to the aspects of the horizontal effect at the EU level, we refer to: Hartkamp, 2008: 88. He distinguishes *procedural* and *substantive* horizontal effects. The first one denotes the possibility for a private law subject to challenge the harmonisation of the national primary law with the EU primary law before a national court. The rule that does not pass this test cannot be applied to the disputed relationship despite being directly regulated by it. The substantive horizontal effect (the direct one) implies the effect of the *acquis communautaire* upon a private law relationship and the possibility to check its harmonisation with the provisions of foundation treaties. Any legal affair that limits the fundamental freedoms or violates the rules and principles, whose binding authority for civil law relationships has been confirmed in the practice of the European Court of Justice, is annulled and does not produce any legal effect. Substantive horizontal effect may also be indirect, and the influence of *acquis communautaire* on private law is milder. The disputed civil law relationship or the validity of a legal affair is decided on the basis of the private law rules, but the goals and principles of the founding treaties will be taken into account in the interpretation of its general principles.

8 That is how the German Federal Constitutional Court acts using the potentials of the famous *Treu und Glauben* (§ 242 BGB) or the general prohibition of concluding immoral or usurious legal affairs (§ 138 BGB).

spiration for interpreting civil law rules, civil law is influenced by constitutional law in an indirect and weak manner.⁹

4. Constitutionalization in judicial practice - German experience

Article 1 para. 3 of the German Basic Law (*Grundgesetz*)¹⁰ stipulates the obligation of the legislature, the executive and judicial authorities to observe the guaranteed human rights and freedoms when applying the law. The legislator meets this obligation if it has ensured (by properly regulating legal relations) that these rights and freedoms perform two important functions: *defensive* (towards the state) and *protective* (in mutual relationships between individuals).

The defensive and protective functions of the rights and freedoms referred to in the Basic Law are present in any legal relationship, no matter if it is regulated by the public or private law rules. For our research, the protective function is significant in civil law relations because its exercise may be reflected to the applicability of the civil law rule that regulates these relationships. The German courts' practice (including regular courts and the Federal Constitutional Court) shows that it is allowed to narrow the domain of applicability of the civil law and its fundamental principles according to which civil law relationships are voluntary relationships of two equal subjects, regulated according to their interests and needs. In several referential court decisions, the influence of constitutional guarantees of human rights and freedoms on resolving a civil law dispute is apparent. It seems that the constitutional principles served as a valuable benchmark, a guideline towards a fair solution of the disputable relationship and the affirmation of the guaranteed right to free development of one's personality.¹¹

⁹ We refer to another division of the horizontal effect: strong direct effect, strong indirect effect, weak indirect effect, and procedural effect (Mak, 2008: 55-56). Mak explains that, under certain conditions, the negative duty of the state (refraining from violating constitutional rights and freedoms) transfers to civil law subjects and, then, they may base their mutual requests directly on these guarantees. This is very direct effect, but it is not a rule. If a constitutional rule should be included in solving a civil law dispute, it will be done directly - by binding the court to take care of the values embodied in human rights (rather than the rights as such) or, at least, to be inspired by them. In the first case, the influence is strong, although direct; in the latter, it is weak. The procedural effect of constitutional guarantees is aimed towards the court not towards the parties to the disputed relationship (litigants). It regularly takes place before a constitutional court, in constitutional complaint proceedings.

¹⁰ *Grundgesetz für die Bundesrepublik Deutschland vom 23 Mai 1949* (BGBl. S 1), zuletzt geändert durch Artikel 1 des Gesetzes vom 23. 12. 2014. (BGBl. I S. 2438), available at: <https://www.bundestag.de/grundgesetz>. Visited on: 25 August 2016).

¹¹ Article 2 para. 1 of the Basic Law: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

Constitutional guarantees, if they influence a civil law relationship, do it indirectly. This rule is established in the landmark Lüth case¹² in 1958, known after the surname of the claimant (Mr Lüth) who brought the case before the Federal Constitutional Court. Having considered the facts of the case in light of the guaranteed human rights relationships (here, the right to freedom of speech), legal standards and civil law principles, the Court reminded that the constitutional guarantee of human rights and freedoms referred to in the Basic Law are laid down as one objective system of values, built on the basis of general rights of any person to freely develop themselves in a democratic society. Human dignity, as an inalienable and inherent value, and the right to free development of personality are the fundamental values of the entire legal system; as such, they have to be equally observed in both private and public law relations. The civil law rules must be, therefore, interpreted and applied in accordance with the values embodied in the human rights and freedoms. This particularly refers to imperative rules, as they introduce general interest into private law relations. Legal standards (particularly *Treu und Glauben*) and the general principles of civil law, developed under a strong influence of morality, fairness and socialization of rights, are also applicable in implementing the aforementioned value-based system. The term used in a court decision, "*Ausstrahlungswirkung des Grundgesetz*"- the radiating effect of human rights to private law¹³, will be the essence of all subsequent considerations on the constitutionalization of private law (for more detail, see: Chantal, 2008: 59-61).

Most civilists commonly refer to the 1993 case dealing with a surety contract (*Bürgschaftsentscheidung*).¹⁴ In this case, the very foundation of private law relationships, namely the principle of private autonomy (freedom of will), has been tested. Depending on the specific standpoint of the economically weaker or the stronger contract party, this principle has and has not withstood the test. For this reason, we find that argumentation of the court in this case can be useful in order to accept constitutionalization or to reject it. The facts of the case are as follows: a twenty-year-old girl of poor education and financial status, who had a part-time job and a humble monthly income, acted as a surety for her father's debt of the amount of DM 100,000 then (EUR 50,000). The conclusion of the surety contract was conditioned upon the waiver of the daughter's right to invoke the rules on prescription period and to initiate court proceedings; she also agreed not to undertake any new surety obligations.

12 BVerfG 15 January 1958, BVerfGE 7, 198.

13 BVerfGE, 198, 207.

14 BVerfGE 89, 214 (*Bürgschaftsverträge*), available at the web page: www.servat.unibe.ch/dfr/bv089214.html. Visited on: 25 August 2016

After the default of the main debtor (father), the bank addressed the surety (his daughter) informing her about the then accrued debt of DM 160,000 (EUR 80,000); in turn, she filed a claim for the termination of the contract. The first-instance (county) court dismissed the complaint as unjustified; upon appeal, this decision was reversed in the appellate procedure, where the higher court reasoned that the guarantor could not be held bound under this contract because she had been incorrectly and incompletely informed on the consequences of concluding such a contract. According to the court assessment, the bank was obliged to eliminate the observed surety's inexperience, insufficient understanding and even underestimation of the risks of the given guarantee, arising from her youth, insufficient education and experience in legal affairs. As the bank had not fulfilled this obligation, which the Court equalled with the pre-contractual duty to inform¹⁵, the principle of good faith and fair dealing was violated, which makes the surety agreement immoral (usurious), particularly if bearing in mind the disproportion between the undertaken obligation and the surety's income.

The Federal Court did not accept this argumentation: any person of age and contractual capacity is capable of understanding the consequences of concluding a surety agreement, and is obliged to meet the undertaken commitment. A person is also free to commit to excessive obligations, which is part of one's freedom of contract. The surety's inexperience, *per se*, does not make the contract invalid, nor does it oblige the bank to inform and warn her of the contractual risks in a more comprehensive manner. The bank can justifiably assume that any adult person is aware of the particular risks entailed in suretyship and the likelihood of being called to meet the obligations instead of the principal debtor, as well as that such a person is capable of assessing his/her own ability to meet this obligation. It would be different only if the bank would consciously mislead the guarantor and, thereby, incite him/her to undertake disproportional commitment or diminish the risks of guarantee, which is not the case here.¹⁶

Deciding on the surety's constitutional appeal filed for the violation of private autonomy, based on the constitutional guarantee of the right to free development of personality referred to in Art. 2 par. 1 of the Basic Law (BL) in conjunction with the social welfare principle (*Sozialstaatsprinzip*) referred to in Art. 20

15 Valid for any contractual relationship and particularly significant here, since the close family relationship with the principle debtor (father) was an important emotional incentive for the young, insufficiently educated and inexperienced daughter to accept the offered conditions of the guarantee agreement. The bank was aware of that and had to inform the guarantor more thoroughly on the consequences of the guarantee.

16 This conclusion is interesting as it established that the bank clerk, prior to concluding the agreement, had asked the daughter: "Would you sign here? You will not undertake any significant obligation; the signature is needed for my documentation." This circumstance will be an additional argument to the Federal Constitutional Court to rule in favour of the surety.

para. 1 of the BL¹⁷, the Federal Constitutional Court accepted the rationale of the second instance court and assessed the case facts in light of the stands taken in the Lüth case and the omission of the first instance court and the Federal Court to correctly evaluate the influence of the surety agreement on the guarantor's constitutional rights and freedoms.

The Federal Constitutional Court reasoned that disputed surety agreement is not a common one, since the daughter undertook proprietary obligation for her father's debt¹⁸, an obligation that significantly exceeds her income. The bank could have foreseen that the surety of poor property status (in this case, the daughter) was indeed obliged for her lifetime. A surety contract concluded under such circumstances does not represent a true freedom of will of both parties, since it limits the private autonomy of the weaker party. Defining the private autonomy as the self-determination of an individual in legal affairs (*Selbstbestimmung des Einzelnen im Rechtsleben*), the Federal Constitutional Court called upon the general personality right referred to in art. 2 para. 1 of the Basic Law, i.e. the right to self-determination, which is in private law expressed through private autonomy or freedom of will. Although guaranteed to both parties, which are formally and legally equal in contractual relations, freedom of will of the economically stronger party can prevail to the extent that this party alone sets the conditions for the conclusion of contract. The duty of the court is to establish the disturbed balance, which is structural by nature and involves serious consequences for the economically weaker party. The court is under a constitutional duty to protect the constitutional right to self-determination and autonomy of will of the weaker party. The general principles and legal standards of the German Civil Code (BGB), particularly paragraphs 138 and 242¹⁹, are construed for the sake of establishing the principle of equal value of mutual performances and reaching a fair contractual result. They should

17 The positive duty of the state to provide to everyone the existential minimum and not to allow that a debtor's dignity be harmed by falling into poverty is derived from this principle (*Sozialstaatsprinzip*) (BVerfGE 89, 214 (223)). The task is fulfilled with an adequate social policy, the rules on exemption from enforcement (in order to ensure the necessary means of subsistence of the executive debtor), and the rules on proclamation of personal bankruptcy. In civil law, the rules on the influence of changeable circumstances, the rules on the subsequent ceasure of *causa*, the rules on *culpa in contrahendo* and the rules on sanctioning the immoral and usurious contracts serve the same purpose: they ensure that both co-contractors are protected against the disproportion of mutual giving, or that such protection is provided to the weaker or economically dependent party (due to subjective circumstances, such as: the state of need, flightiness, inexperience).

18 Under a strong influence of close emotional relation, she guaranteed for the credit given to her father for business purposes, not having any personal or direct property benefit thereof.

19 The prohibition of concluding immoral and usurious contracts (§ 138 BGB) and the principle of conscientiousness and fairness (§ 242 BGB).

prevent spilling over of structural inequality into the contract and enable that both parties equally contribute to its contents, as it is the only way for both of them to express their free will. Proper interpretation of these general clauses (*Generellklausen*), which constitute the basis of judicial control of the contents of agreement (*Inhaltskontrolle*), ensures that contractual relationship equally pertains to the civil law principle of autonomy of will and to the constitutional guarantees of rights and freedoms. The first instance court and the Federal Court did not take into consideration this “radiating effect” of constitutional principles; thus, they violated the surety’s dignity and right to free development of personality (art. 1 and 2 paragraph 1 of the Basic Law) in conjunction with the principle of a social welfare state (art. 20 para. 1 of the Basic Law). In the repeated proceedings, the Federal Court declared the surety agreement null and void because it had been concluded contrary to § 138 BGB.

What are the implications of the decision of the Federal Constitutional Court? When applied to civil law relations, the constitutional guarantees of rights and freedoms may rectify the consequences of the inequality of the parties’ bargaining powers; the inequality needs to be structural and, if it is spilled over into the contract, it prevents the weaker party to freely express the contractual will. The Federal Constitutional Court will not correct all decisions of a civil court but it will check whether civil law rules and principles have been interpreted in accordance with the basic rights and freedoms guaranteed by the Constitution. Thus, the Constitution becomes a point of reference in the interpretation and application of civil law rules to a specific civil law dispute; it has indirect horizontal effect and the court’s omission to fulfil this duty violates the parties’ constitutional rights.²⁰

5. Constitutionalization and relation between public law and private law

The examination of constitutionalization necessarily takes us to the distinction between public and private law, given that the constitutionalization process threatens to make it meaningless or to reaffirm it, although with new and dif-

20 BVerfGE 7, 198. Legal standards are the border crossings (*Einbruchstellen*) through which the constitution and human rights enter into civil law, binding a judge to appraise the behaviour of the parties in the light of constitutional values because they express social agreement on good, useful and progressive for the community. These civil law clauses, i.e. their interpretation and application to an individual case, have a connecting effect upon the public and the private law. The Federal Constitutional Court called upon Dürig’s stand on the same value-based system of constitutional and civil laws and their equal respect for individual freedom (private autonomy proves it best). Civil law should borrow from the Constitution only those values that it itself embodies, and use the constitutional guarantees (directly addressing the state) to fill its legal principles and standards with contents.

ferent arguments. This division is considered to be disputable from the onset, due to the criteria that it is based on - predominantly protected interest. Yet, it is still referential for any analysis of mutual relationship between subjective rights provided by civil law, on the one hand, and the constitutional rights and principles, on the other hand. As per one observation (Collins, 2014: 36), the relationship between public and private law is similar to semi-detached houses: the houses are autonomous, but still sharing the same common walls. Public and private law lean on each other; they are complementary fields and each retains its own autonomy. When drafting civil law rules, one should only take care about the hierarchically higher constitutional principles, and vice versa; the civil law structure and functional direction toward individual interests should not be violated by public law rules. According to another standpoint (Nipperdey, 1961: 12, 14-15), constitutional principles and values protected by the guaranteed human rights and freedoms are built into the foundations of law in general. For the law to be a coherent system, it is necessary to unite public and private law. Presented in this manner, the relationship can easily undermine the independence of civil law concepts and doctrines, since it boils them down to one of the possible expressions of constitutional principles. Thus, private autonomy becomes an expression of constitutionally guaranteed freedom of association, equality and self-determination in private law relationships.

In relation to whether separation of public law from private law is considered obsolete or still needed, constitutionalization is either greeted as a welcome stage in the natural development of law, or completely rejected, or accepted but only in justified cases - exclusively through its indirect effect upon civil law relationships.

Arguments in favour of constitutionalization call to mind the great civil codifications of the 19th century (Comandé, 2008: 161-162). The assertion that the encounter of civil law and human rights law does not have to be bad and at the expense of civil law is proved by recalling the first civil codifications from the 19th century, which were designated as "civil constitution of the French state" (French Civil Code, also marked as *la memoir de la Nation* - the memory of the nation), or the "cathedral of national glory" (the German Civil Code). They were the first one that proclaimed individual freedoms as an ideal of civil society and allocated significant economic, social and political rights to an individual; national constitutions did the same much later. Individuals could have justifiably considered them to be not just the formal legal source of their subjective rights but also the rights they have as citizens and political subjects as well (Comandé, 2008: 163).

It is true that civil codes of that time also contained proclamations that should rather be placed in the constitution than in the act regulating everyday life of an individual (e.g., the principle of secularity in French Civil Code). The reason is that many national states at that time did not have any constitution as the foundation of political, social, and economic organisation of the community; therefore, they used civil codifications for expressing the ideas that they would be governed by in the forthcoming creation of the legal order: the separation of the state from the church, private property as predominant form of property, freedom of association (as the precondition for freedom of entrepreneurship), freedom of expressing opinions, etc.²¹

To our mind, the great civil codifications of the 19th century should be presented as proof of a common value-based system of constitutional law and civil law rather than as the first examples of constitutionalization of the latter one. They show that the bond of civil law and constitutional law does not represent any revolution in law, but only a way for civil law to keep abreast of the times. For the sake of preserving autonomy of both body of law, priority should be given to indirect horizontal effect, as a correct method of bringing together human rights with civil law (also: Collins, 2014: 43), since its rules already contain the values of freedom, equity, dignity, autonomy, which are the mandatory starting point (and end point) of constitutional rights and freedoms. The interpretation of civil law rules in the spirit of constitutionally guaranteed rights and freedoms does not disturb the civil law structure or suspend its principles in favour of the constitutional principles.²² Thus exerted influence of constitutional law on civil law is good because, by preserving the autonomy of civil law (its substance and distinctive features), it does not restrain it in following the times in which affirmation of human rights is becoming increasingly significant. (Collins, 2011: 133).

Direct horizontal effect is quite opposite: it requires a change in doctrinal stands on the advantages of the separation between public law and private law, it jeopardises the autonomy of the latter and, therefore, it should be rejected (Collins, 2011: 133).

6. Conclusion

The question is whether civil (private) law and human rights are compatible or whether they “like oil and water [...] never mix properly” (Collins, 2014: 26).

21 Let us not forget that Prince Miloš Obrenović also fostered the work on the Serbian Civil Code in order to postpone the passing of the Constitution and limitation of his power.

22 “Indirect horizontal effect enables the judge to hear the voice of their neighbour - a judge of constitutional law, not taking away their freedom to assess its significance for a concrete civil law relationship.” (Collins, 2011: 133, according to: Collins, 2014: 43).

How it is possible at all to apply constitutional rights and freedoms, designed to protect individual freedoms against state oppression (negative freedom or *freedom from oppression*), to diverse relationships and concepts of private law? On the one hand, political, social and economic freedoms are guarantors of free development of personality in a democratic society; on the other hand, subjective rights are acknowledged for the sake of satisfying individual (material and spiritual) interests and needs, and they apply between two or more equal individuals.

It is wrong to demand from individuals, in their private affairs, to equally value their own and someone else's interests. An equal consideration of one's own interest and the interest of another is justifiably expected in a vertical relationship of states vs. an individual; but, this expectation is not natural in civil law relationships since they are established for the sake of individual needs and interests. In a civil law relationship, each party aims to attain the most favourable position, which is not necessarily fair (in the sense of distributive justice) but has to be equivalent. Thus, unlike the distributive justice (which is proportional to the needs and the available social wealth), commutative justice is at work: *Suum cuique* (to each what he deserves), *Do ut des* (give and receive something in return) and *Facio ut facias* (I perform so that you may perform in turn). Direct horizontal effect has a ring of political correctness (also: Collins, 2011: 133) but it chokes individual freedom, which is the foundation of modern democratic society; therefore, we do not accept it. It unnecessarily wipes out the limits between the public law and private law, and we have seen that great codifications are predecessors of legal proclamation of freedom, autonomy, dignity, equality, and equivalence, as the highest social values. Even without a stronger influence of public/constitutional law (through direct horizontal effect), private law is capable of adapting to legitimate ideas, such as the prohibition of discrimination: the non-discrimination rule implies (among others) the state's duty and responsibility to provide services of general economic significance to all under equal (non-discriminating) conditions, which corresponds to the consumers' right to satisfy their basic needs²³. Demanding distributive justice in civil law relations dislocates the responsibility of the state to fairly redistribute the social wealth (which can be achieved through measures of social or tax policies) to private law subjects, who neither can nor should deal with it. Also, distributive justice insufficiently observes the democracy of civil law, whose legal principles and standards had embodied the values of individual freedom, equality and autonomy much before it was done by constitutionally guaranteed rights and freedoms.

²³ Art. 83, para.2, point 2, in conjunction with art. 2 para. 1, point 1, of the Consumer Protection Act, *Official Gazette of the RS*, no. 62/14 and 6/16

Constitutionalization of civil law through indirect horizontal effect does not take into account that freedom, as a common value of constitutional law and civil law, does not have the same meaning in these two bodies of law (Collins, 2011: 133). In constitutional law, freedom is placed in a negative context, as it implies freedom from interference of the state in the life of an individual and protection against its oppressive measures. In civil law, freedom is always positive and encouraging for an individual. This is a freedom to act; it is the right to have opportunity and chance for self-realisation²⁴, the right to pursue happiness.²⁵ So understood, freedom in civil law also implies: autonomy (the right to freely and voluntarily establish civil law relations, without pressure or coercion²⁶; the right to optimum satisfaction of own interests but within the limits set by imperative rules, public order, good faith and fair dealing; and a legitimate request from the state to provide the conditions for exercising the freedom. Thus, the civil law freedom is getting closer to modern conception of the role of state in the exercise of human rights (Berlin, 1968), according to which state's refraining from infringing human right and liberties is not enough to fully enjoy them; for this reason, the state has to provide adequate living conditions so that man can live a decent and dignified life.

If we accept that the presented observation of freedom becomes common to public law and private law, the discourse on human rights in everyday relationships of individuals will not be like mixing oil and water but rather a fine adjustment of value-based guidelines, concepts and principles of these two areas, according to the merits of each individual case. The role of the court is essential since it evaluates whether concrete civil law relation meets the terms of relevant provisions.

Social Justice in European Contract Law: A Manifesto (Bianca, Collins, Grundmann, Hondius, Stijn, 2006) speaks about an idea of social justice in contractual relationships as a new paradigm of the European Contract Law; for this idea, it is worth giving up the distinction between public and private law. This document clearly states that contract law (and private law alike) is expected to contribute more to the distributive justice and social fairness, and to prevent liaising of the EU members to boil down to market integration, deprived of feelings for those needs that are not satisfied in the sphere of economy. This new, socially accountable, European contract law would not be exclusively managed by the

24 Art. 2 para. 1 of the German Basic Law speaks about it; in the practice of the Federal Constitutional Court, it has been interpreted as an expression of the fundamental principle of civil law - private autonomy.

25 According to the Constitution of the United States of America.

26 If the decision has not been free, it will be sanctioned as being extorted by force, fraud, or threat, or because it was made in emergency, due to poor material status, insufficient maturity or experience, flightiness or similar circumstances that make the agreement a usurious one.

logic of markets and capital; it would also take into account the interests of insufficiently represented (underprivileged) social groups, taking care that all the EU citizens are essentially equal.

Advocating for better distributive justice in private law starts from an individual invested with universal human rights, which have the same effect and may be equally invoked against the state and in private law relations (Domingo, 2011: 627-647). This idea undermines the demarcation between public law and private law since it asserts that observance of human rights is always the same, irrespective of who the other party in the relationship is (state or private individual). It raises the question (Safjan, 2013: 156) whether we are on the threshold of revolution in private law or whether this is just an anticipated phase in its development.

Repositioning of already sensitive delimitations between public law and private law should not be reduced to mere inconvenience for legal scholars who would have to review their arguments supporting or rejecting this distinction. It seems that pleading for better social sensitivity and receptivity of private law (solidarity, protection of the weaker party in a contractual relationship, non-discrimination in a most benign contract where the "discriminated" is not excluded from market but only referred to alternative product or service) has more disadvantages than advantages. If goals (and interests as protective object) would become common to public law and private law, how shall it be determined which rule "has failed" in the event that the goals are not achieved? By removing the demarcation lines between these two bodies of law, the responsibility for the legal result in social relations is diluted; more specifically, the burden of responsibility shifts from the state, which has primary responsibility for distributive justice and fair redistribution of social wealth, to private law relations (to be realised therein). In our opinion, the limits between public law and private law are already fluid enough to provide a dosed, occasional and justified realisation of important social goals in private law relations as well: property obliges and, thus, the manner of its exercise may be subjected to social control in general interest; sanctioning the abuse of the party's weaker and structurally unequal position; the legal duty to conclude a contract secures access to goods and services of general economic importance, but also to any other good or service for which there is no alternative on the market.

Constitutionalization is acceptable in regard to an employment contract since new forms of workers' engagement (e.g. through labour recruitment agencies) break up the direct link between the employee and the real employer (for whom the work is performed), whereby the former is degraded to a simple object of the contractual relation. The new forms of employment contracts leave an

impression of a triumph of freedom of will of the employee and the employer, as they seemingly enable maximum adaptation of employment relationship to their needs. The impression is, however, superficial, since the employee (as the economically weaker party) does not have an equal bargaining position and influence in determining the terms of employment. Here and in all other cases of unequal starting positions (adhesion contracts, contracts for providing financial services to citizens, various consumer contracts), we believe it is also allowed to consider a civil law relationship through a prism of observance of the basic human rights, particularly the rights to dignity and self-determination. Getting the unequal negotiating powers of contracting parties into balance should be left to a court-of-law, which should respect the logic of civil law as the patrimonial one and as a method of satisfying the most diverse but always individual private interests, needs and wishes. Generally, if a party's subjective right or a basic human right are gravely breached, the court will not give priority to a freedom of will of the other party but, rather, to a higher-ranking right, which is always the basic human right.

The execution of various social functions is a task of other branches of law. Private law can assist in the course, but not at the expense of its primary objective: commutative and corrective justice in relations between private individuals, relations created according to their needs and interests and based on the principles of voluntariness, equality and imposing property sanction for the violation of rights and obligations.

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КОНСТИТУЦИОНАЛИЗАЦИЈА ПРИВАТНОГ ПРАВА: ДЕЈСТВО УСТАВНИХ НОРМИ НА ПРИВАТНОПРАВНЕ ОДНОСЕ

Резиме

Иза израза конституционализација приватног права крије се процес, започет половином прошлог века, којим се непосредна применљивост уставних гаранција људских права и слобода, као одбрамбених права насупрот држави (слобода од), постепено шири и на приватноправне односе. Ratio таквог њиховогутицаја заснива се на чињеници да отеловљују универзалне вредности, темељне за свако савремено друштво (макар тзв. западног света), попут једнакости, правде и правичности, неприкосновености људског достојанства и сличних, па се имају уважавати, по потреби и непосредно примењивати, у сваком сегменту правног система, било јавног било приватног права. Феномен примене уставних норми и њихове супротстављивости у односима између приватноправних субјеката (не више само према јавној власти) постаје све интересантнији за проучавање, концентрисаног око питања: начина на који норме о правима и слободама треба да буду примењене у приватноправним односима (непосредно или посредно хоризонтално дејство), оправданости примене у свим или у само неким областима (нпр. у радном и уговорном праву), међусобног односа уставног и приватног права у будућности (однос субординације или комплементарности).

Решавање грађанскоправних спорова позивањем на зајемчена права и слободе (непосредно хоризонтално дејство) или остајање при грађанскоправној норми, али протумаченој у духу вредности које устав оличава (посредно хоризонтално дејство) далеко је од спорадичног и доводи у питање аутономност приватног права и његову строгу одвојеност од јавног, тиме и уставног, права. Да ли смо на путу померања границе између јавног и приватног права, у корист првог, и свођења грађанскоправних појмова и принципа на пуки алат, мост преко ког ће уставне гаранције непосредно уређивати односе приватноправних субјеката? Или је граница очувана, с тим да ће се и од приватног права очекивати да изражава уставне вредности и смернице? Ово су само нека од у раду анализованих питања, која се, захваљујући свом значају, називају миленијумским питањима европског права. На интензитет конституционализације утиче и организација судова, посебно однос уставног и редовних судова, али и доктрина Европског суда правде - да четири темељне слободе и конвенцијска права имају статус

основних принципа комунитарног права, обавезујућих у сваком правном односу, јавног и приватног права. У критичком одређивању према оваквој тенденцији и испитивању да ли је приватно право суштински промењено, или само начин његовог тумачења и примене, помоћи ће нам референтна пракса овог и националних уставних судова, али и ставови правне доктрине.

Кључне речи: *приватно право, уставне гаранције права и слобода, конституционализација, хоризонтално дејство, Европски суд правде.*

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CONTROL OF FREEDOM OF EXPRESSION THROUGH PROHIBITION OF HATE SPEECH

Abstract: *Although proclaimed and guaranteed by a large number of international and national legal acts as one of the most significant freedoms in contemporary society, freedom of expression is not unconditional and unlimited. Every expression of thoughts and ideas does not imply an adequate exercise of the right to freedom of expression. Under special circumstances freedom of expression can be controlled and limited to prevent its abuse and misuse with the aim of achieving illicit objectives. Prohibition of hate speech is one of the ways of limiting the freedom of expression. Hate speech, as a phenomenon which has a very harmful impact on relations in a democratic society, is every invocation and incitement of racial, national, religious or some other kind of inequality, hate, bigotry and discrimination due to personal characteristics, using verbal and non-verbal ways of public expression of ideas and information. Numerous international documents as well as a large number of legislative acts in the Republic of Serbia regulate prohibition of hate speech. This paper provides an overview of normative sources which regulate the freedom of speech and the prohibition of hate speech, as well as examples from the case law of the European Court for Human Rights in the area of hate speech. The author examines the relevant legal provisions of the new Act on Public Information and Media of the Republic of Serbia, with specific reference to the new legal provision governing civil law protection due to violation of prohibition of hate speech. The author elaborates on the changes in these rules as compared to the earlier legal solutions, and discusses their conformity with other domestic rules related to prohibition of hate speech.*

Keywords: *freedom of speech, limitations to freedom of speech, hate speech, prohibition of hate speech, procedural legitimacy (capacity), civil claims, litigation.*

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1. Introduction

Communication is defined as an interaction of primary social significance characteristic for humans only, in which one or more people, or indefinite number of people, impart and receive, either synchronously or asynchronously, directly or indirectly, via natural and/or artificial mediators, symbolically organized information in the form of verbal and/or non-verbal messages, which in the individual and social lives of people cause immediate effects and relatively permanent side effects (Miletić, Miletić, 2012: 149). According to another definition, communication is a human interaction realized through exchange of information, directly or through the media in a spatially and temporally defined psycho-social context (Radojković, Miletić, 2008: 28). It is, therefore, indisputable that communication represents a constituent part of a life of every individual; it plays a very significant role in their daily activities and operations in the modern world, and without communication there is no exchange of ideas, feelings and information necessary for satisfying various individual needs as well as the needs of the society as a whole. Communication is immanent to humans as conscious beings; only a human being is able to create information using consciousness, to materialize it in the form of a message, and to transfer it in the process of communication with other people. And *vice versa*, only a human is able to receive consciously created information and take part in communication as a continuous process.

In order to express our thoughts and feelings, and thus communicate, with or without a mediator, we use the freedom of expression as one of the basic freedoms in the catalog of guaranteed human rights and basic freedoms. Although defined and guaranteed by numerous international and national legal documents and often defined as grounds for exercising other human rights, "freedom of expression is not an absolute right and it can be limited in situations when other rights or prevailing interests should be protected" (Mendel, 2014: 7).

One of the limitations of freedom of expression is embodied in the definition of prohibition of hate speech. Hate speech implies every invocation and incitement of racial, national, religious or some other kind of inequality, hate, bigotry and discrimination due to personal characteristics, using verbal and non-verbal ways of public expression of ideas and information represents; as such, this kind of expression is not allowed. In this respect, definition of prohibition of hate speech and limitation of freedom of speech is necessary for the purpose of protecting the rights and freedoms of other persons and general interests of the contemporary society.

2. Freedom of expression

The idea of freedom of expression originates back to 1766 when, for the first time, Sweden introduced the Act on the Freedom of the Press. Thus, the idea of the freedom of the press and information was launched. In the 20th century, freedom of expression as a basic human right and freedom was envisaged in the Universal Declaration on Human Rights of the United Nations in 1948, which states that every person has a right to freedom of opinion and expression, which includes the right to hold opinions without being harassed, as well as the right to seek, receive and impart information and ideas through any media and regardless of frontiers (Art. 19).¹

The International Covenant on Civil and Political Rights of the United Nations² contains a more detailed but essentially the same definition of freedom of expression. Thus, Article 19 states that everyone shall have the right to hold opinions without interference, and further specifies that everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of every kind, regardless of boundaries, either in oral, written, printed or artistic form, or through any other media of one's choice.

Freedom of expression has also been proclaimed in the provisions of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,³ which states that every person has the right to freedom of expression, which includes the freedom to hold opinions, receive and impart information and ideas without interference by public authorities and regardless of frontiers.

Relying on the above mentioned documents, in 1982, the Committee of Ministers of European Council adopted the Declaration on Freedom of Expression and Information. Considering that freedom of expression and information is necessary for social, economic, cultural and political development of every human being, and that it is a condition for harmonious progress of social and cultural groups, nations and the international community, this Declaration specifies that the state members of the European Council strive to protect the right of every individual, regardless of frontiers, to express their opinion, to seek and

1 Article 19 of the Universal Declaration on Human Rights of the United Nations. Retrieved 16. 06. 2016 http://www.poverenik.rs/images/stories/Dokumentacija/54_Idok.pdf

2 The Act on the Ratification of the International Covenant on Civil and Political Rights), *Official Journal of SFRY*, 7/71. Hereinafter: the International Covenant on Civil and Political Rights (ICCPR).

3 The Act on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms), *Official Journal of the State Union of Serbia and Montenegro – International agreements*, 9/ 03, 5/05. Hereinafter: the European Convention on Human Rights (ECHR).

receive information and ideas from any source, and to impart them under the conditions set out in Article 10 of the European Convention on Human Rights,⁴ as well as to defend the right of every individual to exercise the right to freedom of expression and information.⁵

The Constitution of the Republic of Serbia (2006) guarantees the freedom of thought, opinion and expression, as well as the freedom to seek, receive and impart information and ideas by speech, in oral, written, artistic or some other form (Art. 46.para.1).⁶

2.1. Limitation of Freedom of Expression

Freedom of expression has constitutive and instrumental significance for both the individual and the community: it is a necessary constitutive and instrumental assumption of self-realization of an individual as a person, but also an assumption for constitution, functioning and progress of the democratic society (Alaburić, 2003: 1-2). A guarantee of every right, including the freedom of expression, implies certain obligations of the state, both negative and positive, in order to ensure that the guaranteed right is practical and effective (Vodinelić, 2007: 37). Therefore, the state has an obligation not to violate the guaranteed rights but also an obligation to provide protection of the guaranteed rights. However, the state also has the authority to impose limitations and restrictions on a specific right.

Notwithstanding the large significance of freedom of expression, it can be limited for the sake of protection of rights and interests of an individual and the public interest. The possibility of imposing limitations to freedom of speech is regulated by certain international and national documents. For instance, after the defining of freedom of expression, the International Covenant states that the exercise of freedom of expression implies specific duties and responsibilities, and that it may be subjected to certain restrictions which have to be explicitly defined by the law and which are necessary for the sake of respect of the rights or reputation of other persons, or protection of national security, public order, public health and morals (Art 19, para.3).⁷

4 Part II, point a, of the Declaration on Freedom of Expression and Information of the Committee of Ministers of European Council in 1982 (Hereinafter: Declaration on Freedom of Expression and Information). Retrieved 16. 06. 2016. http://www.poverenik.org.rs/images/stories/Dokumentacija/55_ldok.pdf

5 Part III, point a, of the Declaration on Freedom of Expression and Information.

6 Article 46, paragraph 1, of the Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, 98/2006. Hereinafter: the Constitution of RS.

7 Article 19, paragraph 3, of the International Covenant on Civil and Political Rights (ICCPR).

The European Convention on Human Rights states that the exercise of freedom of expression implies certain duties and responsibilities, so that it may be subject to formalities, conditions, limitations or penalties which are prescribed by the law and necessary in a democratic society in the interests of national security, territorial integrity or public security, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (Art. 10, point 2).⁸ By analyzing the aforementioned provisions, it can be concluded that limitation of freedom of expression implies a cumulative fulfillment of three conditions: the limitation has to be regulated by law; the specific limitation is aimed at protecting one of the interests defined in the Convention regulations; and the specific limitation is necessary in a democratic society. "The action of limitation always has to be necessary by the standards of a democratic society" (Vodinešić, 2007: 47). The limitation is justified if it protects some of the rights or interests in the wide spectrum of personal rights or the general national interest, and it has to be regulated by law since it is only the legislator who has the authority to introduce measures which can limit freedom of expression as a basic right (Mendel, 2014: 51).

Although the Serbian Constitution guarantees the freedom of thought and expression, it also specifies that freedom of expression may be restricted by law, if necessary, in order to protect the rights and reputation of others, to maintain the authority and impartiality of the court, and to protect public health, moral of a democratic society, and national security of the Republic of Serbia.⁹

3. Hate speech and prohibition of hate speech

The prohibition of hate speech is one of the restrictions to freedom of expression. Although there is no single definition of hate speech in theory, hate speech is considered to be: "every expression that contains messages of hatred or bigotry concerning a racial, national, ethnic or religious group or its members, as well as a speech aimed at causing hatred and bigotry concerning sex or sexual orientation, and also concerning different political and other opinions"¹⁰. Hate speech could also imply statements "which intimidate, offend or harass individuals or groups, and/or statements which encourage violence, hatred or discrimination of individuals or groups" (Petrušić, 2012: 78-79). Etymologically speaking, one

8 Article 10, point 2, of the European Convention on Human Rights (ECHR).

9 Article 46, paragraph 2, of the Constitution of RS.

10 The Positive Law Framework for Hate Speech in Serbia. Retrieved 18. 04. 2016 from. <http://www.watchyourlanguage.rs/pozitivno-pravni-okvir-za-govor-mrznje-u-srbiji/>

may conclude that hate speech only refers to the uttered words and verbal communication, which is certainly incorrect because hate speech includes both verbal and non-verbal forms of public expression of ideas and information. In addition to oral and written expression, as forms of verbal communication, hate speech also implies non-verbal communication, i.e. expression of ideas and information by using images, drawings, signs, symbols, gestures, etc. (Alaburić, 2003: 3, fn.1)¹¹.

Given that hate speech is a phenomenon which has a very harmful effect on relations in a democratic society, numerous international and national documents contain definitions of the concept of hate speech and prescribe the prohibition of hate speech. By prescribing and guaranteeing human rights and fundamental freedoms, these documents prohibit every kind of discrimination on any grounds, including hate speech which may incite different kinds of unequal behavior towards a person or a group of people.

For instance, the International Convention on Elimination of all Forms of Racial Discrimination,¹² adopted by the General Assembly of the United Nations in 1965, defines the measures for suppression of racial discrimination and concurrently prohibits hate speech that spreads or encourages racial discrimination. Article 4 of this Convention specifies that "the member states condemn every propaganda and all organizations which are guided by the ideas or theories based on superiority of a certain race or group of people of certain color of skin or ethnic origin, or which want to justify or support every form of racial hatred or discrimination; they are obliged to accept, without delay, the positive measures which have the purpose to abolish every incitement to such discrimination, or to every act of discrimination".

Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech"¹³ confirms the commitment to freedom of expression and information; it condemns all the forms of expression which encourage racial hatred, anti-Semitism and xenophobia, and all the forms of intolerance because they undermine the democratic security; it points to the harmful influence of these forms of expression when they are spread by the media, etc. The member states are recommended to take appropriate action: to combat hate speech; to ensure that these actions are part of a comprehensive approach to this phenom-

11 In theory, there are opinions that the term "hate speech" is inaccurate and that other technical terms could be used instead (Petrušić, 2012: 80, fn. 20).

12 The Act on Ratification of the International Convention on Elimination of all Forms of Racial Discrimination, *Official Gazette of the SFRY*, 31/67.

13 Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech". Retrieved 14. 06. 2016. [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec\(97\)20_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf)

enon; to sign, ratify and embed in their legislation, if they have not done so, the international documents in this field; and reassess their domestic legislation and practice in order to ensure their compatibility with the principles contained in the Recommendation. Moreover, the governments of the member states, authorities and public institutions at all levels are required not only to refrain from hate speech, especially in the media, but also to establish a legal framework for treating hate speech in the domain of the civil, criminal and administrative procedures. An integral part of the Recommendation R (97) 20 is an Annex which contains seven principles relating to hate speech, especially the one spread by the media. The Annex to the Recommendation R (97) 20, in the part “Scope of Application”, contains a definition of hate speech. This, for the purposes of applying these principles, the term “hate speech” refers to all the forms of expression which spread, encourage or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including the intolerance expressed in the form of aggressive nationalism and ethnocentrism, discrimination and hostility toward minorities, migrants and people of immigrant origin.¹⁴

Considering a significant role of the Internet in modern communication and its role in informing the general public, in 2003, the Council of Europe adopted the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. This Additional Protocol is significant because it defines (in Article 2) the “racist and xenophobic material” as any written material, any image or any other representation of ideas or theories, which advocates promotes or incites hatred, discrimination or violence against individual or group of individuals on the basis of race, skin color, descent or national or ethnic origin, as well as religion if used as grounds for any of these factors¹⁵.

3.1. Prohibition of Hate Speech in the Republic of Serbia

Legal provisions on the prohibition of hate speech are contained in a number of national legal sources. First of all, the Constitution of RS (2006) explicitly

14 See also: the Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the Media and the Promotion of a Culture of Tolerance, which emphasizes the commitment of the Committee of Ministers to guarantee equal dignity to all individuals and the exercise of their rights and freedoms without discrimination, as well as a resolve to intensify activities against intolerance. In the Annex of this Recommendation, media companies are urged to promote the culture of tolerance through their activities. Retrieved 14. 06. 2016. [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec\(97\)21_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)21_en.pdf)

15 The Act on Ratification of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, *Official Gazette of the Republic of Serbia*, 19/2009.

states that any invocation and incitement of a racial, national, religious or other inequality, hatred and bigotry is forbidden and punishable (Art. 49).¹⁶

The Act on the Prohibition of Discrimination of the Republic of Serbia (2009) defines hate speech as “expressing ideas, information and opinions which encourage discrimination, hatred or violence against a person or a group of people due to their personal characteristics, in the public media and other publications, in meetings and places accessible to the public, by writing and showing messages or symbols in some other way” (Art. 11), and concurrently prohibits hate speech.¹⁷

The prohibition of hate speech has been included in a set of other legislative acts and documents, *inter alia* including: the Public Information and Media Act¹⁸ which will be discussed in more detail further on in this paper; the Broadcasting Agency Act¹⁹, the Public Media Services Act²⁰, the Advertising Act²¹, the Act on Prevention of Violence and Misconduct at Sports Events,²² as well as the Journalists’ Code of Ethics which indirectly deals with the prohibition of hate speech.²³

4. The public information and media act and hate speech

The Public Information and Media Act (PIMA) of the Republic of Serbia brings a new and different system of provisions relating to hate speech and procedure in civil litigation proceedings for violation of prohibition of hate speech. Firstly, hate

16 Article 49, the Constitution of the Republic of Serbia.

17 Article 11, The Act on the Prohibition of Discrimination of the Republic of Serbia, *Official Gazette RS*, 22/2009. Hereinafter: the Anti-Discrimination Act (ADA), 2009

18 The Public Information and Media Act, *Official Gazette RS*, 83/2014, 58/2015. (Hereinafter: PIMA).

19 Article 21, paragraph 1, the Broadcasting Agency Act, *Official Gazette RS*, 42/2002, 97/2004, 76/2005, 79/2005, 62/2006, 85/2006, 86/2006 – corr., 41/2009.

20 The Public Media Services Act, *Official Gazette RS*, 83/2014, 103/2015 (Article 3, para. 1; Article 4, para. 1, point 5; Article 7, para. 1, point 5). Although the provisions in these Articles do not explicitly prohibit hate speech, it may be implied from the general rules and aims governing the operation of the public media service.

21 Article 7, paragraph 1, the Advertising Act, *Official Gazette RS*, 79/2005, 83/2014.

22 Article 8a, the Act on Prevention of Violence and Misconduct at Sports Events, *Official Gazette RS*, 67/2003, 101/2005, 90/2007, 72/2009, 111/2009, 104/2013.

23 Part 5 of the Journalists’ Code, which deals with journalists’ due professional diligence, specifies that “a journalist has to be aware of the danger of discrimination that can be disseminated by the media, and shall do his best to avoid discrimination based, among other things, on race, sex, age, sexual orientation, language, religion, political and other opinion, national or social origin”. A special directive of the Press Council also states that journalists have to avoid phrases which have a chauvinist, sexist or any other discriminatory connotations. Press Council, 2015, p. 18-19.

speech is explicitly prohibited in part XI, titled “Special Rights and Obligations in Public Information”, which also enumerates cases in which the act of publishing some information is not considered to be a violation of the prohibition of hate speech. Further on, in part XIV titled “Other Forms of Judicial Protection” and in part XIX titled “Common provisions on legal protection proceedings”, this Act regulates the rules of procedure in civil litigation proceedings initiated on the grounds of violating the prohibition of hate speech.

4.1. Definition and Prohibition of Hate Speech

According to the Public Information and Media Act (PIMA), ideas, opinions and information published in the media must not encourage discrimination, hatred or violence against a person or a group of people on the grounds of their race, religion, nationality, sex, sexual orientation or some other personal characteristics, notwithstanding whether a criminal offence has been committed by the act of publishing (Art. 75 PIMA).²⁴ Further on, Article 76 PIMA defines in which cases there is no violation of prohibition of hate speech. Thus, there is no violation of prohibition of hate speech if the information from Article 75 PIMA is part of a journalistic text, and it has been published: 1) without an intention to encourage discrimination, hatred or violation against a person or a group of people on the grounds of belonging or non-belonging to some race, religion, nation, sex, due to their sexual orientation or some other personal characteristic, especially if such information is part of an objective journalistic report; and 2) with the intention to critically point out to discrimination, hatred or violation against a person or a group of people on the grounds of race, religion, nation, sex, sexual orientation or some other personal characteristic, or to point out to phenomena which represent or may represent encouragement of such behavior.

The aforementioned definition of hate speech significantly differs from the definition contained by the former 2003 Public Information Act (PIA) of the Republic of Serbia. According to the PIA (2003), publishing of ideas, information and opinions which encourage discrimination, hatred or violence against a person or a group of people on the grounds of belonging or non-belonging to a certain race, religion, nation, ethnical group, sex, or due to their sexual orientation was prohibited, regardless the fact whether a criminal offence has been committed by such publication.²⁵ The essential and the very significant difference between the definition of hate speech comprised in the current PIMA (2015)

24 Article 75 of the PIMA.

25 Article 38, Public Information Act, *Official Gazette RS*, 43/2003, 61/2005, 71/2009, 89/2010, 41/2011. Hereinafter: PIA(2003). Technically speaking, this Act regulated the probation of hate speech and the civil litigation procedure in case of violation of prohibition of hate speech in a different way. First, Articles 39 and 40 regulated the rules concerning

and the one in the former PIA (2003) is reflected in fact that the PIMA contains an expanded definition of prohibition of hate speech since it also recognizes "*other personal characteristics*" of a person or a group as a basis for discrimination, hatred or violence. This legal solution is a logical consequence of adopting the Anti-Discrimination Act (ADA) and a set of other antidiscrimination laws in Serbia, defining the concept of "personal characteristics" of a person or a group of people, and harmonizing the subsequently adopted media laws with anti-discrimination legislation.

In the Anti-Discrimination Act (ADA), the legislator has enumerated a large number of personal characteristics, including all those properties of an individual which international documents commonly refer to concerning discrimination (race, color, descent, citizenship, nationality or ethnicity, language, religious or political affiliation, sex, gender identity, sexual orientation, financial standing, birth, genetic characteristics, health condition, disability, marital and family status, conviction records, age, appearance, membership in political parties, trade unions and other organizations, and other real or presumed personal characteristics). A personal characteristic is considered to be any individual-related feature, whereby it should be noted that many personal characteristics (such as: sex, race, skin color, nationality, ethnicity, etc.) are commonly shared with other individuals, in which case the characteristics refer to a group of people (Milenković, 2010: 24). However, some authors consider that the list of characteristics is not final and that discrimination can be based on some other personal characteristic, as well as that discrimination is also present in case a person who committed a discriminatory act had been misled or had a wrong impression about the existence of a personal characteristic of the discriminated person (Petrušić, Ilić, Reljanović, Ćirić, Matić, Beker, Nenadić, Trninić, 2012: 20-21).

The definition of hate speech as provided in the PIMA is extremely important since hate speech does not only refer to the listed personal characteristics but also to "*other personal characteristics*". This practically means that hate speech may be based on all personal characteristics enumerated in the PIMA as well as on other real or presumed personal characteristics. As the list of personal characteristics is almost unlimited, there is no doubt that other personal traits may be used as grounds for discrimination and hate speech.

the complaint for violation of prohibition of hate speech as well as the rules governing the exclusion from liability.

4.2. Claims in Civil Litigation Proceedings

In the part of the PIMA regulating the rules on filing civil claims in order to initiate a litigation procedure in media-related issues, there are also rules on the civil claims which may be filed to initiate a civil proceeding (lawsuit) for violation of provisions on the prohibition of hate speech. The legislator provides a general rule for several kinds of civil claims which can be filed in cases where the publication of some information or record constitutes a violation of prohibitions prescribed by the law.²⁶

In case there has been an infringement of the prohibition of hate speech, a civil claim may be filed if the published information or record encourages discrimination, hatred or violence against a person or a group of people on the grounds of race, religion, nation, sex, or due to their sexual orientation or some other personal characteristic. According to Article 101 (para.1-3), the competent court may be required: to establish whether the publication of information or record has violated some right or interest; to order non-publication of information or record, or to ban the re-publication of specific information or recording; and to order the defendant to deliver a recording, remove or destroy a published record (delete a video recording, delete an audio record, destroy a negative, remove from publication, etc.).²⁷

Obviously, the civil claim filed to initiate a lawsuit for a violation of the prohibition of hate speech is of declaratory or condemnatory nature. In case the plaintiff requires from the court to determine that the publishing of specific information or record has violated a specific right or interest, the claim is of deliberative nature, in which case the court has to determine (deliberate) whether the violation of rights or interests has occurred. On the other hand, when the plaintiff requires from the court to order the non-publication of some information or record, or to prohibit the re-publication of some information or record, the claim is of condemnatory nature; in that case, court provides legal protection to the plaintiff by ordering the defendant not to publish the information, or by prohibiting the re-publication of information or a record which violates the prohibition of hate speech. In the third case, when a plaintiff requires from the court to order the defendant to deliver a recording, remove or destroy a published record, the claim is of condemnatory nature and the defendant is obliged to act according to the court order contained in the judicial decision; thus, the defendant will have to submit the recording, remove or destroy the published record.

Notably, there is a difference between the PIA (2003) and the PIMA (2015) in terms of regulating legal protection which can be required by filing a civil claim

²⁶ Article 101, paragraph 1 of the PIMA.

²⁷ Article 101, paragraph 1, point 1-3 of the PIMA.

for a violation of prohibition of hate speech. The former prescribed that the plaintiff was only entitled to ask for prohibition of re-publishing some information or record, and for the publication of the judicial decision at the expense of the defendant; the latter (PIMA) prescribes that the plaintiff may require from the court to establish that the publication of information or record has violated some right or interest, to ask the court to order non-publication of some information or to prohibit republication of some information or record, and to ask the court to order the defendant to submit a recording, remove or destroy the published record. Thus, the plaintiff is entitled to pursue damages and injunctive relief. Therefore, legal protection that can be pursued by filing a civil claim for a violation of prohibition of hate speech is regulated in the PIMA in wider and more comprehensive terms, and partly harmonized with the provisions of the Anti-Discrimination Act (ADA) in terms of different kinds of civil claims.²⁸

4.3. Procedural Legitimacy

When it comes to the parties' procedural legitimacy (*capacity ad processum*) to initiate civil litigation proceedings concerning the prohibition of hate speech, a civil claim may be filed by a natural person who the information is personally related to or a legal entity whose activity is aimed at protecting human rights, under specific circumstances.

Firstly, a civil claim for a violation of prohibition of hate speech may be filed by *a natural person* who the information or record is personally related to.²⁹ If the published information or record encourages discrimination, hatred or violence against a person or a group of people on the grounds of race, religion, nation, sex, sexual orientation or some other personal characteristic, and such information is personally related to a specific individual, that individual has a procedural capacity to stand in the proceeding, to file a complaint and to initiate litigation procedure for a violation of provision on the prohibition of hate speech. The legislator enables potential plaintiffs to file a civil claim only in case the published information or record is personally related to them.

A civil claim for a violation of prohibition of hate speech may also be filed by *a legal entity* whose activity is aimed at human rights protection.³⁰ In case the published information or record is personally related to a specific individual, the

28 Article 43 of the Anti-Discrimination Act (ADA)

29 Article 102, paragraph 1 of the PIMA.

30 Although the common provisions on forms of judicial protection include the possibility of filing charges for violation of the presumption of innocence, prohibition of public presentation of pornographic contents, the right to personal dignity, the right to authenticity and the right to privacy, the active procedural legitimacy is given to a legal entity dealing with protection of

legal entity involved in human rights' protection has to satisfy a special condition; namely, a civil claim for violation of prohibition of hate speech may be filed only with the consent of that person.³¹ Although it is not explicitly regulated by the legislator, the consent of a person has to be in a written form, communicated in a non-ambiguous and explicit way. When it comes to protection of rights and interests of a group of people, a legal entity involved in human rights' protection may file a civil claim on behalf of the group without an explicit consent of the group members who the information or record refers to.

Yet, the PIMA has not resolved the issue of the procedural legitimacy (capacity) of the Commissioner for the Protection of Equality.³² The institution of the Commissioner for the Protection of Equality was established by the Anti-Discrimination Act, where it is defined as an individual, independent state authority, a central national institution specialized in the field of prevention and suppression of all forms of discrimination, with a large range of authorities regulated by the law (Petrušić, 2012b: 906). At first, the procedural legitimacy of the Commissioner was not an issue of considerable importance because this institution did not exist while the PIA (2003) was still in force. However, after the adoption of the Anti-Discrimination Act (ADA) in 2009, a question was raised whether the Commissioner can file a civil claim for a violation of provisions on the prohibition of hate speech. The issue was expected to be resolved by the new PIMA (2015). However, the technical term "legal entity" used in this Act does not refer to the Commissioner. The Commissioner is not a legal entity, which could imply that he/she is not entitled to initiate a civil litigation proceeding for a violation of the prohibition of hate speech. Although the legislator has omitted to envisage the possibility for the Commissioner to initiate civil proceedings by filing civil claims, it may be logically concluded that the Commissioner will have the right to initiate civil proceedings (lawsuits) for a violation of provisions on the prohibition of hate speech under the rules contained in the Anti-Discrimination Act (ADA), primarily because the Commissioner is officially authorized to seek civil-law protection against all the forms of discrimination.

5. Conclusion

Irrespective of the huge significance of freedom of expression, it can be limited for the purpose of protecting the rights and interests of individuals and general interests. The possibility of imposing limitation of freedom of expression is

human rights only in case of violation of prohibition of hate speech and violation of interests and rights of minors (Article 102, paragraph 2 of the PIMA).

31 Article 102, paragraph 3 of the PIMA.

32 Hereinafter: the Commissioner.

regulated by certain international and national acts. Prohibition of hate speech is one of the forms of imposing limitation to the freedom of expression. In addition to many international documents, legal provisions on the prohibition of hate speech are also contained in a large number of laws in the Republic of Serbia.

The provisions on the prohibition of hate speech in the PIMA, as a restriction to freedom of expression, fulfill the conditions stated in Article 10, paragraph 2 of the European Convention on Human Rights regarding the limitation of freedom of expression. In particular, the prohibition of hate speech has been defined by the law, it protects the rights and interests of individuals as well as the general national interests, and it is certainly necessary in the contemporary society given the fact that hate speech is considered to be a phenomenon which has an extremely harmful influence on relations in a democratic society and a role of an instigator of discrimination based on different personal characteristics of an individual or a group of people.

The new legal solutions in the PIMA (2015) have eliminated the dilemmas and perplexities which were the consequences of different legal solutions in the earlier PIA (2003) and the subsequently introduced Anti-Discrimination Act (ADA), regarding the potential application of legal rules. A question has been raised concerning which rules should be applied: the rules of the ADA (which indirectly regulates hate speech as a form of discriminatory act), or the rules of the PIA (which contained narrower rules in the field of legal protection against a violation of prohibition of hate speech as compared to the ADA).

The harmonization of the PIMA with the provisions of the anti-discrimination legislation has eliminated those dilemmas. The legislator has defined hate speech in more detail, acknowledged the previously enlisted personal characteristics as well as some "other personal characteristics" as possible grounds for discrimination and hate speech, and envisaged a wider scope of rules regarding the type of legal protection which can be pursued in the civil litigation procedure due to a violation of the prohibition of hate speech. The legislator has only omitted the opportunity to explicitly regulate the possibility for the Commissioner for Protection of Equality to file a civil claim due to a violation of the prohibition of hate speech, which is most likely to be a subject to subsequent changes and amendments to the valid legal solutions in the PIMA.

Despite the new legal solutions and harsh reactions of both journalists' and media associations, we bear witness of the fact that hate speech is extremely widespread in the media. Although the mission of the media is to inform truthfully, accurately and completely, the media often fall for sensationalism and exclusiveness. In an attempt to draw more audiences and more readers, they publish the information or records which contain hate speech. Thus, they abuse the

right to freedom of expression and discriminate against an individual or a group of people on the basis of a certain real or presumed personal characteristic.

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КОНТРОЛА СЛОБОДЕ ИЗРАЖАВАЊА КРОЗ ПРИЗМУ ЗАБРАНЕ ГОВОРА МРЖЊЕ

Резиме

Иако је прокламована и загарантована великим бројем међународних и националних правних аката и представља једну од најзначајнијих слобода у савременом друштву, слобода изражавања није безусловна и неограничена. Свако испољавање мисли и идеја није и адекватно коришћење права на слободу изражавања. Под посебним условима слобода изражавања се може контролисати и ограничити, како би се спречила њена злоупотреба и коришћење у сврху остваривања недопуштених циљева.

Забрана говора мржње један је од облика ограничавања слободе изражавања. Говор мржње, као појава која има изузетно штетан утицај на односе у демократском друштву, представља свако изазивање и подстицање расне, националне, верске или друге неравноправности, мржње, нетрпељивости и дискриминације због личних својстава, вербалним и невербалним начинима и облицима јавног изражавања идеја и информација. Многобројни међународни документи али и велики број закона у Републици Србији прописују забрану говора мржње. Законом о јавном информисању и медијима Републике Србије предвиђена су и посебна правила по којима се пружа грађанскоправна заштита због повреде забране говора мржње.

Ураду су нотирани нормативни извори који прописују забрану говора мржње. Евидентирана је судска пракса Европског суда за људска права у области говора мржње и анализирани су одредбе новог Закона о јавном информисању и медијима Републике Србије. Посебно је указано на специфична правила овог закона по којима се поступа приликом пружања грађанскоправне заштите због повреде забране говора мржње, на промене ових правила у односу на ранија законска решења и њихову усклађеност са осталим домаћим правилима која се односе на забрану говора мржње.

Кључне речи: *слобода изражавања, ограничење слободе изражавања, говор мржње, забрана говора мржње, процесна легитимација, тужба, парница.*

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THE PROCESS OF PRIVATIZATION IN THE LEGAL SYSTEM OF THE REPUBLIC OF MACEDONIA

Abstract: *The paper analyses the process of privatization in Macedonian legal system in the period from 2001 to 2016. Throughout this period the privatization process was regulated by three separate legal documents: the 2001 Construction Grounds Act, the 2003 Directive on the Manner and Proceedings for Sale of Construction Grounds Owned by the State (Directive for Sale), and the 2005 Act on Privatization and Lease of Construction Grounds Owned by the State. During the implementation of the 2001 Construction Grounds Act, the privatization process was called 'transformation', as aimed to transform the right to use to the right of ownership on construction grounds. The process of transformation was left unfinished after the Constitutional Court had deemed unconstitutional several of the provision regulation transformation. Another possibility for users of construction grounds owned by the State to obtain ownership of these grounds was afforded by the 2003 Directive for Sale. However, this process was based on transfer of ownership by contract between the State and the user who owned a building on the land in question. The last attempt for concluding the privatization process was the 2005 Act on Privatization and Lease of Construction Grounds Owned by the State, which is the focus of analysis in this paper. The paper addresses all issues relating to the privatization process including the problems and legal barriers that either delay or un-*

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able the privatization, and the measures that were and should be taken for removing these obstacles.

Keywords: *privatization, lease, construction grounds, right of use, transformation, state ownership.*

1. Introduction

Scholars as well as legislation in the Republic of Macedonia define "*privatization of construction grounds*" as a transformation of the right of use on construction grounds to the right of ownership of natural and juridical persons – private ownership¹. The subject matter in this paper is the development of the privatization process of construction grounds in the legal system of the Republic of Macedonia, from its origins until the present day. This process of privatization is actually privatization of the so-called *right of use on socially owned construction grounds*. Therefore, this paper will first address the issue of the legal nature of the right of use, its origins and development.

2. The *right of use*: origins and development

In the legal system of the Peoples Republic of Macedonia as a member state of the Federal Peoples Republic of Yugoslavia (FPRY), and later the Socialistic Federal Republic of Yugoslavia (SFRY), the first condition for acquisition of the right of permanent use was to erect a building according to the laws. That meant acquisition of the *right of use on socially owned construction ground for building*. The second condition was to obtain a building permit for erecting the building of permanent nature, after which the right of use has transformed into the *right of permanent use* (P. Simonetti, 1986: 116). The holders of the right of permanent use were owners or co-owners of the apartments. The object of the right of permanent use² (unlike the right of use) was a socially owned construc-

1 A similar definition on the privatization of construction grounds is given in Article 2, para. 1 of the Act on Privatization and Lease of Construction Grounds Owned by the State (*Official Gazette of the Republic of Macedonia, No. 4/05*): "*privatization of construction grounds owned by the state is acquiring private ownership on the construction grounds owned by the state for natural and juridical persons with the right of use*".

2 The development of the right of use can be divided into four stages. The first began in 1951-1954 with the Directive for Construction of Apartment Buildings for Workers and Public Servants (*Official Gazette of R.Macedonia, No. 23/51*), which introduced the free right of use for workers and public servants in order to meet their housing needs. The second stage from 1954-1965 was marked by the implementation of the 1954 Act on Sale of Lands and Buildings (*Official Gazette of R. Macedonia, No. 26/54*), which introduced a right of use that could be afforded for free to every citizen. According to Article 41 of the 1958 Act on Nationalization of Leased Building and Construction Grounds (*Official Gazette of R.Macedonia, No. 52/58*),

tion ground that was already built. The parcel where the building was erected (the surface under and the yard around the building) were subject to the right of permanent use. The holder of the right of permanent use was able to dispose with the construction ground where the building was erected, including the yard,³ but only if that included the building as well⁴. Under the applicable law of those times (the Basic Property Relations Act), the term *building* included apartment buildings, rest and recuperation homes, office buildings, family homes and buildings with apartments in private ownership⁵.

What is specific about the right of permanent use is the fact that it could only exist until the building of permanent use exists⁶. In cases when the erected building was demolished or the material for construction was removed after the initiation of the construction process, the right of permanent use was consequentially terminated. Another way of termination of the right of permanent use was through different legal reforms concerning the land and the building, like in cases where private ownership is acquired on the land and the building, or the land and the building become socially owned.

The privatization of construction grounds, or the so-called 'transformation' of the right of permanent use of socially owned construction grounds into private ownership has the sole purpose to impose single legal regime between the land

the right of use was still afforded but with compensation. With the Directive for Privileged Ranking of Investor Regarding their Financial Participation in Urbanization of Construction Grounds (*Official Gazette of R. Macedonia, No.19/59*), an obligation was imposed for investors to financially participate in urbanization of construction grounds. However, the obligatory payment started with the 1962 General Act on Urbanization and Use of Construction Grounds (*Official Gazette of R. Macedonia, No. 12/62*). The third stage (1956-1967) started with the amendments of the 1965 Act on Trade of Lands and Buildings (*Official Gazette of R. Macedonia, No.15/65*), which envisaged that the holder of the right of use may also be a socially owned legal entity. The fourth stage dates from 1967-1991, when the Amendments of the Act on Trade of Lands and Buildings (*Official Gazette of R. Macedonia, No. 16/76*) prescribed that the right of use may be acquired for construction of office buildings and offices. This fourth stage was suppose to end in 1991 when the Construction Grounds Act (in Article 3, par. 1) declared the construction ground as the ownership of the State. However, in spite of these provisions, the Ministry of Transport and Communications was affording the right of permanent use long after it stopped existing by law (С. Георгиевски, *Аспекти на трансформацијата на правото на користење градежното земјиште сопственост на Република Македонија.*)

3 Art. 12, par. 1, Basic Property Relations Act, *Official Gazette of R. Macedonia, No. 6/80 and 36/90*. This Act was applied in the legal system of the Republic of Macedonia until the day of enforcement of the 2001 Act on Ownership and Other Real Rights (*Official Gazette of R. Macedonia, No. 18/01*).

4 Art. 12, par. 2, Act on Basic Property Relations.

5 Art. 9, par. 1, *Ibid*.

6 Art. 12, par. 1, *Ibid*.

and the building, as it is the case in all modern legal systems⁷. The single legal regime is reflected in the acceptance of the old Roman principle of *superficies solo cedit* according to which the land is the principal object and the building is its accessory. This meant that the other principle - *superficie solum cedit*, according to which the building is the principle object, has been abandoned.

3. Legal Grounds for Privatization of Construction Grounds in the Republic of Macedonia

Socially owned construction grounds became ownership of the State in the legal system of the Republic of Macedonia in 1999 by introducing amendments to the Construction Grounds Act⁸. In Macedonian legal system, some scholars referred to the amendments as *a new nationalization* (M. Марјановски, 1992). Even after the right of permanent use had been terminated by law, the scholars as well as legislation still used the term in some laws and other legal documents. The right of permanent use was also mentioned in the Final Provisions of the Act on Ownership and Other Real Rights (hereinafter: the Ownership Act), where Article 245 stated that: *the transformation of the prior right of use of socially owned construction ground in private ownership or right of long-term lease or other will be regulated with the Construction Grounds Act and other laws regulating urbanism and construction*. It is obvious from the cited provision of the Ownership Act that it implies the transformation or privatization of the right of permanent use into private ownership on construction grounds. However, the task of regulating the process of transformation (privatization) was left to the special Construction Grounds Act passed approximately at the same time as the Ownership Act⁹.

It is undisputable that the bases for acquiring private ownership on construction grounds are found in Article 30, paragraph 1 of the Constitution of the Republic of Macedonia,¹⁰ which includes the guarantee of private ownership¹¹. Taking into

7 The principle *superficies solo cedit* is observed in the following legal sources: Art. 2, par. 3, Act on Ownership and Other Real Rights, *NN* 1/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14; Art. 14, Act on Real Property Rights, *Službeni glasnik Republike Srpske* br. 24/08, 58/09, 95/11 I 60/15; čl. 18, Real Property Code of R. Slovenija, *Uradni list RS*, št 87/02; čl. 19, st 3, Real Property Relations Act of Montenegro, *"Službeni list Crne Gore, broj 19/2009"*; § 94 BGB (1896); Art. 552, Code Civil (1804); Art. 667, 1, Schweizerisches Zivilgesetzbuch (1907).

8 Art. 5, par 1, Amendments to the Construction Grounds Act, *Official Gazette of R. Macedonia*, No. 21/91.

9 *Official Gazette of R. Macedonia*, No. 53/01.

10 *Official Gazette of R. Macedonia*, No. 52/91.

11 „The right of ownership and inheritance is guaranteed“.

account the constitutional guarantee of private ownership, the the provisions of the Ownership Act also reaffirm the guarantee of the right of ownership,¹² which includes ownership on construction grounds.

Construction grounds are deemed as things of public interest according to the Constitution and the Ownership Act¹³. Article 16, paragraph 3 of the Ownership Act clearly states that *all forms of ownership on construction grounds, agricultural land, forests, pastures and water are regulated with special laws*. Thus, there was a need for special legislation on construction grounds - the Construction Grounds Act, which also regulated the process of transformation of the right of permanent use.

4. Privatization of Construction Grounds in the Republic of Macedonia from the 2001 Construction Grounds Act until the implementation of the 2005 Act on Privatization and Lease of Construction Grounds Owned by the State

According to Article 6 of the 2001 Construction Grounds Act, the construction ground may be owned by the State and domestic natural and juridical persons. The provision of Article 6 actually proclaims that construction grounds may be in private ownership. In this context, Article 8 of this Act prescribed that construction grounds are subject to free trade.

Regarding the right of permanent use, it was already stated in the Ownership Act that its transformation will be regulated by the Construction Grounds Act. Following up the provisions of the Ownership Act, the Construction Grounds Act contains a separate chapter regulating transformation of the right of permanent use¹⁴. It can be noted that the Construction Grounds Act uses the term *transformation* rather than *privatization of construction grounds*, as well as the term *right of use* instead *the right of permanent use*. According to the provisions of this Act, the transformation proceedings fell under the jurisdiction of the Ministry for Transport and Communication. The Ministry was authorized to render decisions or to conclude contracts for transformation of the right of permanent use into the right of ownership on construction grounds.

The former owners, as well as users of construction grounds on bases of purchased houses, apartments or other structures built on socially owned construction grounds and users of construction grounds granted with compensation

12 „All foreign and domestic natural and juridical persons may acquire ownership, including the State and the municipalities in a manner and under conditions determined by this and other law“

13 Art.56, Constitution of the Republic of Macedonia, and Art. 16, Ownership Act

14 Art. 49-67, Construction Grounds Act

for building, were able to transform the right of permanent use into the right of ownership¹⁵.

In cases when the right of permanent use was obtained with socially owned funds for building or on the bases of afforded structure for performance of commercial or other activity of socially owned legal entities, the right of permanent use was transformed into a long-term lease of the construction grounds since the holders of the right of use are subjects of public law¹⁶.

The users of construction grounds afforded on auction sale or by direct settlement with compensation were able to transform the right of permanent use into ownership according to the Construction Grounds Act upon demonstrating valid evidence of payment¹⁷.

The right of permanent use of former owners of the construction grounds was transformed into ownership on bases of a decision rendered by the Ministry for Transport and Communications¹⁸. In all remaining cases of transformation, the Minister concluded a contract with the users of the construction grounds. The transformation contract was the legal base for registration of the right of ownership in the public records for registering rights on real estate¹⁹.

Two years after the implementation of the Construction Grounds Act, the Government of the Republic of Macedonia passed the Directive for the Manner and Proceedings for Sale of the Built Construction Grounds Owned by the State (Directive for Sale) from 7th of March 2003²⁰. The Directive regulated the sale of built construction grounds owned by the State to domestic natural and juridical persons. The sale took place under the following conditions: 1) The construction ground was to be a defined urban parcel; 2) The erected building was to be legal and of permanent nature; 3) The owner of the building was to be a holder of the right of permanent use and in possession of the construction ground²¹. The land, according to the Directive for Sale, was sold by means of contract for sale between the Minister of finance (acting in the name of the State) and the user of the land. The price was pre-determined by the Directive for Sale and it depended on the zone the land was located in. The highest sale price was 600 dinars (approximately 10 Euros) per square meter.

15 Art. 51-52, Construction Grounds Act

16 Art. 54, Construction Grounds Act

17 Art. 55, Construction Grounds Act

18 Art. 51, Construction Grounds Act

19 Art. 57, Construction Grounds Act

20 *Official Gazette of R.Macedonia, No. 13/2003.*

21 Art. 1 and 2, Directive for Sale...

5. Privatization of Construction Grounds according to the 2005 Act on Privatization and Lease of Construction Grounds Owned by the State

1. The right of use today is transformed (privatized) under the Act on Privatization and Lease of Construction Grounds Owned by the State (hereinafter: the Privatization Act). According to the provisions of this Act, the users of the construction grounds may acquire ownership, right of long-term lease and temporary lease.

The construction grounds ownership of the State where the right of use is instated according to this Act may be privatized in favor of natural and juridical persons²². Depending on the number of holders of the right of use, the privatization may be realized on the entire parcel or as co-ownership of several persons in the scope of a defined urban parcel in the zoning plans or other similar documentation²³. It should be noted that the Act has excluded from privatization the construction grounds where objects in public use are built (streets, town squares, parks etc.), as well as the construction ground where the zoning plans predict building of objects in public use, and the construction grounds where temporary structures are placed or planned to be placed²⁴.

The privatization of the construction ground may be with or without compensation. The users of construction grounds on bases of previous ownership of that land, and all the other users who had paid compensation for the right of use, realize the privatization without compensation. All other users (natural and juridical persons) who have obtained the right to use without compensation are obligated to pay compensation in the privatization proceedings²⁵. The amount of compensation that is due is determined by a by-law²⁶.

According to this Act (before being amended), the privatization proceedings are initiated on part of the users in period of two years from the day the Act has been put into effect²⁷. All claims for privatization fall under the jurisdiction of the Administration for Property Related Matters of the Ministry of Finance. The privatization proceedings are terminated by rendering a decision on privatization²⁸.

22 Art. 12, Act on Privatization and Lease of Construction Grounds Owned by the State (hereinafter: Privatisation Act).

23 Art. 13 and 14, Privatization Act

24 Art. 6, Privatization Act

25 Art. 16, 17 and 19, Privatization Act

26 Art. 24, Privatization Act

27 Art. 27, Privatization Act

28 Art. 29, Privatization Act

If the holder of the right of use does not file for privatization in the determined time limit of two years, the basic text of the Privatization Act prescribed that a right of long-term lease will be instated by a decision of the Administration for Property Related Matters.²⁹

In some cases, the privatization is not possible because of disputes related to the right of use. Since the construction grounds could not be privatized or the right of long-term lease to be instated in these cases, the Act prescribed the possibility of instating temporary lease on the land until resolution of all disputes³⁰.

Privatization is the usual manner of terminating the right of use on construction grounds; however, there are situations when this right is terminated on demand of the user if it is determined that other person is the rightful holder of the right,³¹ or if the right is taken away from the user without granting privatization³².

It is interesting to note that the Privatization Act failed to derogate the 2003 Directive for Sale, which caused duality in the privatization process of the construction grounds owned by the State as there were two different proceedings and different prices for privatization, which infringed the principle of just treatment.

2. Due to the problems caused by the relatively short term for filing for privatization, there was a need for the deadline to be prolonged. This initiated the first Amendments of the Privatization Act, where the term was prolonged until 25 of January 2009³³.

3. After four years of implementation of the Privatization Act, the next amendments were introduced in 2008³⁴. The amendments were intended to simplify the privatization proceedings. Also, there were several benefits added, such as: the broadening of the circle of persons who had the right to privatization on the bases of previous ownership on the construction grounds. More precisely, the

29 Art. 50-51, Privatization Act

30 Art. 56-64, Privatization Act

31 Art. 70-80, Privatization Act

32 The right of use may be taken away in 3 situations. The first is when the right of use is instated on agricultural land that has turned into construction ground with new zoning plans and other similar documentation. This type of land was used by juridical persons on the basis of the Act on Transformation of Firms and Communes Operating with Social Capital for Agricultural Purposes (*Official Gazette*, No. 48/00, Art.72). In the second situation, subject of privatization is not part of the construction ground where new construction is planned; therefore, the right of use on that part of the grounds is taken away (Art. 73). The third situation is when the user was afforded a vacant construction ground for construction that has never been performed (Art. 74)

33 *Official Gazette*, No. 13/07.

34 *Official Gazette*, No. 165/08.

heirs of the previous owner were also granted the status of previous owners, regardless of whether they acquired the right of use by gift, contract for allotment of the estate during lifetime, or agreement for lifelong alimantation and not by inheritance. The 2008 Amendments to the Privatization Act also took into account the amendments to the Ownership Act with regard to foreigners who were granted the possibility to acquire ownership on construction grounds in the Republic of Macedonia. Concurrently, foreigners were granted the possibility to file for privatization of construction grounds under the Privatization Act³⁵.

The 2008 Amendments to the Privatization Act also addressed the issue of lack of zoning plans. This impeded the privatization proceedings since, under the Act, privatization was allowed in the scope of a defined urban parcel³⁶. In many settlements, there were no zoning plans, no defined urban parcels and no possibility for privatization. In such cases, the 2008 Amendments prescribed that privatization will be allowed within the scope of the acquired right of use.

In order to provide more just privatization proceedings, the 2008 Amendments increased the number of users of construction grounds owned by the State who were allowed privatization without compensation. It referred to the users who obtained the right of use by transfer from a person who was afforded the right of use with compensation. The logic behind these provisions is as follows: since the former user (should he ask for privatization) is not obliged to pay compensation for privatization, the successor (who is filing for privatization) should not be obliged to pay compensation for privatization either. With the 2008 Amendments, the deadline for filing privatization claims was once again prolonged until 15th January 2011 in order to address the real needs of the privatization proceedings³⁷.

In conclusion, the 2008 Amendments to the Privatization Act simplified the privatization proceedings. They also removed the duality in privatization process by derogating the 2003 Directive for Sale. This made the Privatization Act the only legal act that regulated privatization, except for the cases where sale proceedings had already been initiated and the sale price and transfer taxes had already been paid in accordance with the Directive. Yet, it should be noted that these Amendments also had a restrictive provisions regarding the privatization of construction grounds where apartment buildings were erected.

35 Art. 12, par. 2, the 2008 Amendments to the Privatization Act

36 Art. 7, par. 1 and 2, the 2008 Amendments to the Privatization Act

37 Art. 14, the 2008 Amendments to the Privatization Act

4. The 2009 Amendments to the Privatization Act³⁸ also broaden the circle of users of construction grounds who can file for privatization of the right to use. The users in question are owners of buildings erected on construction grounds owned by the State. In these cases, even if there is no legal act for awarding the right of use, it is considered that these users have acquired the right of use by law³⁹ at the moment the construction of the building has finished according to the building permit⁴⁰. The second important novelty in the 2009 Amendments is implementing equal conditions for privatization for natural and juridical persons by recognizing the term "*acts for urban planning that define urban parcel*"⁴¹. The third important novelty emerging from the 2009 Amendments are the provisions of the Act regulating the manner of privatization in case of co-users of the same urban parcel. In these cases, the privatization is realized in the scope of the ideal part belonging to each user if and when the parts of the co-users were registered in the Land Cadastre or the Real Estate Cadastre⁴². If the ideal parts are not registered in public records, the land will be privatized as joint ownership of the users. However, this solution was subject to criticism by scholars. They warned that joint ownership of land where apartment buildings are erected could limit the freedom of disposition of the right of ownership that is guaranteed in Article 30 (par. 1) of the Constitution of the Republic of Macedonia. In situations where the land is treated as joint ownership, according to the restrictive regulation concerning joint ownership in the Ownership Act, owners of separate building units can only sell that unit to other owners in the same building but not to third person. This clearly is not the intent of the legislator, but the set provisions could cause that adverse effect if they are implemented along with the provisions of the Act on Ownership and Other Real Rights. In order to avoid the limitation of free disposition of apartments and other building units, scholars suggested that the right of ownership on the land where the building is erected should be treated as co-ownership instead of joint ownership (Babić, 2010: 539; Rašović, 2010: 555-556; Simonetti, 2010: 572). According to officials, the reason why the legislator opted for joint ownership on land under apartment buildings was to avoid costs in determining ideal parts of the land for co-owners.

Other novelty in the 2009 Amendments refers to the category of users who have the right of privatization without compensation. This category also included

38 *Official Gazette*, No. 146/09.

39 Basic Property Relations Act. *Official Gazette*, No. 6/80 and 36/90; Construction Grounds Act. *Official Gazette* No.36/75; Act on Trade with Land and Buildings. *Official Gazette*, No. 10/79 and Act on Ownership of Building Units. *Official Gazette*, No. 20/74.

40 Art. 1, the 2008 Amendments to the Privatization Act

41 Art. 2, the 2008 Amendments to the Privatization Act

42 Art. 5, the 2008 Amendments to the Privatization Act

owners of buildings acquired from users who obtained the right to use with compensation⁴³.

The analysis of the 2009 Amendments provisions shows a rapid dynamic in privatization proceedings by simplifying the procedure and the manner of acquiring proper documentation in the proceedings.

5. In 2011, the Privatization Act was amended twice. The first 2011 Act amending the Privatization Act (hereinafter: Amending Act)⁴⁴ introduced a new model for determining compensation in the privatization proceedings when apartment buildings are subject to privatization. In such cases, the amount of compensation required was divided in equal parts among the owners of the apartments in the building⁴⁵.

With the first 2011 Amending Act, the privatization proceedings were further simplified since users were no longer obligated to deliver certain types of documentation that was both costly and time consuming. The amendments also reinstated the privatization of the construction grounds in the scope of the acquired right of use when there were no defined urban parcels, and prolonged the deadline for filing for privatization until 31st December 2012⁴⁶.

6. The second 2011 Act amending the Privatization Act⁴⁷ was of administrative nature and aimed to harmonize the Privatization Act with the Basic Administrative Procedure Act in the area of non-responsive administration. The principle of responsibility for failing to render a decision was introduced⁴⁸. Changes in procedure were also introduced in order to increase efficiency and responsibility for the authorized subjects leading the privatization proceedings.

7. The 2014 Act amending the Privatization Act mostly addressed the issue of a long-term lease as alternative to privatization⁴⁹. The long-term lease was now designated as lease and the short-term lease was removed from the provisions⁵⁰. This Amending Act brought on dilemmas among scholars because Article 2, paragraph 1, point 2 of this Act states that the lease is a real right, whereas the Privatization Act regulates lease as an obligation.

43 Art. 7, the 2008 Amendments to the Privatization Act

44 *Official Gazette, No.18/11.*

45 Art. 1, the first 2011 Act amending the Privatization Act

46 Art. 3, the first 2011 Act amending the Privatization Act

47 *Official Gazette, No. 51/11.*

48 Art. 1, the second 2011 Act amending the Privatization Act

49 *Official Gazette, No. 27/14.*

50 Art. 2, 6, 32 and 33, the first 2014 Act amending the Privatization Act

An important novelty emerging from these amendments is the possibility for rendering a partial decision on privatization of the land under the building in cases when there is no defined urban parcel⁵¹. This Amending Act also prescribes new ways for termination of the right of use of juridical persons that filed for bankruptcy⁵² and in case when a building is legalized on the construction grounds⁵³. Moreover, the deadline for filing for privatization was prolonged for another 9 months' period⁵⁴.

8. The second 2014 Act amending the Privatization Act⁵⁵ determine the distinction between structures that obtained legal status under the right of use acquired by law and structures that obtained legal status by legalization⁵⁶. Another long-awaited novelty is the possibility for previous owner to privatize even the parts of the construction ground where construction of structures of public interest was planned but has never been realized. Considering that many planned constructions of objects in public interest were not undertaken in years, this novelty is considered to be logical and just⁵⁷. Other novelties introduced by this Act include legal provisions for: determining the manner of privatization when the urban parcel has several erected buildings built with building permits or legalized; privatization of construction ground where apartment buildings are erected (condominiums); privatization of ideal parts of the right of use in condominiums; and others.

At the end it is important to note that the second 2014 Act amending the Privatization Act allowed privatization of construction ground owned by the state without a registered right of use. In such cases, privatization is permitted for up to 500 m² of the parcel, and only for housing purposes⁵⁸. The Amending Act also stipulated the last prolonged time limit for filing for privatization, which expired on 15th December 2014⁵⁹. Six months after the expiry of this deadline, the Administration for Property Related Matters was authorized to distribute

51 Art. 8, the first 2014 Act amending the Privatization Act

52 The novelty stems from the provisions of the Act on Termination of Bankruptcy Proceedings Initiated with the Forced Bankruptcy and Liquidation Act and the Bankruptcy Act. *Official Gazette*, No.12/14.

53 The novelty stems from the Act on Treatment of Illegally Erected Structures. *Official Gazette*, No. 23/11.

54 Art. 48, the 2011 Act amending the Privatization Act

55 *Official Gazette*, No. 144/14.

56 Art. 1, the second 2014 Act amending the Privatization Act

57 Art. 2, the second 2014 Act amending the Privatization Act

58 Art. 4, the second 2014 Act amending the Privatization Act

59 Art. 7, the second 2014 Act amending the Privatization Act

information about the submitted requests for privatizations to the Real Estate Cadastre for notation and for the registered right of use to be deleted⁶⁰.

9. In 2015, the Privatization Act was amended three times. The first 2015 Amending Act⁶¹ excluded the possibility for payment for privatization or rent from lease by using state-issued denationalization bonds⁶². The second 2015 Amending Act⁶³ set up the legal framework for digital connection between the Administration for Property Related Matters and the Agency for Real Estate Cadastre. This enabled the Administration for Property Related Matters to obtain relevant information from the Real Estate Cadastre in a relatively fast and easy manner. Also, it enabled the Administration to send digital copies of all document relevant for registration of rights in the Real Estate Cadastre⁶⁴.

More substantial changes were introduced by the third 2015 Amending Act⁶⁵. These amendments specify that users who are former owners and users who had obtained the right of use with compensation can get privatization in the scope of the right of use, even if the land has no defined urban parcel in zoning plans⁶⁶. Users of construction grounds outside the urban planning zone can also transform their right of use to ownership on the bases of conclusion issued by the Administration for Property Related Matters⁶⁷. Former owners who have missed the deadline for filing for privatization can also get the privilege to transform the right of use to ownership by filing an application with the Real Estate Cadastre. However, this is allowed only if the construction ground that former owners use is vacant. The deadline for filing these type of applications expired on 15th June 2016; after the expiry of this deadline, the Agency for Real Estate Cadastre is authorized to delete the registered right of use. According to information obtained from officials, there are 2,583 applications filed with the Agency for Real Estate Cadastre for transforming the right of use of former owners into the right of ownership.

10. The last Act amending the Privatization Act was enacted in 2016⁶⁸. The main reason for passing this Act was the need for harmonizing the Privatization Act

60 Art. 18, the second 2014 Act amending the Privatization Act

61 *Official Gazette, No. 72/15.*

62 Art. 1, the first 2015 Act amending the Privatization Act

63 *Official Gazette, No. 104/15.*

64 Art. 1, the second 2015 Act amending the Privatization Act

65 *Official Gazette, No. 153/15.*

66 Art. 4, the third 2015 Act amending the Privatization Act

67 Art. 5, the third 2015 Act amending the Privatization Act

68 *Official Gazette, No. 23/16.*

with the new General Administrative Procedure Act that set up new principles and guidelines for conducting administrative proceedings (precise deadlines, sanctions for delaying the procedure, etc.)⁶⁹.

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ПРОЦЕС ПРИВАТИЗАЦИЈЕ У ПРАВНОМ СИСТЕМУ РЕПУБЛИКЕ МАКЕДОНИЈЕ

Резиме

Циљ овог рада је да представи, испита и анализира процес приватизације грађевинског земљишта у државној својини у Републици Македонији. Аутори анализирају законе који регулишу приватизацију грађевинског земљишта у Републици Македонији. Приватизација грађевинског земљишта у Македонији почела је доношењем Закона о грађевинском земљишту из 2001. године који је уређивао процес такозване “трансформације грађевинског земљишта”, као правни институт који признаје стицање права својине претходним власницима, као и стицање права својине носиоцима права на коришћење грађевинског земљишта.

Следећи корак у процесу приватизације је Уредба о начину и поступку отуђења грађевинског земљишта из 2003. године, којом се уређује стицање права својине на грађевинском земљишту у корист лица која имају право коришћења тог земљишта, а која притом имају подигнут објект на том земљишту. Према овој Уредби, приватизација грађевинског земљишта у корист претходних власника остаје у надлежности Закона о грађевинском земљишту из 2001.

Трећа фаза у процесу приватизације започела је 2005. године, усвајањем Закона о приватизацији грађевинског земљишта и закупу грађевинског земљишта у државној својини, који је још увек на снази у македонском правном систему. У раду се истиче да се читав процес приватизације у Републици Македонији данас врши у складу са Законом из 2005. године, који признаје право приватизације у корист претходних власника (приватизације без накнаде), као и право приватизације у корист лица која имају право коришћења грађевинског земљишта а који су стекли такво право без накнаде (приватизација уз накнаду).

*Поред представљања, испитивања и анализе прописа о процесу приватизације, аутори наводе разлоге за доношење таквих прописа, од 2001. године до данас. Као што је наведено, циљ државе је да обезбеди приватизацију целокупног грађевинског земљишта у државном власништву, уз право коришћења у корист физичких и правних лица, чиме би се обезбедила примена принципа *superficies solo cedit*.*

Кључне речи: *приватизација, закуп, грађевинско земљиште, право коришћења, трансформација, државно власништво.*

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FAMILY PROTECTION: PROMOTING HUMAN RIGHTS OF FAMILY MEMBERS**

Abstract: *Modern family that copes with current issues (gender equality, prohibition of discrimination, maternity protection, child poverty eradication) is subject to socio-economic changes which generate the instability of the family across the globe. Current situation in this area confirms the need for strengthening the family as an institution. From a legal point of view, preservation and protection of the family is not conditioned either by structure or family type. Hence, the subject matter of this paper is the context and objectives of the international and regional legal instruments that assert the vital importance of the family and traditional family values.*

Keywords: *family, human rights, family protection, family policy, United Nations, European Council, European Union.*

1. Introduction

Law is a mechanism for regulating relations between people, and family relations are regulated by legal rules that have their basis in the national family legislation. However, the family, as the basic unit of society, is studied and conceptually determined, above all, in sociology, given that the law cannot be separated from its social reality (Gurvitch, 1942, 2001: 4). The concept of “a family unit” is determined by two variable elements: 1) common life and work of a group of people living in the same household; and 2) kinship between them (Milić, 2007: 414). The family is a social group where various aspects of human life come to life. Furthermore, it is a unique and dynamic social framework within which

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numerous processes and functions are intertwined. The network of relationships and functions is the focal point of not only social but also philosophical, psychological, social, economic, and legal observation. Perceived in the context of time, family roles had lesser or greater importance in different time periods. Some of those functions declined in importance, some of them have been restored, and some have remained unchanged (Golubović, 1981: 141). In the course of its evolution process, the family as a social phenomenon has been subject to and is still subject to many changes irrespective of changes in its structure. Structural ambivalence of the family enables differentiation and development of diverse relationships within the family itself (Vojvodić, 2009: 49). Since the family is pluralistic by nature (i.e. a natural, historical, biological, social, spiritual and moral community), a review of sociological considerations on the family as a social nucleus is highly important for the purposes of this paper. In the family law literature, one of the most cited definitions of the family assumes that the family is the bridge between the biological and the social, "a bio-social unit that does not come to life only through social laws, rules and conventions but also through biological laws of reproduction and blood relations among the members comprising a family" (Golubović, 1981: 57). The family is, *ipso facto*, the nucleus of society, the basic community as it represents an indispensable framework for procreation and raising children, and so it must be the center of social care as the most important pillar of the social system, as well as its biological substrate (Cvejić-Jančić, 2009: 50).

In the times we live in, the social policy is marked by the process of democratization of society and family. The emancipation of women and special protection of motherhood, gender equality, promotion and protection of children's rights, and socialization of the family are the factors that contribute to the humanization of family relationships and the development of individualism by means of "free bonding, and establishing friendly and democratic relations among family members" (Mladenović, 1966: 327, 1973: 470). Applicability of the aforementioned factors is estimated on the basis of their real social impact. In the body of sociological and legal literature, "socialization" or "socialization of the family" is the official term for a set of measures and social policy strategy concerning the family. This strategy is aimed at establishing a closer cooperation of the family and the society, and it enables direct contact between the society and individual citizens (Pavićević, 2007: 117). When it comes to the individual- family- society relationship, the family no longer has the role of an intermediary. Consequently, the opportunities for free choice and independence of family members in the outside world are considerably greater. On the other hand, this enables a more direct influence of the society (the state) on the individual. In the past period, as a rule, individual needs used to be provided for within the family but, now, the

process of providing for individual family members' needs has been transferred into the jurisdiction of different social institutions that are not sufficiently effective in addressing the needs and problems at the individual level (Pavićević, 2007: 118).

2. The family in national legislation and jurisprudence

Attempts at providing a legal definition of the family, the concept which is subject to a constant process of change and development, and affected by numerous factors outside the legal domain, are provisional, primarily due to the influence of myriad factors in the social environment but also because of the fact that relationships between family members are bound to change over time.¹¹ Thus, in the Family Act of the Republic of Serbia, the general concept of family is not defined, except when it comes to the acquisition of joint property of the family community and protection from domestic violence (Art. 195, item 2 and Art. 197, item 3 FA). *Ratio legis* of this solution is to avoid the risk of restricting the notion of family with a legal definition, since defining does not allow one to distinguish between what is essential and universal in the family and what is changing under the influence of socio-historical circumstances (Draškić, 2014: 46).

Family relationships generate and enable the continuation of processes that are sooner or later undermined by legal solutions, or their initial value and practical significance are completely revoked (Alinčić, Hrabar, Jakovac-Lozić, Korać

¹ For instance, the Family Act of the Republic of Montenegro (*Official Gazette of the Republic of Montenegro*, no. 1/2007), defines the family as the biological community comprising parents, children, and other blood relatives who have mutual rights and obligations, and as the basic community where children are cared for and raised. In the legislation of Bosnia and Herzegovina, the family is defined as the biological community consisting of parents and children and other blood relatives, relatives-in-law, adoptive parents and adopted children, and persons born into extramarital relationships if they are living in the same household (Art. 2. Family Act of Bosnia and Herzegovina Federation, "BiH Official Gazette", nos. 35/05, 31/14). In Article 1 item 2. of the Family Act of the Republic of Srpska, the family is defined as the biological community of parents, children and other relatives ("Official Gazette of the Republic of Srpska", nos. 54/02, 63/2014). The family is defined in the same way in Article 2. item 1. of the Family Act of Brcko District ("Official Gazette of Brcko District" no. 23/2007). In Article 2 of the Marriage and Family Act of Slovenia (Zakon o zakonski zvezi in družinskih razmerjih, "Uradni list RS, št. 69/2004), the family is defined as the biological community of parents and children which enjoys special protection in the interest of the child. The Family Act of Macedonia (in Article 2. item 1) specifies that the family is the biological community of parents and children and other relatives, if they are sharing the same household (Закон за семејството, „Службен весник на РМ“, nos. 80/92, 9/96, 38/04, 33/06, 84/08, 157/08-corrected text, 67/10, 156/10, 39/12, 44/12, 38/14, 115/14, 104/15, 150/15). Definitions of the family can be found in family legislations of most former SFRY republics, except in Serbian and Croatian legislation.

2006: 7). Given the volatility and susceptibility to potential conflicts of interest in family relations, there is a need for developing a normative framework where family relations shall be treated as legal goods (assets) and protected values. Domestic relations are established between natural persons related by a fact that is recognized or designated as a condition for establishing an individual legally regulated relationship. Legal effects of each domestic relationship (a set of rights and duties) are prescribed by the law (Alinčić et al. 2006: 6). The specific nature of domestic relations stems from the bond determined by birth and kinship (by consanguinity or by adoption), marriage (affinity) or other legally relevant fact.

In legal theory, as opposed to the legislation, definitions of the family are frequent, and they are the result of analyzing the content of legal regulation of family relations in a particular legal system. In domestic legal doctrine, for example, one of the many conceptual definitions of the family is as follows: the family is a community including a narrow or a wider circle of persons interrelated through common life and kinship, whose relations are governed by special rights and duties prescribed by the law, morals, custom or religion. (Cvejić-Jančić, 2009: 49). Another definition, from the aspect of the family community, defines the family as a community of (blood) relatives related through responsibility for life and mutual benefit (Janjić-Komar, 2006: 5).

The family is a legal institution and enjoys institutional guarantees (Ponjavić, 2014: 56). The constitutional provisions on marriage and family determine common values which should be used as the legal grounds for regulating family relations and the content of domestic family legislation. The principle of special protection of the family (Article 66, item 1 of the Constitution of the Republic of Serbia)² implies that the family enjoys special protection by the society and the state; it means that the legislator, the government, and professional services should provide family members with the best possible protection of their interests in family relations and socially organized activities (health, education, social protection, etc.). The family is, therefore, a constitutional and legal term that binds the entire legal system even though it has not been conceptually determined either by the Constitution or the Family Act of the Republic of Serbia.³ In the Family Act (FA), the level of regulation has been shifted from family ties and relationships to individual rights, but the legislator has retained the formal legal framework in defining these relationships, which is to say that the family is treated as a model for regulating direct and personal relationships in the social sphere (Janjić-Komar, 2006: 4). Undoubtedly, every society protects the family, in particular due to its reproductive function which is important for the

2 The Constitution of the Republic of Serbia, no. 98/2006.

3 The Family Act of the Republic of Serbia (hereinafter: FA), *Official Gazette of the Republic of Serbia*, nos. 18/2005, 72/2011-another law, 6/2015.

renewal of the population, as well as due to the fact that child-raising, upbringing and psychological support are primarily provided by/in the family. Accordingly, the question is whether the principle of special protection of the family is sufficiently exercised in reality, or whether the protection is only provided to families who do not perform their functions according to the contemporary standards (Kovaček-Stanić, 2014: 17).

3. International framework for family protection

Nowadays, the family is at a great turning point due to the (global) processes that the entire society is going through. These processes have generated the family crisis and disorientation, which call for different forms of social reaction and measures of state intervention, as well as relevant action of international human rights' organizations. These activities are aimed at strengthening cooperation in resolving the existing problems encountered by the family, and taking concrete actions to strengthen family-oriented policies and programs as part of an integrated approach to promoting human rights and human development. Being a natural environment for the growth and well-being of all its members and particularly children, the family should be provided the necessary protection and assistance so that it can fully assume its responsibilities within the community. Within the framework of its powers and jurisdiction, the international human rights protection mechanism is increasingly focusing on the obligation of member states to provide protection and support to the family as a natural and fundamental social unit.

In 2014, for the purpose of promoting and protecting all human rights, civil, political, economic, social and cultural rights, the Human Rights Council of the United Nations adopted Resolution 26/11 on the protection of the family⁴, which triggered the process of intense activity in the field of family protection. A year later, at the beginning of July 2015, the UN Human Rights Council adopted Resolution 29/22 on the protection of the family: contribution of the family to the realization of the right to an adequate standard of its members, especially the

⁴ Resolution 26/11 Protection of the family (A/HRC/26/L.20/Rev.1) (25.06.2014.), available at: <http://www.ohchr.org> Retrieved: May 20, 2016. With reference to General Assembly resolution 44/82 of 8 December 1989, 47/237 of 20 September 1993, 50/142 of 21 December 1995, 52/81 of 12 December 1997, 54 / 124 of 17 December 1999, 56/113 of 19 December 2001, 57/164 of 18 December 2002, 58/15 of 3 December 2003, 59/111 of 6 December 2004, 59/147 of 20 December 2004, 60/133 of 16 December 2005, 62/129 of 18 December 2007, 64/133 of 18 December 2009, 66/126 of 19 December 2011, 67/142 of 20 December 2012 and 68/136 of 18 December 2013 on declaring preparation of the celebration of the International Year of the Family and its 20th anniversary, the primary responsibility of states to promote and protect human rights and fundamental freedoms of all human beings including women, children and the elderly was confirmed.

role of family in eradicating poverty and achieving sustainable development.⁵ The very name of this resolution, with its meaningful and very complex content, calls for an explanation of the concept of sustainable development. Namely, although there is no single definition of sustainable development, the concept of sustainable development could be defined as a new strategy and philosophy of social development, i.e. development that meets the current needs without compromising the ability of future generations to satisfy their own needs.⁶ Sustainable development as an integral concept implies economic, technological, *social* and cultural development that is in harmony with the needs for protection and improvement of the environment in the ecological, economic, social⁷, and institutional dimension.⁸

The family contribution to society is not sufficiently emphasized, which results in marginalization of family potentialities in national development and attainment of the envisaged objectives (eradication of poverty, children’s education, reducing maternal mortality, promoting gender equality and strengthening the status of women in society, shared parental responsibility), and ultimately the creation of just, stable and secure societies based on the rule of law. Considering that the family is more and more vulnerable, the member states are asked to create the environment conducive to the empowerment and support of all families (item 4-8 of the Resolution). In accordance with the obligations arising from the international human rights law, the member states should provide effective protection and assistance by taking the following measures: creation of policies adjusted to families whose major aim is to support the family, and assessment of the effects of such policies and programmes for the benefit of the

5 Resolution 29/22 Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development (**UN Pro-Family Resolution**, 3.07.2015.) (A/HRC/RES/29/22), available at: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/ProtectionFamily.aspx> Retrieved: May 18, 2016.

6 World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development* (Oslo, 20 March 1987) 41, available at: <http://www.un-documents.net/our-common-future.pdf>. Retrieved June 1, 2016.

7 United Nations Commission on Sustainable Development. *Report on the Third Session* (11–28 April 1995) *Economic and Social Council*. Official Records, 1995. Supp. No.12. E/1995/32 E/CN.17/1995/36. United Nations, New York, 1995 available at: <http://www.doc-developpement-durable.org>. Retrieved June 2, 2016.

8 Leadership Council of the Sustainable Development Solutions Network (2013). *An Action Agenda for Sustainable Development. Report for the UN Secretary-General* (6 June 2003), available at: <http://www.unsdsn.org> Retrieved June 1, 2016. The institutional dimension (as the fourth dimension of the concept of sustainable development) refers to the principle of good governance.

family; creation, implementation and realization of family policy in the field of labour, health care, social security and education in order to create an atmosphere in which families can find support (affordable, accessible and quality services whose aim is to care for children and other dependent family members, programmes aimed at raising public awareness and drawing attention of other social factors about the equal division of professional responsibility and family duties between men and women); research into the causes and mitigating the effects of family breakdown; strengthening or establishment of relevant national agencies or governmental bodies whose job involves implementing and monitoring family policy.⁹

In a nutshell, the Resolution (as an instrument of a universal security system) is a response to the socio-economic changes that have exerted a considerable impact on the (in)stability and sustainability of the family worldwide. The member states are responsible for preserving and protecting the family, and obliged to provide for the exercise and protection of human rights and fundamental freedoms of all human beings, including family members. As long as the rights of family members are respected, the family is a powerful factor of social cohesion and integration, intergenerational solidarity and society development, and plays a key role in preserving cultural identity, traditions, morals and value system of the society. To this end, the member states should develop and implement innovative ways of providing assistance to families and their members, who are faced with specific problems such as: extreme poverty, unemployment, illness, domestic and/or sexual violence, dowry payments, drug-addiction, incest, abuse, neglect or abandonment of children. Promoting family-oriented policy adapted to the family needs is a question of general importance for achieving the internationally agreed development goals.

4. The right to respect for family life

At the European level, the system of standardizing and promoting human rights is continuously being developed in accordance with the European standards. Regional organizations are signing agreements on human rights and creating their own systems of control over the implementation of the obligations of the member states in accordance with the specific needs of the environment in which they operate.

Within the European framework, the most important human rights protection system was established by the Council of Europe, by adopting the European

⁹ Subparagraph 20 (a), (b), (c) of Resolution on protection of the family (UN Pro-Family Resolution).

Convention on Human Rights (1950).¹⁰ Article 8, item 1 of the ECHR provides the following: “Everyone has the right to respect for his private and family life, his home and his correspondence”. As the Convention does not provide a definition of family, the correct interpretation of the concept of family life by the European Court of Human Rights (ECtHR) is of paramount importance. In the Court’s practice, which was *inter alia* formed through the interpretation of Article 8, the concept of family life is characterized as an autonomous concept which must be interpreted independently from the domestic legislation of the member states of the Convention, in spite of the fact that general principles of national law must be taken into account in the course of such an interpretation (Ponjavić, 2003: 826).

In determining the concept of family life, the Court interpretation focused on two segments: the relationship between spouses and extramarital partners, and the relationship between parents and children, that is between other persons comprising the family (Gajin, 2012: 72). The European Court of Human Rights adopted the model of family life consisting of husband, wife and children. However, in the Court’s opinion, even though spouses with (born and/or adopted) children constitute “a conventional family unit”, this does not mean that family life is limited only to marriage and kinship. Under Article 8 of the European Convention on Human Rights, the concept of family life also includes extramarital partners.¹¹ On the one hand, family life is not limited only to a legally recognized relationship, i.e. the Court takes into account the social, emotional and biological factors when assessing whether this relationship can be defined by the phrase “family life”, while on the other hand, legal connection can be sufficient grounds to constitute “family life”.¹²

10 The European Convention on Human Rights, *European Treaty Series- No. 5*, available at: <http://www.echr.coe.int> Retrieved June 15, 2016. The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45) which entered into force on 21 September 1970, Protocol No. 5 (ETS no. 55) which entered into force on 20 December 1971, and Protocol No. 8 (ETS no. 118) which entered into force on 1 January 1990, and it also comprised the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

11 No. 25735/94 *Elsholtz v Germany* [2000]; No. 16969/90 *Keegan v Ireland* [1994]; No. 18535/91, *Kroon and others v The Netherlands* [1994]; No. 42276/08 *Kurochkin v Ukraine* [2010];

12 Nos. 78028/01 78030/01 *Pini and Others v. Romania* [2004]; No. 23218/94, *Gül v Switzerland* [1996];

The European Court of Human Rights emphasizes the view that respect for family life implies both positive and negative obligations for the member states. Article 8, item 2 prescribes that “there shall be no interference by a public authority with the exercise of this right”. This Article not only obliges the state not to interfere with family life but also, in some situations, requires from the State to promote family life. The Court judgment in the case *Stubbings v. the UK* explains the aforementioned attitude: “While the essence of the provision of Art. 8 of the European Convention on Human Rights is protection of the individual from arbitrary interference by the state authorities, it does not compel the state to simply refrain from intervention. This basic negative task can be accompanied by a positive obligation which is itself present in effective respect for private and family life. These obligations may involve the implementation of measures devised to provide respect for family life among individuals.”¹³

Positive action or measures taken by the member states may be the necessary element for enjoying the right to family life because, in this particular case, the failure to take action can be interpreted as impeding the exercise of the right to family life. In order to ensure that the interference by the state can be justified, the following facts have to be proven in each individual case: that the interference of the state is in accordance with the law; that it is in the interests of the national, public safety or the economic well-being of the country; and that the interference by the state is necessary rather than sensible or desirable. In addition, the degree of interference by the state must be proportional and appropriate (Herring, 2001, 2004: 312).

All things concerned, it can be inferred that the flexible approach adopted by the European Court of Human Rights is a result of diverse family circumstances in the member states of the Council of Europe, as well as the implications of crisis in family relations and the directions in which they are developing (Roagna, 2012: 29). The fact that the Court decides on the existence of family life on a case-by-case basis, by establishing the presence of close personal ties between the parties, supports the view that it is not possible to enlist all kinds of relations that constitute family life.

5. The family in the European Union: family policy

The interest of wider scientific and political circles in the EU in the field of family policies has begun recently. In the overall EU policy, for six decades of its exist-

13 No. 00022083/93; 00022095/93 *Stubbings v. UK* [1996]; No. 00017383/90 *Johansen v. Norway* [1996]; No. 00019823/92 *Hokkanen v. Finland* [1992].

ence¹⁴, the jurisdiction of the EU member states has been continuously expanded in the economic sphere, whereas the area of social policy has remained within the competence of the member states. Social policy at the EU level is characterized by clear regulations in the field of labour and employment: safety at work, prohibition of discrimination (etc.), and member states have autonomy in the areas of social protection (Pantelić, Burgund, 2013: 178). By establishing the principle of subsidiarity in the Maastricht Treaty, firm limitations were imposed on the spreading of competencies of the EU and in the area of social policy. Given the fact that it is the area where competence is divided between the EU and the member states, it means that the EU exercises its jurisdiction only in matters that are defined through the relevant instrument of the Union, and not in the whole area of social policy (Borhart, 2010: 36).

Common challenges encountered by families in all nation states have a significant impact on defining firmer family policy goals. Bearing in mind the diversity of European family policies and the current situation in the sphere of family policy, there is a clear need for greater harmonization and better coordination of national legislations in this field. Three dimensions or purposes of the EU family policy are as follows: 1) welfare of the child; 2) gender equality; 3) establishing a balance between professional and family life, which are mutually intertwined and cannot be viewed separately (Pantelić, Burgund, 2013: 179). The need for harmonization of national legislations in the field of family policies by providing equal treatment to every family results from the impact of the economic crisis on families and the family policies of the member states, as well as from relevant international human rights documents relating to the protection of the family.

In order to integrate family policy into other communitarian policies, the European Parliament adopted Resolution on family policies in the European Community (1983)¹⁵ and, thereby, paved the way for stimulating further activities of the union in this domain. Three years later, recognizing that there is a fundamental need for common rules and operation, and due to the alarming data on the demographic situation in the European Union, the Council of Ministers

14 The foundations of the EU were laid in 1951 by signing the Treaty on establishing the European Coal and Steel Community (Treaty of Paris). The Treaties of Rome in 1957 established the European Economic Community and the European Atomic Energy Community. The next step towards the political unification of Europe was the Treaty of Maastricht (1992), which contained the instruments for forming the EU. The EU was further developed through the Treaty of Amsterdam (1999) and the Treaty of Nice (2003). For more detail, see: Borhart 2010: 11.

15 *Resolution on family policy in the European Community* (OJ C 184, 11.7.1983), available at: <http://www.eur-lex.europa.eu> Retrieved June 27, 2016.

reached conclusions on family-oriented policies¹⁶, primarily pertaining to those families that are economically most vulnerable and that are losing their primary function and structure. These conclusions established certain areas of common interest, such as: striking the right balance between the family and professional commitments; assisting certain types of families, especially those that are disadvantaged in multiple ways; sharing family responsibilities; and emphasizing the protection of children (Hantrais, 2003: 2).

Since the family plays an important economic role in society, it represents a link between generations and a framework for establishing equality between the sexes. These issues remained topical even when the jurisdiction of the Union was expanded in the 1990s in the field of social policy, with special emphasis on raising awareness about a more active cooperation with regard to family problems (domestic violence, child abuse). The Resolution on the protection of families and family units (1994)¹⁷ and the Resolution on the protection of families and children (1999)¹⁸ supported a comprehensive approach to the protection of families and children by providing equal treatment to all families, regardless of the family structure or type. These documents advocate an equal approach to the protection of families and children: gender equality, prohibition of discrimination, protection of motherhood and combating against child poverty. The European Alliance for Families established in 2007, whose major aim is to promote the exchange of ideas and experiences between the member states, as well as to encourage cooperation between the EU member states, has had a significant influence on developing a common approach in the field of family policy at the EU level.¹⁹

The list of EU legal instruments concerning social policy and family policy is continuously being expanded, and their enumeration and analysis are beyond the aim of this paper. However, the contents of these documents undeniably speak in favour of the fact that the EU regards the family through the prism of economic prosperity, for which reason it encourages the member states to incorporate their family policies into their social and economic policies. Nevertheless, national social security systems are based on different principles and do not have

16 *Conclusions of the Council of Ministers responsible for family affairs, meeting within the Council, of 29 September 1989 (OJ C 277/2, 31.10.1989) p. 2.*

17 *Resolution on protection of families and family units at the close of the International Year of the Family policy in the European Community (OJ C 18, 23.1.1995), p. 96.*

18 *Resolution on the protection of families and children (OJ C 128, 07/05/1999 P. 0079).*

19 *Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the importance of family-friendly policies in Europe and the establishment of an Alliance for Families - Adoption and exchange of views, 9317/1/07 REV 1 SOC 185.*

the same development path; hence, their funding mechanisms, assistance and support vary from country to country. Therefore, governments of the member states resist harmonization of social protection systems and turn their attention to a gradual convergence of social protection objectives (Hantrais, 2003: 1).

National measures which constitute the core of family policies are concerned with social benefits and/or tax alleviation in the form of reimbursement of expenses related to: education of children; providing services in the field of education, child care and child-raising (through direct provision of services and/or subsidizing various services of this type); maternity leave, parental leave, leave due to special care for a sick child or a child with disabilities (Pantelić, Burgund, 2013: 183).

The European dimension of family-oriented policies is characterized by conceptual differences, and represents a combination of traditional patterns and the needs of current living circumstances in the member states. Therefore, the role of the EU in the sphere of family policies is becoming increasingly dynamic when it comes to undertaking varied extensive activities such as: monitoring legislation in the member states, strengthening cooperation and harmonization of national legislations, financial support to various projects launched by countries in the field of family policies, and the adoption of legally binding standards concerning family policy. It can be clearly deduced from the above-said that family policies within the EU cover a wide range of government interventions in various aspects of life of women and men, partners, parents and children in the social protection system (Thévenon, Neyer, 2014: 2).

6. Conclusion

Nowadays, the family needs different forms of social and state intervention. In that context, a significant influence has been exerted by various documents drawn up by universal and regional human rights organizations. Strengthening cooperation with respect to the current problems encountered by families and taking concrete actions in order to develop family-oriented policies and programs is part of an integrated approach to promoting human rights and human development. The family is a natural environment for the growth and well-being of all its members, particularly children; as such, it should be provided the necessary protection and assistance so that it can fully undertake its responsibilities within the community. The family contribution to the society as a whole is insufficiently emphasized, and its importance in the process of national development, attainment of family policy objectives and the creation of just, stable and secure societies has definitely been underrated. It is, therefore, necessary to empower families by providing effective protection and assistance.

In this sense, international and European documents assert the importance of family and family values through the creation, implementation and realization of family policy in the field of labour, health care, social care and education. Drawing on these documents, the member states of corresponding organizations develop adequate family policies at the national level. Common challenges faced by families in all nation states have a significant impact on defining firmer family policy goals. Thus, preservation and protection of the family, as well as state responsibility for the exercise and protection of human rights and fundamental freedoms of family members, are crucial to achieving social cohesion and integration, intergenerational solidarity and social development. Only then can the family fulfill its role in preserving the cultural identity, traditions, morals and value system of the society.

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ЗАШТИТА ПОРОДИЦЕ-УНАПРЕЂЕЊЕ ЉУДСКИХ ПРАВА ЧЛАНОВА ПОРОДИЦЕ

Резиме

У овом раду предмет истраживања посвећен је реafirмацији породице и традиционалних породичних вредности кроз систем заштите на међународном, европском и националном нивоу. Резолуцијом 29/22 Савета за људска права Уједињених нација за заштиту породице: допринос породице у остваривању права на одговарајући животни стандард својих чланова, посебно улога породице у искорењивању сиромаштва и остварењу одрживог развоја (2015), породица-својеврсни наиндивидуални ентитет са специфичностима у оквиру културолошких различитости- на глобалном нивоу, препозната је као природна и основна јединица друштва. Резолуција је инструмент универзалног система сигурности и представља одговор на друштвено-економске промене које су утицале и утичу на (не)стабилност и одрживост породице широм света. Државе чланице имају одговорност за очување и заштиту породице, односно одговорност у извршавању обавеза које произилазе из релевантних одредби међународних докумената о људским правима у вези са заштитом породице.

Регионални систем заштите у области људских права у оквирима Савета Европе утемељен је одредбама Конвенције за заштиту људских права и основних слобода (1950) и оснивањем Европског суда за људска права. Пракса Суда изграђена је на аутономном тумачењу права на поштовање породичног живота у сваком конкретном случају. Упоредо, на нивоу Европске уније, Резолуцијом о заштити породица и деце (1999), подржан је обухватнији приступ заштити породице и деце, обезбеђивањем једнаког третмана свим породицама, независно од структуре или типа породице. Основ овог приступа односи се на равноправност полова, забрану дискриминације, заштиту материнства, борбу против сиромаштва деце. Породица као институција ужива заштиту и на националном плану, односно ужива посебну заштиту државе. Свако има право на поштовање свог породичног живота. Унутрашња регулатива модел породице проширује ван грађанскоправног оквира породице и у складу је са индивидуалистичким концептом људских права.

Кључне речи: породица, људска права, заштита породице, породична политика, Уједињене нација, Савет европе, Европска унија.

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**LEX IULIA DE MARITANDIS ORDINIBUS (LEX
MARITA) AS A CONTROL MEASURE IN THE
MATRIMONIAL LAW OF EMPEROR AUGUSTUS****

Abstract: *In the history of the Roman Empire, the period prior to the Principate era was marked by total political chaos and civil wars. A direct reflection of these social circumstances was the social instability of the Roman society; immorality was constantly on the rise and the society gradually departed from the basic principle of Roman "virtutes". Consequently, the growing numbers of extramarital relations and illegitimate children had a detrimental impact on the Roman institute of "matrimonium", which gradually sank into disrepair. In an endeavour to stop further moral decline and restore order within the Roman family, Emperor Augustus introduces several control measures. One of the most significant measures was the adoption of Lex Iulia de maritandis ordinibus (lex marita) in 18 BCE, to promote marriage in the senatorial and equestrian orders (marital law). This Julian law clearly prescribed which social classes could enter into mutual matrimonial relations. The ultimate objective of introducing this legislation was the control over marriage as an institution but also an attempt to prevent the mixing of the noble blood of the social elite with slave blood. Lex Iulia de maritandis ordinibus (lex marita) was introduced at the beginning of the Principate period, as a control measure in the marriage legislation of Emperor Augustus, but it also had a significant impact on the regulation of marital relations in the Dominate period. In this context, this paper aims to provide a detailed analysis of Lex Iulia de maritandis ordinibus (lex marita) in order to demonstrate the effectiveness of this control measure introduced by Emperor Augustus, which ultimately restored the splendour and respectability of the Roman family.*

Keywords: *moral decline, matrimonium, Lex Iulia de maritandis ordinibus (lex marita), Roman family.*

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1. Introduction

In the history of the Roman Empire, the period directly prior to the Participate period and the very beginning of the Participate was marked by civil wars and absolute political chaos. As a matter of fact, in discussion on this period of human history, all Roman law scholars and historians agree that this period was characterised by significant changes in the Roman society. These changes contributed to the fact that this period is considered to be the crucial stage in the history of mankind. It was the period of the Roman Republic downfall and the creation of a new state system of government, the Participate. In the history of the Roman state, this period was characterised as a period of Roman dominance over the whole world.

On the other hand, at the exact moment when the Romans were becoming the masters of the world, significant changes were occurring in social relations, including the family and matrimonial relations. More precisely, the end of the Republic, and particularly the beginning of the Participate, was marked by a complete collapse of the Roman family.

The collapse was primarily provoked by the accumulation of the vast fortune and a large number of slaves in the hands of powerful individuals. The number of free people was in decline, but the number of slaves was on the rise. This further induced the weakening of the Roman family patriarchal spirit, and principally, the weakening of the family morale. In that period, the old religion was abandoned, and the new one still was not accepted. Women were growingly more independent and they used to enter *manus* marriage with more difficulty. New customary rules of behaviour were being adopted, which in turn progressively fostered debauchery and immorality. People were obsessed by the desire to get the most of their lives, which consequently made them reluctant to contract marriages, since men were surrounded by female slaves and thus unwilling to renounce such pleasures in exchange for marriage that implied numerous obligations and responsibilities. A decline in the number of contracted marriages consequently brought about a decrease in the total number of the Roman population. In such circumstances, it was only logical that the role of the *pater familias* was only figurative and more in the interest of the state than of the household members.

In an endeavour to stop further moral decline and restore order within the Roman family, Emperor Augustus introduces several control measures, the most significant of which was the adoption of *Lex Iulia de maritandis ordinibus (lex marita)* in 18 BCE. This paper provides a detailed analysis of this law as one of the effective control measures by means of which Emperor Augustus endeavoured to restore the splendour and respectability of the Roman family.

2. Circumstances in the Roman State of the Principate Period

The Principate period (27 B.C- 284 A.D.) was the age in which Rome had grown into a world power. In that period, the slave-owning system had reached its climax, for which reason in some of the contemporary sources the period is designated as “the golden age” in the development of the Roman State. This period commenced with the coming of Octavian August to power, and it lasted until Diocletian’s accession to the throne. It was the period of abandoning the policy of centurial civil wars and establishing a stable state organization.

In that period, in order to preserve the Republic institutions from the previous period, a strong central power was established; the power was concentrated in the hands of the *Princeps* and his state apparatus, which in time had received growing elements of a monarchy. By stabilizing the economy, reorganizing the army and by reinforcing new state borders, a period of a long-term peace (***Pax Romana***) was introduced, which provided for general prosperity in all spheres of spiritual life, including the area of law.

The Principate period, or the famous “golden age”, was the period during which the Roman state had become a great world power. This period is characterized by an abundance of legal sources and particularly important theories of jurists (legal scholars), generally known as “the Senate of the Dead” (Ulpian, Papinian, Paulus, Modestinus, and Gaius). Their thoughts were transfused into legal works, which are, even today, the subject of numerous analyses, especially when it comes to the evolutionary development of the private law institute.

In this period, Roman law had definitely become the law of all the residents of the Roman state (the Classical Roman Law), except from the slaves who were not assumed to be people but rather ***res mobiles*** (things which could move and talk). Rome was no longer the state of Romans, but the community of various people, specific cultures, legal traditions and numerous religions, which in time blended together, erasing the differences between the conquered people and *Cives Romani* (Roman citizens who enjoyed full legal protection) (212 Edict of Caracalla).

The period was named the Principate¹ after the ***princeps senatus*** title (“the first in the senate”) which was first held by Emperor Augustus (De Martino, 1958: 222). “Augustus displayed a tremendous skill of leading the Principate into real life, on the basis of the political construction of the Republic. By coming to power, being a cunning and talented Roman ruler, he did not wish to make a visible gap with the past. In fact, he was perfectly aware that it was exactly

1 Moreover, the designation was derived from Augustus’s name for all the latter Augustus’s successors in the Principate who held this official title (Augustus) as a denomination of the Roman Head of State.

the disruption with the past and the Republican tradition that deprived his precursor and adoptive parent Gaius Julius Caesar of life. Thus, Augustus was seeking the security of his position in firm ties with the Republican forms of government. He introduced a new order into life with the utmost caution, and the artful directed the adjustment to the Republican form towards introducing his personal authority." (Mojović, 2008: 121).

In the historical writings, Emperor Augustus was referred to as "not only a great ruler, but also an exquisite connoisseur of human nature and the habits of people surrounding him." (Rostovcev, 1974: 393). He shrewdly realized that both the political and social instability experienced in the last period of the Republic was taking its toll at the beginning of Principate period. Incessant wars and hardship deterred the lower social classes from marriage and childbearing² (Baron, 1925: 79) whereas the family instability among the higher classes was reflected in the polygamy as a common phenomenon³ (Arandelović, 1938: 281). All of that contributed to the growth of immorality of the Roman society and the fall of the Roman family, both of which were a direct threat to the stable and strong Roman State. Deeply aware that the family, burdened with daily hardships, was unable to fight for the general cause (maintenance and prosperity of the Roman State), and wishing to restore the traditional values to the Roman family, Augustus passed several laws which included specific measures, numerous obligations for Roman citizens as well as punishment for the bachelors and those who had no children⁴ (Mladenović, 1964: 41). Actually, at the basis of his aspirations was the wish to preserve the highest classes of the Roman society, due to the fact that senators, governors and other high State officials were recruited from

2 "At the end of the Republic, civil wars had taken place, together with the decline of morality, particularly the baseness of women, all of which, consequently, had taken place in the higher classes (among senators and knights)."

3 Thus, Caesar was claimed to have been married five times; Ovidius (a court poet during Augustus' reign) was said to have contracted three marriages; Cicero was married four times; Sula was married a number of times and he finally married a woman who herself had no idea how many marriages she had entered before him.

4 "Given the fact that during the Augustus' reign there were no civil wars for more than 40 years, the members of the higher class grew less interested in the state and public affairs, which had been the most important issue for them for centuries. After the horrors of civil wars, the people (the ruling class in particular) were enjoying the peace Augustus had provided. By their wanton and dissipated life they affected the ordinary people to change their old life styles. The stability of the family unit, embodied in the authority of the heads of family, was weakening. Growingly liberal lifestyle started finding its way into the strict moral codices of the patriarchal family. The reason for this was mainly the immense fortune which was accumulating in the hands of individuals and a great number of female slaves. Nothing was holy anymore, not even marriage, not even a family. The old customs were substituted by the new ones which rested on debauchery, immorality and prostitution.

these classes. Augustus needed the clean and untainted high class to help him maintain control over the administration of the vast Roman territories.

Thus, in 18 B.C., Augustus passed the Law on the Obligatory Contract of Marriage (*Lex Iulia de maritandis ordinibus (lex marita)*)⁵. This law clearly defined which members of the social classes could contract a marriage among themselves. The purpose of introducing this measure was not only to control marriage as an institution (by favouring the legitimate marriage contracted in accordance with the law, considering the imposed matrimonial limitations and bearing legitimate children) but also to prevent the mixing of slave blood with the noble blood of the higher class members, which was achieved by imposing very high penalties for those who would violate the law: a million of sesterces for senators and four hundred thousand for horsemen (Deretić, 2011: 97)

3. Lex Iulia de maritandis ordinibus (lex marita)

In his endeavour to strengthen the fallen Roman family and to restore its former glory and respectability, Augustus firmly believed that what was actually hiding behind a wish to avoid marriage was a wish for the evasion of progeny, which was basically destroying one of the essential principles of Roman family: bearing children in a legitimate marriage. This further implied that upon contracting a marriage certain matrimonial restrictions had to be observed, since only the marriage of that kind could have been legitimate. In order to achieve that, he had to limit the personal freedoms of an individual for attaining higher ends. So, there were a few prohibitions referring to marriage, which could not have been contracted between a senator or his sons and their female slaves, between free men and women of bad reputation, or women convicted for adultery⁶ (Malenica, Deretić, 2011: 201).

5 At Augustus' proposal, *Lex Iulia aduleteris* (the Adultery Law) and *Lex Iulia maritandis* (the Law on the Obligatory Contract of Marriage) were passed in 18 B.C., which were followed by *Lex Papia Poppaea* (the Law on the Childbearing of Progeny) in 9 B.C. The other name for these laws was "*Caducarum Laws*," derived from the Latin words *caduca* or *bona caducarum*, meaning "the property without an heir". This came as a result of the fact that these laws envisaged that individuals who were incapable of acquisition due to the incapacity to comply with certain conditions (*incapacitas*) could be deprived of inheritance.

6 The reason for this prohibition should be sought in Emperor Augustus' aspiration to preserve the Roman-Latin element in the higher social classes, i.e. to protect the citizens from "the inflow of foreign slave blood." This aspiration is also evident in the provisions of the subsequently adopted *Lex Papia Poppaea*, which specified that free men should not contract marriage with certain "dishonourable women" (*mulieris, infames, feminae probrosae*). This category of women included actresses, bawds, adulteresses, prostitutes and the liberated women.

„*Qui senator est, quive filius, neposve ex filio, proneposve ex nepote filio nato cuius eorum est erit, ne quis eorum sponsam uxoremve sciens dolo malo habeto libertinam, aut eam, quae ipsa cuiusve pater materve artem ludicram facit fecerit; neve senatoris filia, neptisve ex fili, proneptisve ex nepote filio nato nata libertino eive, qui ipse cuiusve pater materve artem ludicram facit fecerit, sponsa nuptave sciens dolo malo est, neve quis eorum dolo malo sciens sponsam uxoremve eam habeto*“.⁷

“A senator and his son, a son’s grandson and a great-grandson born of (grandson’s) sons, whoever of them will or would be, none of them is allowed to consciously and on purpose take for a fiancée a liberated woman, or the one who herself is an actress, or she has a father or mother who are in the acting profession; nor a senator’s daughter, a grandson from the son or a great-grandson from a son’s grandson is allowed to be with a liberated one or the one whose father or mother have been in the acting profession, consciously and on purpose, take the one to be his fiancée or a wife.”

Couples who got married despite these bans were deprived of the right to inheritance.

Furthermore, Augustus prohibited soldiers to get married. If a soldier got married during his military service and had children in that marriage, the children were declared illegitimate. As a result, there was a huge number of divorces, considering the fact that the children from the divorced marriages kept the status of the legitimate children⁸ (Borkovski, Plesis, 2009: 124).

In all other cases, *Lex Iulia de maritandis ordinibus (lex marita)*⁹ provided that all men aged 25-60 and all women aged 20-50 must contract marriage (Beger, 1991: 553). It did not mean that marriage could not be contracted before the

7 D. 23, 2, 44, pr. *Paulus l. Primo ad l. Iuliam et Papiam*

8 These provisions proved to be very unpopular, since they had contributed to an increase in the number of out of wedlock relationships (*concubinage*) at the beginning of the Empire period.

9 Along with another one law passed by Augustus - *Lex Papia Poppaea*, this Law (*lex marita*) deals with some issues concerning marriage. In the writings of Roman jurists, these two laws appear as two independent legal acts, or as a unique legislative work and sometimes they are simply referred to as “**lex**” or “**leges**.” Another tendency of Augustus’ *lex marita* was to promote marriage and encourage child-birth in order to put an end to the further degradation of morality and family life, which was widely spread in the last decade of the Republic. Various privileges were guaranteed to those who entered marriage as well as to the parents of the children. On the other hand, various economic and social difficulties were anticipated as well. The *lex marita* introduced the tax of 5% on the estates and legacy, excluding those which were left to the parents and the children and those of a small value. A proportional part of the tax from the legacy could be denied to the heir. The *lex marita* also contained provisions related to opening the will (*apertura testamenti*) in relation to the taxes that had to be paid.

specified age limit but, in that case, there were special conditions to be met. The reasons for determining these age limits for contracting marriage should certainly be sought in the Emperor Augustus' desire to provide for bearing healthy progeny, as well in the fact that it was the most appropriate age for child adoption. He favoured giving birth to legitimate children by introducing a reward system (Ivanov, 2015: 287) which did not apply to legitimate children of "ordinary mortals" but only to legitimate children from the marriages among the members of the higher social classes: senators and horsemen.¹⁰

Moreover, the *lex marita* specified the number of children the spouses were supposed to have. Thus, the husband was supposed to have at least one child, whereas the wife was supposed to have at least three children.¹¹ Yet, the Law made a clear distinction between unmarried individuals and the married ones without children. The following rule applied to the married individuals: a married person could come into the possession of ½ of inheritance coming from an alien party; in case the person in question was the surviving spouse and heir, then the person could have 1/10 of the inheritance or 1/3 of the usufruct.¹² By all means, the aim of these regulations was to reward the people who had children.

Furthermore, the *lex marita* specified that every obstacle to marriage should be removed if possible, which meant that the conditions related to bachelors (*celebes*)¹³ and widows were proclaimed null and void. As a positive result, there was a broader circle of heirs and now these people were also considered heirs and persons who have a right to legacy - *Lex Iulia miscella*¹⁴ (Baron, 1925: 80). *The negative result was that people who had never contracted marriage would have been declared personae incapax.* These individuals suffered not only the

10 The one who had three living children in Rome, four in Italy, five in the provinces, was exempt from paying public charges. The provisions of *lex marita* were later alleviated by passing *Lex Papia Poppaea*. Thus, *lex marita* specified that if the liberated man had two children or a five-year-old child, he should not be in the service of the master, nor give anything away; if a liberated woman was married to a patron, and if a free-born woman gave birth to three children, or if a liberated woman gave birth four times, the custodianship over her was terminated. Similarly, when a father had three children, he was not obliged to give his daughter to the Vestal Virgins order. See: *Pauli. Sent.* 4,9,1.

11 This provision established the notion of *caducity*. Namely, those who had children had a right to *caduca*; in case there were no children, *caduca* belonged to the state.

12 Ulpiani Reg. 15.

13 Romanist scholars generally agree that the category of bachelors included individuals who had never contracted marriage before or they had not contracted it according to the law, but are within the the prescribed age-limit.

14 The *celebes* category included the people whose marriage had ended but who did not have children; they were obliged to contract marriage again. Widows were also obliged to enter marriage again after the mourning period (*tempus lugendi*).

property-related sanctions (by being deprived of testate succession) but also the sanctions of personal nature (as they could not have been selected for the high honours' positions in the Roman State).

Taking into consideration the fact that this Law was passed in order to protect the family and to preserve the family morale, it also contained provisions pertaining to the form of divorce which was applicable only in case of a unilateral termination of marriage (*repudium*), at the will of the husband (Ignjatović, Kitanović, 2013: 315-331). Thus, it was specified that the husband could not get a divorce until he had expressed his wish divorce in the presence of seven Roman citizens.¹⁵ He was also obliged to prove that he would immediately contract a new marriage.

When it comes to the woman's right to remarry, she had a six-month time limit. If the woman was a widow or a divorced woman, she was obliged to wait for a period of one year to end (*tempus lugendi* - in case of husband's death), and (*turbatio sanguinis fiat* - in case of a divorce). On the contrary, the woman who would not comply with the time-limit was declared an infamous woman.

„Si qua mulier nequaquam luctus religionem priori viro nuptiarum festinatione praestiterit, ex iure quidem notissimo sit infamis“.

“If a woman, not paying due respect, does not mourn her first husband, but rather rushes into entering another marriage, let her by generally acknowledged law be declared infamous.”¹⁶

At this point, we may observe a deficiency in this Law. It lies in the fact that the six-month time-limit was no guarantee that would preclude the mixing of the blood. It further implied a more lenient approach to the legal provision which specified that a new marriage could be contracted within a period of three years. In the second half of the Principate, a step further was taken in the liberalization of this rule, so that a woman could have given birth to an offspring after her husband's death (before the expiry of the prescribed six-month period), without being labelled an infamous woman, if the Emperor had given her a permission to contract a new marriage. In fact, that was a form of Emperor's pardon.

As already noted, the Law made a distinction between those who had never been married and those who were married but had no children, and whose marriage had ended for some reason. Those people were obliged to remarry but, in the case where a spouse had died, the mourning period (*tempus lugendi*) had to be

15 Later on, the husband who wanted to get a divorce was obliged to send a letter (*libellus repudii*), expressing his wish to divorce, but the letter had to be consigned in the presence of the seven witnesses.

16 CJ. 5, 9,1, pr. *Impp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp.* (a. 380).

respected. The difference between the unmarried individuals and those who were married but had no children was that the first category of individuals, as already noted, could not claim their hereditary rights, whereas the second category of individuals could inherit a portion of the inheritance estate of another party; in case the decedent was the husband, the surviving spouse could inherit up to 1/10 of the inheritance and 1/3 of the usufruct right.

4. Abuse of the *Lex Iulia de maritandis ordinibus (lex marita)*

Even though it was Augustus himself who exerted considerable efforts both in the process of passing this Law and later in the process of its application, such interference with personal freedoms of an individual had met a strong resistance¹⁷ (Deretić, 2011: 97). Many historical manuscripts bear witness of multiple cases of abuse of this Law, which ultimately indicates that Augustus's efforts were just an attempt to raise the morality of the already fallen Roman society.

Considering the fact that *Lex Iulia de maritandis ordinibus (lex marita)* specified strict sanctions in case of inobservance of these rules, various misuses of this Law took place soon after it had been passed. Thus, the Roman writer Valerius Maximus (who lived and worked in the period when this Law was passed), described various cases of simulated marriages aimed at attaining the heir status, providing (among others) the following example: after a feud with her children, an infuriated elderly woman Livia contracted a new marriage with a man older than her, constituted her dowry, made a will and disinherited her children. Taking into consideration the fact that it was more than obvious that the interests of the children were in danger, Augustus announced this marriage null and void together with the will. In addition, he specified that under the rules of intestate inheritance the assets could not belong to the second husband but rather to the children, together with the constituted dowry for the benefit of the second husband (Deretić, 2011: 98-99).

Besides, Emperor Augustus himself displayed certain disrespect towards the Law by personal example. Some historical sources reveal that he was married more than once: he divorced his first wife Clodia; he had sexual relations with his second wife, Scribonia, while she was still married; and he snatched his third wife Livia from her husband while she was pregnant. His only offspring was his daughter, Julia, from the second marriage with Scribonia (Jovanović, 1994: 35-41). Moreover, he arranged his daughter and grandchildren's marriages at will,

¹⁷ Yet, the ruling class of the Roman society of that time was not up to the task. They were too focussed on themselves and their personal pleasures to think about "the general interest."

without asking for their consent¹⁸ (Jovanović, 1994: 35-41); thus, he breached the first important condition for contracting a legitimate marriage - *affectio maritalis*.

Augustus's successors also demonstrated by their personal example that the goals envisaged in the *Caducity* Laws had been set too high for the Roman family and society, which by that time still had not attained the required level of consciousness to meet all the demands imposed by laws. Even after Augustus's reign, the persecution of "notorious" women proceeded, for the purpose of preserving the Roman family. Despite the demonstrated efforts in that field, raising the prestige and reputation of the Roman family to a higher level did not take place, and the *concubinage* as an illegitimate union became a progressively spread phenomenon, due to the fact that the rulers themselves chose this kind of union after the death of their spouses.¹⁹

5. Conclusion

By enacting *Lex Julia de maritandis ordinibus (lex marita)*, Emperor Augustus had indisputably set a high aim for the Roman society. However, this aim was set so high that even the Emperor Augustus himself was able to achieve it, by his personal example. Despite the commitment and extensive efforts made not only by Augustus but also by his successors to restore the old traditional values of the Roman family by means of reforms in the area of Matrimonial and Family Law, the conducted control measures did not lead to a significant improvement of the general situation in the society and within the framework of populist politics.

Nevertheless, the aforesaid class differentiation, which was insisted upon in the Principate period, had a significant impact on the fate of matrimonial relations in the Dominate, and all the way to Constantine's reign, and it entirely vanished

18 Initially, he had promised his daughter Julia (while still a child) to the elder son of Antonius, but that marriage was not contracted because his friendship with Antonius had ended. Julia entered her first marriage with Marcel, her cousin. After his death, her father married her again to Agrippa, who was at the time married to Augustus' niece Marcela with whom he had two children. Julia gave birth to five children (three sons and two daughters). After Agrippa's death, Augustus married Julia to Tiberius but this marriage was short-lived. After his death, Julia succumbed to lascivious life, which was documented in numerous sources including the Ovidius' *Ars Armatoria*. This was also the reason why Augustus banished her from Rome for good.

19 A woman who would join that kind of union was no longer considered to be an immoral and lascivious woman. She still did not enjoy the same rights as the wife from a legitimate marriage but, as she was not considered to be a spouse, she had all the rights to gifts, legacy, and even inheritance. Children conceived in such a union did not belong to the father but to their mother, and they received their name, position and inheritance after their mother.

during the reign of Justinian. As a matter of fact, it was the rulers themselves, Constantine and Justinian in particular, who further decided on the fate of matrimonial and family relations, according to their own inclination.

Thus, Constantine declared the children born out of wedlock legitimate (*legitimatio*)²⁰ (Ignjatović, Kitanović, 2013: 657-667). Justinian, on his part, abolished the usage of *Lex Iulia* for the members of high social classes (senators and their successors), thus barring them from contracting marriage with individuals leading a dishonourable life or those involved in degrading professions.²¹ (Malenica, Deretić, 2011: 202).

In the end, even though the desired effects did not take place at that specific time, it must be concluded that the visionary capacity of Emperor Augustus is undeniable, as well as his need to control the Roman family. His conception of the family as the essential postulate of society, as well as the idea that marriage and family were not only a private matter of an individual but also a very important issue of the Roman society and any society at large, has survived in the past centuries and has remained a current issue even today in the countries which have attained high levels of social and state responsibility.

20 It may have been his personal experience that had inspired Constantine to such a course of action. Namely, according to some historical sources, Constantine was a child born out of wedlock. Originally from Dardania, his father Flavius Constantinus was a Roman army officer and a member of Aurelius personal guard. He advanced in his service and in 284 or 285 Emperor Diocletian he was given the authority to govern Dalmatia. Constantine must have spent very little time with him. Constantine's mother, Helena, came from a lower social class, originating from Bitinia. Ambrose referred to her as a "*stabularia*" (*stable-maid* or *ale-maid*), as her father was believed to have owned a guesthouse, where she is thought to have met Constantinus. She was described as "a good *ale-maid* who was well familiar with the inn-keeper who had healed the wounds of the injured man, the wounds inflicted by outlaws." Ambrose further noted: "Blessed was Constantine by having such a mother who asked for her regal son the aid in the form of divine grace, so that in battles he would be safe and he would not be afraid of danger." For more, see: Ambrose, *Post Mortem Letter to Emperor Theodosius* 41. It is not known for certain whether Helen was legally married to Constantinus, or whether she was only his concubine. This makes us think that Constantine, as a child born outside the legitimate wedlock, who had spent most of his life deprived of father's attention and intimacy, was treated differently from "the legitimate" children. He had probably felt all the injustices of his position, especially when it came to limitations within the public life, first of all those referring to being unable to perform as a public duty, as well as in his private life when it came to limitations in hereditary rights.

21 The motive for abolishing the *Lex Iulia* was Justinian's intention to marry Theodora, a famous Constantinople courtesan. According to some sources, she was of the lowest origin: she was born in a circus, where her father was a servant, and later she had many occupations; *inter alia*, she was a famous courtesan in Constantinople.

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LEX IULIA DE MARITANDIS ORDINIBUS (LEX MARITA) КАО МЕРА КОНТРОЛЕ У БРАЧНОМ ЗАКОНОДВСТВУ ИМПЕРАТОРА АВГУСТА

Резиме

Период непосредно пре почетка принципата у историји Римског царства обележен је потпуним политичким хаосом и грађанским ратовима. Овакве друштвене прилике директно су се рефлектовале на социјалну нестабилност римског друштва, а проузроковале су и перманентно нарастање неморалности и удаљавање од основног принципа римског „virtutes“. У таквим околностима дошло је до тоталног посрнућа римског matrimonium, што је условило пораст броја ванбрачних веза али и пораст броја ванбрачне деце. У жељи да заустави опадање морала и да заведе ред унутар римске породице, император Август уводи неколико мера контроле, а једна од тих мера било је свакако доношење Lex Iulia de maritandis ordinibus (lex marita). Овим законом било је јасно издефинисано који припадници друштвених слојева су могли између себе да закључе брак. Циљ увођења ове мера била је контрола брака као институције али и онемогућавање мешања робовске крви са припадницима виших друштвених сталежа. Lex Iulia de maritandis ordinibus (lex marita) као мера контроле у брачном законодавству императора Августа, донета са почетка периода принципата, имала је значајне последице и на регулисање брачних односа у доба домината. У том смислу овај рад има за циљ да детаљном анализом закона Lex Iulia de maritandis ordinibus (lex marita) докаже ефикасност ове Августове мере контроле која је повратила сјај и углед римске породице.

Кључне речи: *опадање морала, matrimonium, Lex Iulia de maritandis ordinibus (lex marita), римска породица.*

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APPEAL AGAINST ADOPTION DECREE IN THE LEGISLATION OF SERBIA AND THE LEGISLATION OF REPUBLIC OF SRPSKA**

Abstract: *In the Serbian legislation and the law of Republic of Srpska, the judicial control of the adoption decree is exercised in the second-instance administrative procedure by lodging an appeal with the competent authority. Having in mind that both legal systems are based on the same legal tradition and the comparable jurisdiction, it would be natural to assume that the rules regarding appeal would be the same or, at least, similar. However, the rules concerning the appeal against adoption decree in the Serbian legislation are substantially different from the rules in Republic of Srpska. This paper deals with differences between the said legislative solutions, including their advantages and disadvantages. Finally, the author concludes that legal provisions on appeal against adoption decree should be amended in the laws of both countries. In the Serbian legislation, the rules on appeal should be adjusted to the established decree-based system. In the Republic of Srpska legislation, the rules concerning the time limit and grounds for lodging an appeal ought to be more precisely defined.*

Keywords: *adoption decree, appeal, contract-based system, decree-based system.*

1. Introduction

In the legislation of Serbia and the legislation of Republic of Srpska the adoption placement is finalized by the decree issued by the custodial authority in a special administrative procedure. The second instance review of this administrative act is carried out by the competent ministry in response to an appeal lodged by the

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parties in the proceedings. Despite the fact that both legal systems are based on the same legal tradition, they differ significantly in legal impact of seeking regular legal remedy against the adoption decree.

2. Adoption in the legislation of Republic of Srpska

The Family Act of Republic of Srpska stipulates that upon its finality the adoption decree is delivered to the competent civil registry office, within fifteen days, for entry in the register of births. An appeal against the decision denying adoption is permitted and it is to be lodged with the second-instance authority –the Ministry of Health and Social Welfare within 30 days from the day the decision is delivered. An appeal is to be lodged in writing through custodial body which issued the first-instance decision. The person authorised to lodge the appeal is the same person whose request for adoption was denied. An appeal against the adoption decree is permitted only for the faults of will. In case of error, fraud or coercion, parties in the proceedings can lodge an appeal with the second-instance authority. The period during which an appeal can be lodged is not limited.¹

Such legislative solution gives rise to several legal issues, the main being: at what point does the adoption decree become final and enforceable in the legislation of Republic of Srpska? In order to answer this question, we first need to examine whether it is possible to adopt in Republic of Srpska at all! This dilemma is created by the provision which does not stipulate the time limit for lodging an appeal against the adoption decree. If there is no such time limit, it remains unclear at what point in time the adoption decree becomes final, and whether its finality is even possible at all. Moreover, if it cannot become final, can it become enforceable? Besides this primary question concerning the time limit for lodging the appeal, another issue related to the grounds for lodging the appeal is raised, since they are specified by the Family Act.

2.1. Finality and enforceability of adoption decree

Since the time limit for lodging an appeal in the Family Act of Republic of Srpska, as a special act, is different (there is no time limit)² from the general rules in the Administrative Procedure Act (the time limit for lodging an appeal is 15 days from the day the decree is delivered, unless otherwise specified),³ the

1 Article 168 and 169 of the Family Act of the Republic of Srpska, Official Gazette of Republic of Srpska 54/02, 41/08 and 63/14.

2 Article 169, paragraph 3 of the Family Act of the Republic of Srpska.

3 Article 169, paragraph 3 of the Family Act of Republic of Srpska, relating to Article 215 of the Administrative Procedure Act of Republic of Srpska, Official Gazette of Republic of

only explanation is that the general rules are excluded in this case, i.e. that it is impossible to apply the provisions of the Administrative Procedure Act. This means that in the law of Republic of Srpska, the party in proceedings can lodge an appeal against the adoption decree at any time, as long as he/she lives.

The fact that the Administrative Procedure Act stipulates that decree is final if the appeal against it cannot be lodged⁴ means that first-instance adoption decree in the law of Republic of Srpska cannot become final as long as there is possibility for an appeal to be lodged, i.e. while the party in the proceedings is alive.⁵ As long as there is a possibility for an appeal to be lodged (and there is such possibility since the appeal is permitted, without a specified time limit), there will be uncertainty concerning the finality of the first-instance order. Consequently, the adoption decree can become final only if the appeal is lodged and it is reviewed by the second-instance authority.

Very few legal scholars tackled this issue. Those who did generally pointed out that such a legislative solution is untenable both from the aspect of adoption and from the aspect of logic of a legal system (Ćuretić, 1982: 126). In their view, unlimited right to an appeal compromises legal security (since the decision is not materially final) and certainty in legal relations, and what is more, it jeopardizes the adoptees interests (Ćuretić, 1982: 126; Babić, 1990: 433; Babić, 2007: 170, Račić, 2006: 128).

Generally speaking, we have nothing much to add to arguments presented by the aforementioned legal scholars. However, we do have a few more points to make. Authors dealing with this issue point out that adoption decree does not become materially final;⁶ consequently, the adoption decree can be changed many years after it had been issued which can compromise the established relations between the adoptive parents and the adoptee.

Since material finality refers not only to the act but also to relation itself, i.e. the subject of the decision (Marković, 2002: 314), and having in mind that material finality cannot begin before formal finality has occurred, it seems that using the term adoption and highlighting the fact that “adoption decree does not become materially final” represent *contradictio in adjecto*.

Without material finality of the adoption decree there can be no adoption simply because material finality, among other things, means establishing adoptive

Srpska, 13/02, 87/07 and 50/10.

4 Article 13 of the Administrative Procedure Act of Republic of Srpska.

5 Some authors stress out the possibility of contesting a decree by an appeal even after the death of the adoptee (Babić, 1999: 443).

6 Except for prof. Račić who makes no reference to this at all.

relationship between the adoptive parents and the adoptee. No material finality means no adoptive family, no adoptee or adoptive parents. Therefore, we can only partially support the view of other authors on this matter. For instance, we agree that decree in the first instance is not materially final but we feel it is wrong to say that adoption occurred based on decree nisi.⁷

Having in mind that legislative solutions, at least those concerning appeal against the adoption decree, copied from the Family Act of the Federal Republic of Bosnia and Herzegovina into the Family Act of the Republic of Srpska,⁸ the question is raised whether these provisions could have been a result of legislative solutions from the Basic Law on Adoption which preceded the Family Act of the Federal Republic of Bosnia and Herzegovina. The Federal law on adoption allowed for lodging an appeal against the decision of the custodial authority denying request for adoption, without defining the time limit for the appeal.⁹ Since adoption appeared in the form of adoption placement agreement signed before the competent body by the authorised persons entering into agreement, it was impossible to allow an appeal against positive decision, for no such decision was issued in the first place. Namely, adoption occurred in the form of agreement, not in the form of administrative act. However, some sort of permission preceded the very act of adoption, but neither was this permission made in writing nor could it have had any significance once the adoption occurred in the form of agreement.

Such a legislative solution in the Basic Law on Adoption leads us to believe that the drafters of the Family Act of the Federal Republic of Bosnia and Herzegovina, and subsequently the Family Act of Republic of Srpska simply copied it because they linked this solution to the wrong decision – positive rather than negative decision on adoption. Another matter pointing to this conclusion are the grounds for appeal which, in effect, represent reasons of relative nullity of the adoption placement agreement (used to create adoption in accordance with

7 Admittedly, the said authors do not say this explicitly but it is inferred from their words that "adoptive parents", "adoptee", "adoptive family" may have difficulties due to the possibility of subsequent appeal against the decree.

8 Article 166 of the Family Act of the Federal Republic of Bosnia and Herzegovina, Official Gazette of Federal Republic of Bosnia and Herzegovina, 21/79 and 44/89.

9 Article 16 of the Adoption Act– Basic Law on Adoption, Official Gazette of the Federal Peoples Republic of Yugoslavia, 30/47 and 24/52 and Official Gazette of Socialist Federal Republic of Yugoslavia, 10/65. Defending such legislative solution in the Basic Law on Adoption, some legal scholars pointed out that setting a time-limit for decision on denying adoption would complicate the adoption process (Begović, 1959:166). Apparently, authors, when stating this, did not take into account the fact that there are two types of administrative acts: positive and negative ones, and that negative administrative acts can never become materially final. For example, the decision denying request for adoption is a negative administrative act.

earlier regulations). Admittedly, these reasons were not explicitly stipulated by the Basic Law on Adoption, but were widely accepted as such in legal theory.

In our view, legislative solutions in the Family Act of the Federal Republic of Bosnia and Herzegovina and subsequently the Family Act of Republic of Srpska are a result of incomplete transition from the contract-based system to the decree-based system in the process of adoption. Apparently, drafters of the Family Act of the Federal Republic of Bosnia and Herzegovina were not experts in the field of administrative procedure, as rude and scientifically incorrect this may sound. For, had they known the general rules of administrative procedure well enough, they surely would not have prevented administrative act on adoption from becoming final. Understanding fully the institute of finality, enforceability and material and formal finality, as well as differentiating between a positive and a negative administrative act would have resulted in stipulating logical and applicable legislative solutions, instead of prescribing regulations under which it has become virtually impossible to adopt.

It is evident that legislative solutions in Republic of Srpska legislation, and earlier in the law of the Federal Republic of Bosnia and Herzegovina, are completely unacceptable as they are practically inapplicable and they violate the basic principles on which legal order is based.¹⁰ Therefore, the question arises whether it has been possible, under such legislative solutions, in the last thirty five years to adopt legally. Apart from rendering adoption decree final by means of issuing a decision in the second instance upon appeal (regardless of whether an appeal is lodged against a positive or a negative decision), two more ways are used in legal practice in the Republic of Srpska to circumvent the existing legislative solution.

Most of the centres for social welfare in Republic of Srpska referred to the general time limit for lodging an appeal stipulated in the General Administrative Procedure Act rather than the one envisaged in the Family Act. Thus, 15 days after the decision had been delivered to the parties in the proceedings (as a time limit for an appeal under the general rules of Administrative Procedure Act), and 30 days after delivering the administrative act to a party (as a time limit for filing a lawsuit in administrative dispute), social workers inserted finality clause to the adoption decree and sent it to competent register for entry.¹¹

It seems though that, due to the formerly explained rule, under which explicit legislative solutions from the special law exclude the general rules from the Administrative Procedure Act, adoption conducted in such a way was not en-

10 Just to name a few: the principle of legal certainty and the principle of legality.

11 Adoption decree from Centre for Social Welfare in Bijeljina No. 02-543/1-10/2-1994 from May 4, 1995; Adoption decree from Centre for Social Welfare in Bijeljina No. 02-543/1-834/4-1993 from October 20, 1993.

tirely legal. We do understand the need of the social workers to find the way to circumvent inapplicable and unsound legislative solution, but the fact remains that they acted in violation of positive law.¹²

Unlike most centres for social welfare, some centres in Republic of Srpska found another way to render adoption decree final. Namely, they asked the parties in the proceedings at the adoption hearing or upon delivering adoption decree to waive their right to appeal against the decision, so as to terminate the time limit for the appeal, thus rendering the decision final.¹³ In doing so, workers of these centres for social welfare referred to rules of civil proceedings in administrative proceedings, since the General Administrative Procedure Act does not provide for waiver of right to appeal.

Apparently, such actions of the centres for social welfare were against the law as well. Our principal objection concerns the remark of the workers in some social welfare centres that the rules of civil litigation are applied in administrative proceedings. It is a fact, well pointed out in legal theory (Marković, 2007: 48), that one of the goals of administrative law is to exercise administrative authority under the rules similar to the rules of civil proceedings. It is also a fact that certain issues in general administrative procedure are resolved by referring to provisions of civil litigation (e.g. power of attorney).¹⁴ However, it is not true that administrative procedure will apply rules of the Civil Procedure Act in issues which are not regulated in a different way by the General Administrative Procedure Act.¹⁵

For the rule on conformable application to be in force, it has to be explicitly regulated, as it is the case with relationship between general law and special laws on administrative procedure. Therefore, when there is no such explicit

12 "We must therefore of necessity have laws, that we may terminate the evil and cherish those which are good; but never let us permit the evil rebel against the good (...) for it is to no purpose to enact laws, unless punishment be also inflicted." – (St. John Chrysostom – Zlatoust, 2010:95)

13 Adoption decree from Centre for Social Welfare in Pale No. 01-324/1987, from September 5, 1987.

14 Article 49, paragraph 3, Administrative Procedure Act of Republic of Srpska- „On issues concerning power of attorney which are not regulated by the provisions of this law, provisions of the Civil Procedure Act will apply.“

15 Therefore, some authors seem vague or incomplete when they argue that „whenever some of the matters of general proceedings of issuing administrative act is not regulated by general law, legislation governing civil proceedings is subsidiarily applied – e.g. Article 61, paragraph 3, of the General Administrative Procedure Act which governs rules on power of attorney “ (Marković, 2002: 48). This is true for these particular provisions of the Act but no such rule exists in the General Administrative Procedure Act.

provision, the rule on conformable application is not in force. Unlike the general administrative procedure rules, the administrative dispute provisions explicitly provide for the conformable application of rules of civil proceedings in the matters which are not regulated by any of these laws.¹⁶

As for the rule governing waiver of the right to appeal in civil proceedings, it is true that parties to the dispute can waive their right to appeal. It can be done from the moment the decision was delivered onwards. Also, the disputing party can abandon the appeal by the time the court of second instance has reached its decision. However, waiver of the right of appeal cannot be revoked.¹⁷

Nevertheless, this institute from the Civil Procedure Act is, for the reasons we explained earlier, not applicable in administrative proceedings.¹⁸ The courts gave their opinion on this matter on several occasions.¹⁹ Such a standpoint was stressed out in legal theory too, but not as often and not as clearly. It seems to us that only a few more daring scholars were unambiguous about this matter, whereas others mostly inarticulately referred to case law. According to some scholars, the General Administrative Procedure Act does not allow for the institute of waiver of the right to appeal; therefore, such a statement would be legally insignificant (Rašić, 2009: 14). Waiver of the right to appeal prior to issuing an administrative act is also not allowed, which is understandable because, if a party is not allowed to waive the right to appeal after the decision has been issued, they are not allowed to do it before either.²⁰

16 Article 48 of the Administrative Disputes Act.

17 Article 124 of the Civil Procedure Act of Republic of Srpska, Official Gazette of Republic of Srpska, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/03.

18 Some scholars point to similarities between the provisions of the Civil Procedure Act and the Administrative Procedure Act, in certain areas only. They explicitly state what these areas are, but conformable application of rules from civil proceedings to administrative procedure is mentioned nowhere (Rađenović, 2005: 15-16).

19 „Party in administrative proceedings cannot waive their right to appeal against decision in the first instance, therefore, the appeal cannot be dismissed as unallowable, and a statement can be revoked“ – decision of the Supreme Court of Serbia U.322/94, of May 31, 1993. Cited from: Web regulations database, Infotek, August 15, 2016, http://www.podaci.net/_verzija33/rezu-ltati.php?w=alba+odricanje&i=211&l=SR&b=propisi_scg_ulaz.

„Waiver before the administrative authority of the right to appeal does not render the appeal which is lodged unallowable.“ – Decision of Supreme Court of Yugoslavia Už.6771/62 from July 20 1962. (Tomić, Bačić: 315).

20 „In administrative proceedings, a party cannot waive his/her right to appeal beforehand. Even if it were true that the plaintiff 'waived her right to appeal,' the appeal could have been lodged in time. Consequently, the finality of the decision could have been established only after the time limit for lodging the appeal has expired“ – Decision of Constitutional Court of Croatia Us-108/86 from January 14, 1987. (Krijan, 2005: 305).

The inconvenience which stem from the fact that waiver of the right to appeal is not explicitly provided for in the administrative procedure is evident from court decisions on civil disputes that involve both abandoning the appeal and waiving from the right to appeal. The given situation can, nevertheless, be interpreted only as abandoning the appeal,²¹ the only possibility which is explicitly provided for by the law.²² Some social workers pointed out to the need of providing for the possibility to waive the right to appeal after the decision in the first instance has been issued, well aware of the fact that this is not the way to render the adoption decree final.

Otherwise, we do have to justify, to a certain extent, the actions of the some social workers with reference to their need to circumvent the illogical legislative solutions concerning lack of time limit for appeal against adoption decree in Republic of Srpska. Rules prescribed by special administrative acts (the Family Act being one of them) can and must depart from general rules.²³ However, these special rules cannot be contrary to the fundamental legal principles of administrative procedure. This principle is also provided for by the general administrative procedure rules. It is explicitly stated that provisions of special laws must be in compliance with the basic principles established by the General Administrative Procedure Act.²⁴ The same view is held by some scholars who give examples of disregard of the rule in some special administrative proceedings areas in Serbian legislation, such as tax proceedings (Tomić, 2012: 58-59).

It is evident that the Family Act of Republic of Srpska, and earlier, Family Act of Federal Republic of Bosnia and Herzegovina disregarded the principle stating that regulations of special administrative procedure must be in compliance with the general principles of the Administrative Procedure Act. Instead of complying fully with these principles, provisions of the Family Act overtly disregard them. As noted by some scholars, fundamental principals should ensure consistent and uniform application of law to particular non-contentious matters. As such,

21 "Statement on abandonig the appeal must be unambiguous, so as not to leave room for any doubt concerning the will of the party to waive his/her right to appeal (underlined by D.Ć.), and abandoning the appeal cannot be conditioned." – Decision of Supreme Court of Federal Republic of Serbia in 494/87 from August 5, 1987. (Rađenović, 2005: 177, footnote 1).

22 Article 232, paragraph 2 of the Administrative Proceedings Act of Republic of Serbia – "When the party abandons the appeal, the appellate proceedings are terminated by the statement". Although law does not specify the point in time until which the party can abandon the appeal, we conclude by systematic and functional interpretation of the law that this point in time coincides with issuing the decision on appeal.

23 Had there not been departure from general rules, there would have been no need for special rules and regulations.

24 Article 23 of the Administrative Procedure Act of Republic of Srpska.

these rules should reflect and strengthen the uniformity of administrative procedure, and serve as guidelines for interpretation of certain contentious matters (Tomić, 2002: 58-63). However, the Family Act of Bosnia and Herzegovina and the Family Act of Republic of Srpska deviate from these principles. Legislative provisions thereto do not offer a chance for obtaining a legal decision, nor do they adhere to the principles of effectiveness and efficiency of the proceedings. Adoption decree in the first instance cannot be re-rendered final. Therefore, in legal practice, the general and special provisions of administrative procedure are often interpreted and applied „loosely“, which represents illegal action, i.e. deviation from the principle of legality. On the other hand, if one insists on applying the principle of legality in legal practice, it becomes impossible to obtain the final adoption decree in the first instance. Hence, it is impossible to either establish or maintain legal certainty.

Legislative solutions in the Family Act of Republic of Srpska are almost entirely inapplicable and in contradiction to the fundamental principles underlying the entire legal order, and the principles governing administrative procedure as well. As long as the time limit for lodging an appeal against the adoption decree is not set, it will be impossible for this administrative act in the first instance to become final. The only way in which social work centres can obtain finality of the adoption decree is to ask one of the parties in the proceedings to lodge an appeal against the decree, so that the competent body in the second instance can issue a final decision.

Unfortunately, although the legal theory points out to the discrepancy between legislative solutions (on the one hand) and the fundamental legal principles and general principles of administrative procedure (on the other hand), it has no legal impact whatsoever. Since it is in the jurisdiction of the Constitutional Court of Republic of Srpska to review the constitutionality of acts and by-laws, it would be impossible to initiate the review of the „legality“ of particular legal provisions of the Family Act which are in contradiction to expressly stated provision in the General Administrative Procedure Act (Tomić, 2012: 59). Both legal acts are legislative acts and, hierarchically speaking, they have the same legal importance, which means they cannot be harmonised by a court decision.

Therefore, we can only hope that legal drafters and legislators will, after thirty five years of witnessing senseless legislative solutions being applied, find the strength and knowledge to abolish this irrationality; notably, they lost one such opportunity in 2002 when the Family Act of Republic of Srpska was passed, as well as in 2008 and 2014 when it was amended.²⁵

25 The effort to instigate a process of drafting an entirely new Family Act was discussed earlier (Ćeranić, 2012: 155-165).

With regard to the finality of the administrative act upon which adoption is established in Republic of Srpska, we have to point out to several general conclusions. Even if we could understand why utterly inapplicable and ill-founded legislative solutions had been adopted in the 1970s, it remains unclear why none of the scholars or legal practitioners dealt with this issue in a serious and systematic manner all these years. It is understandable that the existing legislative solutions were, by and large, the result of the historical development of our family law, incomplete transition from the contract-based to the decree-based system, redistribution of constitutional jurisdiction, lack of knowledge of general rules of administrative procedure by the legislation drafters, etc.; but, it is beyond our comprehension that not a single scholar noticed in the past thirty five years that virtually none of the adoptions in the Federal Republic of Bosnia and Herzegovina, Republic of Srpska or the Federation of Bosnia and Herzegovina was conducted legally?! If any of the scholars did touch on this issue, their discussion was reduced to the conclusion that regulations regarding the appeal were bad, but no one mentioned that, owing to such regulations in administrative proceedings in Bosnia and Herzegovina, there had been no legally conducted adoption for over three decades!

Virtually every adoption decree became final in a manner that is in contradiction to special rules prescribed by the family legislation! Consequently, such adoption decrees never, in effect, became final. This means they could not have become enforceable either, which leads us to the conclusion that all those adoptions, actually, never happened! If there is no adoption, there can be no family relationship between alleged adoptive parents and adoptee; therefore, there can be no legal impact of such a relationship! Finally, this means that all this time, hundreds if not thousands of individuals had been led to believe they had adopted a child and that they had been related to him/her!

To resolve this problem, we suggest that legally irrational and inapplicable legislative solutions regarding the time limit for appeal against the adoption decree in the Republic of Srpska legislation be finally amended either by introducing the general time limit for appeal from the Administrative Procedure Act or by stipulating some other shorter or longer time limit. Either way, the rule which stipulates that there is no time limit for seeking legal redress is unacceptable. We believe that we have offered precise enough explanation of theoretical and practical reasons to support our view. Suffice it to say that the existing legislative solution is in contradiction to both the principle of legality and the principle of legal certainty which are fundamental to every legal system.

2.2. Grounds for appeal against adoption decree

The Family Act stipulates that appeal against a positive adoption decree can be lodged only “in the event of error, fraud or coercion”.²⁶ It is pointed out in our legal theory that these, are, actually, the reasons for annulment of the decree on the grounds of relative nullity (Đuretić, 1982: 126; Babić, 1990: 433). We also remind that stipulating only these reasons limits the possibility of lodging an appeal on other grounds (Babić, 1990: 433, Račić, 2006: 128).

We do have to comment on the view that reasons for lodging an appeal stipulated by the Family Act are the reasons for annulment of the decree on the grounds of relative nullity. It is a fact that faults of will are a textbook example of the reason for voidability of a legal transaction, such as an adoption placement agreement. It is also a fact that these reasons are stipulated in some family law regulations as grounds for relative nullity of adoption, provided that the adoption procedure can be reviewed by a court in civil proceedings. However, the earlier provision of the Federal Republic of Bosnia and Herzegovina and the positive legislation in Republic of Srpska do not allow the annulment of adoption by means of civil action. The attempt to introduce a decree-based system into the adoption procedure in family law resulted in abrogation of the possibility that the court annul the adoption in civil proceedings. But, we feel that the attempt has yielded few results. By stipulating faults of will as grounds for appeal, lawmakers in Federal Republic of Bosnia and Herzegovina and Republic of Srpska proved their inability to differentiate between a decree-based system and a contract-based system.

Besides criticizing poorly executed transition from a contract-based into a decree-based system with regard to adoption in the laws of Federal Republic of Bosnia and Herzegovina and Republic of Srpska, we do have to comment on the alleged limitation of lodging an appeal “solely” on the grounds of error, fraud or coercion. Although the Family Act expressly specifies faults of will as the ground for lodging an appeal, and although the wording of the provision includes the phrase “solely faults of will”, we strongly believe that in the adoption appeal against a positive decision can be lodged for other reasons which are stipulated in the General Administrative Procedure Act. Any other interpretation, so it seems, would result in a violation of the constitutional provision regarding right to appeal,²⁷ and of the general principle concerning the right to appeal in the General Administrative Procedure Act.²⁸

26 Article 169, paragraph 2 of the Family Act of Republic of Srpska.

27 Article 16, paragraph 2 of the Constitution of Republic of Srpska.

28 Article 12, paragraph 1 of the Administrative Proceedings Act of Republic of Srpska – „Appeal is allowed against the decision in the first-instance.“

In addition, any other interpretation would result in violation of general principles which are fundamental to legal system and administrative procedure, and in immediate elimination of the Family Act provisions on the second instance proceedings, because it creates an absurd situation where several different provisions of an act are derogated by a single provision of the same act. We fail to understand the purpose of prescribing a rule under which a review of an administrative act in the second instance is limited to faults of will. Apart from linguistic interpretation, this legal rule requires systematic and functional interpretation, as well as some historical interpretation, as discussed earlier.

The existing legislative solution should be amended at the earliest opportunity because it represents remnants of an earlier contract-based system. In the contemporary decree-based legal systems, there is no need for stipulating any special reasons for lodging an appeal against the act on adoption, let alone stipulating faults of will as grounds for the appeal. The modus used in Republic of Srpska legislation to regulate this matter is in contradiction with the main purpose of adoption - the protection of interests of a minor, as well as with the general principals which are fundamental to administrative procedure.

3. Adoption in the legislation of Serbia

Under the Family Act of Serbia, the process of adoption is carried out in several phases. First, the custodial authority, establishes whether the prospective adoptive parents are suitable for adoption, i.e. that the child is suitable for the adoption (general suitability for adoption of the adoptive parents and the adoptee), and enters the data on the prospective adoptive parents and the adoptee into the Single Personal Adoption Registry. This registry is kept by the competent Government ministry responsible for family welfare. Upon establishing the general suitability for adoption, the custodianship authority appoints prospective adoptive parents from the Adoption Registry and issues a separate statement.²⁹ If, after a mandatory period of adjustment, adoptive parents and the adoptee show special suitability for adoption, the custodial authority which appointed the prospective adoptive parents issues an adoption decree. It is explicitly stated by the legal norms that the adoption is established on the day the adoption decree is issued.³⁰ This decision is ceremoniously handed over to the adoptive parents i.e. to the guardian. By virtue of the adoption decree, the custodial authority issues a second decision on entry of the adoption facts into the Adoption Registry. This decision is final and it is used to cancel the data about the adoptee from Birth Registry.³¹

29 Article 316-317 of the Family Act of Serbia, Official Gazette of Republic of Serbia, 18/05.

30 Article 320 of the Family Act of Serbia.

31 Article 325 of the Family Act of Serbia.

Several conclusions can be drawn from the mentioned legal provisions. Firstly, we believe that the lawmaker in Serbia failed to break apart from the contract-based system that existed in the 1980 Act on Marriage and Family Relations of the Federal Republic of Serbia.³² This does not mean, of course, that the adoption occurs in the form of a statement. It is clear that the adoption is established by the decision issued by the custodial authority which, at least in principle, implies accepting the decree-based system. However, the commencement of adoption still contains some elements featuring the contract-based system. “Adoption commences on the day the decision is ceremoniously handed out to the adoptive parents.” This very much resembles the legislative solutions from the General Act on Adoption and the Act on Marriage and Family Relations of the Federal Republic of Serbia, in which adoption commenced at the moment of signing a statement by all the parties in the procedure and the person representing the custodial authority. Under these laws, adoption occurs in the form of contract, rather than in the form of administrative act. Having in mind the transition from the contract-based to the decree-based system, it remains unclear why, in the existing Serbian legislation, the commencement of adoption is linked to one such moment. Namely, changing the procedure of adoption should have resulted in changing the moment of commencement of adoption as well.

The existing legal provisions raise a question: what is the moment of “issuing the adoption decree”, i.e. when does the adoption commence, and when does the family relatedness between the adoptive parents and the adoptee begin? Is it the moment when the representative of the custodial authority signs the adoption decree, or is it the moment when the adoption decree is delivered to the adoptive parents? This particular issue has never been tackled, either by the scholars specializing in family and inheritance law or by those specializing in administrative law. The explanation which is offered regarding this issue is reduced to sheer paraphrasing of the legal norm under which adoption commences on the day the adoption decree is issued.³³

As for the moment of commencement of adoption, despite the fact that the Family Act expressly states that the adoption is established by issuing the adoption decree, we believe that it happens when the decree is delivered to the adoptive parents and the child’s guardian! Our view is supported by the general rules of

32 Article 191, paragraph 1 of the Act on Marriage and Family Relations of the Federal Republic of Serbia, Official Gazette of Federal Republic of Serbia, 22/80 and 11/88 and Official Gazette of Republic of Serbia, 22/93, 25/93, 35/94, 46/95 and 29/01.

33 Although the Family Act of Serbia uses the phrase “decision on adoption” we will, in this paper, use the term “adoption decree” because act on adoption can be either positive or negative.

administrative procedure stipulating that the decree is issued in writing.³⁴ The General Administrative Procedure Act stipulates that, in matters governed by this law, a decree can be issued orally as well. However, this refers to situations when urgent measures need to be taken to maintain public order or to avert immediate threat to people's life and health and property.³⁵ Therefore, when the adoption decree is communicated orally to the party at the hearing, this does not mean that the decree was issued orally; on the contrary, it was simply communicated orally. After communicating the decree orally, the authority must draft the decree and deliver it to the party. Only then is the decree deemed issued!

This view concerning administrative acts, but without commenting on the adoption decree, is commonly held by administrative law theoreticians (Marković 2002: 399-401) and the case law.³⁶ The issuing authority is bound by the act from the moment the act has been delivered to the party in the proceedings by hand, or from the moment the act has been submitted for dispatch. Until that moment, the issuing authority has the possibility to change the act. Since the Family Act stipulates that the adoption decree be delivered by hand, we believe that other means of delivery are not acceptable.³⁷ This means that the authority issuing the decree is bound by the decree from the moment it has been ceremoniously handed in to the party. Since the legal effect on the party cannot begin before he/she learns that the administrative act has been issued, the commencement of the adoption can be linked to the moment of delivery, at its earliest, or in this particular case, to the moment the decree is handed over! Therefore, we insist that adoptive relationship between the adoptive parents and their relatives and the adoptee begins at the moment the adoption decree has been delivered to the adoptive parents and the legal guardian of the child.

34 Article 196, paragraph 2 of the General Administrative Procedure Act of Serbia, Official Gazette of Federal Republic of Yugoslavia, 33/97 and 33/01 and Official Gazette of Republic of Serbia, 33/10.

35 Article 204, paragraph 1, General Administrative Procedure Act of the Republic of Serbia.

36 "Decision which was not delivered to the parties in the proceedings has no legal impact. The decision can be changed, or even withdrawn, by the administrative authority until the moment it has been delivered. Afterwards, this can be done only in compliance with the provisions of the General Administrative Procedure Act." Ruling of Supreme Court of Croatia No. 4661/58 from February 21, 1959. (Tomić, Bačić, 1989:288).

37 The General Administrative Procedure Act (GAPA) stipulates that person who is to be delivered a writ can be summoned for the purpose of delivery only exceptionally, when it is required by the nature and importance of the writ. – Article 171, paragraph 2 of the GAPA of Serbia. It seems that delivering adoption decree is one such situation provided for by the law, when it is necessary that the writ is handed in to the party in the hearing before the administrative authority.

As for the means of delivery, we believe that the same rules apply here as to the delivery note. To be more precise, the decree is deemed delivered when the parties (adoptive parents and legal guardian of the child) sign the delivery notice or the decree itself, noting the date of delivery. The signature of the authorised person under the signatures of adoptive parents and the child's legal guardian is not necessary for the adoption to come into effect, because the social worker has already put his/her signature on the adoption decree. Having in mind that the adoption commences at the moment of delivery of the decree, we also recommend that, besides the date, the time of the delivery shall also be noted, in case of any future disputes.

3.1. Appeal against the adoption decree

The Family Act of Serbia contains no express provisions regarding an appeal against the adoption decree. Consequently, appeal is governed by the general rules of administrative procedure.³⁸ However, since adoption begins at the moment of issuing the decree, an appeal against the decree does not stay the adoption. The appeal can only lead to termination of adoption. Besides appeal, one can seek ancillary remedy against this administrative act, as provided for by the General Administrative Procedure Act of Serbia.³⁹ The review of legality of this administrative act can be conducted by means of initiating civil proceedings as stipulated in the Civil Proceedings Act of Serbia.⁴⁰

Common to these legal remedies is that they may result in abrogation, rescission or voidability of the adoption decree. Considering that the Family Act of Serbia stipulates that adoption occurs by virtue of issuing decree, any further abrogation, rescission or voidability of the adoption decree will result in termination of full adoption.

4. Conclusion

The review of the adoption decree in the legislation of Serbia and the legislation of Republic of Srpska is conducted by lodging an appeal in administrative procedure in the second instance. Having in mind that both legal systems are based on the same legal tradition and that they have comparable jurisdiction, it would be natural to assume that regulations regarding appeal would be the same or, at

38 Article 213-238 of the Administrative Procedure Act of Serbia. On appeal in administrative proceedings, cf. Dimitrijević, 2008: 100-120.

39 Article 251-258. Administrative Procedure Act of Serbia.

40 Article 25-32, 40-48. Administrative Procedure Act of Serbia. On lawsuit in civil proceedings and verdicts thereto, cf. Dimitrijević, 2008: 227-279.

least, similar. However, regulations concerning appeal against adoption decree in the Serbian legislation are radically different from that in Republic of Srpska.

Under the legislation of Republic of Srpska, a timely filed appeal stays the moment of adoption. Moreover, due to the explicit provision allowing for the unlimited time for lodging an appeal against the adoption decree, adoption cannot occur as a result of an administrative act in the first instance. The only legal way to adopt is to obtain an administrative act issued in the second instance. Also, grounds for appeal are poorly regulated to the extent that the question is raised whether the appeal can be lodged only for the faults of will, or for other reasons stipulated in the General Administrative Procedure Act as well. Conversely, in the Serbian legislation, adoption occurs at the moment the adoption decree is issued, which means that the appeal against the decree does not prevent adoption, but terminates it.

Apparently, legal provisions concerning the appeal against the adoption decree should be changed in the laws of both countries. In Serbian law, legal provisions on appeal should be adjusted to the established decree-based system. In the law of Republic of Srpska, on the other hand, the provisions concerning the time limit and grounds for lodging an appeal ought to be more precisely defined.

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**ЖАЛБА НА РЈЕШЕЊЕ О ЗАСНИВАЊУ УСВОЈЕЊА У
ПРАВУ СРБИЈЕ И ПРАВУ РЕПУБЛИКЕ СРПСКЕ**

Резиме

Инстанциона контрола акта о заснивању усвојења у праву Србије и праву Републике Српске, остварује се путем жалбе у другостепеном управном поступку. С обзиром на заједничку правну традицију на којима почивају поменути правни системи, као и на истоврсну надлежност, логично би било да су правила у вези са жалбом иста, или барем слична. Међутим, правила о жалби на рјешење којим се заснива усвојење у праву Србије, суштински се разликују од правила у праву Републике Српске. Аутор у раду говори о разликама између поменутих законских рјешења, као и о њиховим предностима и недостацима. На крају, аутор закључује да би требало измијенити законске одредбе у вези са жалбом на рјешење о заснивању усвојења и у једном, и у другом праву. У праву Србије, правила о жалби требало би прилагодити прихваћеном систему декрета, док би у праву Републике Српске требало прецизније уредити правила о року и разлозима за жалбу.

Кључне речи: Рјешење о заснивању усвојења, Жалба, Систем уговора, Систем декрета.

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**SUCCESSION RIGHTS OF SPOUSES IN THE PRIVATE LAW
OF VOJVODINA BETWEEN THE TWO WORLD WARS, WITH
REFERENCE TO THE SPOUSES' SUCCESSION RIGHTS
IN THE CONTEMPORARY SERBIAN LEGISLATION**

Abstract: *In this paper, the author has presented the succession law aspect of the legal status of spouses in the private law of Vojvodina in the period between the two World Wars. Upon analyzing the legal solutions in that period and the judicial decisions of the Court of Appeals and the Cassation Court in Novi Sad, the author has shed more light on the legal scope of the spouses' succession rights and authorities directly stemming from the intestate succession legislation, the testamentary disposition, and the inheritance contract. These legal solutions are further compared and contrasted with the legal solutions envisaged in the contemporary Serbian succession law. The author points out that the courts should be much more actively involved in creating the legal rules which should be adjusted to the needs of the immediate social reality.*

Keywords: *mutual intestate succession rights of spouses, widow's succession right, statutory (forced) portion, joint will, spousal succession agreement.*

1. Introductory Notes

The marital relationship with the testator has had a specific influence on creating legal succession rules throughout legal history. While the relation by birth has always been the pillar of legal succession, the marital relationship with the testator has gradually gained significance and importance. The law directly acknowledged specific inheritance law entitlements to the surviving spouse,

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concurrently enabling him/her to inherit the deceased spouse on the basis of a will or an inheritance contract.¹

The subject of our attention in this paper is the inheritance law aspect of the legal status of spouses in the private law of Vojvodina between the two World Wars. Herein, through an analysis of the inheritance law entitlements of spouses, founded on the legislation from that period and regulated more closely by the decisions of the Appellate Court and the Court of Cassation in Novi Sad, we endeavour to shed more light on this segment of succession, compare it with the contemporary Serbian legislation in this domain, and point out to the need for a more active role of courts in creating legal rules which should be adjusted to the needs of the immediate social reality.

2. Spouses' intestate succession rights

2.1.1. *Intestate succession right of spouses (successio contugalis)*

Reciprocity in succession existed between the spouses in the private law of Vojvodina.² Thus, after opening the deceased spouse's succession, besides acquiring the statutory one-half of the community property,³ the surviving spouse (of either gender) was also entitled to receive the inheritance estate of the deceased spouse or a part thereof.

If we disregard a smaller part of the territory of Vojvodina where the amended Austrian Civil Code was applied,⁴ the intestate succession right of spouses directly depended on the composition of the estate. This is undoubtedly confirmed by the content of Article 14 of the Conclusions of the State Legal Commission, dated 5th November 1861,⁵ which stipulates that the marital property is inherited by the spouse if the decedent has no children; the non-marital property is part of

1 For more details on the inheritance law status of spouses in the past, see: Blagojević, 1939: 224–226; Đorđević, 1988: 13–31.

2 In this regard, see: K. 4391–86. Cited after: Ignjatović, 1910: 34.

3 According to the view of the Novi Sad Court of Cassation, the community property «*shall be established in such a manner as to establish first the value of the estate after the deduction of all the estate's debts, including the dowry, whereupon the special property of the testator shall be deducted from such established net property, and whatever is left after all this shall be the community property. The dowry, therefore, shall be deducted from the entire property, including both the decedent's separate property and the property acquired during marriage*». See: The Decision of this Court, no. G. 280/1926, *The Collection of Decisions of the Higher Courts, VIII*, 1928, Dec. no. 163, p. 141–143.

4 The provisions of the Austrian Civil Code were applied in the territory of Kovin, Pančevo, Titel and Bela Crkva. Cited after: Nikolić, 1995: 46.

5 Hereinafter, these regulations will be referred to as Provisional Legal Regulations.

the spouse's inheritance if the deceased left no one in the circle of descendants, predecessors and lateral kin.⁶ The surviving spouse would inherit the entire marital property of the decedent no matter if it was acquired before or during their marriage.⁷

According to the stance of the Novi Sad Court of Cassation, in the event that the decedent had no descendants, or they could not or did not want to inherit, the entire estate would be a part of the spouse's inheritance, as it was assumed that "the probate estate is marital property".⁸ The opposite claim could have been argued by all the persons having inheritance law interest.⁹ If proven that there was any property from collateral descent, it had to be returned to the relatives or, if alienated, its value had to be fully compensated.¹⁰

The *materna maternis, paterna paternis* principle was applied for inheriting property from collateral descent, thereupon the circle of potential heirs was limited to those from whose line (or collateral line) the inherited goods descended.¹¹ If there were no such heirs, a portion of the non-marital property that descended from their line did not accrue to the heirs of the other line, but the so-called declassification of property from the line would be exercised and it would be converted into marital property (Milić, 1921: 59).

Regarding the legal treatment of dowry, the stand of the Appellate Court and the Court of Cassation in Novi Sad was clearly defined in several decisions. If the dowry was given to the bride by her parents, and she had no descendants or left

6 For more details on marital and non-marital property in Vojvodina law, see: Blagojević, 1941: 33–44.

7 See: Decision of the Novi Sad Court of Cassation, G. 1226/929, *The Collection of Decisions of the Higher Courts, XXI*, 1941, Dec. no. 104, p. 124–125.

8 See: Decision of the Novi Sad Court of Cassation, G. 148–1922. Cited after: Bogdanfi, Nikolić, 1925:199.

9 In addition to the aforementioned Decision, see the Decision of the Novi Sad Court of Cassation, G. 2/1930, *The Collection of Decisions of the Higher Courts, XIII*, 1933, Dec. no. 72, p. 103–105.

10 Such is the stand of judicial practice. See: Decision of the Novi Sad Court of Cassation, G. 142–1922. Cited after: Bogdanfi, Nikolić, 1925: 200.

11 The same inheritance law regime also applied to those movables that the wife was given by her parents, as the bride's *trousseau*. See: Decision of the Novi Sad Court of Cassation, Rev. II. 4632/1935. Source: The Archive of Vojvodina.

no will, then it would constitute the family estate.¹² Otherwise, it represented the marital property and belonged to the surviving spouse.¹³

According to the provisions of the amended Austrian Civil Code,¹⁴ a 1/4 of the estate value belonged to the decedent's spouse when the spouse inherited with his/her descendants; if the deceased had more than three children, the spouse inherited a child's portion of the inheritance estate. When inheriting jointly with the decedent's predecessors (including third-degree predecessors), the surviving spouse acquired half of the estate. As a statutory heir, the spouse had a privileged position in relation to other ancestors because he/she inherited the entire succession estate. The household items (as a *pre legatum*) were also part of the spouse's inheritance, irrespective of who the decedent's heirs were.¹⁵

In the contemporary Serbian law, the spouse claims together with the decedent's descendants and parents, and their descendants. The founders of the third *parentela* (grandparents), their descent and other predecessors are excluded from the inheritance.¹⁶

As a rule, the spouse acquires the decedent's assets as ownership title,¹⁷ no matter if the decedent acquired them during lifetime or inherited them from the predecessors.

The size of the intestate succession portion is in direct relation to who claims the inheritance with the spouse. If the claimants are the decedent's descendants, the spouse and the children (regardless of their family status) inherit in equal parts.¹⁸ However, when the spouse inherits with the decedent's parents

12 See: Decision of the Novi Sad Court of Cassation, G. 271/1920, *The Collection of Decisions, 1921*, Dec. no. 57, p. 96–98; Decision of the Novi Sad Court of Cassation, G. 570/1931, *The Collection of Decisions of the Higher Courts, XV*, 1935, Dec. no. 36; Decision of the Novi Sad Court of Cassation, Rev. II, 446–938, *The Collection of Decisions of the Higher Courts, XXI*, 1941, Dec. no. 90, p. 110–112.

13 According to the stand of judicial practice, when the wife had spent the dowry on her medical treatment of her own free will, the husband was not obliged to compensate its value to the deceased's parents. See: Decision of the Novi Sad Court of Cassation, G. 249/34, *The Collection of Decisions of the Higher Courts, XVII*, 1937, Dec. no. 17, p. 28–31.

14 See: par. 757 of the Austrian Civil Code. For the needs of this paper, we use the translation of this legal text dated 1921, by the author D. Arandjelović.

15 See: par. 758 of the Austrian Civil Code.

16 See: Art. 8–20 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

17 Possible discrepancies from this solution will be discussed in more details hereinafter.

18 See: Art. 9 para 2 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

and their descendants, the spouse is regularly entitled to one half of the value of the estate.¹⁹

Besides, the spouse, all the descendants and the decedent's parents who lived with the decedent in a common household are entitled to inherit the household items of lower value, used for satisfying their common needs.²⁰

In the contemporary Serbian law, the spouse's intestate succession portion however, can be, under certain conditions, reduced both when he/she inherits as the heir of the first inheritance order and as the heir of the second inheritance order.

In the event that the spouse inherits as the heir of the first inheritance order, the current inheritance law regulations provide for the possibility of reducing the spouse's intestate succession portion for the purpose of protecting the property interest of the decedent's children. For such a correction in the size of the intestate succession portions of the heir of the first legal inheritance order, it is necessary to meet three conditions: at least one first-order descendant of the decedent shall not be a child of the surviving spouse; the surviving spouse's property is bigger than the portion of the estate that they would receive by inheriting the deceased spouse; and the court, taking into consideration the circumstances of the specific case, finds that the increase of the inheritance portion of the children is justified.²¹ If the stated conditions are cumulatively met, the inheritance portion of the spouse can be reduced by double in relation to the decedent's children.

Most certainly, the solution contained in Article 9 paragraph 3 of the Inheritance Act of the Republic of Serbia deserves full respect as it provides an additional legal protection to inheritance law interest of the decedent's children, who are not concurrently the descendants of the surviving spouse. The Serbian legislator, in our opinion, unjustifiably does not take into consideration the fact that the other heirs of the first inheritance order can (due to the distribution of the estate in equal portions) be in an adverse property-law position, as they are additionally "burdened" with their overall property position, incapacity to earn their living, health status, age, impossibility of employment, etc. Therefore, we

19 See: Art. 12 para 2 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

20 See: Art. 1 para 3 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

21 See: Art. 9 para 3 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

believe that the change in the size of inheritance portions of other heirs of the first intestate inheritance order is justifiable.²²

In the situation where the spouse inherits as the heir of the second inheritance order, there is a possibility of reducing the inheritance portion of the decedent's spouse in favour of the parents and their descendants, under certain conditions. Namely, in order to have certain correction in the size of inheritance portions of the heirs of the second legitimate inheritance order, the following requirements have to be met: the inherited assets need to comprise over a half of the estate of the decedent; the marital community between the decedent and the spouse did not last for a longer period of time; and an heir requests the reduction of the spouse's inheritance portion. If the stipulated requirements are met, the inheritance portion of the surviving spouse may be, according to the wording of the law, reduced to one quarter of the estate.²³

While the judicial practice in Vojvodina between the two World Wars had a clear stand that the inherited goods obtained by donation *inter vivos* or *mortis causa* are also classified under the umbrella of inherited goods,²⁴ the contemporary law may be interpreted more narrowly in legal practice, i.e. that the concerned property rights are exclusively acquired on the inheritance law basis, or more broadly, i.e. that the property rights acquired by gifts shall also to be taken into consideration.²⁵

The reduction of the inheritance portion of the decedent's spouse is not examined by the court *ex officio*, but only if it is specifically demanded by any of the heirs of the second legal inheritance order who inherits *in concreto*. However, since the legal provision on this issue is imprecise and ultimately unclear, the dilemma remains whether the predecessors and the collateral kin from one line are entitled to demand the reduction of the the spouse's inheritance portion even if more than a half of the inherited assets does not come from the line they belong to? In other words, is there any room for limiting the spouse's inheritance portion if it is absolutely certain that the inherited goods originate from the spouse from the former marriage, or from some other person who does not belong to the circle of relatives? Although there are opinions in the legal litera-

22 On the possible manner of correction of legitime portions, for the spouses and the other descendants of the deceased, see in more detail: Stojanović, 1999: 63–65.

23 See: Art. 26 para 1 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

24 In this regard, see: N. O. 226 and the Decision of the Novi Sad Court of Cassation, no. G. 863/929. Cited after: Ignjatović, 1910: 26–27.

25 On "inherited goods" in a broader sense, see: Antić, Balinovac, 1996: 170–171; Svorcan 1999: 103.

ture that the universal successor, who inherits in the concrete case, may raise a claim for the reduction of the inheritance portion of the surviving spouse if the decedent acquired the inherited goods from the blood relatives from the line the decedent belongs to (Antić, Balinovac, 1996: 172–173), it is a fact that the inherited goods do not have to originate from those relatives at all; therefore, the argument in favour of the interpretation of this legal solution, which enables the preservation of non-marital goods in a broad family community, is irrelevant (Antić, Balinovac, 1996: 169–170; Svorcan, 1999: 103).

2.2. Widow's inheritance right (*successio vidualis*)

Although it may sound as a legal paradox, in addition to the mutual inheritance right, the wife who survived her husband (of a certain social status) was also acknowledged the widow's inheritance right. Namely, Article 15 of the Provisional Legal Rules specifically regulated this institute, which was exclusively related to the wife of a nobleman or "*honorarios*" (honorable men), when they had descendants. Then, the surviving spouse inherited specific movable chattels, which had not been part of the common matrimonial property. The chattels included: a coach and horses, her husband's formal clothes, a wedding ring, a half of the horse stable (if there were less than fifty horses), and a child's portion of the acquired chattels of her deceased husband. The wife received those goods *in natura*, unless such goods were indivisible. Then, their pecuniary counter-value was part of her inheritance (see in more detail: Piškulić, Đerđ, 1924: 265).

2.3. Widow's usufruct right (*ius viduale*)

Being profoundly aware of the wife's economic subordination to her husband in social reality, the lawmaker in Vojvodina between the two World Wars entitled the widow to inherit property not only on the basis of her intestate succession right but also on the basis of the widow's inheritance right (*successio vidualis*) and the widow's usufruct right (*ius viduale*). Such an entitlement undoubtedly stems from the content of Art. 16 of the Provisional Legal Rules.

The legal volume of the widow's right encompasses the usufruct of the entire or a part of the estate of her deceased husband, depending on who acquires the property ownership in the given case.

If the decedent had descendants, the entire estate would belong to the spouse to use and enjoy for life. If, though, the deceased had no children, the wife would

be entitled to enjoy the assets that constituted the property from collateral descent.²⁶

The widow's right to the property acquired by her deceased husband in his lifetime did not exclude the widow's usufruct right to the remaining portion of his estate (Milić, 1921: 60).

The widow's usufruct right belonged to the wife of the deceased husband, irrespective of the value of widow's property (Bogdanfi, Nikolić, 1925: 207). Judicial practice did not recognize this entitlement only to the widow of the former heir, thus protecting the inheritance law interests of the subsequent heir.²⁷ When it comes to the relationship between the widow's right and the matrimonial community property, the Court of Cassation in Novi Sad stated (in a number of decisions) that the widow who accepted her widow's rights and did not file any claim in regard to the community property, thus, manifested her own free will by disclaiming the rights to the marital community property.²⁸

In the opinion of the Cassation Court in Novi Sad, the unmarried wife of the deceased was entitled to the widow's usufruct right, provided that such a privilege was assigned by the deceased's heir himself, being aware of her family status thereof.²⁹

The Novi Sad Cassation Court also protected the widow of the deceased husband, who died without an estate, by ordering the husband's parents to provide the needed support to their daughter-in-law, provided that their son had earned for living with them jointly.³⁰ The support was, by default, given in-kind. However, the widow was entitled to financial support if she could not continue living with the parents of her deceased husband through her own fault (in more detail: Bogdanfi, Nikolić, 1925: 208).

26 The widow's right had to be ensured by the court *ex officio*, even if the widow was not present at the probate hearing. See: par. 72, 81, 90 and 102, XVI: 1894. Cited after: Bogdanfi, Nikolić, 1925: 207–208.

27 See: Decision of the Novi Sad Cassation Court, G. 227–1921. Cited after: Bogdanfi, Nikolić, 1925: 210.

28 See: Decision of the Court of Cassation in Novi Sad, G. 688–1933, *The Collection of Decisions of the Higher Courts, 1938*, Dec. no. 143, p. 231–232; Decision of the Novi Sad Cassation Court, G. 938/1931, *The Collection of Decisions of the Higher Courts, XVI, 1936*, Dec. no. 68, p. 100–101; Decision of the Novi Sad Cassation Court, Rev. I. 239–1938, *The Collection of Decisions of the Higher Courts, XIX, 1939*, Dec. no. 306, p. 330–332.

29 In this regard, see: Decision of the Novi Sad Cassation Court, G. 133–1923, *The Collection of Decisions of the Higher Courts, IV, 1924*, Dec. no. 2, p. 5–7.

30 See: The Decision of the Novi Sad Cassation Court, G. 918–1931 and no. G. 842–1936. Cited after: Ignjatović, 1910: 42–43.

The widow was acknowledged the entitlement of widow's usufruct even if the decedent, in his lifetime, had alienated his own property by the way of gifts. Then, she was entitled to claim an adequate pecuniary amount for maintenance purposes which matched the social position and property status of her deceased husband. However, if the deceased bestowed his descendant and the claimant is the widow from the second marriage, then she was entitled to usufruct of the endowed goods, in the size of one child's intestate portion of the estate (Bogdanfi, Nikolić, 1925: 209).

Although the scope of the widow's right was established by a legal rule, the spouses could settle this issue by an agreement and in some other way. The validity of such a legal transaction rested on the following two conditions: it had to be settled in the form of the public notary act, and it had to ensure the protection of the forced portion (*legitime*) of forced heirs (Jesensky, Protić, 1922: 148).

Additionally, the discrepancy in relation to the legal regime of the widow's rights could also be established by the husband's bequest. He could settle this privilege of his wife in a different manner, for example, by leaving her: support,³¹ annuity, legacy, and a statutory portion of inheritance estate.

According to the lawmaker's intention, the widow's right could be limited in a number of ways: by the institute of *legitime* (forced portion); by securing maintenance to decedent's descendants; by securing maintenance in favour of the decedent's first wife; by another widow's usufruct right; at the request of the decedent's descendants and by the will of the deceased, expressed in the testament.³² The provisions on the limitation of the widow's usufruct right could be applied only in case of intestate succession.³³

In the event of securing maintenance to descendants and settling down the forced portion of forced heirs, the widow's right could be limited to the minimum funds needed to meet the widow's daily needs.³⁴

If the wife from the former marriage was awarded the necessary maintenance amount, then the widow had to bear the costs of such maintenance, if her widow's

31 According to the Appellate Court in Novi Sad, if the husband bequeathed maintenance to his wife by will and she agreed, she was entitled to claim (if her life situation changed) an increase of the amount which had been given for subsistence. See: The Decision of this Court, G. 1120-1922, *The Collection of Decisions of the Higher Courts, III*, 1923, Decision no. 118, p. 149-150.

32 In this regard, see: Decision of the Novi Sad Court of Cassation, G. 265/1930, *The Collection of Decisions of the Higher Courts, XIV*, 1934, Dec. no. 50, p. 57-58.

33 See: K. 338-904. Cited after: Ignjatović, 1910: 39.

34 See: Decision of the Novi Sad Court of Cassation, G. 734-933, *The Collection of Decisions of the Higher Courts, XVIII*, 1938, Dec. no. 43, p. 71.

right was not limited in any way; on the contrary, the burden of maintaining the decedent's first wife would be charged to his universal successors.³⁵

In case of a conflict between two widows' rights which could not have been entirely or partially settled from the estate, the usufruct right of the son's mother excluded entirely or partially the widow's right of the son's wife.³⁶

The right to claim the limitation of the widow's right of the surviving wife belonged only to the decedent's descendants.³⁷ Depending on who invoked the inheritance right to the estate of the deceased father, there were also differences in the scope and manner of limitation of widow's rights.

If the decedent was inherited by descendants who were concurrently the widow's own children, then they were entitled to claim the limitation of her widow's right to the amount of a decent maintenance, which entailed the financial assets for food, housing, clothes, footwear and satisfaction of cultural needs.³⁸ A similar solution was in use if a nobleman or "*honoracior*" was a decedent, but the only difference was that his widow was also entitled to receive wedding costs and the *trousseau* (Bogdanfi, Nikolić, 1925: 211–213).

The widow's stepchildren could claim the limitation of her widow's usufruct right, involving one portion of the children's part of the estate.³⁹ When assessing this part of the estate, the widow was accounted for as a child, and the decedent's family estate was taken into consideration as well as the estate acquired during the first marriage.⁴⁰ The same solution was applied if the inheritance was

35 In this regard, see: Decision of the Novi Sad Appellate Court, G. 161–1923, *The Collection of Higher Court Decisions, IV*, 1924, Dec. no. 23, p. 42–43.

36 See: Decision of the Novi Sad Court of Cassation, G. 393–1931, *The Collection of Decisions of the Higher Courts, XVII*, 1937, Dec. no. 56, p. 91; Decision of the Novi Sad Court of Cassation, G. 732–1933, *The Collection of Decisions of the Higher Courts, XIX*, 1939, Dec. no. 25, p. 39–42 and the Decision of the Novi Sad Court of Cassation, no. G. 804–934, *The Collection of Decisions of the Higher Courts, XX*, 1940, Dec. no. 254, p. 253.

37 In one case, the Court of Cassation in Novi Sad expanded the circle of subject who would be entitled to the limitation of the widow's right of the wife, including the descendants' legal successors (e.g. the cessionary and the buyer of the inheritance portion). See: Decision of this Court, no. G. 44–1924, *The Collection of Higher Court Decisions, IV*, 1924, Dec. no. 96, p. 171–174.

38 According to permanent court practice, this entitlement was a subject-matter of security. See for instance: Decision of the Novi Sad Court of Cassation, no. G. 287–1932, *The Collection of Decisions of the Higher Courts, XVII*, 1937, Dec. no. 75, p. 110–112.

39 See: Decision of the Novi Sad Court of Cassation, G. 359/1926, *The Collection of Decisions of the Higher Courts, VII*, 1927, Dec. no. 32, p. 46–47.

40 In this regard, see: Decision of the Court of Cassation in Novi Sad, G. I, 14–1924. Cited after: Bogdanfi, Nikolić, 1925: 212; Decision of the Court of Cassation in Novi Sad, G. 166/1928, *The Collection of Decisions of the Higher Courts, IX*, 1929, Dec. no. 15, p. 38–40 and the Decision of

simultaneously invoked by the decedent's descendants from his former marriage and the widow's own children.⁴¹

The wife's usufruct right could also be limited by her husband's declaration of the last will. This limitation, however, was not to exceed the legally provided minimum, which entailed the means needed for decent subsistence,⁴² i.e. the usufruct of one portion of children's share (for the second wife) and, exceptionally, the bridal *trousseau* (for the wife of a nobleman or a «*honoraciór*») (Bogdanfi, Nikolić, 1925: 209).

The limitation of the widow's usufruct could be claimed not in the court of law but also by agreement between the surviving wife and the descendant.⁴³ However, according to stand of the Cassation Court in Novi Sad, the limitation of the widow's right could not have been claimed if the surviving wife and the descendant had previously reached an agreement on the division of inheritance.⁴⁴

If the court assessed that there was room for the limitation of the widow's right, the evaluation of the maintenance amount was governed by the following criteria: the widow's civil status/class she belonged to, her personal relationship with the deceased husband, and the net income of the estate (Jesensky, Protić, 1922: 147). The judicial practice took the stand that the widow's stepchildren did not have to prove in civil proceedings that the usufruct of one portion of the children's share of inheritance was sufficient for her existence.⁴⁵

The widow's usufruct right could not be limited in the following circumstances: if the husband secured the enjoyment of the entire estate by the declaration of his last will; if the income from the estate had little value and did not provide

Court of Cassation in Novi Sad, G. 1253/1929, *The Collection of Decisions of the Higher Courts*, XV, 1935, Dec. no. 5, p. 12–13.

41 In this regard, see: Decision of the Court of Cassation in Novi Sad, no. G. 359–1926. Cited after: Ignjatović, 1910: 39.

42 See: Decision of the Novi Sad Court of Cassation, G. 525–1931. Cited after: Ignjatović, 1910: 38–39; Decision of the Novi Sad Court of Cassation, G. 265–1930, *The Collection of Decisions of the Higher Courts*, XIX, 1934, Dec. 50, p. 57–60; Decision of the Novi Sad Court of Cassation, Rev. 496/30/1938. Source: The Archives of Vojvodina.

43 See: Decision of the Novi Sad Court of Cassation, G. 359/1926, *The Collection of Decisions of the Higher Courts*, VII, 1927, Dec. no. 32, p. 46–47.

44 See: Decision of the Novi Sad Court of Cassation, G. 813–932, *The Collection of Decisions of the Higher Courts*, XVIII, 1938, Dec. no. 144, p. 231.

45 Such was the stand expressed in the Decision of the Novi Sad Court of Cassation, no. G. 1/1928, *The Collection of Decisions of the Higher Courts*, X, 1930, Dec. no. 66, p. 96–99.

for the widow's decent subsistence;⁴⁶ if the widow was the legal guardian of the children, in charge of managing their property; and if the rights acknowledged under other laws were in question, e.g. pension, license for selling alcohol (Jesensky, Protić, 1922: 144).

According to the permanent judicial practice, the widow whose inheritance right was limited by a specific form of maintenance was entitled to enjoy the usufruct of the estate until the widow has been settled by the descendants.⁴⁷ The Cassation Court in Novi Sad protected the widow's interests even if there was a final decision on the limitation of the widow's right, and she continued to enjoy the estate even if there was a final and enforceable decision on the limitation of the widow's right. In the opinion of the supreme court instance, she was not obliged to compensate the owners for the lost profit, if they "tacitly consented to her further possession":⁴⁸

The widow of the deceased was accountable for the decedent's debts on the basis of the right to enjoyment, jointly and severally, together with the heirs who were to acquire property ownership (Bogdanfi, Nikolić, 1925: 280).

In the contemporary Serbian inheritance law *milieu*, the surviving spouse of the decedent may inherit the remaining portion of the estate, which he does not inherit as an ownership right but as a usufruct right, only if the requirements are met for the increase of his inheritance portion (given that he is an heir of the second inheritance order).

According to the letter of the law, the spouse's inheritance portion may be increased if the conditions of basic and auxiliary (additional) character are fulfilled. The basic requirements include: a lack of necessary means of subsistence for the spouse (a substantive condition), and filing a claim for the increase of one's inheritance portion (a procedural condition). The additional requirements include: the length of marriage between the decedent and the surviving spouse;

46 In this regard, see: Decision of the Novi Sad Court of Cassation, no. G. 111-1923. Quoted according to: Bogdanfi, Nikolić, 1925: 211; Decision of the same Court, no. G. 111/1923, *The Collection of Higher Court Decisions, IV*, 1924, Dec. no. 58, p. 99-101; Decision of the same Court, no. G. 274/931. Quoted according to: Ignjatović, 1910: 38; and the Decision of the same Court, no. Rev. I. 243/1935. Source: The Archive of Vojvodina.

47 K. 592-97 and K. 5125-99. Cited after: Ignjatović, 1910: 37 and 39.

48 Decision, G. 582-1927, *The Collection of Decisions of the Higher Courts, XX*, 1940, Dec. no. 206, p. 212.

property circumstances of the universal successors who inherit in the specific case; their capability of earning, and the value of the succession estate.^{49 50}

Apart from this case, as an heir of the second legal inheritance order, the spouse may get a portion of the estate to enjoy for life, if he/she makes a choice between being granted the reduced inheritance portion (1/4) as ownership title, or the lifetime usufruct of the increased inheritance portion (1/2).⁵¹ A direct consequence of the declaration of the decedent's spouse on the choice of lifetime enjoyment is also the existence of undistributed portion of the succession estate, the so-called proprietary surplus. Who inherits this part of the estate? The Serbian legislator does not provide answer to this question. In legal literature, several solutions have been proposed for the purpose of solving this dilemma. According to one opinion, which was not argued in more details, the stated surplus of the estate belongs (under the application of the right of survivorship) to all the heirs of the second inheritance order, or only to those who raised a claim for the reduction of the inheritance portion [Babić, 2005: 78]. Some authors deem that if all the heirs inheriting *in concreto* claim the reduction of the spouse's inheritance portion and the spouse opts for the lifetime usufruct of a half of the estate, this surplus belongs to all of them. If, however, only one of the heirs claims the reduction of the spouse's inheritance portion, the spouse's declaration on the choice of the 1/4 part of the estate for life usufruct consequently entails that the proprietary surplus belongs to the spouse, given that the inheritance portion of the other heirs (who did not ask for any reduction) must not be encumbered by the spouse's usufruct right (Antić, Balinovac, 1996: 183–185). Contrary to the presented considerations, there are theoreticians who consider that the most expedient solutions in such a case would be to award the undistributed part of the estate to the heirs claiming the reduction of the spouse's intestate succession portion (Svorcan, 1999: 105–106; Đurđević, 2001: 167–170).

The obvious conflict of stands in the theory on this topical issue may be a suitable ground for taking different actions in identical procedural situations and, ultimately, for unequal treatment of the parties to the proceedings. Therefore, we hold that the regulation of this legal situation is much needed.

By opting for the usufruct right over the greater part of the estate (1/2) instead of the smaller part (1/4) in ownership, the surviving spouse practically abandons

49 See: Art. 23 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

50 In theory, there are opinions that when assessing the requirements for the increase of the inheritance portion of heirs in the second inheritance order, the priority should be given to two substantive facts: the lack of necessary means for living, and the length of marriage between the surviving spouse and the decedent. For more detail, see: Antić, Balinovac, 1996: 161.

51 See: Art. 28 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

his/her 1/2 of ownership, which implies that that it is wholly free for intestate distribution; therefore, that part of the estate should be distributed to all the heirs of the second inheritance order, who inherit in the specific case, regardless of whether they claimed the reduction of the spouse's inheritance portion or not. Favouring the heirs who claimed the reduction of the spouse's inheritance portion as opposed to those who did not is considered unjustifiable because the reduction of the spouse's inheritance portion to a 1/4 of the estate and receiving a 1/2 of the estate in usufruct are two mutually preclusive options.

The favoured position of the heir who claims the reduction of the spouse's inheritance portion should only stay in a situation when the surviving spouse does not opt for the lifetime usufruct of a part of the estate. Thereby, the claim for the reduction of the spouse's inheritance portion is beneficial only to the heir who claimed the change in the size of his inheritance portion. The Inheritance Act does not respond to the issue how to distribute the free part of the estate after reducing the spouse's inheritance portion if the reduction is claimed by several or all heirs. In such a case, we think that the freely disposable portion of the estate should go to the heirs who claimed the reduction of the spouse's inheritance portion, in line with the basic rules on the distribution of the estate in the second inheritance order.

In our opinion, what may be a stumbling block in practice is the following issue: shall the spouse be accountable for the decedent's debts whenever he gets an aliquot part of the estate in usufruct.⁵² Unlike the judicial practice in the private law of Vojvodina between the two World Wars which had a clear stance on this issue, the contemporary Serbian legislator is silent thereof.

Taking into account the interests of heirs who acquire the decedent's estate either as a right of ownership or as a usufruct right, as well as the interests of the decedent's creditors, we consider that it would be most appropriate to accept the solution that the usufructuary is directly accountable for the decedent's debts, in value of the acquired income, reduced by the amount needed for securing the minimum of existential needs.

The Inheritance Act of the Republic of Serbia also does not provide an answer to the question whether the usufructuary should participate in the settlement of forced portion (*legitime, legitima portio*). In line with the legally prescribed order of settling the authorised persons from the estate, stipulated in Art. 41 para. 1 of the Inheritance Act of the Republic of Serbia, it follows that the Serbian lawmaker does not specifically protect the usufructuary; hence, in proportion

52 Such a case exists in intestate succession even when the adopter succeeds the adoptee from an incomplete adoption. See: Art. 38 of the Inheritance Act, *Official Gazette RS*, 46/1995, 101/2003, 6/2015.

to the value of his/her income, the usufructuary would have to participate in the settlement of the decedent's forced heirs. However, for reasons of fairness, and by analogy with the payment of the decedent's debts, the usufructuary (whose usufruct right is acknowledged and who lacks the necessary means of subsistence) shall enjoy legal protection but only in terms of providing the existential minimum from the succession estate for his/her daily needs.

2.4. The spouse's marital relationship with the decedent and forced heirship

In the Vojvodina private law, the spouse was not acknowledged the right to forced portion (*legitime*). There was an identical situation in the territory where the amended Austrian Civil Code was applied.⁵³

The contemporary Serbian law includes the spouse in the circle of forced heirs,⁵⁴ enabling him/her, irrespective of the decedent's will and even against his/her will, to get 1/2 of the statutory portion as forced portion, regardless of whether he/she inherits as a forced heir of the first or the second forced inheritance order.⁵⁵

Although the Vojvodina inheritance law did not acknowledge a forced heir status to the spouse, the fact is (as already noted) that the property interests of the widow were particularly protected from excessive decedent's gratuitous dispositions *inter vivos*. In fact, even in such a case, she was acknowledged the widow's usufruct rights. Also, the husband/testator was precluded from limiting this entitlement over the limit necessary for the satisfying the existential minimum.

2.5. The spouse's loss of inheritance entitlements

In the Vojvodina private law, the spouse was not entitled to inherit the deceased spouse if the marriage was officially terminated by a final court decision,⁵⁶ annulled, or if the spouses were judicially (rather than factually) separated before the court (the so-called "separation from table and bed").⁵⁷ The decedent's petition for divorce or his/her incapacity to do so, by reason of insanity, produced the same consequences.⁵⁸

53 For more on forced heirship in the Vojvodina inheritance law, see: Piškulić, Đerđe, 1924: 267–270.

54 See: Art. 39 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

55 See: Art. 40 para 2 of the Inheritance Act, *Official Gazette of the RS*, 46/1995, 101/2003 and 6/2015.

56 The Decision of the Novi Sad Court of Cassation (G. 316–1923, *The Collection of Higher Court Decisions*, IV, 1924, Dec. no. 76, p. 124–125) is interpreted in this sense.

57 K. 1128–1910. Cited after: Milić, 1921: 58.

58 K. 2317–188. Cited after: Ignjatović, 1910: 34.

In case the surviving spouse was unworthy of inheritance, he/she was deprived of the inheritance right and excluded from the estate (for the same reasons that give rise to hereditary unworthiness) by the testator's will expressed in the testament (in more details: Milić, 1921: 58; Jesensky, Protić, 1922: 141).

According to the stand of permanent court practice, separate life of the spouses caused by the fault of the surviving spouse entailed the loss of the right to inherit.⁵⁹ The right to inherit did not cease to a *bona fides* spouse from a putative marriage.⁶⁰

The specific facts relevant for the termination of the widow's right were as follows: widow's death or declaring the missing widow dead; her re-marriage, widow's unworthiness for inheritance;^{61, 62} widow's waiver to this right, through a contract with the spouse;⁶³ and the agreement between the widow and the decedent's heir (in more details: Bogdanfi, Nikolić, 1925: 213–214).

59 See: Decision of the Court of Cassation in Novi Sad, G. 394/1931, *The Collection of Decisions of the Higher Courts, XIII*, 1933, Dec. no. 70, p. 99–101; Decision of the Court of Cassation in Novi Sad, G. 783/1931, *The Collection of Decisions of the Higher Courts, XIV*, 1934, Dec. no. 206, p. 188 and N. O. 12–IX 1906, no. 4750, *The Collection of Decisions of the Higher Courts, XVIII*, 1938, Dec. no. 218.

60 N. O. 219, Cited after: Ignjatović, 1910: 34.

61 In several decisions of the Novi Sad Court of Cassation, there is a clear stand that the widow was unworthy of the right to widow's enjoyment if she entered the so-called common-law marriage. See, for instance: Decision of the Novi Sad Cassation Court, G. 381/1928, *The Collection of Decisions of the Higher Courts, IX*, 1929, Dec. no. 61, p. 102–104; Decision of the Novi Sad Cassation Court, G. 1393/1929, *The Collection of Decisions of the Higher Courts, XIV*, 1934, Dec. no. 112, p. 124; Decision of the Novi Sad Cassation Court, G. 521/1931, *The Collection of Decisions of the Higher Courts, XV*, 1935, Dec. no. 14, p. 27–29. Yet, according to the stand of the Novi Sad Cassation Court, if the person authorised to demand the termination of the widow's rights tolerated such a behaviour of the widow for a longer period of time, it was considered that the unworthy act was pardoned in that way. In this regard, see: Decision of the Novi Sad Cassation Court, G. 198–1924, *The Collection of Higher Court Decisions, V*, 1925, Decision no. 58, p. 85–88; Decision of the Novi Sad Cassation Court, Rev. 491–1935, *The Collection of Higher Court Decisions, XX*, Decision no. 122, p. 120–123. For a similar decision, see: Decision of the Novi Sad Cassation Court, G. 99/1923, *The Collection of Higher Court Decisions, IV*, 1924, Dec. no. 33, p. 58–61.

62 We cannot fail to note the different acting of the Novi Sad Cassation Court towards the spouse found at fault for separate life, when the succession right and the widow's rights are in question. In the first situation (as confirmed by the decisions stated in the footnote no. 63 herein), the supreme court instance in Vojvodina was benevolent towards the spouse; in the second situation, the widow was sanctioned with the loss of the widow's enjoyment. In regard to this, see: K. 592–902. Cited after: Ignjatović, 1910: 35 and the Decision of the Novi Sad Cassation Court, no. Rev. II. 571/15/1938. Source: The Archives of Vojvodina.

63 The Novi Sad Cassation Court took the stand that the widow, who had renounced the widow's usufruct right through a pre-marital agreement in the countervalue of 1,000 *Kronen*,

The widow could not have been deprived of her widow's rights by her deceased husband's will expressed in the testament, unless there were reasons for hereditary unworthiness, nor on the basis of the inheritance contract concluded between the decedent and his potential heirs (Jesensky, Protić, 1922: 145).

In the contemporary Serbian law, the surviving spouse is not entitled to inherit the deceased spouse if the marriage, at the time of the opening of the estate, ceased to exist by divorce or the annulment of marriage. Besides, the surviving spouse may lose the right to inheritance if one of the reasons envisaged in the current inheritance law has been met.

Although the marriage existed at the time of opening the estate, the surviving spouse loses the right to inherit the deceased spouse if the deceased spouse had submitted a petition for divorce and it was established (after his death) that the charges were founded.⁶⁴ Although the marriage was terminated with the death of deceased, his heirs were entitled to request the continuation of the divorce proceedings,⁶⁵ with a view of proving the grounds of the petition for divorce. If the competent court finds that the petition for divorce was grounded, it cannot render the judgement on divorce because the marriage had been terminated upon a stronger legal ground: the death of the spouse-petitioner; however, the court is obliged to state in its decision that, although the marriage was terminated by death, the legal consequences are practically the same as in case of divorce, i.e. the surviving spouse cannot inherit the deceased spouse (in more detail: Mitić, 1966: 112; Đorđević, 1988: 107).

The right of the surviving spouse to inherit the deceased spouse ceases *ex lege* if their marriage was annulled for reasons that were known to the surviving spouse at the moment of concluding the marriage.^{66 67}

Ex lege, the surviving spouse loses the right to inherit the deceased spouse, if the marital community with the decedent, before opening his estate, had been

could not have been awarded a higher pecuniary amount due to the changed currency situation. See: Decision of the Novi Sad Cassation Court, G. 536/1931, *The Collection of Decisions of the Higher Courts*, XV, 1935, Dec. no. 27, p. 44–45.

64 See: Art. 22 para. 1 point 1 of the Inheritance Act, *Official Gazette of RS*, 46/1995, 101/2003 and 6/2015.

65 See: Art. 220 para 2 of the Family Act of the Republic of Serbia, *Official Gazette of RS*, 18/2005, 72/2011 – other law and 6/2015.

66 See: Art. 22 para 1 point 2 of the Inheritance Act, *Official Gazette of RS*, 46/1995, 101/2003 and 6/2015.

67 On the reasons why marriage may be absolutely or relatively null, see: Art. 31–39 of the Family Act of the Republic of Serbia, *Official Gazette of RS*, 18/2005, 72/2011 – other law and 6/2015.

permanently terminated by the fault of the surviving spouse or by agreement with the decedent.⁶⁸ However, in this case, the hereditary capacity ceases to exist if the basic requirement has been fulfilled, i.e. if there is a permanent termination of marital community, and if one of two alternatively set conditions has been met: if there is an agreement on the permanent termination of marital community between spouses,⁶⁹ or the surviving spouse's culpability for the termination of marital community.

3. Spouse as a testamentary heir

When it comes to *mortis causa* dispositions in the Vojvodina private law, the institute of joint will was particularly significant for legally married spouses. The essence of this type of will is that two declarations of will on the distribution of the estate are consolidated in one writ, which may be made in the form of a private or public document.

The spouses could dispose of their property *mortis causa* by joint will, independently of each other (*testamentum mere simultaneum*), conditioning and making their dispositions dependant on the disposition of the other spouse (*testamentum correspectivum*) or mutually dependant, specifying each other as heirs (*testamentum reciprocum*). Also, a joint will could limit the spouses' inheritance law entitlements, by stipulating a condition or a time limit, or burdened by an order (*modus*). A joint will could also specify a substitute or a legacy to be granted to the surviving spouse.⁷⁰

The institute of a joint will is not recognized in the current succession law of the Republic of Serbia. This legal gap generates different treatment of this legal transaction in legal practice. In our opinion, the Serbian lawmaker must explicitly prescribe that a joint will shall be null and void, for a specific reason: namely, binding one declaration of the last will to another is nothing else but a negation of the last will and testament as a unilateral legal transaction *mortis causa*.

68 See: Art. 22 para 3 of the Inheritance Act, *Official Gazette of RS*, 46/1995, 101/2003, and 6/2015.

69 The stand of judicial practice is that the agreement on permanent termination of factual marital community is also possible by silent acquiescence, when on the basis of the circumstances of a concrete case, it may be concluded that there is a clear manifestation of will of one of the spouses to terminate the marital community and clear conduct of the other spouse who shows his/her consent thereof. See: Decision of the Supreme Court of Yugoslavia, Rev. 3025/63 dated 10. 01 1964. Cited after: Kurdulija, 1975: 94; and the Decision of the Supreme Court of Serbia – Novi Sad Department, Gž 106/1964, dated 13. 05. 1965, *The Bar Association Gazette /Glasnik advokatske komore APV*, No. 2/1966, p. 56.

70 For more on joint will in the Vojvodina private law, see: Jesensky, Protić, 1922: 168–169.

4. The spouse's right to succession on the basis of an inheritance contract

In Vojvodina inheritance law, an inheritance contract, as a bilateral legal transaction for the disposition of the estate, could have been entered by all persons with full contractual capacity, including spouses.^{71 72}

By concluding an inheritance contract, the spouses could mutually name one another as heirs; alternatively, one spouse could specify the other spouse as his/her universal *mortis causa* successor, or they could both designate a third person as their heir.

In the contemporary Serbian law, this legal transaction is deemed to be null and void. In contemporary domestic legal literature, this legal institute is almost forgotten (except for: Stojanović, 2003). In students' textbooks, authors regularly paraphrase and sum up the legal provision on this matter, without considering its legal physiognomy in more detail (see, for example: Antić, 2001: 293; Svorcan, 2004: 218–219). In our opinion, the recognition of an inheritance contract as an allowed legal transaction may contribute to exercising greater freedom in regulating legal relations, according to the needs and possibilities of the subjects involved; it may also provide a higher degree of legal protection regarding the interests of forced heirs and creditors in comparison to that provided (for example) in the life maintenance agreement (for similar arguments, see in: Žnidaršič Skubic, 2005: 387–389).

5. Conclusions

Comparing the legal solutions and those contained in judicial decisions on the succession rights of spouses in the Vojvodina private law and the contemporary Serbian law, we may observe that the spouses' legal position in the sphere of intestate succession is more favourable in the contemporary Serbian law, considering that the surviving spouse always acquires ownership of a part of the decedent's estate; the mechanism of the institute of usufruct is applied irrespective of the gender of the spouse who inherits; and the surviving spouse is entitled to receive the forced portion.

In the sphere of testamentary and contractual succession, the situation is quite different since the Serbian law does not regulate joint wills and explicitly prohibits an inheritance contract as legal transaction, unlike the legal provisions of the Vojvodina private law which envisaged that a joint will could only have been

71 In legal literature, there are different opinions on the circle of subjects who were entitled to enter this legal transaction. For more detail, see: Milić, 1921: 72.

72 For more details on this matter in the Vojvodina private law, see: Jesensky, Protić, 1922: 169–172; Milić, 1921: 71–72.

drafted by the spouses whereas an inheritance contract could be made between the spouses and other subjects (heirs) of full contractual capacity.

The current regulation of the position of spouses in the contemporary Serbian succession law only confirms the thesis that, irrespective of the legislator's wisdom and capacity to predict possible conflict situations, the lawmaker cannot provide answers to all questions that may be encountered in everyday life.

For this reason, we believe that the Vojvodina succession law between the two World Wars, which was based on a limited number of legal rules and numerous supreme court decisions referring to individual controversial cases, may be a successful formula for regulating succession law relations in future. On the one hand, such a solution would eliminate the need for introducing continuous alterations and amendments to succession law provisions; on the other hand, it would provide for keeping pace with the demands of the contemporary legal practice.

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**НАСЛЕЂИВАЊЕ СУПРУЖНИКА У ПРИВАТНОМ ПРАВУ ВОЈВОДИНЕ
ИЗМЕЂУ ДВА СВЕТСКА РАТА, СА ПОСЕБНИМ ОСВРТОМ НА ПРАВО
НАСЛЕЂА СУПРУЖНИКА У САВРЕМЕНОМ СРПСКОМ ПРАВУ**

Резиме

У раду је аутор приказао наследноправни аспект правног положаја супружника у приватном праву Војводине између два светска рата. Кроз анализу законских решења из тог периода и ставова Апелационог и Касационог суда у Новом Саду, аутор је осветлио правни волумен наследноправних овлашћења супружника, која су имала непосредно извориште у закону, завештању и уговору о наслеђивању и упоредио их са оним која, у том домену, предвиђа савремено српско право. У раду је аутор указао на потребу активније улоге судова у стварању правила, прилагођених потребама социјалне стварности.

Кључне речи: *узајамно законско наслеђивање супружника, удовичко наслеђивање, удовичко право, нужни део, заједничко завештање, уговорно наслеђивање супружника.*

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HISTORIA MAGISTRA CURIAE ET IURISPRUDENTIAE EST: IS JOINT WILL PROHIBITED IN SERBIAN POSITIVE LAW?*

Abstract: Joint will is an institute which is not envisaged either in the 1995 Inheritance Act of Serbia or in the Draft of the Civil Code of the Republic of Serbia, nor was it part of the 1955 Federal Inheritance Act or the 1974 Inheritance Act of SR Serbia. However, our courts see joint wills as absolute null and void, or simply refuse to probate them. The question on the reasons and justification for the ignorant and negative attitude of our post-war laws, Serbian judicial practice and domestic authors towards joint will is raised. On the basis of application of the rules of the pre-war legislation, it can be argued that joint will is still allowed in the positive law of the Republic of Serbia, despite the fact that is not mentioned in the current Inheritance Act of Serbia. In order to make a valid attempt to verify this hypothesis, the author first defines the concept of the joint will and analyzes its legal nature. Further discussion focuses on critical examination of the arguments which have been posed in the domestic legal theory and jurisprudence against the institute of joint will.

Key words: joint will; mutual will; inheritance agreement; pre-war rules; Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation.

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1. Concept and legal nature of the Joint will

Joint will (*testamentum simultaneum*) is a kind of last will in which two or, less commonly, more persons of active testamentary capacity (usually spouses) jointly declare their last will in one act (within the same document), by distributing the estate, i.e. naming each other or a third party as an heir.¹ In joint will it is necessary that the declared wills of the testators are causally interrelated,² and that "both of them are merged in the very text of the same composition," although the testators' assets remain separate and may have different legal destiny.³ Thus, an essential feature of the joint will is that it is the emanation of the common will of both testators, and it will always be the case when one testator is aware of the decision and disposition of the other one.⁴

Therefore, the dispositions, in which two persons would state their last wills on one and the same document but completely independently of each other, would not be considered joint wills,⁵ which also refers to the statements of the last will

1 Ђорђевић, 1903: 51; Марковић, 1930: 236; Аранђеловић, Беговић, 1940: 84; Антић, Балиновац, 1996: 306; Mellows, 1973: 16; Malaurie, Aynès, 2008: 253; De Waal, Schoeman-Malan, 2011: 191; Јовичић, 1936: 1; Тороман, 1996: 190.

2 Марковић, 1930: 236. Malaurie et al. 2008: 253.

3 Ђорђевић, 1903: 52; Јовичић, 1936: 5, 9.

4 Dukeminer, Johanson, 2000: 322; Michalski, 2010: 82.

5 Dukeminier et al. 2000: 322; Malaurie et al. 2008: 253. In Common Law systems, these kind of wills are called *mirror wills*. Croucher, 2005: 392.

In the decision of the Municipal Court in Čačak V. no. 1338/01 of 09.07.2004 and the decision of the District Court in Čačak Gz. no. 74/05 from 21.01.2005, it was pointed out that the 1995 Inheritance Act of Serbia neither recognizes nor expressly prohibits joint will written in presence of witnesses (olographic will), and that in situations where two persons make such a will, each in his/her written testament in presence of witnesses, or on a sheet of paper, such a testament is to be considered valid. In the explanation of the decision, the court stated: "The case file indicates that both parties (testator spouses) created individually their own wills on the same single sheet of paper. On the basis of properly established facts, the Court of First Instance erroneously applied the substantive law finding that the will is null and void in relation to the deceased M. O. Obviously, this is a so-called joint will, or more precisely, the will in the presence of witnesses by the two parties (testators) but written on the same sheet of paper, which contains two separate statements of will of two persons for the distribution of their estate. The standpoint of the Court of First Instance that the will of the late M. O. has no legal effect because testament cannot be probated twice cannot be accepted. After the death of each of said testators, their testament was probated in presence of witnesses and it is completely separated from testament made in the presence of the witnesses of the other testator. It fulfills the conditions of Art. 69 and 90 of the Inheritance Act because each testator properly drafted the written testament in the presence of witnesses, whereas the provisions of the testament should be interpreted according to the true will of the testator, and the wills of both testators are clear and precise. Therefore, the judgment by Court of First Instance in paragraph 1 of the operative is modified ". According to: Стојановић, 2012: 90.

which would be prepared in two different documents referring to each other, even including identical content or identical terms used therein, but with some time lag between the two disposals.⁶ It would not be enough even if one spouse wrote and signed a will in his/her own hand, while the other spouse just annotated his/her consent with the written content, accepting it fully and signing it.⁷ The only thing that would be considered as mutual will in this case is the object on which a will is made, i.e. a will in the objective sense.⁸

Joint wills may be of such a type that the testators' disposals can be completely independent of each other (*testamentum mere simultaneum*). When the testators designate each other as an heir or a legatee, without binding the statements of their will to one another, so that they remain completely independent and autonomous in their content, then such joint will is mutual or reciprocal (*testamentum reciprocum sive mutuum*).⁹ If the validity of the provisions of a testamentary disposition is expressly conditioned and dependent on the validity of the provisions of the other disposition, we then have a corespective will (*testamentum corespectivum*), although it does not have to be reciprocal at the same time.¹⁰ The difference between reciprocal and joint corespective wills is relevant in terms of revocation or invalidity of individual testator dispositions.

"One written document can contain a written testament of two people when each of the two wills individually contains all legally prescribed conditions for their validity." (Croatian Supreme Court, Rev-1501/75, dated 24 October 1985), according to: Crnić, 2003: 76-77.

6 Malaurie et al. 2008: 253. An exception exists in German and in English law, where a joint will includes disposals that testators make in two separate documents immediately following one another, provided that they wanted to establish correlation and interdependence between these provisions. Bonomi, 2003: 49; Michalski, 2010: 82.

7 Аранђеловић et al. 1940: 85. See: Decision K. 3076/1915 from pre-war law of Vojvodina; Игњатовић, 1936: 13.

8 Marković, 1978: 194; Марковић, 1930: 236.

9 Marković, 1978b: 194; Стојановић, 2008: 68-69; Ђорђевић, 1903: 51; Марковић, 1930: 236; De Waal et al. 2011: 191.

10 Пишкулић, Ђерђ, 1924: 271; Ђорђевић, 1903: 51; Марковић, 1930: 236; Аранђеловић et al. 1940: 85; Marković, 1978b: 194. According to subparagraph 3 of paragraph 2270 of the German Civil Code, corespective provisions may be only the provisions relating to appointing an heir, or determining the bequest or the order, while all other provisions have one-sided character; so, the norms pertaining to the inheritance contract accordingly apply to disposals in the corespective wills. Edenfeld, 2008: 242.

2. The standpoint of Serbian legal doctrine and Case law on the Joint will

Joint wills are not allowed in the French, Belgian, Luxembourg, Italian, Portuguese and Spanish laws.¹¹ In Switzerland, this institute is not explicitly prohibited by law but the prevailing arguments in case law and in the professional literature are in favour of its nullity.¹² On the other hand, joint wills are allowed in the German and Austrian laws, but they can only be created by spouses.¹³

Although the regulations passed in Yugoslavia after the Second World War, including Serbian positive law, have never explicitly prohibited or allowed joint wills, our post-war inheritance law doctrine and jurisprudence are almost unanimous in the view that joint wills, even those created only by spouses, are prohibited in Serbian law.¹⁴

One of the reasons for this is the uncertainty of our courts about the concept and legal nature of a joint will, i.e. the fluid definition of this institute which has enabled the courts to consider it in the manner and from the aspect which they would more easily justify its invalidity. For example, in the explanation of the judgment of the District Court in Pančevo Gž. 87/69 of 26 April 1969, the court stated: "It is true that a joint will of the spouses is not valid according to the Inheritance Act. In this particular case, the provisions of the testament of the deceased V. pertaining to mutual inheritance between her and her husband, now late J., are not valid. However, there is no reason to invalidate the part of the testament by means of which the deceased V. disposes of the remaining estate in favor of the claimants. In that part, it is not a joint will. Joint will was made between the deceased V. and her late husband J., which is not valid in terms of their mutual inheritance. However, it does not preclude the validity of that part of the will of the deceased V. referring to claimants, since that part is not based on the provisions that are common to deceased V. and late J. in the said will. Therefore, the appellate court finds that the court of first instance correctly applied the substantive law when it admitted the validity of the testament in relation to the claimants."¹⁵ Obviously, the court equates the concept of joint

11 Art. 968 of the French Civil Code; Art. 968 of the Belgian Civil Code; Art. 968 of the Luxembourg Civil Code; Art. 589 of the Italian Civil Code; Art. 2181 of the Portuguese Civil Code; Art. 669 of the Spanish Civil Code. Indeed, although it is not allowed in the Spanish Civil Code, joint will is allowed in provincial regulations of Aragon, Navarra, Galicia and the Basque Country. Cámara Lapuente, 2011: 295.

12 Bonomi, 2003: 48.

13 § 2265 of the German Civil Code, § 1248 of the Austrian Civil Code.

14 Ђурђевић, 2004: 158; Marković, 1978a: 195; Антић et al. 1996: 306. Nataša Stojanović thinks that the possible changes and amendments to our inheritance law shall expressly envisage the nullity of the joint will. Стојановић, 2007: 210.

15 Збирка судских одлука (Collection of judicial decisions), 1969: 111-112.

will with only one type of joint will: the reciprocal will, which is considered null and void; but, concurrently, it neglects the fact that there are also joint wills for the benefit of third parties, which are apparently considered valid by the court.

Although there is a notable discrepancy and diffusion when our doctrine and jurisprudence need to justify the argument of nullity of this legal institute, it seems that the most common arguments for banning a joint will in the Serbian law can be summed up as follows: a) the joint will is not regulated by the Inheritance Act of Serbia;¹⁶ b) a joint will is not a legally defined form for making testaments;¹⁷ c) this legal institute “is nothing but a negation of the will as a unilateral legal transaction *mortis causa*”;¹⁸ d) it constitutes a departure from the legal nature of testament as strictly personal legal transaction;¹⁹ e) it cannot be partially probated; f) it violates “the principle that the will is a unilaterally revocable legal transaction”; g) it is contrary to Serbian compulsory prescripts, public policy and *boni mores* (fair dealing practices) because it produces legal effects identical to the contract of inheritance, which is prohibited by Serbian law.²⁰ However, domestic legal doctrine does not comprise much literature on

16 In the decision of the District Court in Belgrade, Gž. no. 2005/97 of 13 September 1997, it is stated that joint will is null and void because it is “contrary to the provisions relating to testament in the Inheritance Act.” Судска пракса, 2000: 29-30. Similarly, in the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. 63 0 P 002255 11 Rev. from 2/10/2012, it is said that “Inheritance Act does not provide for a joint will, so if the two persons created such a will it is invalid.” <https://advokat-prnjavorac.com/nasljedno-pravoduska-praksa-BiH.html>, retrieved 8.8.2016

17 “Under the former Inheritance Act, joint will is not a legally prescribed form of testamentary disposition, nor is the form of the joint will recognized by the current Inheritance Act. In this case, testators drafted a written testament on mutual inheritance, which does not constitute a form of testament prescribed by law; hence, the lower instance court shall review the legal nature of the legal transaction and check whether the conditions for its validity are fulfilled within the meaning of Articles 62, 77 and 103 of the formerly valid Inheritance Act. Therefore, both lower-instance decisions were abolished and the case was referred to the Basic Court in Novi Sad for a retrial, in accordance with Article 3, Item 20 of the Act on Seats and Territories of Courts and Public Prosecution Offices.” The decision of the Supreme Court of Cassation in Belgrade, Rev 168/12 of 20.06.2013, which repealed the decision of the District Court in Novi Sad Gž 1466/08 of 02.10.2009, and the Decision of the Municipal Court in Bačka Palanka P 481/07 of 30.10.2007; .(author: Jarmila Loncar); <http://bilten.osns.rs/presuda/sentenca?url=zajednicki-testament>, retrieved 8.8.2016

18 Стојановић, 2007: 210.

19 Стеванов, 1964: 5.

20 Ђурђевић, 2004: 158. The Decision of the Supreme Court of Cassation in Belgrade, Rev 168/12 of 20.06.2013, which abolished the judgment of the District Court in Novi Sad Gž 1466/08 of 02.10.2009, and the judgment of the Municipal Court in Bačka Palanka P 481/07 of 30.10.2007, stated: Whether a joint will was made between N.K. and D.K. “had to be assessed according to the provisions of Article 103 of the formerly valid Inheritance Act,

the subject matter of joint will, and these sporadic claims were seldom accompanied by adequate discussions. These arguments will be discussed further on in this paper.

2.1. Joint will is not prescribed by the Inheritance Act of Serbia

Serbian courts see joint wills as null and void because joint wills were not envisaged in the normative framework of Yugoslav postwar laws on inheritance, nor in the applicable 1995 Inheritance Act.²¹ This is not a valid argument because joint wills were not expressly prohibited by any post-war legal provision. There-

which prescribes the nullity of the inheritance contract, through which a person leaves the estate or its part to his/her contracting party or to a third party."

All the above arguments were sublimated in the following judgements:

"The court of first instance in its judgment found that the joint will of the decedent and his wife - second respondent, is void, considering that the Inheritance Act does not recognize the institution of a joint will, that a will that cannot be probated in part because the second testator is still alive, that the death of a testator deprives the other testator of the right to amend the testament, who is thus deprived of the right to dispose of its assets till death. Since the Inheritance Act of Serbia does not recognize a joint will, a testament drawn up contrary to the testamentary provisions contained in this Act is null and void.

The District Court upheld the judgment, considering also that a joint will made in presence of the witnesses of the decedent and his wife- second respondent does not meet the conditions for the validity of wills under Article 62 of then valid Inheritance Act, given that under Article 64 of the same Act a decedent may be just one person, so the first instance court correctly applied Article 77, paragraph 1 of the Inheritance Act by declaring the testament null and void. "(Judgment of the Third Municipal Court in Belgrade, P. no. 226/95 of 22 May 1995, and the judgment of the District Court in Belgrade Gž. no. 2005/97 of 13 September 1997). Судска пракса, 2000: 29-30.

A similar argument was raised in the part of the explanation of the judgment of the Appellate Court in Belgrade, Gž 2226/10 of 22.7.2010: "Testament is strictly formal, personal act which is intended to ensure the will of a person to dispose of its property in case of death. At the same time, the will is a unilateral legal transaction and the legal effect of a single statement of will. A joint will is not allowed. Annulment of a will for lack of form may be requested by the parties in terms of Art. 77 of the Inheritance Act, and in this case those conditions are met. From the court records, i.e. from the will indicated as a mutual will drawn up before the court, it appears that it is actually a testament through which spouses ĐĐ and now late PP inherit each other in case of death; therefore, in content and substance, it is a joint statement by the spouses, or a joint will, which is not prescribed as a testamentary form by the Inheritance Act and, therefore, cannot be the basis for inheritance. The inheritance Act does not recognize the institute of a joint will, so the will can not be probated in part because the second testator is still alive; thus, upon the death of a testator, the other testator loses the right to amend the testament and is, therefore, deprived of the right to dispose of his/her assets till death." <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/gradjansko-odeljenje/parnica/nasledno-pravo/gz-2226-10.html>, retrieved 8.8.2016.

21 *Official Gazette of the RS*, 46/95, 101/2003, 6/2015.

fore, since the joint will is neither permitted nor prohibited in our inheritance legislation, its admissibility and validity can be assessed only by examining the conformity of its content with the Serbian compulsory prescripts, public policy and *boni mores*.²² However, some of our authors believe that joint wills should be considered invalid just because they are contrary to our public policy and *boni mores*.²³

Until the Civil Code of the Republic of Serbia comes into force, the basic principles contained in the Serbian Obligation Relations Act shall be construed as a substitute for the general part of the Civil Code and shall be accordingly applied in other areas of civil law.²⁴ Article 10 of the Obligation Relations Act²⁵ provides that the obligation relations parties, within the limits of compulsory prescripts, public policy and *boni mores*, are free to arrange their relationship at will, while Article 12 of the same Act provides that the parties entering into obligation relations and exercising rights and duties arising from such relations are required to adhere to the principle of good faith. Therefore, joint wills are not contrary to compulsory prescripts for the simple reason that they are not prohibited by any of our legal regulations.

Public policy (*ordre public*) is „a set of principles governing the existence and subsistence of a legally organized community; these principles are manifested through certain social norms (legal and moral), which must be observed by parties in their relations.”²⁶ It implies “the spirit of a legal system that the court must underscore in deliberating on any particular subject matter.”²⁷ This means that a joint would be absolutely null and void only if it could be established that it was contrary to the basic principles underpinning the Serbian legal and social system, and that its formation is inconsistent with the fundamental values that make up the spirit of our legal and social system. But even if it were so, it would inevitably entail the need to specify the elements and reasons that make the institute of a joint will contrary to our public policy. In the post-war period, neither the Serbian legal doctrine nor the jurisprudence has provided a response to this issue.

Boni mores (fair dealing practices) are unwritten rules of behavior stemming from the prolonged exercise of specific norms in the community. The difference

22 Бурђевић, 2004: 154.

23 Бурђевић, 2004: 158.

24 Антић, 2008: 37.

25 *Official Gazette of the SFRY*, 29/78, 39/85, 45/89, 57/89, *Official Gazette of the FRY*, 31/93 and *Official Gazette of the SM*, 1/2003.

26 Перовић, 1995: 344; Перовић, 1976: 23; Перовић, 1982: 311.

27 Антић, 2008: 218-219.

between the factual and legal usages is that a legal usage (unlike the factual one) is accompanied by the awareness and confidence of the community members (who abide by the rules) in its legally binding nature (*opinio juris necessitatis*), i.e. that the state provides protection for such law-abiding behavior.²⁸ The court shall determine what dealings are "fair" on the merits of each case, taking into account the entire public policy and the governing moral norms of a particular epoch, and always bearing in mind that the fair usages are the embodiment of the principle of good faith.²⁹ Therefore, a joint will would be contrary to fair dealing practices and moral attitudes ingrained in the consciousness of a community only if it would be contrary to "the general flow of ideas and principles which the society that brings the necessary legal security is based on."³⁰ However, a will might not be qualified as being contrary to the fair usages without comparing the concrete fair dealing practice with the specific content of the testament and determining in which parts and provisions a joint will is contrary to fair usages.³¹ So far, this has not been the case in our jurisprudence.

All cases of nullity of wills which are contrary to the compulsory prescripts, public policy and *boni mores* can be reduced to cases in which the will is void either due to inadmissibility or immorality of the subject matter of a testament (being contrary to fair usages), or due to the inadmissibility of the cause.³² So, the subject matter or the cause of the joint will cannot *per se* be contrary to public policy and *boni mores*; the inadmissibility of these essential elements should be assessed in the same manner as in any other type of will. It would be even less reasonable to regard an institute of joint will as invalid by itself because its presence in the legal system is a matter of legislative policy rather than compulsory prescripts, public policy and *boni mores*.

By their own free will, the parties themselves create, change and abolish their subjective civil rights.³³ In testamentary law, autonomy of will is manifested in the freedom of testation, as the exercise of freedom to dispose of property assets *mortis causa*, which represents the concretization of the free initiative of the parties.³⁴ The testator makes a decision whether he/she will make a testament at all and how the content of his/her testamentary disposition will be formed. The

28 Станковић, Водинелић, 1996: 42-46; Стојановић, Антић, 2004: 99-100; Перовић, 1966: 199; Перовић, 1995: 347.

29 Антић, 2008: 220.

30 Перовић, 1971: 18; Перовић, 1966: 199.

31 Живојиновић, 2002: 479; Перовић, 1966: 198.

32 Перовић, 1966: 201; Живојиновић, 2002: 483.

33 Antić, 1983: 154, фн. 3; Станковић et al. 1996: 4.

34 Gams, Đurović, 1991: 36-37; Antić, 1983: 155; Перовић, 1995: 247.

testator may be limited in terms of disposal of the property assets *mortis causa* as well as in terms of choice of legal transaction through which he/she would exercise such disposition, but only “in a general manner that ensures respect for and enforcement of certain social interests”,³⁵ i.e. compulsory prescripts, public policy and *boni mores*, as a general domain border of the autonomy of will.³⁶ But, the limitation or exclusion of the autonomy of will has no excuse if the general interests are not endangered, or if the factual relationship of inequality does not obviate the weaker party to realize their interests too, or does not lead to excessive dependence.³⁷ None of this is the case with the joint will. On the other hand, just as the owner may limit himself/herself to the disposition of property during his/her life, the testator is allowed to limit his/her testamentary disposition to the occurrence of certain conditions or time limits, including the way through which he/she would “link” the content of a will to the content of will of another testator (his/her spouse).

The importance given to autonomy of will in comparative law is evident in the following example. Despite the explicit prohibition of the joint wills, expressed in § 968 of *Code civil* (“Two or more persons are not allowed to create a last will in favor of third parties or on the basis of reciprocal and mutual disposition in a single and the same act.”), the French courts, reasoning that the testator was free in its decision, do not declare these wills null if two conditions are cumulatively fulfilled: first, the formal condition is that the statements of testators’ volition are fixed in one and the same act, and signed by each of the testators; and second, the psychological condition is that this joint act expresses the joint statement of volition of the testators.³⁸

In this regard, our case law proceedings are wrong for two reasons. First, unlike the French courts, which by favoring the principle of autonomy of will deliberately act *contra legem*, the Serbian courts are not governed by the rules of the pre-war law in which (as it will be shown) they actually could find support for the implementation of the joint will. Secondly, joint will differs from other wills “only in terms of the number of the testators who make it, while everything else in its content is the same as in other types of regular form of wills (handwritten, court-made will, Notarial will, etc.)”.³⁹ Therefore, the validity of the joint wills between spouses is assessed by general rules that apply to testaments.⁴⁰ The

35 Перовић, 1995: 247.

36 Перовић, 1976: 24.

37 Стојановић, 1968: 385; Станковић et al. 1996: 252.

38 Malaurie et al. 2008: 253.

39 Тороман, 1996: 190.

40 Rušnov, 1893: 54.

fact that each of the declared and interconnected wills in a joint will fulfills all material and formal requirements for a testament would not be contrary to Art. 73. of the Inheritance Act of Serbia (IAS), because that rule is only about "the statement of volition of the person capable for it." Art. 83 of the IAS says that a last will has to be made up in the form and under the conditions specified by the IAS (similar formulations existed in the 1955 Federal Inheritance Act and the 1974 Inheritance Act; even if this provision was interpreted restrictively, joint wills could not be declared absolutely null, but could only be declared relatively null. Specifically, Article 164 of the IAS explicitly stipulates that the will is voidable if in the process of its creation the form and conditions prescribed by the IAS for the wills were not respected.

2.2. Joint will is not a legally defined form for making a will

Joint will does not represent any specific form of last will, but a type of last will that is still made in one of the existing forms in which generally last wills may be made.⁴¹ Although there is a view that the testator would be able to make a joint will only in one of the regular forms of wills, excluding the oral will,⁴² the prevailing opinion in contemporary literature is that the joint will is possible to be made in any private or public, regular, extraordinary or emergency form because the general rules on the form of wills apply to the joint wills as well.⁴³ Even so, some authors do not define joint will as a separate modality of last will, but as a legal transaction *sui generis*, which is "located midway between wills and inheritance contracts."⁴⁴

41 Thus, although the Municipal Court in Bačka Palanka in the probate proceedings O. 399/2000 correctly concluded that the joint will is valid, because the testators stated that it was their will and personally signed it in the presence of two witnesses (as confirmed by the signatures of the witnesses), the Supreme Cassation Court Belgrade's Decision no. Rev 168/12 of 20.06.2013 abolished the judgment of the District Court in Novi Sad Gž 1466/08 of 02.10.2009 and the judgment of the Municipal Court in Bačka Palanka P 481/07 dated 30.10.2007, wrongly arguing that joint will is not a legally prescribed form of a will.

42 Бранковић, 1953: 4; Јовичић, 1936: 6; Ђорђевић, 1903: 53; Тороман, 1996: 190. The same is solution of the pre-war Vojvodinian law.

43 Благојевић, 1946: 208; Rušnov, 1893: 54, 635; Ђорђевић, 1903: 53; Марковић, 1930: 287; Аранђеловић et al. 1940: 84; Стојановић, 2007: 199. This standpoint is also accepted in the German legislation, § 2247, § 2266 BGB in conjunction with § 2249 and § 2250 BGB and § 2267 BGB. Reimann, Zekoll, 2005: 284; Helms, 2012: 23; Michalski, 2010: 82; Edenfeld, 2008: 241. For the criticism of this solution in the German doctrine, see: Röthel, 2011: 165. In the Spanish province of Navarra, joint will cannot be drawn up in the form of a handwritten will. González Campos, 2002: 443.

44 Ђурђевић, 2005: 286; Braun 2007: 218.

2.3. Negation of joint will as a unilateral legal transaction mortis causa

One of the arguments often pointed out is that the legal nature of the joint will is contrary to the essence of the last will as a unilateral legal transaction.⁴⁵ Unilateral legal transactions occur and consist of a statement of volition of one party only, while bilateral legal transactions are created through free and consensual will of the two parties, for which reason they are called contracts.⁴⁶ So, in unilateral legal transactions, specific legal relationship is based on and produces legal effects through only one statement of volition, while the legal effect in bilateral legal transactions is based on mutual consent – only after a declaration of will of one party is accepted by the other party.⁴⁷

For the validity of the joint will, admission of the testator's disposal by a non-deceased testator is not required, neither before nor after the drafting of the will or upon death of the first testator. Although individual dispositions of testators must be integrated into the same act and although it is necessary that both are the result of mutual wish, intent and awareness of each testator of the disposal of the other one, each of them produces legal effects for itself and those legal effects can be totally independent, unless the joint will is the corespective one. When contracts are concluded, each contracting party may include more than one person, and the statement of volition still remains bilateral; so, the will of the testators (spouses) in a joint will must be understood only as a single and unilateral, regardless of the fact that it was declared by two persons.

Since joint will lacks acceptance of promise as a distinctive element of a contract, it cannot be regarded as a bilateral legal transaction.⁴⁸ Joint will therefore can be revoked just like any other testament because, if the statement of volition could not be unilaterally revoked, the statement of volition of one spouse would be considered a promise, while the statement of volition of another spouse would be considered as acceptance of promise, which altogether would really make the inheritance agreement.⁴⁹ Thus, due to its revocability, the joint will is not (unlike the inheritance contract) subject to the principle of *pacta sunt servanda*.⁵⁰ Therefore, starting from the fact that the inheritance contract is bilateral and that joint will is a unilateral legal transaction, Bartoš notes that the joint will is always revocable, even without the consent of the other testator.⁵¹

45 Стојановић, 2007: 210.

46 Станковић et al. 1996: 161-162; Стојановић et al. 2004: 324.

47 Марковић, 1912: 194.

48 Rušnov, 1893: 54.

49 Rušnov, 1893: 54, 635; Ђорђевић, 1903: 51; Бранковић, 1953: 6.

50 Mellows, 1973: 17. Ђурђевић, 2004: 156.

51 Бартош, 1931: 253.

2.4. Negation of joint will as a strictly personal legal transaction

Some authors argue that a joint will should be sanctioned by absolute nullity, because it does not discern the will of one testator from that of the other testator. It is pointed out that this will "cannot be treated as an exclusive, personal, »free« will of the deceased, as it is influenced by the will of the other party/person."⁵²

The last will is a strictly personal legal transaction because it is the only legal transaction that cannot be concluded through a representative (either legal or voluntary) but the testator must personally and directly make last will by his/her own free will and formulate its content.⁵³ Although this criticism was probably referring to the fact that the testator's will must be devoid of any external influence, any influence on the will of the testator will not be inadmissible (if given in the form of advice from a third party or made dependent on the occurrence of some circumstances determined by the testator), but only such influence that would involve deficiencies of volition on the side of the testator.⁵⁴

Joint will, like any other type of will, will be valid if the volition that the testator declares is serious, real, free, specific and unconditional.⁵⁵ There is no reason to consider a joint will null only because both testators made their disposals within the same act on the basis of common purpose. Testators are anyway permitted to produce identical dispositions to that of the joint will, but in two separate wills.⁵⁶ The guarantee of preserving the free will of each testator in

52 Стеванов, 1964: 5.

53 Благојевић, 1964: 221-222; Marković, 1978a: 194-195; Антић et al. 1996: 307.

54 Благојевић, 1964: 218-221; Антић, et al. 1996: 306. Hence, in the decision of the Supreme Court of Cassation in Belgrade Rev 168/12 of 20.06.2013, which abolished the judgment of the District Court in Novi Sad Gž 1466/08 of 02.10.2009, and the judgment of the Municipal Court in Bačka Palanka P 481/07 dated 30.10.2007, the Court incorrectly stated that "unilaterality as an essential feature of the last will is expressed very strictly so that, when creating the last will, the influence of the will of other testator always leads to its relative nullity."

55 See Art. 81. and 82. of IAS.

56 This view is also confirmed in the court explanation of already cited judgment of the Appellate Court in Belgrade, Gz 2226/10 of 22.7.2010, which declared that the mutual will of the spouses was void:

"According to the opinion of the court of first instance, on __ day 198_ year, ĐĐ and late PP drew up the will made by court, in which they disposed of their separate estate and ordered for the record of the drafting last will what is to be considered the separate estate of each one of them, agreed on the disposition of the community property acquired during marriage, and left separate estate to each other, which in the specific case implies the existence of two separate testamentary documents. In the particular case, two separate testaments were admitted to the same log in the same procedure. As estimated by the court of first instance, the testament of the late PP meets all the legal requirements for the validity of the will made by court, because it was composed by the judge upon the request and in presence of

a joint will, and a barrier to the lasting impact on the will of a testator by the other, is guaranteed by the possibility to revoke a joint will unilaterally, which is not subject to any time limits.

2.5. Joint will cannot be partially probated

Joint will is criticized for the following: it is said that after its drafting, one and the same testament has to be probated twice, which is not possible. Probation of the last will is the act whereby the court, to which the testament is submitted, opens the will, reads its contents, and publicly announces the testator's last will, after which it is deemed that the existence of the testament is known to everyone.⁵⁷ Then, the official record (minutes) is made on the testament probation, which is signed by the judge, the recording secretary and witnesses to the probation. In the end, the court certifies on the face of it that the will has been probated.

However, the essence of probation of a will is not the probation of the testament in objective sense, i.e. the probation of the testamentary document, but the probation of the dispositions of the testator's last will, fixed on one or more documents, in order to establish the one and the only testator's last will, i.e. testament in the subjective (material) sense. This means that it is less important whether the testator's last will is declared on one or more documents (as all of them must be probated) and whether one document contains the last will of one or more persons. Accordingly, it is either possible or not possible to probate more last wills fixed on one document, while it is less important for the act of probation whether it is a joint will or more separate and independent wills. It is not the very document which is probated, not even the text of the will for its own sake, but the statement of volition therein.⁵⁸ The fact that reading of the last will of

the testator; after the testator's identity was established, the testator signed the will in the presence of the judge, as confirmed in the testamentary document; therefore, the claim for annulment of testament was rejected.

However, in the opinion of the Court of Appeal, by denying the claim, the court of first instance erroneously applied the substantive law, Art. 62 of the Inheritance Act: "Therefore, the court of first instance had wrongly applied the substantive law when it concluded that there were two separate testaments, received on the same log in the same procedure. It is true that the testators in drafting the testament clearly specified what was to be considered separate property of each of them; thus, they consentually divided the community property acquired during matrimony, which was hence transferred from the community property regime into the separate property regime; yet, they did not dispose of their separate estate in the way as specified by law, so this will is null and void. "

57 Marković, 1978a: 298.

58 In exceptional cases and given the presence of *animus testandi*, handwritten testament could be affixed onto the wall, on the floor or on the egg shell, in which case the court would

the surviving testator in the joint will would be structurally associated with the last will of the deceased testator would not be of significance, and would only serve to clarify the testamentary dispositions of the deceased testator. By making separate minutes and by placing separate probate certificates on the same document, the court would clearly distinguish whose last will was probated at that moment, which would mean that the same last will was not probated twice.

The Anglo-Saxon legal science also includes the view that "when the first testator dies, the document is probated as his/her testament; when the second testator dies, the same document is probated as a testament of the second testator".⁵⁹ This is due to the stance that joint will does not produce effect as one but as two separate wills of the testators who made it.⁶⁰

2.6. Joint will cannot be unilaterally revoked

One of the essential features of the legal nature of the last will is the possibility of revocation of the last will (without any time limits) as a unilateral legal transaction. This means that it is possible to revoke joint wills in one of the ways in which any other testament can be revoked.

There is no doubt that each testator can revoke his/her disposition in the joint will while the other testator is alive. But, legal effects are different, depending on the specific types of the joint will. In reciprocal wills, in case of revocation (as well as nullity) of one statement of will, the destiny of one disposal is independent and separate from the destiny of the other disposal, which means that reciprocal wills lose legal force through revocation only if both testators revoke their dispositions of the last will. If only one testator revoked his/her disposal, revocation would produce a legal effect only in terms of his/her testamentary disposition, whereas the disposal of the alive testator would produce legal ef-

not probate the wall, the floor or the egg shell but the content of what is affixed on them. After all, Serbian courts have probated certain joint wills. Although the Supreme Court of Cassation in Belgrade in its decision Rev 168/12 of 20.06.2013 abolished the judgment of the District Court in Novi Sad Gž 1466/08 of 02.10.2009, and the judgment of the Municipal Court in Bačka Palanka P 481/07 of 30.10.2007, a joint will was probated at the hearing held on 13.7.2005 at the probate court in Bačka Palanka in the case O. 399/2000.

59 Dukeminer et al. 2000: 322. In the Anglo-Saxon case law, there are many court cases which prove this claim, for example: eg. *Re Duddell*, [1932] 1 Ch. 585; *In the Goods of Stracey* (1855), Dea. & Sw. 6; *In the Goods of Lovegrove* (1862), 2 Sw. & Tr. 453; *In the Goods of Miskelly* (1869), 4 I.R. Eq. 62; *In the Goods of Piazzzi-Smyth*, [1898] P. 7; *In the Estate of Heys*, [1914] P. 192, according to Mellows, 1973: 17, fn. 1.

60 Mellows, 1973: 16.

fects, unless it was revoked.⁶¹ On the other hand, in corespective wills, as one testator's disposition in joint will is closely associated with the other testator's disposition, they "either survive or fall through together"⁶²; thus, the revocation of one testamentary disposition leads to the revocation of the other testamentary disposition, without special statement of volition of the other testator.⁶³

Nevertheless, is it possible to revoke a joint will after the death of one testator (spouse)? In German law, "unilateral" provisions in a joint will (which correspond to reciprocal wills) are always revocable, both in life and upon death of a spouse,⁶⁴ while the "interdependent" provisions (which correspond to corespective wills) are revocable only until the testator's death, only if the revocation was made through a new will in the form of a notarial record and if the other spouse is informed about the making of such a will.⁶⁵ Therefore, pursuant to § 2271 of the German Civil Code (BGB), the right of revocation of the corespective testament ends upon the death of a testator, which is derived from § 2270 of the German Civil Code, where it is prescribed that a testator cannot revoke a joint will without the full consent of the other testator. Similarly, if testators through a joint will declared a third party as a successor (e.g. a child of the testator-spouses), each of the testators could feel free to revoke his/her disposal, but only until the death of one of the testators, and not thereafter.⁶⁶ All this has affected the German theory to take a stand, which was later accepted by some of our authors and part of the jurisprudence, that the possibility of revoking a joint will is limited to the moment of death of the first testator because, otherwise, the trust of the deceased testator at the other testator who outlived him/her could be betrayed.⁶⁷

A similar position exists in the common law⁶⁸ but it refers to mutual wills, where it is common to envisage a provision (in the very last will or in a separate agreement) that every testator is committed not to revoke his/her disposal without

61 Богданфи, Николић, 1925: 257; Пишкулић et al. 1924: 271; Марковић, 1930: 239; Аранђеловић et al. 1940: 85; Стојановић, 2007: 200; Mellows, 1973: 17.

62 § 2270 al. 1 BGB; Reimann et al. 2005: 284; Helms, 2012: 22; Марковић, 1930: 238; Аранђеловић et al. 1940: 85; Јовичић, 1936: 7.

63 § 2271 i § 2296 BGB; Braun, 2007: 219; Michalski, 2010: 86; Благојевић, 1946: 208-209.

64 Braun, 2007: 219

65 § 2271, al. 1 and § 2296, al. 2 of the German Civil Code; Bonomi, 2003: 49. The rule on irrevocability of corespective wills after the death of a spouse existed in the legislation of Vojvodina between the two world wars. Пишкулић et al. 1924: 271.

66 Ibid. Such a limitation existed in the Vojvodina legislation in the period between the two world wars. Богданфи et al. 1925: 258-259.

67 Ђурђевић, 2004: 156.

68 Herskowitz, 2013: 77-78; Mellows, 1973: 23; Braun, 2007: 220.

the consent of the other testator (which is not assumed, but must be proved).⁶⁹ However, then we are actually in the field of contractual inheritance, not of joint wills. Namely, if a joint will was not unilaterally revocable at common law, testators would not oblige themselves by contract that they would not revoke it.

On the other hand, the provisions of the Serbian Civil Code (SCC) and the Austrian Civil Code (AGB) allow the revocation of joint wills without limitations.⁷⁰ The fact that joint wills can always be revoked without time limits, even after the death of one of the testators, is not called into question by a large number of domestic and foreign authors.⁷¹ The only thing we need to point out here are the different legal effects, depending on the type of joint will *in concreto*.

In the mutual will, the testator who outlived the co-testator has the right to revoke his/her disposition of the joint will even when he/she has already received the inheritance of the deceased testator, because dispositions of the last will in mutual wills are mutually autonomous and independent. He/she could revoke the disposal even in corespective will, but would then have to renounce a succession in terms of the subjective hereditary right over the succession of the deceased spouse and return the received succession because with his/her revocation of the disposal would also revoke the the disposal of the other spouse.⁷² The testator who outlived the co-testator has the right to unilaterally revoke his/her disposal in corespective will even after the death of the other testator, without the obligation of renouncing a succession inherited from the

69 Mellows, 1973: 17-27; Dukeminer et al. 2000: 322-328.

70 §1248 AGB: "Spouses are allowed to appoint each other or other persons for successors within one and the same will. Such a will can be revoked but, if one party revokes the testament, it does not follow that it was revoked by the other testator"; SCC §779: "In case of a mutual apointment of successors, whereby a husband appointed his wife, and a wife appointed her husband, or somebody else as an heir, but afterwards changed their minds, such testamentary order shall cease and terminate. But if one of them changes his/her mind while the other does not, then the will is valid for the latter, while it is void for the former".

71 Antić says: "Even in the legislations that allow joint wills, unilaterality (in terms of unilateral revocability) overpowers mutually decared will, because wills can always be withdrawn, even after the death of a spouse." Antić, 2014: 222, fn . 559. Similar: Матић, 1851: 999-1000; Rušnov, 1893: 635; Ђорђевић, 1903: 53; Марковић, 1930: 239; Аранђеловић et al. 1940: 85; Стојановић, 2007: 199; Јовичић, 1936: 12; Бранковић, 1953: 6; Mellows, 1973: 17; Malaurie et al. 2008: 253. This is also the standpoint of the South African courts. De Waal, 2011: 191.

72 § 2271 al. 2 of the BGB; In South African law and the law of the Vojvodina between the two wars, joint will could not be revoked after the death of a testator (spouse) if both testators in case of death jointly disposed of their complete estates or some parts thereof. Braun, 2007: 223; Богданфи et al. 1925: 258-259.

other testator, if the late testator manifested behavior that constitutes grounds for exclusion from the right to *legitime* (compulsory/forced portion).⁷³

2.7. Equalizing joint wills and inheritance contracts

Some authors are inclined to conclude that “the nullity of the joint will stems from its hybrid nature, because after the death of one of the testators legal effects of the joint will are identical to effects of inheritance contract.”⁷⁴

This argument is difficult to defend. The legal effects of the inheritance contract in exceptional cases are not only equated only to certain types of coresponsive testaments (as a rule, made up for the benefit of third parties) but these two separate legal transactions differ in other features as well. Given that a joint will is unilateral and an inheritance agreement is a bilateral legal transaction, the revocability of a joint will, which is possible even after the death of one of the testators, draws a crucial distinction between the two institutes.⁷⁵ Furthermore, an active testamentary capacity is needed for drawing up a joint will, while the contracting testator, as a rule, requires a general and complete business capacity.⁷⁶ Differences exist in terms of formal requirements as well, since general regulations on the form of testaments are valid in terms of joint wills, so that they can be composed in any testamentary form, while the inheritance contract, in comparative law, can be concluded only in the form of a notarial act.

These arguments eliminate the claim that, by composing joint will provisions, the rules on banning inheritance contracts are circumvented, for which reason this testament is contrary to public policy and fair usages.⁷⁷

3. Is the institute of joint will recognized by the serbian positive law?

By the end of the Second World War, on the territory of today’s Republic of Serbia there were three “inheritance areas”. The Serbian Civil Code was in use in the territory of the Kingdom of Serbia; in the territory of Vojvodina (excluding Srem), the applicable law included the Legislative Article XVI: 1876 – On the formal requirements of testaments, inheritance contracts and donation in case of death, and

73 Michalski, 2010: 86. The same rule existed in the Vojvodina legislation. Пишкулић et al. 1924: 271.

74 Ђурђевић, 2010: 45, фн. 138.

75 Mellows, 1973: 17-27; Dukeminer et al. 2000: 322-328; Stojanović, 2003: 163; Kraljić, 2011: 267.

76 Јовичић, 1936: 4-5.

77 Ђурђевић, 2004: 158. For more on similarities and differences between a joint will and an inheritance contract, see: Stanković, 2015: 242-254.

the Austrian Civil Code in districts of Alibunar, Bela Crkva and Pančevo.⁷⁸ After the war, on 23 October 1946, the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation⁷⁹ was passed, which declared the regulations enacted during the occupation non-existent, while the pre-war provisions lost their legal force.⁸⁰ However, Article 4 of this Act stipulated that "legal rules contained in laws and other legal regulations referred to in Art. 2 of this Act, which in terms of Art. 3 of this Act have not been declared mandatory, can be applied to relations that are not governed by the applicable regulations, but only if they are not contrary to the Constitution of the FPR of Yugoslavia, the constitutions of the republics, laws and other relevant regulations issued by the competent authority of the new state, as well as with the principles of the constitutional order of the Federal Republic of Yugoslavia and its provinces."

Although our post-war legislation, including the 1995 Serbian Inheritance Act, did not recognize joint will, this institute was regulated in § 779 of the Serbian Civil Code, in § 583 and § 1248 of the Austrian Civil Code, and in § 13 of the Legislative Article XVI: 1876- On the formal requests of testaments, inheritance contracts and donation in case of death, which was in force in those parts of Vojvodina where the Hungarian customary law was in force. Consequently, given the fact that the current Inheritance Act of Serbia does not either explicitly allow or prohibit drafting a joint will, the following question is raised: is application of the joint will possible nowadays in Serbia based on the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation? In other words, can the existence and validity of this legal institute be based on the rules of the pre-war law, despite the fact that three inheritance regimes were in use in the territory of Serbia after the Second World War, whereas none of them explicitly mentioned a joint will?

By analyzing Article 4 of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation, it can be concluded that two conditions have to be fulfilled for the application of legal rules contained in laws and other regulations (ordinances, orders, books of regulations) which were in force on 6 April 1941. The first one is that the specific legal relation is not regulated by the current legislation; the second one is that the legal rules of the pre-war law that govern such a relation are not contrary to the constitutional principles and legislation adopted after the Second World War.

78 Stančković et al. 1996: 30; Stojanović et al. 2004: 72-73.

79 *The Official Gazette of FPRY*, no. 86/46, 105/46 and 96/47.

80 See: Art. 1 and Art. 2 of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation.

Regarding the first condition (i.e. that a legal relation is not regulated by the current legislation), the following question can be raised: is this condition met only if a new regulation was not adopted in a branch of law or a legal field after World War II (e.g. in inheritance law, until the adoption of the 1955 Federal Inheritance Act or, in the field of obligation relations, until the enactment of the 1978 Obligation Relations Act), or could this condition be considered met in every and each one of the cases when a particular legal relation, i.e. a legal institute (e.g. joint will), was not regulated by the post-war legislation, regardless of whether new regulations were made in this matter? In other words, the meaning of the formulation “concrete legal relation that is not regulated by the legislation in force” is questionable; namely, it is disputable whether the “concrete relation” should be interpreted in a narrow sense, as a complete legal area which is not regulated by post-war rules, or in a broader sense, as a concrete legal situation that arises between two or more persons which, for some reason, was not standardized in the positive law but was regulated by the pre-war law.

For a number of reasons, it seems that we can accept the extensive interpretation of the term „concrete legal relation that is not regulated by the current legislation for a number of reasons”. This view is based on the linguistic interpretation of Art. 4 of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation. Article 4 of this Act reads that “the legal rules contained in laws and other legal regulations referred to in Art. 2 of this Act⁸¹ ... can be applied to relations that are not regulated by the current legislation...” Thus, the Act itself makes a significant distinction between the concept of “a legal rule”, the concept of “a legal relation” and the concept of “legal regulation”; in our opinion, it allows certain legal rules from the pre-war law to be applied even when there are new legal regulations in the same area, but they do not regulate a specific legal relation, i.e. institute that existed in the pre-war law.

By grading of the mandatory force of the pre-war and post-war legislation, Konstantinović points out: “The distinction between legal regulations and legal rules is undoubtedly done consciously in that order, although the difference itself could be argued. The so-called legal rules are not hard rules of law, but much softer material, which is given to the judge in order to be used in the best possible way to fill in the gaps created by global abrogation of all previous regulations.”⁸² In his view, the legal rules of the pre-war law are not equalized according to their legal force to the new regulations, but they serve only as the court’s “softer material” which, as a specific type of assistance, should be used when addressing

81 Art. 2 of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation states: “The legal regulations (ordinances, orders, books of regulations) that were in force on 6 April 1941 have no legal force.”

82 Константиновић, 1982: 543.

gaps created by abrogation of the pre-war policies and for resolving concrete disputes resulting thereof.⁸³ Therefore, this distinction concurrently implies the impossibility of applying the legal regulations of the Kingdom of Yugoslavia as a whole, but only specific legal rules.⁸⁴ Yet, in no way does it exclude the possibility of applying the rules on joint will in the contemporary Serbian law.

Gams makes a distinction between legal rules of the pre-war law, on the one hand, and legal regulations, i.e. pre-war norms of law, on the other hand. In his opinion, legal rules include "only the rules of civil law, which are general for all civil law systems, because they are necessarily dictated by commodity relations. These rules exist in every civil-law system, and they are by legal doctrine, practices, and techniques built up over the centuries so that they would match most appropriately social needs and the needs of economic trade. Of course, uniformity is only in the basics. In greater or lesser detail, any legislation is different."⁸⁵ It seems that the general nature of these legal rules mentioned by Gams, including the way in which he refers to them, implies that they have to be equated with the principles of the pre-war law, to the principles that inevitably exist in every legal system and therefore are not inconsistent with the principles of the Constitution and legal order of the FPRY.

This view gives rise to some critical remarks. First, even if we had in mind the specificity and the "admissible departures" in terms of diverse formulation of these general rules that exist in different legal systems, it would be very difficult (if not impossible) to single out such legal rules from the disintegrated pre-war Yugoslav law. Second, even if this was possible, the general nature and latitude which is immanent to every principle, i.e. the legal rule of the Kingdom of Yugoslavia in the way it is defined by Gams, would not be helpful to the courts in post-war Yugoslavia, because these rules would not be able to regulate a large number of legal relations which called for practical solutions, which is actually the essence of Article 4 of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation. Therefore, it appears that the pre-war law rules should be interpreted in terms of the standards governing each single institute of pre-war civil law which is not mentioned in the post-war law, and whose admissibility and compliance with the legal rules and principles of the legal system in the post-war Yugoslavia should be established in each particular case.

This view is in line with the principle of *lex posterior derogat lex priori*, which means that a legal norm is valid until it is abolished by a new legal norm of the

83 Константиновић, 1982: 542-543.

84 Gams et al. 1991: 49.

85 Gams et al. 1991: 50.

same or higher legal force, whose content is contrary to the old norm.⁸⁶ Although in the field of inheritance law field there is a new Inheritance Act of Serbia, it does not contain a norm that regulates the institute of the joint will (nor did such a norm exist in any of the laws on inheritance subject matter which were in force on the territory of Serbia after the Second World War); so, there is no subsequent norm which would abolish the validity of the norm of the joint will from the pre-war law. In addition, Article 4 of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation expressly permitted the application of all the rules of the pre-war law governing the pre-war legal relations which were not regulated by the post-war legislation. At the same time, the legal validity of this Act has never been abrogated by any subsequent general norm.⁸⁷ Although elusive to elementary legal logic, according to which a legal act and its legal rules in their equality are either applied or not applied, in Serbian law there is indeed a strange situation: different legal rules from the same source of law do not have equal mandatory power to a judge.⁸⁸

This claim may be supported by some examples from our legal practice. The contract of donation is the most blatant example of the legal institute which is even today regulated by the rules of the pre-war law and the general rules of contract law; it was not normed in the Obligation Relations Act⁸⁹ because it was

86 Ђорђевић, 1996: 268-269; Васић, Чавошки 1999: 96; Лукић, Кошутић, 2002: 486.

87 This is commonly done in the transitional and final provisions of the newly adopted laws regulating a specific area of law which had previously been regulated by law. It seems that, here, we cannot speak about what Andra Đorđević called “internal base of the invalidity of civil laws”, which occurs when the law as a temporary (transient) act made the transition from the old to a new legal form. Ђорђевић, 1996: 268. The reason lies in the fact that the Serbian civil law has not been codified until the today; thus, the rules of the pre-war law are still applied in terms of some institutes.

88 Константиновић, 1982: 543.

89 In one case, deciding on the request of the plaintiff (seeking to revoke the gift he had given to the defendant) the court declared: “In light of the facts established by the lower instance courts, they have correctly applied the substantive law and concluded that the conditions for revocation of gifts due to the donee’s lack of gratitude and the donor’s impoverishment are not fulfilled, which is why they refused the claim. As the donation contract is not regulated by positive law, the rules of civil law apply in resolving parties’ disputes on this matter. According to the legal rules contained in paragraph 567 of the former Serbian Civil Code, there are conditions for revocation of the gift if the donor (after the commission of the gift) becomes so poor that he has no necessary means of subsistence, and if the donee showed great ingratitude towards the donor by harming his personal assets: life, body and reputation, or endangered his liberty and property.” (Judgment of the Fifth Municipal Court in Belgrade, P. Nr. 3714/95 of 17.09.1999, Sentence of the District Court in Belgrade Gž. no. 2788/00 of 24.05.2000, and judgment of the Supreme Court of Serbia Rev. no. 1002/05 of 24.11.2005.), Билтен Округног суда у Београду 2006: 85-88.

deemed to be the jurisdiction of the republic and provincial legislators.⁹⁰ The identical situation and arguments exists regarding the application of the loan for use,⁹¹ or in case of commorientes. Yet, it does not mean that these institutes have disappeared from the Serbian legal relations.

Since it is clear that the first condition for the application of joint will, as an institute of the pre-war law, is fulfilled in Serbian positive law, it should be establish whether this institution is contrary to the principles enshrined in our Constitution, i.e. compulsory prescripts, public policy and *boni mores*. The fact that joint will is not inconsistent with the fundamental principles of our legal system is shown in item 2.1. of this paper. Also, in 1951, the Supreme Court stated that "the duty of the court, considering the specific circumstances of each case, is to determine whether the application of a particular legal rule contained in the old law was permissible in the sense of Art. 4 and, if it finds that the application was incompatible, the court must give reasons for this in particular with reference to the regulation, the institution, practical and political tasks and other principal decisions of the legal system that such application is inconsistent with. Starting from an abstract point of view that a certain rule of the old law is not valid as a legal rule, the Court cannot refuse such a specific assessment without providing a concrete and well-reasoned justification".⁹² However, the contemporary judicial practice does not comply with the 1951 instructions of the Supreme Court. Therefore, there seem to be no obstacles for the pre-war law rules be applied to joint will, i.e. that joint will should be considered an institute of the Serbian positive law on the basis of the still existing Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation.

4. How should Joint will be applied in Serbian positive law?

Referring to the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation, as a transmitent legal source for the implementation of the pre-war legal rules, Serbian courts could decide on joint will on the basis of the rules of the Serbian Civil Code, the Austrian Civil Code, or the 1876 Act on Testaments.

The Austrian Civil Code generally prohibits joint wills, the only exception to this rule being the option of spouses to make them.⁹³ In §583 of AGB, there is a following provision: "As a rule, one and the same text is only valid for one testator.

90 Perović, 1990: 603.

91 Perović, 1990: 693-694.

92 Decision of the Supreme Court of the FPRY, Gz 24/51 of November 1951, Гајић, Ступаревић, 1952: decision бр. 145.

93 Rušnov, 1893: 54.

Exception concerning spouses is in the chapter about the marriage contracts”, while §1248 AGB says that “spouses are allowed to appoint each other or other persons for successors within one and the same will. Such a will may be revoked, but if one party revokes the will, it cannot be inferred thereof that the same is done by the other testator”. In addition to spouses, joint will in Austrian law can be made by fiancés, under the suspensive condition that they get married later.⁹⁴

The Serbian Civil Code determined in §424 that a testament is the order through which in case of death the person may dispose “of all property or just one part of it”, while in §425 it specified that “if the two persons commit to each other, even in case of death, it is a form of contract, and it is treated by court as such.” Through these provisions of the SCC, drafting of joint wills is generally prohibited but, based on the model of the Austrian Civil Code, §779 provided one exception to this rule, which allowed their drafting between the spouses: “If in one testament a husband appoints his wife or a third party a successor, and vice versa, and then revokes this will, then such order shall cease and be revoked. But if one testator denies his/her disposition, and the other one does not, then the latter testator’s disposition remains effective, while the first one’s is revoked”.

The Legislative Article XVI: 1876 – On the formal requests of wills, inheritance contracts and donation in the case of death from 1876, stipulated in §13 as follows: “Spouses are allowed to make their last will in one and the same written private testament, regardless of whether the last will contains a mutual appointment of the spouses or not. Apart from this case, if the testament contains within itself the last will of more persons, each of these disposals is void.”⁹⁵

The question arises whether the rules of the SCC, the AGB and the 1876 Act on Testaments should be applied depending on the territories in which they were valid, or whether a single rule considering joint wills should be set up for the territory of Serbia. In the opinion of Mihailo Konstantinović, legal security, certainty and unity of the legal system are the mainstay for the courts to take into account not only the legal principles of one, but of all pre-war „inheritance areas“. If the rules are different in different legal areas, the judge has the option to apply the rule to what he deems best suited to today’s needs, which for sure in each case should be explained and substantiated by appropriate evidence.⁹⁶ However, the provisions of the SCC, the AGB and the 1876 Act on Testaments, through which joint wills are standardized, essentially do not differ; so, there would be no problems in terms of the content of regulations which Serbian courts would call upon on the territory of the Republic of Serbia. However, due

94 § 1248. AGB; Helms, 2012: 22; Благојевић, 1946: 207.

95 Игњатовић, 1936: 12.

96 Константиновић, 1982: 544.

to the explicitly standardized possibility of unilateral revocation, but also in order to promote freedom of testation, priority should be given to the Serbian or Austrian codification because the 1876 Legislative Article limits the possibility of making a joint will only to private written form. Nevertheless, we should bear in mind that even when the court applies the pre-war rule of law, "the legal power of that rule is not derived from the pre-war legislation but from the Act on Invalidity of Legal Regulations."⁹⁷ In fact, Art. 4. par. 2 of this Act stipulates that state authorities cannot base their judgments and other acts directly on the legal rules of the pre-war law.

Therefore, it can be concluded that Serbian courts should consider valid only those joint wills which were made by spouses and in which they appoint each other or a third party a successor, or concurrently appoint a spouse and a third party successors.⁹⁸

5. Conclusion

Introduction of the joint will in the forthcoming codification of civil law in Serbia would be in line with the trends that are revived in our law. The 2005 Family Act allows the conclusion of marriage contracts,⁹⁹ and the Draft of the Civil Code of the Republic of Serbia provides for the possibility of reintegration of contractual inheritance in the Serbian law. Inheritance contract could be concluded only by spouses, including the ban on further mutually concluded contract of lifetime support.¹⁰⁰ Due to its unilateral revocability, joint will is less binding for spouses, i.e. represents less of a burden than a inheritance agreement;¹⁰¹ therefore, in case of reintroducing the inheritance contract in the Serbian law, there is no reason why the institute of joint will (which can also be drafted only by spouses) shall not be specifically standardized in the our civil law codification. Such a solution would contribute to the legal economy and to the recognition of the freedom of testation, especially in terms of regulating the legal effects of a spouse's death, given that joint wills have their basis in the "intimacy of the spouses, a community of interest stemming from joint life and work, joint child care", as well as the interests of collateral relatives; it would also contribute to

97 Gams et al. 1991: 50.

98 Rušnov, 1893: 635; Ђорђевић, 1903: 53.

99 See Art. 188. of the Family Act of the Republic of Serbia, *Official Gazette of the RS*, 18/2005, 72/2011 – and 6/2015.

100 See Art. 181. Paragraph 1. / IV and Art. 199 par. 4./IV of the Draft of the Civil Code of the Republic of Serbia. Влада Републике Србије – Комисија за израду Грађанског законика: 2011, 87, 93.

101 Бранковић, 1953: 6.

the effort to make the fewest changes possible in property relations in case of death of one of the spouses.¹⁰²

However, until the Civil Code of the Republic of Serbia comes into force, it is necessary to change the wrong case law of our courts, which refuse to probate joint wills or declare them absolute null and void. Although supported by a group of local authors, such actions are a result of a complete lack of understanding of the concept and the legal nature of the joint will. It does not represent a special form, but a special kind of testament, which is distinctive only by the number of testators as compared to the “regular” wills. In joint wills, two persons (usually spouses) jointly declare their last will in a single act, where each testator is aware of the disposition of the co-testator. Hence, there are no arguments that would support the claim that the joint will is invalid because it is not regulated by the Inheritance Act, because it represents a departure from the legal nature of the last will as a unilateral, strictly personal and unilaterally revocable legal transaction in case of death, which cannot be partially probated and which produces legal effects identical to that of an inheritance contract.

The interpretation of the Act on Invalidity of Legal Regulations enacted prior to April 6, 1941 and during the Occupation provides the legal ground for the application of the pre-war legal rules on joint will in the Serbian positive law (just like the donation contract, loan for use, or the case of commorientes). Joint will fulfills both conditions stipulated by the Act on Invalidity of Legal Regulations: first, the concrete legal relation that it regulates, which should be understood extensively, is not regulated by the current regulations; second, the legal rules of the pre-war law by which joint will is regulated are not inconsistent with constitutional principles and regulations adopted after World War II, i.e. they are not incompatible with the compulsory prescripts, public policy and fair dealing practices.

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102 Бранковић, 1953: 7-8.

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**HISTORIA MAGISTRA CURIAE ET IURISPRUDENTIAE
EST: ДА ЛИ ЈЕ ЗАЈЕДНИЧКО ЗАВЕШТАЊЕ ЗАБРАЊЕНО
У СРПСКОМ ПОЗИТИВНОМ ПРАВУ?**

Резиме

Нормирање заједничког тестаментна у предстојећој кодификацији грађанског права у Србији било би у складу са тенденцијама које оживљавају у нашем праву. Породичним законом из 2005. године допуштено је закључивање брачних уговора, а Нацртом Грађанског законика Републике Србије предвиђена је могућност реинтегрисања уговорног о наслеђивања у српско право. Уговор о наслеђивању би могли да закључују само супружници, уз забрану да надаље међусобно склапају уговоре о доживотном издржавању. Обзиром да заједничко завештање услед своје једностране опозовности супружнике мање везује, тј. представља мањи терет од уговора о наслеђивању, нема разлога да у случају поновног увођења уговорног наслеђивања у српско право и заједнички тестамент, који би такође могли да сачињавају само супружници, не буде изричито нормиран у кодификацији нашег грађанског права. Такво решење би допринело правној економичности и афирмацији слободе завештања, нарочито у погледу регулисања наследноправних последица смрти супружника, за које заједнички тестаменти основ имају у „присности брачних другова, заједници интереса, која потиче из заједничког живота и рада, узајамног старања за децу“, као и за побочне рођаке са обе стране, и настојању да за случај смрти једног од брачних другова у имовинским односима настану, по могућству, што мање промене“.

Међутим, док Грађански законик Републике Србије не ступи на снагу, требало би изменити погрешну праксу наших судова, који заједничка завештања одбијају да прогласе или их оглашавају апсолутно ништавим. Овакво поступање, подржано од дела домаћих аутора, последица је потпуног неразумевања појма и правне природе заједничког завештања. Оно не представља посебну форму, већ посебну врсту тестаментна, карактеристичну само по броју завешталаца у односу на класична завештања. У њему два лица, најчешће супружници, заједнички изјављују своју последњу вољу у једном истом акту, при чему је сваки завешталац свестан одлуке и располагања оног другог. Отуда су аргументима необдрањиве тврдње да је заједничко завештање неважеће јер није нормирано Законом о наслеђивању, јер представља одступање од правне природе завештања као једностраног, строго личног

и једнострано опозивог правног посла за случај смрти, да га је немогуће делимично прогласити и да производи правна дејства идентична уговору о наслеђивању.

Тумачење Закона о неважности правних прописа донетих пре 6. априла 1941. године и за време непријатељске окупације даје основ за примену предратних правних правила којима је регулисан заједнички тестамент и у српском позитивном праву, слично уговору о поклону, уговору о послузи, или случају коморјената. Заједничко завештање за то испуњава оба услова предвиђена Законом о неважности правних прописа: предметни правни однос који се њиме регулише, а који треба схватити екстензивно, није уређен важећим прописима, правна правила предратног права којима је уређено заједничко завештање нису у супротности са уставним начелима и прописима донетим после Другог светског рата, односно, нису у несагласности са принудним прописима, јавним поретком и добрим обичајима.

Кључне речи: *заједнички тестамент, узајамни тестамент, уговор о наслеђивању, Закон о неважности правних прописа донетих пре 6. априла 1941. године и за време непријатељске окупације.*

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ASSESSING THE VALIDITY OF LEGAL TRANSACTIONS FOR THE DISPOSITION OF SUCCESSION ESTATE IN PROBATE PROCEEDINGS**

Abstract: *In this paper, the author deals with the issue of verifying the validity of wills and inheritance agreements by probate courts in the probate procedure. Probate courts have jurisdiction solely over disputes involving the matters of applicable law in probate proceedings, while in case of disputes arising over factual matters they refer the parties involved to civil courts. This paper is aimed at determining whether in all cases when there is a dispute over matters of law, i.e. when the validity of legal transactions for the disposition of succession estate in probate proceedings is in question, probate courts can deliberate on their validity. Since the courts are ex officio obliged to consider the possible nullity of wills and inheritance agreements, the author analyses whether probate courts have jurisdiction (and obligation) to assess the reasons that could possibly make wills and inheritance agreements null and void, in which cases probate courts should decide upon their nullity, and how a decision declaring a legal transaction null and void should be formulated.*

Keywords: *probate court, will (testament), inheritance agreements, validity of legal transactions.*

1. Introduction

In the legal system of the Republic of Serbia, the succession law effects arising from a person's death are established in probate procedure. Probate courts are obliged, *inter alia*, to determine the content of succession estate, identify the heirs, examine the grounds for their claims over the estate, determine the inher-

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itance quotas and, on the grounds of all those legally established relevant facts, to officially dispose of the succession estate by issuing a probate ruling. Bearing in mind the fact that a probate proceeding is a kind of non-contentious proceeding, regarded as a noble act of the court – *nobile officium iudicis* (Петрушић, 1996: 513), in such proceedings the court adjudicates only on the grounds of indisputable facts.

It is not a rare case in legal life that an estate be settled by means of a legal transaction: a will and/or an inheritance agreement. The practical issue, which has been almost entirely disregarded by legal doctrine, is whether probate courts are authorized and/or obliged to verify the validity of legal transactions by means of which deceased persons disposed of their estates. Are the probate courts obliged *ex officio* to examine the possible nullity of legal transactions, and can they settle disputes over the validity of legal transactions between the participants in probate proceedings?

Decades-long practice has produced a certain pattern of behaviour that probate courts adhere to. In this paper, we will critically examine the probate courts' procedural practice in such cases and assess its validity. We will try to point to the cases in which probate courts should deal with disputable legal issues, provided there is a dispute between the participants of the probate proceedings over the legal validity of legal transactions concerning the disposition of succession estate. In addition, we will point to the cases in which those courts should *ex officio* deliberate on legal (in)validity of those transactions, and we will also consider the kinds of decisions the courts should reach provided they establish that the transactions are invalid. Bearing in mind the fact that a will is the only legally approved transaction in our legal system by which a person can validly dispose of their estate, in this paper we will mostly focus on the verification of legal validity of this kind of legal transaction in the probate proceeding. In particular, we will also focus on the disposition of succession estates by means of inheritance agreements, and consider the issue of probate courts' jurisdiction over determining their invalidity in probate proceedings.

2. A brief summary of reasons for invalidity of legal transactions for the disposition of succession estate

In order to point to the cases in which probate courts should establish legal invalidity of wills and inheritance agreements for the disposition of goods that constitute a succession estate, we will first examine for which reasons such legal transactions could be declared null and void.

2.1. Declaring wills null and void or voidable

In the Republic of Serbia, testate succession rules allow a person to dispose of their estate only by means of a will, and stipulate the reasons that make such legal transaction legally valid. Section 5, Chapter 3 of the Inheritance Act of the Republic of Serbia, entitled *Invalidity of a will*¹, classifies legally invalid wills as null and void, or voidable. Although the criteria for determining a will null and void or voidable differ,² a legal transaction (a will) is usually considered null and void if it poses a threat to the public interest, while it is considered voidable if it poses a threat to the private interest.³

A will can be declared null and void in its entirety or only in certain parts. By means of a general null and void clause, Inheritance Act stipulates that a will is null and void if its contents are contrary to preemptory norms, public policy or *boni mores*.⁴ A will is also declared null and void in the following cases: if it was forged, if it was made by a person under the age of 15, or if it was made by a person who due to mental incompetency was totally deprived of legal capacity.⁵ If a will is made during the proceeding for depriving a person of legal capacity,

1 In legal doctrine the term “null and void legal transaction” is criticized since the term only denotes transactions that actually are null and void, while voidable transactions are considered legal until they are declared void. That is the reason why the term “invalid” legal transaction is proposed as a generic term that better denotes the essence of null and void or voidable legal transactions (Радишић, 2004: 170). Agreeing with this position, we point to the issue of adequacy of the term “null and void legal transactions”, since voidable legal transactions exist in legal practice and produce results until they are removed from legal practice by a court decision which declares them null and void.

2 Classification of legal transactions into null and void or voidable is based on the reasons that cause their invalidity, legal sanctions that follow them, the circle of agents that could refute them, as well as time frames within which they can be refuted (Klarić, Vedriš, 2009: 137).

3 This criterion is usually quite relative, so it is not easy to draw a clear demarcation line between null and void transaction, on the one hand, and voidable transaction, on the other hand. In theory, even voidable transactions can pose a threat to public interests, and in some cases the two types of transactions are classified as one or the other quite arbitrarily (for example, in case a testator is incapable of clear judgment, whereas the consequences of permanent or temporary incapability of judgment are considerably different from the standpoint of invalidity of will, although testators in both cases have no legally relevant will). For more details, see: Ђурђевић, 2004: 5 onwards.

4 See: Article 155 of the Inheritance Act, *Official Gazette of the Republic of Serbia*, 46/1995, 101/2003 – the Decision of the Constitutional Court of the Republic of Serbia and 6/2015 (hereinafter referred to as: IA).

5 See Articles 156–157 of IA. If due to his or her mental incompetency a testator is totally deprived of legal capacity, his/her will will be declared null and void even if it was made during the lucid interval (*lucida intervala*) (Сворцан, 2001: 114).

the practice says that such will should be considered null and void if the proceeding ends in a court decision totally depriving the testator of legal capacity.⁶

Reasons for declaring other legal transactions null and void, such as unlawful grounds (causes) and similar, are perceived as valid reasons for declaring a will null and void as well. Bearing in mind the fact that a will is a gratuitous legal transaction, and given that in gratuitous legal transactions a motive is important and closely related to cause (Радишић, 2004: 87), the testator's intention that is contrary to peremptory norms, public policy, *boni mores* or moral norms can also make their will null and void.⁷ That would particularly be the case if drawing up a will and disposing of an estate by a testator was motivated by achieving a certain purpose – influencing the actions of inheritors (see more in Ђурђевић, 2004: 452).

The Inheritance Act enumerates reasons for declaring certain provisions of a will null and void. The provisions of a will are unacceptable if in the said will the testator names heirs to his/her successors or legatees (prohibition of fideicommissary substitution in a narrow sense), if they forbid an heir or a legatee to dispose of the inherited property or the inherited rights (prohibition of fideicommissary substitution in a broad sense), or if they forbid or limit the apportionment of the inherited property.⁸

The declaration of nullity also bars the provisions of a will that pass any part of the succession estate to the authorized persons who participated in drawing up a public version of the will, the testamentary witnesses, their spouses, heirs, ancestors and siblings. When it comes to oral wills, a circle of persons who cannot be named heirs is wider (due to a greater possibility of abuse); so, the provisions passing any part of succession estate to the testamentary witnesses, their spouses, first-degree blood relatives, and up to fourth-degree collateral descendants, including the spouses of all aforesaid persons, are considered null and void.⁹

As a rule, the fact that one provision of a will is null and void does not necessarily imply that the will is null and void in its entirety. The only cases when one such provision can overturn the whole will are if a will cannot exist without the null

6 See: the Decision of the Supreme Court of the Republic of Serbia, Rev. 1842/93 (source: Magazine *Избор судске праксе*, no. 11/94, p. 38).

7 According to some theorists, in lucrative business, a motive is concurrently a cause of a legal transaction; so, any unlawful incentive makes that transaction invalid (Антић, 2008: 277).

8 See Article 159 of IA.

9 See Article 160 of IA.

and void provision or if such a provision was a decisive motive for the testator to draw up the will.¹⁰

The Inheritance Act stipulates that a will is voidable if a testator was not mentally competent at the time of drawing up the will (but he/she was not fully deprived of contractual capacity), if the will was made by lack of consent, or if in drawing up the will a specified form¹¹ or legal requirements¹² were disregarded.

2.2. Declaring inheritance agreements null and void

In the succession law theory, the agreements envisaged by the Inheritance Act commonly belong to two groups: inheritance agreements and obligation agreements of special interest to succession law.¹³

Inheritance agreements are those legal transactions concluded between a future testator and a future inheritor or a third person, or between a future inheritor hoping to receive inheritance and a third person (Сворцан, 2006: 207). They can serve as grounds for claiming the inheritance or as means for relinquishing future succession (Антић, 2009: 333). Inheritance agreements include: agreements on future inheritance or legacy, agreements on contents of the will, agreements on renouncing succession before *delatio hereditatis*, and inheritance contracts, which are the strongest grounds for claiming inheritance in the legal systems that recognize such agreements.¹⁴ A common feature of all these agreements

10 See Article 158 of IA.

11 According to the Draft Civil Code of the Republic of Serbia (the text available at <http://www.mpravde.gov.rs/files/NACRT.pdf>; last accessed on August 2nd 2016), a will shall be considered null and void if its form completely departs from the form prescribed by the Code (Article 2753).

12 See Article 164 and Articles 166–168 of IA.

13 Besides life maintenance agreements and contracts on assignment and disposition of property *inter vivos*, obligation agreements of special interest to succession law include life annuity agreements and donation agreements in case of death (Стојановић, 2006: 704).

14 An inheritance agreement is a legal transaction *mortis causa* by means of which one party in the agreement (an agreement settlor) disposes of an aliquot part of the succession estate or entire succession estate on behalf of a co-contractor or a third person (an agreement heir). In most cases, it involves a gratuitous contract but in some cases it may be an onerous contract. By means of an agreement on future inheritance or legacy, a person disposes of inheritance or legacy hoping to receive in the form of either gratuitous or onerous contract. By means of an agreement on contents of the will, a testator pledges to enter or not to enter, or to retract or not to retract, a certain provision in their will. An agreement on renouncing succession is a transaction in which a future heir renounces his/her hereditary right on the estate of a future decedent, with or without compensation.

is that they are used to dispose of succession estate before *delatio hereditatis*. All inheritance agreements are considered null and void in our legal system.¹⁵

3. Assessing legal invalidity of wills and inheritance agreements in probate proceedings

3.1. Procedural action of probate courts in case of succession disputes on matters of fact and matters of law

Judges and their assistants in probate courts are often said to adjudicate cases "in white gloves" because they base their decisions exclusively on indisputable facts. If during a probate procedure a factual dispute arises between the participant that may affect the resolution of the previous issue, a probate court has no jurisdiction over resolving that dispute.¹⁶ A dispute over legally relevant facts is a dispute regarding circumstances that form the factual grounds for the probate ruling, a dispute on matters that make the minor premise of the court syllogism (Ђурђевић, 2004: 338). In case of a dispute concerning factual matters, the court will direct the disputing parties to resolve their dispute in civil or administrative proceedings, leaving them a maximum 30-day period to initiate the proceeding. The probate court stays (ceases) the probate proceeding until receiving notification that the civil or administrative proceeding has been initiated. Once the civil or administrative proceeding is initiated, the probate proceeding is suspended by a court decision until the final resolution of the civil or administrative proceeding (Крстић, 2016: 284–285).¹⁷

15 See Articles 179–181 and Article 218 of IA. The Draft Civil Code (Article 2776) proposes a solution according to which an inheritance contract can be made solely between spouses. In case this draft norm is accepted by the legislator, by concluding an inheritance contract spouses will be able to dispose of estate on behalf of children of one or the other spouse, their mutual children, foster children or other descendants.

16 See Article 119, paragraphs 1 and 2 of the Non-contentious Proceedings Act, *Official Gazette of the Socialist Republic of Serbia*, nos. 25/1982 and 48/1988, and *Official Gazette of the Republic of Serbia* 46/1995 – 46/1995 – another law, 18/2005 – another law, 85/2012, 45/2013 – another law, 55/2014 and 6/2015 (hereinafter referred to as NCP Act).

17 See Article 24, paragraph 1 of the NCP Act. However, in practice, the courts immediately direct the parties to litigation and simultaneously halt the probate proceeding, without waiting for the civil proceedings to actually be initiated. For examples of such departures, see Decision of the First Instance Court in Kruševac, O. 1196/11 of 25th May 2012, and Decision of the First Instance Court in Negotin, O. 1817/12 of 2nd April 2013 (source: the courts' archives).

The court will advise the party whose right is deemed to be less legally grounded to initiate contentious or administrative proceedings.¹⁸ By designating the plaintiff, the probate court indicates which party will have the burden of proof (*onus probandi*) and a more difficult role to convince the court of the legitimacy of their claims. As a general rule, the burden of proof against an invalid legal transaction falls upon the party claiming that the said legal transaction is null and void or voidable (Познић, Ракић-Водинелић, 1999: 242), given that a legal transaction is generally presumed to be valid *ab initio*.¹⁹ Only in specific situations, when inheritors contest the validity of the will, does it seem justifiable that the probate court, in case of a dispute, assigns the role of the plaintiff to the inheritors who claim that the will is valid. That would be the case when, for example, the probate court undoubtedly establishes that the formal conditions were not met (e.g. when the signatures of witnesses are missing in case of a will drawn up before the witnesses), which makes the will voidable. In such a case, the court may declare that the right of these successors is less legally grounded. However, by directing the participants of the probate proceeding who claim the will to be legally valid to litigation, the probate court would face insurmountable obstacles, which will be addressed later in this paper.

In case of a dispute between the parties in the probate proceeding regarding the matters of law, legislation stipulates quite a different solution to that arising from a dispute regarding the matters of fact. By taking the ancient concept of *iura novit curia* as a point of departure, the Act on Non-Contentious Proceedings of the Republic of Serbia authorizes and obliges probate courts to deliberate on all disputable legal issues arising between the participants in a probate proceeding.²⁰ Disputes over legal matters between the parties arise when they disagree over the specific legal act or a norm from the specific act that should be applied,

18 See Article 23, paragraph 2 of the NCP Act. As this criterion is not quite clear, the courts sometimes arbitrarily act and assess which participant should be referred to initiate a lawsuit. In our doctrine, the dominant position is that the court must take into account which party has the benefit of legal presumptions, since the term presumption implies probability (Антић, 2009: 395; Радоман, 1966: 6), so it should advise the other party to initiate the proceedings. Some are of the opinion that the court in any case should evaluate all the evidence and, based on that evaluation, decide whose right will be considered less probable (Благојевић, 1969: 335).

19 The most probable outcome is generally presumed to be true – *id quod plerumque fit*. That is why the burden of proof shifts to the party whose claim is contrary to the general presumption.

20 See: Article 119, para. 3 of the NCP Act. The exception to the rule is stipulated in Article 121 of the NCP Act: the probate court shall cease the probate proceedings and refer the parties to litigation if the heirs dispute either the facts or the application of the law: if there is a dispute between the heirs as to whether certain property is to be included in the estate, or if there is a dispute regarding the claims of the testator's descendants who lived in the same

i. e. when the parties differently interpret the same norm (the dispute over the major premise of the court syllogism). As the court knows the law, this type of dispute can be settled in the probate court as well.

Disputes on matters of law between the participants of a probate proceeding may also arise over the legal validity of the transaction *mortis causa* by which a testator disposed of the succession estate. However, it is questionable whether the probate court can examine all disputable legal issues regarding the validity of a will, make a decision about it and distribute the succession estate based on the decision of legal (in)validity of the will. This issue will be addressed later on in this paper.

3.2. Determining legal (in)validity of wills and inheritance agreements contested in court by parties involved in probate proceedings

Parties involved in a probate proceeding, who are dissatisfied with the contents of a will either because they have not been nominated for inheritance or because under the testator’s last will they have inherited less or something different than expected, have to inform the court during the probate proceeding that they contest the validity of the will. It is usually done immediately after reading the will, if that procedural action is taken in the course of the probate proceeding, or during the first hearing of the probate proceeding, if the will is read before the probate proceeding started. The parties can inform the court of the specific reasons for claiming the will to be null and void or voidable, or they can just state their intent to contest the will.

An important difference between null and void wills and voidable wills is the circle of persons who can claim the will to be legally invalid. Another important difference is the time frame for submitting the claim. Only the persons with direct legal interest can claim the will to be voidable,²¹ and they must file their claim within the subjective time frame of one year from the moment of becoming aware of the reason for the will’s voidability, in case there is a lack of consent and testamentary incapacity, or from the moment they became aware of the will, in case there are some faults in the legal form of the will. In all cases, the right to claim a will voidable expires ten years after the official reading of the will, while in case of *mala fide* persons, the right to claim the will voidable due to testamentary incapacity and faults in the last will and testament ceases to exist after twenty years.²² These time frames are preclusive and the court observes

household with the testator to exempt from the succession estate the share that corresponds to their contribution to increasing the value of the testator’s estate.

21 See Article 165 of IA.

22 See articles 169 and 170 of IA.

them *ex officio* (Сворцан, 2004: 364; Стојановић, 2011: 301; Ђурђевић, 2015: 206).²³ There is no time frame for declaring a will null and void,²⁴ and every interested person may invoke the reasons for its nullity (Article 161 *in fine* of IA).

When an issue of a will's validity arises during a probate proceeding, it regularly creates a dispute between the parties involved since it is in the interest of one party that the will produces effect, while it is in the interest of another party that it be declared null and void. Then, the actions of the court should depend on whether it is a dispute regarding legally relevant facts or a dispute regarding the application of specific legal rules,²⁵ since the probate court has a jurisdiction to resolve only the disputes regarding matters of law. Furthermore, the actions of the court should depend on the actual reasons for the will's invalidity that the parties point to.

When the party contesting the validity of the will brings out the reasons that make the will null and void and the dispute is over legal matters, the probate court is obliged to settle the dispute. For example, if a testator says in his/her will that they disinherit their son because contrary to the parent's will he married a woman of a different religious belief (race, or similar), and the parties in the proceeding are in dispute over the validity of such provision, the probate court could determine whether such provision is in discord with peremptory norms and public policy. We are of the opinion that in such and similar cases of dispute over the application of legal provisions, when the reasons that make the will entirely or in part null and void arise, for the reasons of effectiveness and procedural economy, the dispute should be resolved by the probate court rather than the civil court. In the said case, the will would be declared null and void in the enacting terms of the probate ruling, and the probate court would distribute the estate *ab intestato*.

In our opinion, a probate court may declare a will to be partially null and void for all the reasons stipulated in Articles 159 and 160 of the Inheritance Act. It

23 The judicature took the same stance. See: Judgment of the Supreme Court, Rev. 4953/95, from November 15th 1995 (cited from: Крсмановић, 1997: 270); Decision of the Supreme Court, Rev. 970/06, from November 8th 2007 (cited from: Вуковић, Станојчић, 2011: 344).

24 Although there is no time frame for determining a will null and void, and the effects of the declarative court decision proclaiming the will null and void are such as if the will had never existed, such court decision does not affect the rules on acquiring ownership right by possession, acquiring ownership right by acquisition from a non-owner, and statutory rules on overdue claims, which are the effects that the will produced in legal reality. See Article 162 of IL.

25 Differentiating between a legal and a factual issue is often not an easy task (for more information, see: Познић, 1955: 260–262). On differentiating a factual matter from a legal matter in probate procedure, see: Трговчевић-Прокић, 2015: 638–641.

may also declare the will null and void if it was made by a person under 15 years of age (except in case of the parties' dispute over whether the will was made before or after the testator turned 15), or a person who is totally deprived of legal capacity due to mental incompetency (when there is no dispute over the fact that the will was made after the official deprivation); in most cases, the court may also give its opinion on the issue of whether the provisions of the will are contrary to the peremptory norms, public policy or *boni mores*. However, in case of a dispute between the parties as to whether the will is forged or not, it seems that it would be a difficult task for the probate court to ascertain the existence of the forged will and that, in such case, a civil proceeding would be the only legal way of proving the officially read will to be a forgery.

It is much more debatable whether a probate court is authorized to settle a disputable legal issue when a party brings out the reasons for the voidability of a will. In case the parties in the probate proceeding have pointed out the faults in the legal form of the will, there is a stance in our legal practice that a probate court has the authority to decide on the will's invalidity (or the reasons for its voidability) since it is an issue concerning a matter of law.²⁶

Yet, it is disputable whether a probate court is authorized to examine of reasons for the voidability of a will and declare it null and void, given the fact that the civil court decision that nullifies a legal transaction due to its voidability is constitutive in its nature whereas the probate ruling is a declarative decision. It seems that in a probate proceeding, being in nature a non-contentious proceeding, it is not possible to verify the voidability of legal transactions for the disposition of succession estate even when the will is clearly invalid and the heirs have pointed out the reasons for that. In a nutshell, the probate ruling cannot annul the will, and in order to distribute the succession estate *ab intestato* (or under another will), the invalid will must be made null and void, which can only be done by means of a constitutive ruling of the probate court. Therefore, it seems that the only option available to the probate court is to refer the parties to litigation. By exercising its statutory authority to direct the party whose right is deemed to be less legally grounded to litigation, it seems that the probate court should refer to litigation the party claiming that the will is valid rather than the one claiming it to be invalid. However, for practical reasons, in such cases probate courts direct to litigation the heirs who claim the will to be invalid, primarily because a voidable will may be annulled only by rendering a constitutive decision. Courts do so for the reasons of effectiveness; namely, in case the heir claiming the will to be valid is directed to civil proceedings in the capacity of the plaintiff, it may be reasonably expected that a lawsuit may never be initiated as it is not in the

²⁶ See: The Decision of the Higher Court in Subotica, Gž. 295/13 from June 21st 2013 (source: *Paragraf Lex*).

interest of that heir to initiate a lawsuit because of the initial presumption of the will's validity. That would put the probate court in a "no-win" situation: as the probate court does not have the authority to annul a voidable will by issuing a probate ruling, it implies that it would have to distribute the estate on the basis of an invalid will, unless the successors contesting the will initiate a lawsuit for its annulment; (in such a case, they are obliged to duly inform the probate court, which would then suspend the probate proceeding until the final and enforceable decision is rendered in the contentious proceeding). For these reasons, we believe that the court should always refer to litigation the parties who stipulate the specific reasons for the will's voidability.

When the validity of the inheritance contract is contested during the probate proceeding, we are of the opinion that the probate court is obliged to consider the possible reasons that could make the contract null and void. For example, in practice, inheritance contracts are most often made under the guise of life maintenance contracts, when the recipient of life maintenance transfers his/her entire estates (accrued at the moment of his/her death) to the party providing maintenance. The probate court is not authorized to decide on the legal validity of the life maintenance contracts, and it is under no obligation to suspend the probate proceeding and direct the parties to initiate a litigation proceeding (more in, Krstić, 2016: 285–288). However, the probate court has the authority to examine whether a contract designated as a life maintenance agreement is actually an inheritance contract, since it deals with the disposition of assets from the succession estate. If the court establishes that as a fact, the court shall issue a probate ruling declaring a provision of the contract or the entire contract null and void, and distribute the estate under the rules of intestate succession.

In practice, however, the courts (almost) never proceed in this way. When the parties in a probate proceeding contest the will or an inheritance contract, the probate proceeding is suspended, regardless of the nature of dispute and reasons for the invalidity of the document, and the parties are directed to settle the dispute in the civil proceeding. Probate courts do not get involved into deliberation on legal validity of legal transactions essential for the disposition of the succession estate. In such cases, judges and judicial assistants adjudicating in probate proceedings have quite an opportune approach to this matter: they simply do examine the disputed legal matter and, thus, they reduce their own workload and save time. Another incentive for such an approach is the imposed obligation to complete the norm regarding the number of settled cases, given the fact that a stayed proceeding is regarded as one third of the settled case.

4. Declaring wills and inheritance agreements null and void *ex officio*

According to the letter of the Inheritance Act, a probate court is obliged *ex officio* to consider the reasons that could possibly make a will null and void.²⁷ Article 109, paragraph 1 of the Obligation Relations Act,²⁸ stipulates that the court shall examine the reasons for nullity of agreements *ex officio*.

But, which court does the provision refer to? Is it only a civil court, when the civil proceeding is initiated by filing a claim for nullity of the will, or is a civil court obliged to consider all the reasons that may nullify a will or an agreement even without the officially filed claim? Can it be inferred from such a legal formulation that a probate court as a non-contentious court does not have the authority to deliberate on nullity of legal transactions? Considering that the will is the strongest legal ground for claiming the inheritance right and that a probate court (as a body that primarily applies the regulations of the Inheritance Act) is obliged to determine all the succession law effects arising from a person's death and deliberate on all the issues essential for issuing a probate ruling, the question arises whether the probate court (which primarily applies the rules of the Inheritance Act) has the authority to deliberate on the nullity of a will. Can the aforementioned legal provision be interpreted in a way that a probate court, as a non-contentious court, cannot *ex officio* deliberate on the nullity of legal transactions and, thus, autonomously resolve a previous issue of relevance for the probate proceeding?

In legal doctrine and judicial practice, opinions on this issue are quite different.

Professor Svorcan, also an experienced judge, is of the opinion that a probate court, when determining the existence of reasons for nullity of a will or any of its provisions, is obliged to duly inform all the potential testate and intestate successors and a public prosecutor about it. If the successors choose not to initiate a civil proceeding for the annulment of the will, the public prosecutor is obliged, on the grounds of the information received from the probate court and the collected evidence, to institute proceeding for declaring the will null and void.²⁹ Professor Svorcan, however, states that the courts or public prosecutors almost never act in such a way (Сворцан, 2001: 117).

27 See Article 161 of IL.

28 The Obligation Relations Act (Contracts and Torts), *Official Gazette of the SFRY* 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the FRY* 31/93 and Official Gazette of SMN, 1/2003 – Constitutional Charter. Hereinafter: the ORA.

29 Notably, the IA does not mention a public prosecutor as an agent authorized to claim the nullity of a will, as opposed to the ORA, which authorizes a public prosecutor to claim it. Compare Article 161 of the IA and Article 109, paragraph 2 of the ORA.

By examining the issue of possibilities of probate courts to declare the nullity of wills when they are in contrast to peremptory norms, public policy and *boni mores*, professor Đorđević points out that the court actions depend on the nature of the dispute (whether it is factual or legal in nature), and provides further analysis through hypothetical examples. So, in case an heir claims that the legatee was the testator's mistress who was given some property benefit as a result of the testator's pursuit to enter a love affair with her, and the legatee denies the claims, such a dispute is factual in nature and the court should direct the disputed parties to litigation. However, if the legatee does not deny the heir's claims but does not consider such a provision in the will void, it is a dispute of legal nature which is to be resolved by the probate court itself. Similarly, if the parties in a probate procedure dispute about whether the testator was younger or older than 15 at the time he/she made the will and whether he/she was mentally competent at the time, it is a dispute about important facts. In case there is no dispute about whether the testator was partially deprived of contractual capacity at the time he/she made the will but there is a dispute about whether a person of limited contractual capacity can be regarded as having testamentary capacity, the resolution of such a legal issue lies in the jurisdiction of the probate court (Ђурђевић, 2004: 339).

Since probate proceedings are dominated by the principle of acting *ex officio* and the principle of court examination (Стојановић, Видић -Трнинић, 2015: 29), we are of the opinion that probate courts are authorized to deliberate on the reasons that could make a will or an inheritance agreement null and void, when the participants in the proceeding do not dispute legally relevant facts.

As a general rule, the court assesses the reasons for possible nullity of a will at the moment when the will was made (by examining if the testator was mentally competent at the time, if the will has the required legal form, if there was lack of consent, etc.). Yet, the question is what the relevant moment of reference is for examining whether the will is contrary to public policy and *boni mores*: is it the moment of drawing up a will, or the moment of the official reading of the will, since the circumstances possibly important for assessing the validity of a will can change considerably. In the national scientific literature, there are two opposing points of view. The first states that the validity of a will must be examined at the moment it was made, and if the subject matter or the grounds are found invalid, then the will is regarded null and void *ab initio*; what does not exist at the moment of *delatio hereditatis* cannot be subjected to validity assessment (Живојиновић, 2003: 114–117). According to the second point of view, the only relevant moment for assessing the validity is the moment of opening the testator's will, given that it is the moment when the will starts producing effects (Ђурђевић, 2004: 321). Besides, it should be taken into account that public

policy (*ordre public*) is a fluid and variable institute, and that the interpretation of a single provision depends to a considerable extent on the moment when the court decides on the validity of the testamentary disposition, given that the same legal provision can be differently interpreted at different times (Стојановић, 1968: 388).³⁰ Bearing all these dilemmas in mind, it seems questionable if the probate court should assess in each individual case whether the provisions of the will are contrary to the public policy and *boni mores*. We are of the opinion that, in some cases, the probate courts should transfer the role of the defender of public policy and *boni mores* to civil courts.

A probate court is not authorized to assess *ex officio* whether a will is forged or not; that issue should at all times be resolved in civil proceedings. When it comes to other reasons for nullity (testamentary incompetency recognized as the reason for nullity, incongruence of the provisions of the will with peremptory norms, existence of reasons for the nullity of certain provisions as stipulated in Articles 159 and 160 of the Inheritance Act), probate courts are obliged to determine the nullity of a will, in part or in its entirety.

We believe that probate courts should decide on the nullity of a will or an inheritance contract in the first paragraph of the enacting terms of the probate ruling and distribute the estate in the subsequent paragraphs. In the reasoning of the probate decision, the court would present the reasons for declaring the legal transaction null and void. It is our opinion that the decision on nullity must be comprised in the enacting terms of the decision and not just in the reasoning, due to the fact that only the enacting statement (holding) is the elements that makes a judicial decision final and enforceable.

Do probate courts *ex officio* determine the possible nullity of wills and inheritance agreements? Although their function is, among others, to protect public interests, in practice probate courts rather leave that role to civil courts.³¹ As a rule, probate courts do not *ex officio* examine possible nullity of wills or inheritance agreements, nor do they inform the interested parties of the reasons that could make that legal transaction null and void. Such action is contrary to the rules of law, to the principles of effective legal protection and procedural economy, and in a broader context, to the principle of trial within a reasonable time. Namely,

30 It should be noted that, in spite of the fact that the conception of public policy is fluid and relative, its interpretation by the court must not be arbitrary because, thus, the court would violate the principle of legal security. In testamentary succession, its limits are determined by the rules governing the subject matter and the grounds of the will (Живојиновић, 2002: 191-192).

31 Such conclusion is based on the results of research and interviews with representatives of judicial authority, who pointed out that in practice the issue of invalidity of wills is always resolved in civil proceedings.

in certain unambiguous cases, when a probate court can determine whether the legal transaction is null and void or not, it is ineffective to initiate a whole set of mechanisms of legal protection before the litigation court, considering that all delays and postponements that are so common in civil proceedings make legal protection long and expensive.

If a probate court chooses not to assess the reasons for possible nullity of a will or an inheritance contract, and distribute the estate on the grounds of a void legal transaction, then the participants in the proceeding who did not claim nullity of that legal transaction are bound by the final and enforceable probate ruling. They will be at a disadvantage because of the subjective boundaries of the final and enforceable ruling. When the ruling comes into effect, it gains authority and generally cannot be contested. However, the law stipulates one exception. A corrective civil proceeding is acceptable only if the conditions are met for instituting a new trial under the rules of civil procedure, in order to establish all the relevant facts (Станковић, Мандић, 2013: 248) and distribute the estate on the grounds of correctly established facts.

5. Conclusion

In a probate proceeding, a probate court is obliged to establish all of the succession law effects arising from a person's death and to distribute the succession estate by issuing a probate ruling. Relying on the fact that the probate proceeding is dominated by the principle of acting *ex officio* and the investigative principle, it follows that in certain cases the probate court is undoubtedly authorized to determine legal invalidity of a legal transaction by which a testator disposed of the estate, considering that it is a prior issue essential for the proper distribution of the succession estate.

When the parties in the probate proceeding dispute about matters of applying the law concerning the legal validity of a will or an inheritance agreement, the probate court is authorized to settle that dispute. However, given that voidability of a legal transaction must be declared by a constitutive decision of the civil court, which upholds the constitutive claim stated in the action, it seems that probate courts could only resolve disputes on matters of law, involving disputes over the possible nullity of a will (or some of its provisions) or inheritance agreements.

The probate court is obliged to *ex officio* examine the reasons for the nullity of a will or some of its provisions, as well as the reasons for the nullity of inheritance agreements. The probate court is obliged to deliberate on all the cases of partial nullity of wills stipulated in the Inheritance Act, and it is authorized to assess possible legal (in)validity of all testamentary provisions. The court

may assess the reasons that make the entire will null and void, except in cases when the parties dispute about some important fact (for example, in case of a disagreement over whether the will was made before or after the testator was deprived of contractual capacity). In the first paragraph of the probate ruling, the court should state that it declares the legal transaction for the disposition of the estate null and void, and the subsequent paragraphs should include provisions on the distribution of the estate and the legal grounds supporting the heirs' inheritance claims. Nonetheless, the probate court is not authorized to examine if the will is forged, and it is disputable whether this court should examine on the case-to-case basis whether the testamentary provisions are contrary to the public policy and *boni mores*.

In practice, however, probate courts in most cases decide not to assess the legal (in)validity of legal transactions for the disposition of succession estate; instead, they rather leave this control function to civil courts. The imprecision of the Non-Contentious Proceedings Act provisions, which do not explicitly stipulate that probate courts are obliged to deliberate on possible nullity of legal transactions, allows probate courts to bypass the existing norms. It seems that some thought should be given to writing clear and precise legal provisions that would oblige probate courts to resolve disputable legal issues regarding the legal validity of legal transactions for disposition of succession estate, and to *ex officio* assess the reasons for possible nullity of such transactions. It would eliminate the need for initiating long and expensive civil proceedings, and ultimately contribute to procedural economy and efficiency in providing legal protection before the probate court.

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**КОНТРОЛА ПРАВНЕ ВАЉАНОСТИ ПРАВНИХ ПОСЛОВА КОЈИМА СЕ
РАСПОЛАЖЕ ЗАОСТАВШТИНОМУ ОСТАВИНСКОМ ПОСТУПКУ**

Резиме

У поступку за расправљање заоставштине утврђују се наследноправне последице смрти једног лица. Оставински судови, као ванпарнични, суде у “белим рукавицама”, будући да нису надлежни за решавање спорова чињеничне природе. Међутим, као *iura novit curia*, оставински суд овлашћен је за решавање спорова о примени права. У пракси, независно од природе спора међу учесницима поступка, судије и судијски помоћници који суде у оставинским стварима радије њихово решавање препуштају парничним судовима. Такође, оставински судови се ни по службеној дужности не упуштају у утврђивање неважности правних послова од којих зависи расправљање заоставштине. У раду се анализира да ли и у којим ситуацијама, у случају спора међу учесницима поступка о правној ваљаности правног посла битног за расправљање заоставштине, оставински судови треба да се упусте у решавање спорних правних питања. Осим тога, аутор указује на случајеве када би ови судови *ex officio* требало да испитају правну (не)ваљаност завештања и наследноправних уговора, и какву би одлуку требало да донесу уколико утврде њихову неважност.

Кључне речи: оставински суд, завештање, наследноправни уговори, пуноважност правних послова.

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CONSTRUCTION AS A MANNER OF ACQUIRING OWNERSHIP IN THE LEGAL SYSTEM OF THE REPUBLIC OF MACEDONIA

Abstract: *The paper analyses construction as a manner of acquiring ownership on buildings and other structures of permanent nature in Macedonian law. The subject matter of analysis are the general Act on Ownership and Other Real Rights and special laws that regulate construction. The research focuses on the provisions of the Construction Grounds Act and the Construction Act, as the most important legislative acts regulating construction in the Republic of Macedonia. The Construction Grounds Act regulates the right to build which is derived from the right of ownership on construction grounds (envisaged in this Act), and the right of long-term lease as a real right (which is also in its essence a right to build). As underlined in the paper, the dual regulation creates dilemmas about the legal nature of the right to build, especially in light of recent proposals for renaming the right of long-term lease as the right to build. With respect to the Construction Act, the paper analyses the novelties implemented in the period 2009-2016 and their effectiveness in resolving legal issues that emerged in the legal practice.*

Keywords: *construction, ownership, real estate, right to build, zoning plans.*

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1. Construction under the revisions of the Act on Ownership and Other Real Rights

In Macedonian legal system, construction is a manner of acquiring ownership on the erected building in accordance with the laws regulating construction and zoning plans. The general Act on Ownership and Other Real Rights¹ in Article 113 prescribes that ownership is acquired by law in several cases, one of them being construction. Further on, in Article 116 the Act stipulates that *the owner of land planed for construction acquires ownership on the erected building according to the laws regulating construction and by registering the right of ownership in public records for registration of rights on real estate*. In the same Article, the Act also recognizes the possibility for a person other than the owner to acquire ownership by construction on the erected building if that person had the owner's permission to build, and if construction complies with the construction laws and the right of ownership over the erected building is registered in public records. As noted by the civil doctrine, the provisions of Article 116 of the Act on Ownership and Other Real Rights set up the foundation for the two separate cases of acquiring ownership by construction. The first case is when the owner exercises the right to build on his/her land. In the second case, the owner gives consent for a third person to erect a building on his/her land and acquire ownership on that building. However, in the latter case, the Act does not contain articles regulating the relations between the owner of the land and the owner of the erected building.

By analyzing the provisions of Article 116 of the Act, the civil doctrine comes to the conclusion that the principle of *superficies solo cedit* is applicable only in the first but not in the second case². It cannot be argued that in the first case, when

1 *Official Gazette*, No. 18 /01.

2 The Principle of *superficies solo cedit*, as defined by scholar, expresses the connection between the land and all the things planted or erected on that land. Since the land is considered to be the principal object of ownership, anything planted or erected on the land is by law property of the owner of the land. This principle dates form Roman law, however, there were some exceptions. The so-called *superficies* in Roman law allowed for a person to erect and use building on land owned by another as long as *solarium* was paid (rent for the use of the land) (Р. Живковска, 2005: 159-160; R.Kovačević-Kuštrimović, M. Lazić, 2004: 388; Stanojević, 1982: 106.-107; A. Romac, 1994: 195). In Macedonian law, the principle of *supreficies solo cedit* is considered to be one of the basic principles in regulating the relation between the land and all things planted or erected on the land. In the general Act on Ownership and Other Real Rights, this principle is expressed in Art. 126 of the Act, and it has been reaffirmed in all construction ground acts passed since 2001 (art. 7 of the Construction Grounds Act of 2001, *Official Gazette* No. 53/01; art. 7 of the Construction Grounds Act of 2008, *Official Gazette* number 82/08; art. 8 of the Construction Grounds Act of 2011, *Official Gazette* No. 17/11; and art. 8 of the Construction Grounds Act of 2015, *Official Gazette* No. 15/15).

the owner exercises his/her right to build, the erected building and the land represent one object of ownership in the eyes of the law, the land as principal object and the building as its accessory. However, in the second case, the owner gives consent for someone else to build on his/her ground. This third person will, by law, acquire ownership on the erected building, but not on the land that it is built on. In this second case, the civil doctrine concludes that there is an exception from the *superficies solo cedit* principle, and the erected building cannot be considered as accessory of the land but, instead, it is an accessory of some other right, such as the right of long-term lease, concession rights or public-private partnership. All of these rights in Macedonian legal system allow acquisition of ownership by construction over the erected building on land owned by others. It is important to note that in these cases the acquisition of the right of ownership over the erected building or other structure is time limited; so, when the right of long-term lease, concession or public-private partnership expires, so does the right of ownership over the erected building or other structure³.

Usually construction is undertaken by the owner of the land, or by another person with the consent of the owner of the land. In the Act on Ownership and Other Real Rights, the person undertaking the construction is called *the builder*. In both cases, the builder acquires ownership over the erected building by law. However, the Act also regulates the situation when the builder has undertaken construction on land owned by another without the consent of the owner. In such situations, the dispute on who will acquire ownership over the erected building is resolved by use of the principle of good faith. By applying this principle, the law regulates two possible situations: first, when the builder is the conscience party; and second, when the owner of the land is the conscience party. It is important to note that in both cases the conscience party acquires ownership on the erected building and on the land as one object of ownership (the principle *superficies solo cedit* is applied). According to Article 117, when the builder is the conscience party,⁴ he/she acquires ownership on the erected building and on the land providing that the construction has been undertaken with a building permit (even if the permit is annulled later on because of faulty documentation). The owner in this case has the right to demand the builder to pay out the market value of the land in period of three years from the day the construction has finished, but no later than ten years. Article 118 regulates the situation when

3 Art. 10 and 36, Construction Grounds Act; Art. 11, Concessions Act, *Official Gazette No. 6/12*.

4 The builder is considered to be the conscience party if he or she did not know, nor could have known, that the construction is undertaken on land owned by another person, and if the owner of the land was aware of the construction but did nothing to prevent it.

the owner of the land is the conscience party⁵. In this situation, the owner of the land may demand: ownership over the erected building (in which case the owner will be obligated to pay the market value of the building); for the building to be demolished and the land returned to its previous condition;⁶ or for the builder to pay the market value of the land. The owner is entitled to make the choice between these options in a period of three years from the day the construction has finished. After the expiration of the deadline, the owner may only demand payment of the market value of the land in a period of ten years from the day the construction has finished. The provisions of Article 117 and 118 are applicable in situation when one of the parties (the builder or the owner of the land) is conscience and the other party is not; however, if both parties are conscience, then the provisions of Article 119 of the Act are applied. If both parties are conscience, then according to Article 119, the dispute is resolved by using the principle of just treatment. What this means is that the court will take into account the value of the erected building as compared to the value of the land, and if the building is more valuable the builder acquires ownership over the building and the land; if the situation is reversed, then the owner of the land acquires ownership over the erected building as well. The other party has the right to compensation of the market value of the land or the building depending on who was awarded ownership. If the value of the building and the land is approximately the same, then the court takes into account other factors such as the needs of the builder and the owner of the land and their housing situation.

The provisions of the Act on Ownership and Other Real Rights provide the base for regulating construction as a manner of acquiring ownership in the legal system of the Republic of Macedonia. However, these few provisions are not sufficient to regulate a complex area such as construction, especially taking into account the dynamic nature of the businesses involving construction and urban development that has flourished these past few years mostly in the capital – the City of Skopje. According to the data of the State Statistical Office, in the last five and a half years (2010 - June 2016), a total of 17,872 building permits were issued. In 2016 (till June), the number of issued building permits is 1,588, from which 943 were issued for buildings, 205 for civil engineering and 440 for reconstructions. In 2015, the number of issued building permits was 3,143, from which

5 The owner of the land is considered to be the conscience party if the builder has undertaken construction knowing that the building permit is faulty and construction is undertaken on land owned by another person, and if the owner of the land has requested for the construction to be stopped.

6 According to the provisions in Article 117 (paragraph 2), the owner's request for the building to be demolished may be denied on the ground that is not socially justified considering the value of the building, the assets of the builder and the owner, and their behavior during the construction.

1,938 were for buildings, 454 for civil engineering and 751 for reconstruction. In 2014, the number of issued building permits was 2,628, from which 1830 were for buildings, 323 for civil engineering and 475 for reconstructions. In 2013, the number of issued building permits was 2,269, from which 1751 were for buildings, 196 for civil engineering and 322 for reconstructions. In 2012, the number of issued building permits was 2,794, from which 2054 were for buildings, 318 for civil engineering and 422 for reconstructions. In 2011, the number of issued building permits was 2,596, from which 2,007 were for buildings, 211 for civil engineering and 373 for reconstructions. In 2010, the number of issued building permits was 2,854, from which 2,170 were for buildings, 277 for civil engineering and 407 for reconstructions. The average price per square meter of apartment space varies from 749 Euros in 2015 (860 in the City of Skopje and 541 in other cities), 756 Euros in 2014 (876 in the City of Skopje and 545 in other cities), 761 Euros in 2013 (892 in the City of Skopje and 638 in other cities), 812 Euros in 2012 (954 in the City of Skopje and 705 in other cities), 815 Euros in 2011 (959 in the City of Skopje and 672 in other cities) and 848 Euros in 2010 (1,043 in the City of Skopje and 718 in other cities). According to the statistical analysis of the State Statistical Office, highest investment in construction in this five and a half years' period was made in 2014. The highest price per square meter apartment space was in 2010, and the price has been gradually declining ever since.

Considering the complex nature of construction, many special laws were passed that contain provisions relevant for construction, such as: the Construction Grounds Act, the Spatial and Urban Planning Act⁷, the Construction Act⁸, the Agricultural Lands Act⁹, the Act on the Protection of Cultural Heritage¹⁰, the Real Estate Cadastre Act,¹¹ and other laws and by-laws. However, the paper will focus on two most relevant legislative acts: the Construction Grounds Act and the Construction Act. The process preceding construction such as spatial and urban planning and implementation of the zoning plans will not be subject to analysis in this paper.

7 *Official Gazette No.199/14.*

8 *Official Gazette No.130/09.*

9 *Official Gazette No.135/2007.*

10 *Official Gazette No.20/2004.*

11 *Official Gazette No.55/13.*

2. Construction according to the provisions of Construction Grounds Act

The Construction Grounds Act principally regulates the legal regime of construction grounds as things of public interest for the Republic of Macedonia¹². According to the provisions of this Act, construction ground is the land planned for constructions according to the zoning plans determined by the Spatial and Urban Planning Act¹³. The construction ground could be built or planned for construction. In this sense, only the construction grounds where buildings of permanent nature are erected is considered to be built¹⁴.

Regarding ownership on construction grounds, the Act states that such grounds may be in private, municipal or State ownership¹⁵. What is interesting with respect to the right of ownership is the fact that the Act defines separately the content of the right of ownership¹⁶ dependent whether the construction ground is in private, municipal or State ownership. In this sense, Article 11 of this Act states that "*Private ownership on construction ground also includes the right to build, the use of the land and the right to transfer the right to build on other persons in accordance with this and other law*". Further, in Article 12 the Act states that "*Municipal ownership of construction grounds includes right to build, the use of the land and the right to transfer the right to build on other persons, as well as the right to sell the construction ground in accordance with this or other law*". The provisions of Article 13 of the Act refer to ownership of the State on construction grounds;

12 Art. 3 states that "*Construction ground are goods of public interest for the Republic and as such enjoy special protection in a manner and under the conditions determined by this and other law*".

13 Art. 4, Construction Grounds Act

14 Notably, this Act does not consider the construction ground as built if temporary structures are placed since the purpose of such structures are to remain on the ground until the implementation of the zoning plans that involve construction of buildings of permanent nature. Regarding this issue, scholars note that the material from which the building is constructed is irrelevant in determining its nature. It is clearly stated that a building of permanent nature is the building for which a building permit is issued; all other buildings constructed under different documentation are considered as temporary. (Р. Живковска, 2005: 161). The same opinion is expressed in the Judgment of the Supreme Court of the Republic of Macedonia number 4/96.

15 Art. 7, Construction Grounds Act

16 According to civil doctrine, the right of ownership consists of three basic rights for the owner: the right to possess one's property (*jus utendi*), the right to use one's property (*jus fruendi*), and the right to dispose of one's property (*jus abutendi*). The right to possess refers to the owner's opportunity to keep possession of the object of ownership; the right of use is linked to the economical and other usage of the object of ownership; and the right of disposition refers to the authority of the owner to sell, rent, loan or otherwise dispose of the property, even by destroying it (unless prohibited by law). (Р. Живковска, 2005: 21; N. Gavella, I.Gliha, T. Jospović, Z.Stipković, 1992: 26-27).

however, there is no definition regarding the content of the right of ownership. Defining the content of the right of ownership differently depending whether it is private, municipal or State ownership is unusual, to say the least. The content of the right of ownership (*jus utendi, jus fruendi, jus abutendi*) is determined by the Act on Ownership and Other Real Rights, and it does not vary depending on the fact whether the owner is a natural or legal person, municipality or the State. Clearly, the provisions of the Construction Grounds Act are contrary to the provisions of the Act on Ownership and Other Real Rights. Further on, it is not up to the special laws to define the content of the right of ownership, especially in a manner different from the general Act on Ownership and Other Real Rights. If this practice persists and if it is adopted in other special laws, it will lead to legal uncertainty that may even undermine the constitutional guarantee of the right of ownership in Article 30 paragraph 1 of the Constitution of the Republic of Macedonia¹⁷.

Another dilemma arising from the cited provisions of the Construction Grounds Act is why the legislator chooses to include the right to build along with the right to use as integral part of the right of ownership on construction grounds. Most would agree that, when viewed as an integral part of ownership, the right to build is a form of use of the construction ground, or more precisely it is a variation of *jus utendi*.

The cited provisions of the Construction Grounds Act also state that the right to build is transferable to third parties by contract, law or court decision; and in the case of municipal ownership, the right to build is transferable only by contract based on a decision rendered by the Council of the Municipality. This poses the question whether the right to build in the Macedonian legal system has dual nature: one being an integral part of the right of ownership on construction grounds, and the other being the right to build as an independent real right known as the right of long-term lease. There are certainly bases for such conclusion not only in the Construction Grounds Act but also in the Construction Act. This is why the right to build should be observed from two aspects: first, as an integral part of ownership and, second, as an independent real right known as the right of long-term lease¹⁸.

17 *Official Gazette No.52/92.*

18 Scholars view the right to build as a real right of specific nature since it enables the holder of the right to erect a building and to acquire ownership on the erected building built on a construction ground owned by others. Some scholars note that the right to build may also be viewed as fictive real-estate since the building by law is considered to be attached to the right to build, and not to the land that it is built on. (P. Simonetti, 2011: 2; P. Simonetti, 2013: 6; D. Medić, 2013: 6).

The Construction Grounds Act, when defining ownership on construction grounds, clearly states (in Articles 11 and 13) that the right to build is an integral component of ownership. Further, the Act states that the right to build is transferable, meaning that the owner is able to derive the right to build from the right of ownership and transfer that right to a third party without transferring the right of ownership on the construction ground. The transfer of the right to build will enable the recipient to obtain the status of a builder or investor according to the Construction Act. In this situation, the builder (investor) will acquire ownership on the erected building by construction, but without owning the construction ground that it is erected on. This creates a complex legal relations between the owner, the investor and sometimes third parties to whom ownership over the erected building has been transferred by the investor. In this type of situations, the investor usually receives power of attorney from the owner or owners of the land so that they can sell the land together with the apartment or office space in the building, or the owner of the land cosigns the contract of sale with the investor so that an ideal piece of the land will be sold along with the sale of the apartment or office space. However, there are situations where the investor and the owner of the land have not taken this type of measures. In those cases, the investors only transfers ownership over the apartment or office space in the building, since that is what they own, and the land remains registered in the Real Estate Cadastre in the name of the owner that transferred the right to build to the investor. The owners of the apartments and office spaces in the building are put in a very unfavorable situation because they own parts of a building erected on a land owned by another person, meaning that they have no rights on that land, other than what the owner is prepared to offer. The owner of the land is sometimes prepared to sell ideal parts of the land parcel, but with additional compensation on part of the owners of the building. However, there are also owners who are reluctant to sell the land in order to exercise some type of control over the building owners. Since there are no provisions in the law that obligate the owner to transfer or recognize any other rights when transferring the right to build, the solution is left up to his/her good will to enter into agreement with the owner or owners of the building. The only right guaranteed by law that the owners of the building have in this case is the right to use the land for designated purposes¹⁹.

The other aspect of observation is the right to build as a real right. In Macedonian legal system, the right to build as a real right is known as *the right of long-term lease*. The right of long-term lease is defined in Article 21 of the Construction Grounds Act as "*a right that enables its holder to erect his own building (structure) on the surface or beneath the surface of a construction ground owned by another*

19 See: Art. 11, par. 3, Construction Act

and the owner is obligated to tolerate it".²⁰ The holder of the right of long-term lease is the owner of the erected building, and has the right of *usufruct* over the construction ground that the building is erected on. For the use of the land, the holder of the long-term lease is due to pay rent to the owner of the land²¹. When the building (or other structure) has been erected on the basis of the right of long-term lease, the building is by law treated as accessory to the right of long-term lease. This means that the holder of the long-term lease, who is also the owner of the erected building, transfers or charges the right of long term lease along with the building he or she owns²². It is important to note that the ownership of the building is time limited for the holder of the long-term lease. The Construction Grounds Act states that the right of long-term lease may be acquired for no less than 5 years and no more than 99 years²³. After the expiry of the long-term lease, the ownership of the erected building by law passes onto the owner of the land²⁴.

There is much debate in Macedonian legal system about renaming *the right of long-term lease* to *right to build* since that terminology is used in comparative law. However, there are some concerns on how that would affect the concept adopted in the Construction Act where the terminology *right to build* is used for a right derived from the right of ownership and not as one of other real rights independent from the right of ownership. As shown in this paper, the two should not be confused because of the different legal regimes regarding the right of ownership over the erected building and the use of the construction grounds that the building is built on.

3. Construction according to the provisions of the Construction Act

Solid regulation concerning construction, as already noted, is very important for the Macedonian legal system because construction is a very lucrative business for companies. Also, real estate is one of the areas where Macedonian citizens are always prepared to invest even in times of economical crisis. The need for better regulations was highlighted during the big real estate frauds committed by construction companies that resulted in initiating both criminal

20 Under the 2001 Construction Grounds Act (art. 20) and the 2008 Construction Grounds Act (art. 21), besides third parties, the holder of the right of long-term lease could be the owner of the land. However, that possibility is not regulated in more recent laws, such as the 2011 Construction Grounds Act and the 2015 Construction Grounds Act.

21 Art. 20 and 22, Construction Grounds Act

22 Art. 25, Construction Grounds Act

23 Art. 19, par. 3, Construction Grounds Act

24 Art. 36, Construction Grounds Act

and civil proceedings. Some of the cases are still pending resolution in courts, where the defrauded people are trying to receive some type of compensation, but with little success.

The centerpiece in regulating construction in the Macedonian legal system is the 2009 Construction Act. This Act, especially in its amendments, addresses many of the issues that were not sufficiently regulated by the previous 2005 Construction Act²⁵, and introduces novelties in respect to the building permit and the procedure for issuing building permits.

The Construction Act regulates all aspects of the construction process, such as: defining construction, determining the basic construction standard, necessary documentation, and the manner of using and maintaining the erected buildings and other structures. It also regulates rights and duties of the participants in the construction process and other relevant issues.

With respect to defining construction, the Act adopts a broad meaning of the term *construction* that includes: preliminary activities, drafting of blueprints and other documentation, preparatory works, erecting the building, construction on existing buildings (beside or above the existing buildings), reconstruction and adaptation of existing buildings and other activities involving or linked to construction²⁶. The Act also makes the distinction between buildings of permanent nature erected on construction grounds and temporary structures and urban equipment²⁷. The distinction is important because the construction ground is considered to be built only if the building or other structure is of permanent nature. This paper will focus on the construction of buildings and other structures of permanent nature.

Construction may only be initiated by the person that has the status of an investor. According to the provisions of Article 13 of the Construction Act, the status of an investor may be granted to: the owner of the construction ground, the holder of long-term lease, the holder of concession contract, a person with the right of servitude for construction, a person with a transferred right to build from the owner or the long-term leaseholder, a person that acquired the right to build in bankruptcy proceedings, and a person that acquired the right to build in any other manner determined by law.

25 *Official Gazette No.51/05*.

26 Temporary structure is an object placed on construction ground planned for construction for temporary use of the space until construction of the permanent structure. Urban equipment, unlike temporary structures, are only placed on construction grounds that are built and are in function of the permanent structure or have other uses (e.g. phone booths, portable toilets, benches, garbage bins, platforms, etc.). Art. 2, par. 1, Construction Act

27 Art. 2, par. 1, Construction Act

With the last Amendments to the Construction Act from 2013,²⁸ government bodies, public enterprises and other entities founded by the Government, Parliament or municipalities can also have the status of an investor. They derive the right to build from their right of usage for the purpose of construction obtained by a decision of the Government. They may transfer the right to build to natural or legal persons with the consent of the Government.

The provisions from the last Amendments to the Construction Act (2013) were introduced so that government bodies and other entities with public functions may acquire office spaces for work-related matters without undertaking construction personally. Therefore, the only criterion for a right to build to be awarded to the interested party is the amount of space from the building offered as compensation for the transfer of the right.

Before initiating the construction, the investor must obtain a building permit. The Construction Act contains strict provisions regarding construction without a permit or contrary to the issued permit. Article 56 of the Act states that a structure erected without the building permit or contrary to the issued permit is deemed as illegal. In cases when a permit was issued, but the investor has started building contrary to that permit, the structure is considered to be illegal and the issued building permit will be nullified. The goal of the legislator is to discourage illegal construction by enforcing very rigorous sanctions against investors that build illegally. These illegal structures do not fall under the provisions of the 2011 Act on Treatment of Illegally Erected Structures²⁹. In addition, building illegally is a crime according to the Macedonian Penal Code that may bring on a prison sentence of up to 8 years³⁰.

The jurisdiction for issuing a building permit depends on the category of the structure. According to Article 57 of the Construction Act, there are two categories of structures: structures of first and second category. The structures of first category are considered as structures of importance for the Republic. The building permit for the first category structures is issued by the Ministry of Transport and Communications. The second category includes structures of local importance, in which case the building permit is issued by the municipalities. Different jurisdiction is determined for structures in technological and industrial zones, green zones, etc. For construction in this areas, building permits are usually issued by the government body authorized to manage all matters related to

28 Art. 2, *Official Gazette No.163/13*.

29 *Official Gazette 23/11*. This Act only applies to structures erected before the day of its enforcement (March 2011).

30 Art. 244-a. Penal Code. *Official Gazette No.37/96*.

such areas³¹ (hereinafter in this paper, all the different subjects authorized to issue a building permit will be referred to as "the authorized subject").

The procedure for issuing a building permit is initiated upon a request of the investor. Since the novelties introduced in 2014,³² the request for issuing a building permit is submitted digitally with all the necessary documentation³³, and the entire administrative procedure is also conducted digitally by the authorized subject using the so called *information system e-building permit*. The use of the e-building permit system is obligatory. Any permit issued without the use of this system is considered to be null³⁴. Only the permits issued for technological and industrial zones and industrial green zones are excluded from this digital system³⁵. The digitalized process of issuing building permits is expected to lower the costs and increase efficiency, especially by shortening the time necessary for issuing the permit. According to the provisions of Article 59 (para.13) the building permit is to be issued five days after the day that the investor has submitted proof that the taxes for urbanization have been paid.

Considering the need for flexibility to accommodate the different needs of investors in the process of issuing building permits, the Act also recognizes the possibility for a permit to be issued for the entire structure or for part of the structure if that part represents separate technical and functional unit³⁶. When there are several investors submitting a request for a building permit together, the Act implements another novelty that is expected to prevent future disputes among them. In this case, it is possible for a building permit to be issued in name of all investors determining ideal or real parts of the structure that will belong to each investor separately³⁷. These type of building permits, especially the ones where real parts of the structure are determined, not only decrease the possibility for disputes but also exclude the need for physical division proceedings that are costly and time consuming.

The Construction Act also contains provisions that guarantee transparency during the proceedings for issuing the building permit. The first step in providing transparency is the duty of the authorized subject to inform the owners of the adjacent real estates of the fact that the building permit is being issued. The information sheet also needs to advise the neighbors of their right to inspect the

31 Art. 57, Construction Act

32 *Official Gazette No. 149/14.*

33 Art. 59, par. 2, Construction Act

34 Art. 58-e, Construction Act

35 Art. 58-e, par. 5, Construction Act

36 Art. 62, Construction Act

37 Art. 59-d, Construction Act

submitted request for a building permit and all the documentation attached to that request in 15 day upon the issuing of the building permit³⁸. The neighbors also have the right to file a complaint against the building permit³⁹ before an authorized administrative body and a lawsuit before the Administrative Court. If they do not complain, the building permit becomes final and construction may commence.

Regarding the right of the neighbors to file a lawsuit before the Administrative Court, the Act states that if the claim in the lawsuit is denied, or the lawsuit is thrown away, the plaintiff (in this case, the neighbor) is liable for damage to the investor for delaying construction. The provision is debatable and poses the following question: Should there be legal sanctions like liability for damage caused by delay if a person uses available legal remedies, since the investor is not legally obligated to start construction before the building permit is final? The logic behind this provision is to prevent people from filing frivolous lawsuits with no merit. However, the possible liability for damage may also discourage people from filing lawsuits even if the issued permit infringes their rights. Attributing liability for damage to the plaintiff due to delay of construction is an unjust measure that creates misbalance between the rights of the investor and the rights of others in protection of property. This is contrary to the principle of balancing rights and also the principle of equality in civil law relations. The unjust nature of the measure is also evident in light of the fact that the investor is obligated by law to start with the construction only after the building permit becomes final⁴⁰. It is not illegal for the investor to start construction after the permit was issued, but before it becomes final, if he is prepared to assume personal risk and responsibility.

With this being said, it is important to note that filing frivolous lawsuits with no merit and for the sole purpose of delaying construction is abusive. In these situations, the risk for the plaintiff is, and should be, losing the case, which also means that the plaintiff as the losing party will be obligated to bear all the costs of the court proceedings.

The second step in providing transparency is the duty of the authorized subject to digitally deliver the issued building permit and the construction project to

38 Art. 62-a, para. 1, Construction Act. According to this Act, after the building permit becomes final, the investor is obligated to start construction within a period of no later than two years (art. 66 par. 1) and the building should be finished within a period of no later than 10 years (art. 68).

39 Art. 62-a, par. 2, Construction Act

40 Art. 65-a, par. 1, Construction Act

the Agency for Real Estate Cadastre for registration⁴¹. The imposed duty for the authorized subject is complementary to the novelties regulating registration in the Real Estate Cadastre.

The novelties with respect to registration of rights in the Real Estate Cadastre were implemented to provide security in acquisition and transfer of real estate rights, and to prevent various fraudulent behaviors in the real estate market. Some of the fraudulent acts on the real estate market committed by construction companies were closely linked to acquisition of ownership by construction. The fraud essentially consisted of multiple sales of the same apartments to different buyers during the construction process. These contracts were not registered in public records, so the buyers and third parties had no way of knowing how many sales were made. The lack of regulation and control in this area made it easy for these types of frauds to be committed by investors. In some cases, the investors even managed to take mortgage against the building under construction, even after they had sold the apartments. The frauds left a lot of buyers with no apartments and no refunds since the construction companies were closed in bankruptcy proceedings. The solution for preventing these types of frauds was offered in the provisions of Article 121 of the Real Estate Cadastre Act (2008)⁴² that regulated the registration of rights in the so-called *pre-registration sheet of structures*. The same legal solution is adopted in Article 158 of the new Real Estate Cadastre Act of 2013. The pre-registration sheet of structures contains information about: the investor, the land parcel where construction is in progress, the building, the separate and common parts of the building (derived from the construction project) and information about mortgages and contracts related to the building under construction. The fact that there is a pre-registration sheet of structures is also noted in the property sheet for the land where construction is in progress. The information in the pre-registration sheet and the property sheet are public records so, nowadays, every person is able to obtain information about a building under construction with detail information about the construction and the sale contracts that were concluded by the investor.

During the construction process, changes may be necessary with respect to the construction project or changes with respect to the investor as the holder of the building permit. In general, the Construction Act allows for changes to be made during construction as long as the investor reports it and the authorized subject renders a decision on the matter⁴³.

41 Art. 59-d, par. 1, Construction Act

42 *Official Gazette No.40/2008*.

43 Art 69 and 70, Construction Act.

The changes in the construction project are possible as long as they are not contrary to zoning plans and do not have negative effect on the standards for construction.

The Construction Act also allows for the change of the investor, which may be consensual or court-ordered. Consensual change of investor is a matter of agreement between the current and the new investor, and it is possible until the permit for use of the building is issued⁴⁴. However, the change must be reported to the authorized subject by submitting the agreement with a statement on part of the new investor declaring that he/she is prepared to assume all rights and duties of the previous investor concerning third parties. Upon receiving the report on the change of the investor, the authorized subject renders a decision to make the change official.

The possibility for the court-ordered change of investor was introduced by the amendments to the Construction Act of 2014⁴⁵. According to the provisions of Article 70-a of the Construction Act, the change of investor may occur if a person has obtained the right to build in bankruptcy proceedings. This type of change of investor is also made official by the decision of the authorized subject. The reason that instigated this amendment of the Construction Act was the large number of bankruptcies filed against construction companies. The courts in these proceedings had no way of transferring the right to build from the investor under bankruptcy to an interested party since the Construction Act only recognized voluntary change of investor once a building permit has been issued. This legal barrier prevented for the construction process to continue once the investor (construction company) ceased to exist due to bankruptcy and left all those who had rights pending over the building under construction (buyers, mortgage creditors) unable to exercise those rights. Once the amendments of the Construction Act of 2014 came into force, this legal barrier was removed.

The final phase of the construction process is the act of handing over the erected building for use as fully constructed. The act of handing over is based on an issued permit for use (for structures of the first category), report for performed technical inspection (for buildings and other structures of the second category), or statement of the supervising engineer for individual homes under 300 square meters⁴⁶.

44 The issuing of the permit for use of the building (or a corresponding act for other structures) marks the end of the construction process. At that moment, the building or other structure is considered as finished and it may be registered in a property sheet in the Real Estate Cadastre. Art. 87-95, Construction Act

45 *Official Gazette No. 28/14*.

46 Art. 95, Construction Act

After the construction has completed, the authorized subject sends a registration request to the Real Estate Cadastre Agency. The registration of the right of ownership on the building and other structure in the Real Estate Cadastre is mandatory according to Article 142 of the Real Estate Cadastre Act. Also, according to Article 143 of the Real Estate Cadastre Act, "*The right of ownership and other real rights on real estate are acquired and terminated with registration in the Real Estate Cadastre*". Once the Real Estate Cadastre Agency receives the registration request, along with the necessary paperwork, the pre-registration sheet is deleted and the data are transferred to a property sheet which is proof of the existence of the right of ownership and other real right on the building as real estate.

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**ГРАЂЕЊЕ КАО ЈЕДАН ОД НАЧИНА СТИЦАЊА ПРАВА СВОЈИНЕ
У ПРАВНОМ СИСТЕМУ РЕПУБЛИКЕ МАКЕДОНИЈЕ**

Резиме

У раду се разматра грађење као један од законских начина стицања својине на изграђеним објектима. Чланом 113 Закона о својини и другим стварним правима грађење се дефинише као начин стицања права својине “непосредно на основу закона”. Овај Закон истиче да се грађењем својина на објекту може стећи само ако је градња извршена у складу са одредбама специјалног Закона о градњи, који пописује прибављање уредне, потпуне и ваљане грађевинско-техничке документације, као и упис објекта у катастар непокретности.

У правном систему Републике Македоније, грађење је регулисано посебним Законом о грађењу из 2009. године (“Службени гласник” РМ бр. 130/09), који веома широко одређује појам градње. Овим Законом грађење је дефинисано као: извођење претходних грађевинских радова, израду нацрта и друге пројектне

документације, обављање припремних радњи, изградњу нове зграде, изградњу на постојећим објектима: дограђивање и надграђивање, реконструкцију и адаптацију постојећег објекта. У раду се анализирају врсте градње и услови потребни за стицање својине на овај начин.

Предмет анализе је и поступак прибављања грађевинске дозволе, који је по свом карактеру управни поступак и покреће се на захтев инвеститора. Према Закону, инвеститор може бити: власник грађевинског земљишта, носилац права дуготрајног закупа, концесионар, носилац права службености грађења, лице на које је власник грађевинског земљишта или дугорочни купац пренео право грађења, лице које је стекло право грађења у стечајном поступку, као и друга лица која су ово право стекла у складу са законом. Поседовање грађевинске дозволе (уз осталу документацију) је услов за стицање својине на подигнутом објекту. Изградња без грађевинске дозволе сматра се кривичним делом. Лице која гради без грађевинске дозволе или у супротности са издатом дозволом не може стећи право својине на бесправно подигнутом објекту. Бесправно подигнути објекти су нелегални и морају бити срушени, осим ако могу бити легализовани у складу са одредбама Закона о поступању са бесправно подигнутим објектима.

Ширење градских средина ставило је изградњу и стицање права својине грађењем у центар пажње, посебно због спорова у вези са правом грађења и својином на подигнутим објектима. Ти правни спорови су предмет анализе у овом раду. У раду се анализирају и измене и допуне Закона о грађењу, којима се настоји обезбедити законитост у изградњи и правна сигурност у поступку стицања права својине на подигнутим објектима. Као важна новина истиче се издавање електронске грађевинске дозволе, чиме се осигурава ефикасност и контрола над издавањем грађевинских дозвола. Још једна новина је предбележба права својине на објектима у изградњи у катастру непокретности, чиме се најзад онемогућава вишеструка продаја истих станова у зградама у изградњи. Повећање одговорности у издавању грађевинских дозвола доприноси законитости поступка.

Кључне речи: изградња, својина, непокретности, право грађења, просторни план.

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DEPRIVATION (EXPROPRIATION) OF THE NEIGHBOUR'S RIGHT**

Abstract: *The subject matter of this paper is deprivation (expropriation) of the neighbour's right in the public interest. The concept of expropriation is commonly associated with deprivation of the right of ownership. Expropriation is a mechanism by which a society and a state seize private property assets for the purpose of accomplishing public goals and interests. The legal institute of expropriation of the neighbour's right is much less known. This legal institute exists in Swiss law, where it formally has the same goals as the expropriation in general. Expropriation of the neighbour's right implies a lawful deprivation of a neighbour of the right to seek cessation or prevention of excessive emissions (nuisances) in cases involving the public interest. Expropriation of the neighbour's right is applied if these nuisances are necessarily related to lawful usage and purpose of public goods, and if they are unavoidable or can be avoided only by incurring disproportionately high costs.*

Keywords: *expropriation, neighbour's right, emissions, private nuisance, public goods, environmental law.*

1. Introduction

The social function of the right of ownership has been discussed for almost a century (Стојановић, 1963: 13-14, 26-35, Gavella, Josipović, Gliha, Belaj, Stipković, 2007: 346-349). It is specifically embodied in the neighbour's right, which implies a restriction of right of ownership which should contribute to peaceful coexistence within a wider or narrower (social) community. Members of the neighbourhood community may be both private persons and public entities. The neighbour's right represents a victory of the general public interest of the society

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to preserve its unanimity, peace and uninterrupted operation for the well-being of its members over the interest of an individual to enjoy the benefits of his own property without any limitations. Yet, there is another aspect of this victory of the public interest over the private interest; in the field of neighbours' rights, the society wins over the private interest by depriving the private persons of some neighbours' rights in the public interest.

Expropriation of the neighbour's right is a lawful deprivation of a neighbour of the right to request cessation or prevention of excessive emissions (such as: noises, dust, foul odours, fumes, quakes, light, and other nuisances), which are inevitably connected with an activity of public interest (such as: exploitation of highways, airports, railways; public works; etc.). Swiss legal theory points out that expropriation of the neighbour's right is by its nature an equivalent to servitude in public interest, which includes an obligation to bear the excessive emissions (nuisances). Expropriation of the neighbour's right is applied if these nuisances are necessarily connected with a lawful usage of a public property (asset), in line with its purpose, and if they are unavoidable or can be avoided only by incurring disproportionately high costs.

2. Expropriation¹

Expropriation is a measure of forced deprivation or restriction of the right of ownership or some other property right in the public interest, which is prescribed by statute or a by-law, along with a prior payment of certain compensation to the expropriated subject (Collignon, 1882: 4, Mignot, 1886: 3, Костић, 1936: 372, Крбек, 1962:163, Гамс, 1974: 292-293)."Expropriation means that the precisely determined property right, which is appropriate for some public purpose, is transferred from the ownership of one subject to the ownership of another." (Meyer, 1868: 603).

2.1. History of expropriation

The right of ownership was subject to numerous and intensive private and public law restrictions in the 20th and 21st century. As a total or partial cessation of the right of ownership, expropriation represents the "the most substantial interference" with this right. The issue of the historical origin of expropriation has not been completely resolved.

In earlier French legal theory, we can find extensive discussions about the question whether expropriation had been regulated and practiced in ancient Rome.

1 The term derives from Latin words: *ex* (out) and *proprius* (own); the word coined thereof was *expropriare* (to deprive, forcefully dispossess).

On the one hand, there were Proudhon, MM. Fustel de Coulanges, Dumay, Laboulaye and Recy (Mignot, 1886: 6), who advocated the thesis that expropriation could not have existed in ancient Roman law because of its incompatibility with Roman public law and religious and customary rules (Mignot, 1886: 6), that is, because of the aristocratic structure of the Roman society and special sacred properties attributed to the land (Collignon, 1882: 10). "Respect of the private interest, represented in private property, was so great and so deeply rooted in Rome, that the very idea of questioning the inviolability of private property, was outlandish to the Roman spirit." (Collignon, 1882: 11).

These theorists' assertions that expropriation was unknown to the ancient Romans were based on several ancient written accounts, primarily anecdotes, epistolary and biographic sources. These texts testify about the expensive public works projects undertaken by well-off individuals, mostly for political purposes; thus, it may be inferred thereof that the state was not the only one in charge of supplying the community with the necessary infrastructure and other useful and luxury objects. One of the versions of Augustus biography allegedly stated that he had to withdraw his project of enlarging the Forum due to the protest of the neighbouring owners whose houses were, according to that project, destined to be demolished for the purpose of enlargement works (Collignon, 1882: 19-20). There is also an account of Titus Livius describing how an ordinary citizen, Licinius Crassus, had prevented the building of an aqueduct, by opposing to the building on his land (Collignon, 1882: 23).

On the other side, there were M. de Fresquet, M. Garboulleau, H. Collignon, A. Mignot and others (Collignon, 1882: 23), who took a unanimous stand that the issue of expropriation had existed and had been applied in ancient Rome, either involving the payment of compensation or not. Yet, this area had been insufficiently regulated by general norms because only special, hypothetical and concrete situations were regulated. As there were no general legal rules, there were no principles of expropriation.

The most cited account, from the period of the Republic, was a *senatus consultum*² praising the custom of leaving some empty space alongside the aqueducts, without paying any compensation to the land owners for the value of the appropriated part of the land. However, if some owners had refused to give up their land, the whole real estate was being redeemed from them (Collignon, 1882: 24). An *edictum*³ had prescribed that some free space had to be left at both sides of the

² *Senatus consultum* - an opinion issued by the Senate upon the request of high magistrates (Бујуклић, 2009: 676).

³ *Edictum* – a proclamation issued by a magistrate in the Forum on the day of assuming official duty, by means of which he established the general rules of conduct for the year

aqueduct, and that the owners of appropriated parcels had to be compensated for any damage sustained thereof. Cicero had written that some *augures*⁴, while performing their duties at the Capitol, had ordered to a Claudius Centumalus, the owner of a house on the Celius hill, to demolish a part of his house which had obstructed their view (Collignon, 1882: 30).

Byzantium law provides much better grounds for argumentation in favour of regulation on expropriation. *Codex Theodosianus* includes a chapter titled "*De operibus publicis*", which comprises three *constitutiones* on expropriation. Under the first one, the owners deprived of their land for the purpose of completing the final works on Honorius baths were compensated by being given some other real estate objects; the second one prescribed that the owners deprived of their land for the purpose of building new ramparts of Constantinople were granted the right of habitation in the city defense towers; the third one prescribed that the owners deprived of their land for the purpose of renovating public halls intended for public lectures of capital city professors had the right to relevant pecuniary compensation (Mignot, 1886: 55-57). The last *constitutione* of emperors Arcadius and Honorius prescribed that a magistrate competent for carrying out public works ordered by the emperor could demolish only the houses valued at under 50 pounds of silver and, in case the house that is to be demolished had a higher value, the magistrate was obliged to go to the emperor who had to decide whether the works should be suspended or the plan of works should be changed, depending on the estimated amount of compensation owed (Collignon, 1882: 32).

In the available sources, it is hard to find reliable information about whether the institute of expropriation had existed and been applied in the Middle Ages (Staničić, 2011: 28). It is quite understandable, bearing in mind the prevailing feudal system of divided ownership.

The first traces of expropriation cannot be traced earlier than the 15th and 16th century. In that period, one of the important documents in French law (for example), at the time of the so-called Ancient Regime (*Ancien Régime*), was the 1510 Lyon Regulation, under the right to expropriation was granted to towns, primarily for the purpose of widening public roads (Staničić, 2011: 29-30). In other European countries (Italy, England, Germany), there were sporadic and isolated traces, mostly in the form of different by-laws and rarely in the form of statutes (e.g. in England) the envisaged the application of expropriation (Staničić, 2011: 29-31).

of his mandate (Бујуклић, 2009: 306).

4 *Augures* - interpreters of the omens of gods (Бујуклић, 2009: 177-179).

2.2. Regulation of expropriation in positive law

In legal theory, the legal institute of expropriation is considered to have emerged and developed its current contours alongside with the famous provision of the Declaration of the Rights of Man and the Citizen (*La Déclaration des droits de l'Homme et du citoyen*)⁵: “No one can be deprived of even the smallest part of the ownership right without consent of the owner, unless that is required by lawfully ascertained public interest and, even then, provided that a just and prior indemnity has been paid.” (Kutscher, 1938: 21, Labaudère, 1960: 113-115).

In view of the fact that this paper primarily deals with deprivation (expropriation) of the neighbour’s right in the public interest, as a specific institute of Swiss law, we provide a short representative overview of the contemporary regulation of the legal institute of expropriation by referring (at first) to the rules of the 1930 Swiss Expropriation Act⁶ According to that Act, the right of expropriation can be exercised for the purposes of carrying out works in the interest of the whole confederation, or a considerable part of the country, as well as for accomplishing other lawfully declared goals in the domain of public interest, and only to the extent necessary for exercising that interest (art. 1). In determining the scope of this right, the Act regulates that it can be exercised for the purpose of realisation, changing, maintenance, or exploitation of public works, as well as for the future expansion of works; for transport and for depositing materials necessary for construction works; for acquiring the necessary materials, if a different form of acquiring them is too expensive; for taking necessary action to compensate the owners of already expropriated property *in natura*; or for the purposes of preserving public interests.

According to this Act, the object of expropriation can be all real rights on land, the rights arising from rules about land ownership in the domain of neighbourhood relationships, and the right of lease. The object of expropriation can also be rights on land destined to the public interest (art. 7). If the expropriator’s activity incurs damage to the existing public goods (such as: roads, bridges, pipelines), the expropriating authority is required to take all necessary measures and precautions to ensure the proper operation of these public goods, to the extent required by the public interest. The expropriator has to take all necessary precautions to protect the public property and neighbouring real estates from danger and nuisances, which are unavoidably related to his activity, and which shall not be tolerated according to the rules of neighbour’s law. Expropriation can only

5 <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>, downloaded 07.07.2016.

6 <https://www.admin.ch/opc/fr/classified-compilation/19300026/index.html>, downloaded 07.07.2016.

take place upon the payment of full compensation for the deprived or restricted right (art. 16). The elements which must be taken into account in the process of determining the compensation are: the full market value of the expropriated interest/ right, all damage sustained by the owner of the expropriated property and the amount of any other foreseeable damage that may be incurred, in the normal course of events, as a consequence of expropriation (art. 19).

Under Article L1 of the French Code on Expropriation for the Public Utility Purposes (*Code de l'expropriation pour cause d'utilité publique*)⁷, expropriation (total or partial) on real estates and real rights on land can be executed only if it is in accordance with the public interest previously declared and formally confirmed after a public investigation. The expropriated property owner is entitled to receive a just and full (prior) compensation. The awarded indemnity integrally covers direct, material and other damage caused by the expropriation (art. L 321-1).

According to the Expropriation Act of the Republic of Serbia⁸, expropriation may be exercised in the public interest, lawfully declared and confirmed, whereby the compensation cannot be lower than the market value of the land (art. 1). The compensation for expropriated land is pecuniary.

3. The neighbour's right and expropriation

The neighbour's right in an objective sense is a body of rules regulating the life of legal subjects in certain community. In a subjective sense, it is the right arising directly from the statute, which implies the authority of the permanent owner or user of a real estate to use the land of another (neighbouring land) in certain manner and for a specific purpose, but also requires from the constant owner or user of a neighbouring land to exercise certain restraint, performance or forbearance.

Although the right of ownership is restricted by statutory rather than contractual limitations of right of ownership, the rules regulating this right are of dispositive nature, and they can be changed by the neighbour's agreement, provided that the agreement protects the equality and balance of interests of neighbours. The neighbour's right is in direct service of private interests. Indirectly, it also serves the public interest for peace, order, public health and security. Expropriation exclusively serves the public interest. Measured and

7 <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074224&dateTexte=20160715>. downloaded 15.07.2016.

8 *Сл. гласник РС*, 53/95, *Сл. лист СРЈ*, 16/01 - одлука СУС и *Сл. гласник РС*, 20/09 и 55/13 - одлука УС.

clearly declared public interest is, actually, the only reason of its application in each specific situation. Statutory rules on expropriation cannot be changed by agreement because they have the aim to protect, to the largest possible extent, the “sacred and inviolable” right of ownership.

The neighbour’s right has two distinct aspects: the first one is the restriction of right of ownership; the second one is the “expansion” of the right of ownership. Expropriation has only one aspect: from the standpoint of the land owner, it is a mechanism of the almighty state government machinery that grasps into his sacred asset. If we look at the neighbour’s right and expropriation in this context, we can understand the very idea of expropriation, notwithstanding the fact that (formally speaking) it may *prima facie* seem to be beyond common sense to restrict the right of ownership.

4. Emissions (nuisances) emanating from public goods

Most frequently, we imagine an individual as a neighbour. However, besides private individuals and legal entities, it is inevitable that the neighbourhood community includes public legal entities. In modern society, living in the vicinity of some public property is a rule rather than an exception. Railways, roads, highways, public parks, airports, canals, public buildings, squares, markets, bridges, streets, playgrounds, dams, different public works related to these and other public goods are part of our everyday life.

Public goods are aimed to serve the needs of the society as a whole. Subjecting public assets to private interests could endanger the functioning of the social system, even the existence of the society itself. Bearing in mind that public goods are intended to be used by all citizens under the same conditions, all users (*désinateurs*) have a duty to contribute to their maintenance and proper functioning. General usage of public goods is the purpose of their existence and their legal attribute (Костић, 1936: 341). Apart from the general usage of public goods, there is also a “expanded” usage for specific purposes, such usage is subject to issuing a special authorisation (permit or licence), which entails the payment of relevant compensation (e.g.: placement and usage of newspaper stands, restaurant terraces, café-bar plateaus, stands and counters for selling produce; use of public areas for parking lots, private firms, billboards, advertisements)⁹ (Костић, 1936: 344, 350, Bovey, 2000: 6-7). In legal theory, it is considered that this kind of purpose of public goods justifies a higher level of tolerance for nuisances stemming from public goods or from activity related to usage and

⁹ Case: *Moreno Gomez v. Spain*.

¹⁰ Swiss Federal Court, ATF 120 II 15 (17).

maintenance of public goods¹¹ (Boulisset, Couchet, 2010: 455-457). Immediate neighbours (adjacents)¹², who are most exposed to nuisances from public goods, have more benefits from certain public goods than some other users (*destinateurs*) (Костић, 1936: 344). Emissions (nuisances) from public goods are noise, foul odours, smoke, dust, soot, exhaust gases, fumes, harmful vapours, quakes, trepidations, vibrations, electromagnetic radiation, emissions of light, but also deprivation of light and view and even "ideal" emissions, in those legal systems that consider this kind of interference with peaceful enjoyment of the ownership right as nuisance (Boulisset et al, 2010: 476-477).

5. Expropriation of the neighbour's right

The consequences that would arise for an organized society if the law did not ensure tolerance for nuisances stemming from the usage of public goods are immense. The necessary tolerance is ensured by designating the limits of forbearance. This level is defined by the Civil Law rules, which are (depending on the legal system) supplemented or could be supplemented with the rules of environmental law.

The Swiss Civil Code regulates that real estate owners have a duty, while exercising their right of ownership (particularly related to some professional activity), to refrain from any excessive interference that may be detrimental for the neighbourhood land (art. 684, item 1). Detrimental influences that are not justified by the location or nature of land, or by local custom (such as: harmful emissions of vapours, noise, vibrations, radiation or deprivation of light or view), are particularly forbidden (art. 684, item 2). In the amendments to the Swiss Civil Code of 2009, the so-called negative emissions (such as deprivation of light and view) were classified as harmful emissions. The duty to refrain from excessive emissions (Art. 684 of the Swiss Civil Code) equally applies to all land owners, the state and other public entities.

In case of excessive emission emanating from a neighbouring real estate, Swiss Civil Code (Art. 679) envisages the right to initiate an action (lawsuit) for cessation of interference, for prevention of certain interference, and for damages; in case the excessive emissions (nuisances) are temporarily caused by lawful usage of land, and particularly by building, a neighbour affected by such emissions is only entitled to seek damages (Wessner, 2002: 16-18).

11 Case: *Powell Rayner v. The United Kingdom*.»The existence of large international airports, even in densely populated urban zones, and ever-growing intensity of using air traffic, had become a necessity in the interest of the economic welfare of a state.»

12 *ad jaceo*: to stand along with something.

In case of excessive emissions emanating from or pertaining to public property, under the presumption that the activities are generally useful and aligned with the purpose of the public asset, the wrongdoer may be deprived of these rights. It is a formal expropriation of the neighbour's right. The Swiss Expropriation Act (art. 5) envisages that the object of expropriation can be all real rights on land, the rights arising from the rules in the field of neighbourhood relations, and the right of lease. These rights can be cancelled or restricted, temporarily or finally, in the public interest.

5.1. Compensation for the expropriation of the neighbour's right

The expropriation of the neighbour's right can be exercised (with relevant compensation) if the interference involves excessive emissions that can hardly be avoided or are inevitably related to the regular usage of certain public goods (an airport, highway, public market) or their development (building a road or a railway), restoration or maintenance (Bovey, 2000: 146-147).

It is well known that expropriation implies the payment of compensation to the owner of the expropriated land; its primary purpose is to bring the expropriated subject into the same proprietary position as if the expropriation had never happened. In case of noise emanating from land, air and water traffic, it is common practice in Switzerland that compensation is paid only then three cumulative conditions are met: the damage that the neighbour has sustained due to deprivation of the right to protection against excessive emissions is severe, specific and unforeseeable (Bovey, 2000: 91-92, Zufferey, Pantillon, 2015: 275). Justification for such practice lies in the attitude that the usage of these infrastructures is in harmony with nature, the condition of the real estate and local usage, which makes the emissions bearable, as they are not excessive (Bovey, 2000: 154-155, Wessner, 2002: 15). This judicial practice was definitely supported by the decision of the Swiss Federal Court in the *Werren* case¹³, and it was very harshly criticized in legal theory (Bovey, 2000: 169-178, Zufferey et al, 2015: 275).

The condition pertaining to specific damage is essentially equal to the theory of "specific sacrifice". According to that theory, individual members of a society are expected to sacrifice their rights and goods for the wellbeing of the society. Those who had some sacrifice for the common good have the right to equitable compensation from the community (Петровић, 2011: 152-153). The condition pertaining to specific damage is considered to be fulfilled when a neighbour (who sustained such damage from excessive emissions of noise) was placed in an unequal position in comparison to other neighbours living in the vicinity of the traffic infrastructure. In Swiss legal theory and judicial practice, it is

13 ATF 94I 286 ss - JdT 1968, I 515.

considered that the condition pertaining to specific damage complies with the criterion of excessive emissions, and that it can theoretically be justified on that ground (Bovey, 2000: 173-174).

The condition pertaining to the severity of damage is much more debatable, given that it is considered fulfilled when a neighbour proves that there is sufficiently important loss of economy value of the land (Bovey, 2000: 162-163). This condition does not comply with the conditions for civil law protection from excessive emissions (Bovey, 2000: 162-163).

The condition concerning the unforeseeability of damage is based on the expectation of the community that an individual adjusts his usage of land with the general circumstances of the place where the real estate is located, particularly having in mind the needs of the society to develop traffic and traffic infrastructure. For that reason, damage has to be unforeseeable, which implies that the neighbour could not have seen it coming in the given circumstances and at the given time. This condition is contrary to the prohibition of invoking the acquired rights (Петровић, 2011: 189-195). Besides that, the development of traffic and traffic infrastructure may reach unpredictable dimensions. Through this condition, the society (embodied in the state) gains authority to "brutally modify local usage" (Стојановић, 1963: 71, Bovey, 2000: 175-176, Петровић, 2011: 202-203).

Since the expropriation of the neighbour's right is, by its nature, a forced constitution of a real servitude of enduring excessive emissions, the compensation should cover for loss of value of the land caused by enduring emissions. It has to be equal to the difference between the market value of the land, with and without the burden of servitude of enduring emissions. If the owner or a user of the real estate (which the expropriation of neighbour's right is related to) has benefits from the public good and/or the activity connected with a public good from which the emissions derive, the amount of compensation shall be reduced by the value of that benefit (Bovey, 2000: 109 - 110). In some period after the expropriation, some interferences (nuisances) may appear, which could not have been predicted at the moment of expropriation and payment of compensation. In such a case, the neighbour is entitled to subsequently claim larger compensation; the procedure involving such a claim is called subsequent expropriation (Bovey, 2000: 125-133).

5.2. Expropriation of the neighbour's right and environmental law

In Swiss legal theory, there is an opinion that observance of environmental law rules may completely exclude the application of the institute of expropriation of the neighbour's right, at least when it comes to positive material emissions (Fahrländer, 1985:77). The objective indicators of the levels of certain types

of emissions provide a clear demarcation between permitted and excessive emissions (Лазих, 2012: 137-138). The observance of the prescribed levels of noise, vibrations, exhaust gases (etc.) may have a preventive effect in terms of expropriation of the neighbour's right and damages related to that expropriation. On the other hand, these regulations do not have any advantage in relation to expropriation when it comes to negative and ideal emissions (Bovey, 2000: 283-286). It was probably one of the motives for amending the Swiss Civil Code in 2009, by introducing negative emissions.

We should bear in mind that the application of environmental law regulations may result in emergence of negative and "ideal" emissions. For example, the noise-protection wall along roads and highways may deprive the adjacent neighbouring real estates of light and view, or it may give rise to a feeling of isolation of the people living on that land and endanger their psychological equilibrium (Yocas, 1966: 26-29, Bovey, 2000: 285-286, Gordley, 2010: 73).

6. Conclusion

The institute of expropriation of the neighbour's right and judicial practise in that field have encountered much criticism. Public legal entities are members of the neighbourhood community just as private individuals and private legal entities. On the basis of the principle of equality of civil law subjects, public law entities are (just like any other individual citizen) subject to the application of civil law rules on the prohibition of interference with the peaceful enjoyment of one's property by excessive emissions. That practice may be qualified as discriminatory. Consequently, a person who (for example) lives in the vicinity of a highway under construction is obliged to accept a lower quality of life than those who live farther away from the highway, in the public interest and without any compensation (because it is very hard in such cases to prove the severity, specific nature and unforeseeability of damage).

The observance of environmental law regulations may completely exclude the application of the institute of expropriation of the neighbour's right, depending on the significance attributed to the indicators for certain types of emissions, which was the subject matter of numerous disputes in Swiss legal theory. On the other hand, it seems that the application of environmental law rules (as well as the issue pertaining to the relevance of the institute of expropriation of the neighbour's right) have contributed to amending the Swiss Civil Code in 2009 and introducing negative emissions into the legal definition of emissions. In that context, the legal theory and positive legislation may address an issue of further expansion of the concept of emissions, which may include not only positive and negative emissions but also "ideal" emissions.

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ОДУЗИМАЊЕ (ЕКСПРОПРИЈАЦИЈА) СУСЕДСКОГ ПРАВА

Резиме

Рад је посвећен теми одузимања суседског права у јавном интересу. Појам експропријације се уобичајено везује за одузимање права својине. Експропријација је механизам којим друштво и држава усмеравају потенцијале приватне својине ка остваривању јавних интереса. Мање је познат правни институт експропријације суседског права, који постоји у швајцарском праву.

Под експропријацијом суседског права подразумева се законито лишавање суседа права да захтева прекид или превенцију прекомерних емисија (као што су нпр. бука, прашина, непријатни мириси, шкодљива испарења, потреси, емисије светлости и друге емисије) нужно повезаних са активношћу од јавног интереса (експлоатацијом аутопутева, аеродрома, железнице, са извођењем јавних радова и слично). У швајцарском праву постоји пракса да се у случајевима емисије буке од друмског, воденог или ваздушног саобраћаја надокнада за експропријацију исплаћује само уз кумулативно испуњење трију врло оштро конципираних услова: да је штета коју је сусед претрпео услед одузимања права на заштиту од прекомерних емисија тешка, специјална и непредвидива. И сам институт експропријације суседског права и судска пракса изграђена око његове примене, наишли су на бројне критике. Она има за последицу да погођени сусед, примера ради, једне саобраћајнице у изградњи или функцији, бива приморан да прихвати за себе лошији квалитет живота у односу на оне који живе даље од те саобраћајнице, у јавном интересу и без икакве надокнаде.

Кључне речи: експропријација, суседско право, емисије, еколошко право, јавна добра.

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SPECIAL MODE OF CIVIL LIABILITY OF THE ORGANIZER OF A PUBLIC EVENT**

Abstract: *The civil liability of organizers of public events has been one of the most topical issues within the framework of some specific cases of liability. It is particularly important in the context of widespread mass violence and disorderly conduct of hooligans in sporting events. Although the legal rules on these special cases of liability have not significantly changed since the adoption of the 1978 Obligation Relations Act of the SFRY, some disputable issues still remain. Moreover, the public debate on the Preliminary Draft of the Civil Code of the Republic of Serbia has given rise to some other issues which have not been perceived as controversial. In this paper, the author discusses the parties involved in these cases, the requirements and circumstances for establishing liability, and the legal grounds for exemption from liability. The primary liability rests with the organizer of a public event, who shall not be equated with other organizers of large-scale public assemblies. Further on, the author points to the characteristics of the incurred damage and causality (the causal link), which are the essential elements for establishing liability of event organizers. Given the generally accepted standpoint that the event organizer has objective (strict) liability regardless of fault, this type of liability is based on the concept of fairness. On the other hand, a contributory action or fault of the injured party (or a third party), as well as a force majeure, may be the legal ground for exonerating the organizer from liability.*

Keywords: *event organizer, extraordinary circumstances, strict liability, death, bodily injury, the injured party action.*

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1. Introduction

The civil liability of the event organizer was first regulated by the SFRY Obligation Relations Act (hereinafter: ORA),¹ where it was envisaged as one of the special modes of liability.² However, the Yugoslav judicial practice soon drew attention to the need to give special consideration to damage caused by people at different public assemblies. Thus, in a judgment from 1957, the court took a position that the people gathered in large groups represent an increased risk to group members and the environment; so, irrespective of his/her own fault, the event organizer is liable for the damage caused by others.³ That view became a standard in jurisprudence in term of establishing liability not only of sport-event organizers but also any other legal entity that organizes gathering of a large number of people.⁴

The judicial practice was a reflection of the foreign and (subsequently) domestic legal theory, which confirmed the view that the organizer of sporting or any other events involving the gathering of a large number of people, are obliged to act with due diligence of an expert (Kostić, 1976: 82). It follows that the punishment for this type of liability should be more severe.⁵

The legal doctrine as well as the views of the highly creative judicial practice served as the cornerstone to the editors of the Yugoslav Obligation Relations Act (ORA), during the effort to regulate liability of the event organizer, particularly given that such a provision was not included in the Preliminary draft of the Code on Obligations and Contracts, drafted by prof. Konstantinović.⁶ However, while jurisprudence set a broad framework of event organizers' liability, the ORA editors limited the scope of this liability, for which reason it was classified into special modes of liability.

Although very precise, the ORA provision on the civil liability of the event organizer has (from the outset) given rise to some dilemmas, which are still present

1 Obligation Relations Act, („Službeni list SFRJ“, No. 29, 39/85, 45/89, 59/89; „Službeni list SRJ“. 31/93).

2 Art. 181, Obligation Relations Act

3 Judgment of the Supreme Court of NR Serbia, Gž. 1735/1957.

4 Judgment of the Supreme Court of Yugoslavia on liability of movie production company, Rev. 1619/1963. Judgement of the Supreme Court of SR Croatia, Gž. 3920/1977, on liability of the socio-political unit which organized the territorial defence field training exercise.

5 "Event performers and spectators reasonably expect that the event organizer will manage his operations with maximum caution and fulfill all the conditions in terms of expertise and readiness to organize events.» (Kostić, 1976: 81).

6 Konstantinović M., Obligations and Contracts (A Preliminary draft of the Code on Obligations and Contracts), Law Faculty in Belgrade, Belgrade, 1969.

today. In this paper, bearing in mind the current case law, some new legal solutions, as well as the published Preliminary Draft of the Civil Code of the Republic of Serbia (hereinafter: Preliminary Draft CC),⁷ we will consider all these dilemmas and suggest possible solutions.

2. Liable Persons

The event organizer and the injured party are the parties in the obligation relationship which is created when some damage is caused by a large number of people gathered at some public event.

2.1. The event organizer as a liable person

The organizer of the event has primary liability because such a person is responsible for the damage caused by any of the event participants. It is logical that the organizer will be liable only if the gathering has been organized by a specific identified organizer (Đurđević, 2010: 361). Having that in mind, the organizer's liability does not exclude the liability of direct tortfeasors, who remain liable according to the general liability rules. The event organizer, who has paid damages for their misconduct, is entitled to recourse (Loza, 1979: 44; Mijačić-Cvetanović, 1986: 11). The tortfeasor may be held jointly and severally liable (Borovac, 2010: 94) alongside with the identified organizer.

The concept of an event organizer includes any natural or legal person who has taken upon himself the responsibility⁸ to organize the gathering of a number of people, either indoors or outdoors, regardless of the purpose or nature of the event. An event organizer can be an individual or a legal entity, such as a company, institution, civic association, sports or cultural organization.

The specific Serbian term ("*priredba*" – performance) used in the title (*rubrum*) above Article 181 ORA, suggests that the Article deals with the organizer's liability for damage caused by the people gathered at a particular public event (performance). However, the discrepancy between the title and the text of the provision raises serious concerns. Namely, the specific term ('performance') implies only one form of public assembly which, in any case, has a narrower meaning than the phrase "the organizer of a *public gathering* of a large number of people," which is used in the text of the provision.

7 The Preliminary Draft of the Civil Code of Republic of Serbia, Belgrade, 29.5.2015.

8 «Event organizer is a natural or legal person who assumes responsibility to decide on and perform certain activities which he organizes and manages. His actions are essential preconditions for the event to occur. The indispensable characteristic of the organizer is that he is the manager of the event» (Đurđević, 1992: 59; Đurđević, 2010: 362).

Due to the wider formulation in the provision, a number of authors believe that the legislator had in mind the liability of the organizer of any form of public assembly (Stanković, 1980: 538; Loza, 1979: 42; Tomić, 1984: 200; Mijačić-Cvetanović, 1986: 8), including a public demonstration and manifestation,⁹ as well as any other gathering of a large number of people indoors or outdoors (e.g. a group of children in the schoolyard, the crowd of passengers on the platform or in the building of the railway station, mass scenes on movie sets, people gathered for military purposes, etc.) (Tomić, 1984: 201).

Yet, these authors completely ignore the title above Article 181 ORA and treat it (without any grounds) as an ordinary typographical error, although it is difficult to believe that the legislator was not aware of the difference that exists between "public performance" and "public assembly". In addition, this interpretation relativizes the clear distinction between liability for acts of terrorism, public demonstrations and manifestations (protests, rallies, parades) on the one hand, and the liability of the organizer of public events and performances (football games, concerts, presentations, etc.) on the other hand (Nikolić, 1995: 420). Thus, it seems that these two specific modes of liability overlap (Nikolić, 1995: 420). There is no justification for this kind of interpretation.

However, it also seems that the legislator did not intend to envisage such a broad scope of provision on the liability of the event organizer. On the contrary, opting to title the Article in such a way, the legislator made it clear that the provision addresses only those public meetings which take the form of a public event (performance). An important characteristic of a public event (performance) as a special form of public assembly is its pre-determined program, which most commonly presumes the performers and the audience. "Public and collective expression of approval or disapproval" (Tomić, 1984: 201) is not the decisive element of a public event (performance), although the audience often expresses their opinions during the program. But, if the audience's expression of opinion is a decisive and consequential factor, then there is hardly any difference between "a manifestation" and "a public event (performance)"; notably, in Serbian legislation, such public assemblies include sports events (football games, boxing matches, etc.) which take the form of sporting "manifestations".¹⁰

The interpretation of the terminological discrepancy is also unacceptable. The liability of the event organizer is a special mode of liability, which implies that

9 The term "a large number of people gathered" implies different public assemblies (under the constitutionally guaranteed freedom of assembly): public events, rallies and other more or less independent forms." (Tomić, 1984: 200)

10 Art. 3 para. 1 Act on Sports ("Službeni glasnik RS", No. 52/1996 i 101/05); Art. 2 para. 1. Act on prevention of violence and improper behavior in sports events („Službeni glasnik RS", No. 67/2003, 101/05, 90/07, 111/09).

the above provision cannot be interpreted extensively; it should be interpreted restrictively instead. Therefore, it may be more logical to assume that the legislator had in mind only the liability for damage caused by people assembled at public event (performance), provided that it presumes the gathering and participation of a large number of people. Certainly, the number cannot be determined by a legislative act because it is a factual matter that will be assessed by the court on a case-by-case basis, taking into account the nature of the event and the usual number of participants (Loza, 1979: 42).

We believe that the notion of a public event (performance), in a broader sense, may include gatherings that do not have all the elements required.¹¹ However, the extensive interpretation of the provision on liability of the event organizer is unacceptable because this provision shall not be given such a wide scope as to include all public gatherings. Such liability of the organizers is usually not necessary because there is efficient civil law protection for citizens who sustained damage, injury or harm during public demonstrations or manifestations. Therefore, we advocate for a more restrictive interpretation of the expression “*gathering of a large number of people*,” which shall exclude gatherings that have nothing to do with public events (performances), such as gathering of children groups in the schoolyard, the passengers on the platform or in the railway station building, mass scenes on movie sets, gathering people for military purposes, etc. In addition, if we look at the title and the text of provision in Art. 181 ORA as a whole, there is no doubt that the legislator had in mind only the gatherings that take the form of a public event (performance).

2.2. The injured party

The injured party may be any person who has sustained some damage, injury or harm as a result of exceptional circumstances which occurred during the event (performance), regardless of whether such person is a participant (a spectator or a performer) or a third party (Loza, 1979: 44).

In most cases, the injured party is a spectator or a person who was in the crowd of people whose actions caused the damage (Stanković, 1980: 539; Tomić, 1984: 201; Nikolić, 1991: 61). In addition to a spectator, the injured party may be a performer (artist) (Stanković, 1980: 540; Tomić, 1984: 202; Mijačić-Cvetanović, 1986: 8; Đurđević, 1991: 144), for example, in a situation where spectators break

¹¹ In one case, the court viewed a school cross-country race as a public event (Judgement of the Supreme Court of Serbia, Rev. 210/92. In another case, the court treated a cultural/sporting event as a public event (Judgement of the Supreme Court of Croatia, Rev. 286/2005). In a third case, gathering in an indoors disco club was treated as a public event (Judgment of the County Court in Split, Gž. 4424/08).

the fence, enter the football ground and, in general disorder, harm a player or an official referee (Stanković, 1980: 540). However, Vizner (1978: 818) argues that the special liability of the event organizer does not cover the damage caused to direct participants (performers); he claims that the organizer is liable for such damage on the grounds of presumed fault. This attitude is totally wrong since it does not refer to damage caused by uncontrolled actions of the crowd; instead, it pertains to the damage the performer sustained during the event itself (e.g. sports competition) because, as generally accepted (Kostić, 1976: 94) and specifically noted by Vizner, "the organizer did not take those security measures that are required by the rules of particular competition" (Vizner, 1978: 818). Moreover, the injured party may even be a person who, due to uncontrolled behaviour of the crowd, suffers damage outside the arena where the event is held.¹²

In addition to the immediate victims, there is a wider circle of persons who are entitled to seek compensation for sustained damage, injury or harm (Mijačić-Cvetanović, 1986: 7). This issue is regulated in the provisions on pecuniary damages, as compensation for damage in case of wrongful death, bodily injury and harm to one's health¹³, and the provisions on compensation for non-material damage/harm.¹⁴

Some authors (Stanković, 1980: 540; Tomić, 1984: 202) argue that security personnel or other persons in the service of the organizer cannot appear as the injured party because, if injured at work, they may claim compensation from the employer under the provisions of the Labor Act. It seems, however, that such an approach is not justified because there is no single provision which restricts the right of the organizer's employees to call upon the special mode of liability of the event organizer.

3. Liability prerequisites

The prerequisites (legal requirements) for establishing special liability of event organizers are: damage and causality (causal link). These two essential elements are quite sufficient for establishing the organizer's liability.

12 For example: damage caused to a bystander, during a stadium demolition, in the course of general disorder among viewers, (Stanković, 1980: 539); injury inflicted to a bystander on the street by an explosive charge that was launched from the stadium.

13 See. Art. 193-197 ORA.

14 See. art. 200-201 ORA.

3.1. Damage

The sustained damage is an unavoidable prerequisite for establishing the special mode of event organizer liability. However, his liability is specifically limited to the damage that occurs as a result of wrongful death or bodily injury, which means that other forms of damage are not covered (Stanković, 1980: 539). However, the legal doctrine suggested long ago that health impairment should also be taken as a legally relevant cause of damage (Mijačić-Cvetanović, 1986: 6). In this regard, there was a proposal to amend the ORA provision, which is quite justified given that the ORA does not make any distinction between bodily injury and health impairment.¹⁵ The forms of damage for which the event organizer is liable are regulated by specific provisions on compensation for material damage in case of death and bodily injury or health impairment,¹⁶ and by provisions on the compensation for non-material damage.¹⁷

By limiting the liability of the event organizer to damage caused by (wrongful) death or bodily injury, the legislator has excluded the organizer's liability for damage resulting from devaluation or devastation of material goods (chattel). One author critically assessed such solution, given that it represents a departure from the adopted "full compensation" principle (Jakaša, 1979: 86).¹⁸ His criticism, however, is not supported by legal theory which supports the view that this special mode of liability always entails some peculiarities (Nikolić, 2001: 60; Borovac, 2010: 92). In addition, this special mode of liability actually extends the organizer's liability over the common borders, which may be a justification of its limited effect (Nikolić, 1995: 419).

Former Yugoslav republics (Slovenia, Croatia and Macedonia) adopted their own Obligation Relations Acts,¹⁹ where they retained the provision on the limitation of event organizers' liability. Only Montenegro extended his liability to the damage caused to material goods.²⁰

The Preliminary Draft CC has also envisaged the limitation of event organizers' liability as provided in the ORA but, there is an alternative solution which includes the possibility of extending this liability to damage caused to property (material

15 This may be inferred from Art. 195 ORA („Compensation in case of bodily injury or health impairment“)

16 Art. 193-197 ORA

17 Art. 200-203 ORA.

18 Art. 189 i 190 ORA.

19 Art. 157 Obligations Code (Uradni list“, št. 83/2001, 28/06, 40/07); Art. 1081 Obligation Relations Act („Narodne novine“, No. 35/05, 41/08); Art. 170 Obligation Relations Act („Služben vesnik na RM“, No. 18/01, 04/02, 05/03, 84/08).

20 Art. 188 Obligation Relations Act („Službeni list Crne Gore“, No. 47/2008).

assets).²¹ However, it is evident that the current legal doctrine does not agree with this alternative proposal, for both theoretical and practical reasons. Some authors (Borovac, 2010: 92) point to the fact that an event participant usually has or carries only inexpensive personal items when attending such an event. Case law shows that the court assessment of the value of damaged property requires painstaking evidence examination, including expert opinions, which always has always prolonged the litigation process and made it expensive, and resulted in numerous abuses related to these requirements (Borovac, 2010: 92).²² All this leads to the conclusion that the extension of liability of the event organizer for damage to property would be irrational because time and cost required to determine the relevant facts are disproportional to the benefits (Borovac, 2010: 92).

3.2. Causality (causal link)

Damage that entails the liability of the event organizer needs to occur as a result of "extraordinary circumstances" during the public event, which means that there must be a causal link between the damage caused by death or bodily injury and the extraordinary circumstances. Article 181 ORA illustrates the "extraordinary circumstances" by providing examples: "swaying crowds, crowd movements, general disarray, etc." The terms used and given examples clearly indicate that the event organizer is liable only if the damage occurred due to influence of assembled crowd (Stanković, 1980: 539; Tomić, 1984: 200; Mijačić-Cvetanović, 1986: 6-7; Nikolić 1991: 63; Đurđević, 1991: 142), which is manifested in the form of crowd movements, general disorder, uncontrolled activities, etc. In a decision on this matter, the Croatian Supreme Court strikingly observed that "extraordinary circumstances (mass movement, general disorder) are common in gatherings involving a large number of people, but the sustained bodily injuries need not necessarily be the result of these extraordinary conditions. Quarrels and fights between event participants *per se* do not represent exceptional circumstances within the scope of Art. 181 ORA, if they are not the result of crowd swaying, mass movements, general disorder, etc."²³ If the damage was caused by some other cause, for example, the spectator's death caused by heart attack due to over-excitement during sports event (Jakaša, 1979: 86), or due to the collapse of stadium grandstands (Mijačić-Cvetanović, 1986: 7), or if the bodily injury was inflicted to a spectator in the theater lobby as a result of

21 Alternative solution for Art. 337 Preliminary Draft CC.

22 Borovac (2010: 92) argues that those practical problems, together with high inflation rate at the end of the 20th century, almost removed tortious claims related to personal items from court practice.

23 The Supreme Court of Croatia, Rev. 286/2005-2.

collision with a running child (Nikolić, 1985, 419), then the event organizer is not liable, despite the fact that the damage was caused during the performance.

Uncontrolled crowd actions can be caused by different circumstances, such as: panic over false alarms, fights among viewers, tossing various objects, use of firearms, weather disasters, fire or stands collapse; all these circumstances have no effect on the liability of the event organizer (Stanković, 1980: 538; Loza, 1979: 43; Radisic, 2014: 303; Nikolić, 1995: 419).

The event organizer is liable only for premises where the event is held (Stanković, 1980: 539; Tomić, 1984: 203; Nikolić, 1991: 61), which means only for harmful effects of human crowd in that area (Mijačić-Cvetanović, 1986: 7; Đurđević, 1992: 61; Nikolić, 1995: 419). The scope of this liability is easily determined in case of indoor events because such space has its own boundaries. However, open air events demand some clarification. The situation is clear and the problem is almost nonexistent in terms of open-air spaces of clearly demarcated boundaries (a stadium, a courtyard). But if the event held in an outdoors space which has no clear boundaries (streets, roads, fields, etc.), then, according to the particular case circumstances, the court must establish the limits where organizer could exercise direct control (Jakaša, 1979: 86). The organizer must ensure direct control not only over the area where the event spectators are situated but also over the entrance and exit areas (Stanković, 1980: 539; Tomić, 1984: 203; Nikolić, 1991: 61). If the event participants cause damage outside the premises where the event is held, for example, outside the stadium during street violence, the event organizers is not liable (Nikolić, 1995: 419). Still, he may be held liable under the general tort rules; moreover, the state may be held liable under the provisions on liability for acts of terrorism, public demonstrations or manifestations (Jakaša, 1979: 86; Stanković, 1980: 539).

Besides the event organizer's liability for damage resulting from crowd actions in the area where the event is held, he may be held liable for damage materialized outside the event area if the damage is caused by extraordinary circumstances that occurred in the event area (Jakaša, 1979: 87; Tomić, 1984: 202). For example, during violence at a football match, supporters of two teams fire rockets, one of which flicks over the stadium fence and injures a bystander on the street.

Courts are prone to interpreting provision on liability of event organizers extensively, not only when dealing with the form of the gathered crowd but also in terms of the causal link, i.e. the effect of "extraordinary circumstances". Thus, in a judicial decision, the court viewed the concentration of a large number of participants at the start of a cross-country race as an "extraordinary circumstance". The court obliged the organizer (school) to pay compensation to the

race participant who fell and injured himself at the beginning of the race.²⁴ Therefore, the court evaluated the concentration of people at the race start as an "exceptional circumstance" although that circumstance is quite common for any race. In addition, the court has completely overlooked the fact that the concrete damage was not caused by the uncontrolled crowd action; it was actually caused during the sports competition, which entails a completely different liability regime. In this case, the school may be liable for the damage sustained by the race participant only under the general tort rules, i.e. on the grounds of school's presumed fault (Kostić, 1976: 94). So, the school may be exempted from liability if it can prove that it exercised the required duty of care which the organizer is reasonably expected to provide during the organization of the race (Kostić, 1976: 95).

4. The legal nature, legal ground and exoneration of liability

4.1. The legal nature of liability of the event organizer

The liability of the event organizer is very distinctive because it embodies the elements of contractual liability and the elements of non-contractual liability (in tort). This distinctive feature is particularly emphasized by those authors who clearly differentiate between the spectator who paid an event ticket and the spectator who enjoys the event for free (Kostić, 1976: 84).

The spectator who paid the ticket enters into a contractual relationship with the organizer, which is why many authors conclude that, in case of damage, the event organizer has contractual liability. The organizer is obligated by contract, among other duties, to ensure the spectators' safety during the event, provided that this obligation has the character of "an obligation of assets" (according to one opinion) or the character of "an obligation of results" (according to another opinion). According to a third opinion, the organizer's liability for damage caused by wrongful death or bodily injury is based on the rules of non-contractual liability.²⁵

Legal theory has a different approach to the spectator who watches an event for free. Many authors claim that organizer does not assume any special obligation to such spectator; so, the organizer can be held liable only for the damage which can be attributed to his fault. In this case, the organizer only violates the general prohibition of causing harm to another, i.e. the general legal duty of care, which means that his liability for the spectator's damage is of a non-contractual nature.

24 Judgment of the Supreme Court of Serbia, Rev. 210/92.

25 For more detail, see: Kostić (1976: 84-86).

Domestic legal theory holds that the distinction between the spectators with a ticket and those that watch an event for free is unacceptable (Kostić, 1976: 86). In fact, there is no doubt that the spectator concludes the contract by purchasing the ticket, in order to observe the event. The event organizer's failure to fulfill his obligations entitles the spectator to claim compensation under rules of contractual liability. However, the safety of spectators attending an event cannot be the subject matter of contract (Kostić, 1976: 87) because the organizer assumes the obligation to guarantee the safety of all viewers, regardless if they have bought a ticket or not. Therefore, the event organizer's liability in relation to all viewers is of non-contractual nature (Kostić, 1976: 87), which also refers to his liability for damage sustained by event performers (Kostić, 1992: 1336). This liability is regulated by mandatory provisions, which further implies that exoneration clauses are not allowed. Nevertheless, if such a clause is printed (on the tickets, bulletin boards, etc.), it does not produce any legal effect (Kostić, 1976: 107; Vizner, 1978: 820).

The ORA regulates the liability of the event organizer in the section dedicated to non-contractual liability; hence, the non-contractual nature of the event organizer's liability is not disputable. Besides, it is irrelevant whether the spectator pays a charge or watches an event for free (Vizner, 1978: 818 and 819).²⁶

4.2. Legal Grounds of Liability

In legal theory, there is no dispute that the liability of the event organizer, as one of the special modes of liability, is not based on fault. Thus, many authors conclude that the organizer is liable according to the rules (criteria) governing strict liability, i.e. regardless of his fault (Wisner, 1978: 818; Stanković, 1980: 540; Tomić, 1984: 203; Radišić, 2014: 303). Some authors even underline that it is a "severe strict liability" (Plavšak, Juhart, Vrenčur, 2009: 588). This certainly does not mean that the organizer cannot be held liable on the grounds of his own fault, i.e. for a breach of duty to ensure the spectators' safety (Jakaša, 1979: 87; Vizner, 1978: 819; Tomić, 1984: 206). He may also be liable for dangerous items and activities, if the injured party suffers damage due to hazardous properties of the premises where the event is held (Kostić, 1976: 104; Tomić, 1984: 206).

Relying on the court practice, legal theory finds the grounds of event organizer liability in: "an increased risk" or "risk created" (Vizner, 1978: 818 and 819); "a dangerous activity, or the source of increased danger" (Radičić, 1979: 219);

²⁶ It is unacceptable to hold that the organizer of a charity event is liable under special regime because he does not make profit, whereas the professional organizer, who organizes the event for profit, is liable under the general rules of liability for dangerous objects and hazardous activities (Vuckovic, 1989: 280).

"causation" and "the fact that damage resulted from the operation of the crowd" (Jakaša, 1979: 86; Loza, 1979: 44; Nešković, 1979: 487). It can be concluded that our jurists are unanimous in the claim that the ground for liability is "the risk created" (Đurđević, 2001: 146).

However, the ORA did not accept the view that event organization represents a dangerous activity (Jakaša, 1979: 87; Tomić, 1984: 203; Nikolić, 1991: 66) because the legislator, apparently, had in mind that event organization does not have the character of dangerous activity in the true sense of the word. Some authors also claim that event organization is not a dangerous activity where organizer creates an increased risk of damage to the environment (Nikolić, 1995: 421; Đurđević, 2010: 367; Borovac, 2010: 94-95).²⁷ The organizer may only be liable for damage which occurs only as a result of correlation between the event itself and exceptional circumstances that may arise on that occasion. Extraordinary circumstances, as a direct cause of damage, may not be attributed to the organizer's fault at all, nor to the risk created, because the organizer has in no way caused the extraordinary circumstances. It all leads to the conclusion that neither fault nor the risk created are the legal ground that may serve as justification of the organizer's liability.

It seems that the event organizer's commercial gain (which is commonly attained) should not be circumvented (Nikolić, 1995: 421). Because of this commercial effect, which may not be directly expressed in terms of tickets revenue,²⁸ it seems quite fair that the organizer should pay at least for some damage caused by the crowd gathered at the event due to extraordinary circumstances during the event. In this case, fairness seems to be the most acceptable and logical ground for establishing the organizer's liability (Nikolić, 1995: 421; Radišić, 2014: 304). The organizer is making profit, so it is logical and fair that he shall pay damages/pay for the damage arising from the extraordinary circumstances during the event. In addition, this opinion is corroborated by and in compliance with the provision on the limitation of his liability, under which the organizer is liable only for damage stemming from wrongful death or bodily injury.

27 Djurdjevic (2002: 61) states that «strict liability is conditioned by unrelenting or accidental causes which originate from a single source, while the risks associated with the public event are primarily created and realized by the behavior of many participants and spectators, not the individual organizer.»

28 Public events are frequently sponsored by companies and other business entities for advertising and other purposes..

4.3. Exoneration from liability

Exoneration options, available to the event organizer in order to avoid strict liability, are very limited. He cannot be exempted from such liability even if he proves that he is not at fault (Loza, 1979: 44), or that has taken all necessary protective measures (Đurđević, 2010: 368), or that there were no flaws in his work (Borovac, 2010: 95). His *culpa* is irrelevant. Besides, as some authors reasonably claim (Plavšak, Juhart, Vrenčur, 2009: 588), the organizer, in principle, cannot be exonerated on the basis of general provisions regulating the exemption from liability of the owner/holder a dangerous object (Art. 177 ORA).

In legal theory, there is a general consent that the event organizer is not liable if there is exclusive fault of the injured party (Stanković, 1980: 539; Radišić, 2014: 304; Nešković, 1979: 487), which implies the injured party action that exclusively contributed to the damage (Loza 1981: 221; Tomić, 1984: 204), for example: when a sports event spectator hurts himself in an attempt to jump over the protective fence. In this case, the action of the injured party is the sole cause of sustained damage, which is in no way connected with uncontrolled actions of the assembled crowd. Hence, one of the basic prerequisites for establishing the special liability of event organizer is missing.

Majority of authors believes that the action of a third party does not lead to the exoneration of the event organizer (Loza, 1979: 45, Stanković, 1980: 539; Mijačić-Cvetanović, 1986: 11). In contrast, there is a smaller number of authors who believe that the action of a third party, which could not have been foreseen, prevented or avoided by the event organizer, excludes his liability (Vizner, 1978: 830; Tomić, 1984: 204). Yet, it seems that the action of a third party, just like the personal action of injured party, may exclude the liability of the event organizer only if the damage is in no way connected with the action of the assembled crowd (for example: when one spectator shoves another over the stairways, as a result of which he falls and breaks his hand). The organizer is not liable for such damage because it was not caused by the uncontrolled action of the assembled crowd.

Legal theory has also discussed the effect of a terrorist attack during the event and its impact on the liability of the event organizer (Stanković, 1980: 539; Tomić, 1984: 205; Nikolić, 2001: 68). Thus, the organizer is not liable for immediate damage (caused by a terrorist attack during the event) which is in no way connected with the action of the assembled crowd (Tomić, 1984: 205; Nikolić, 2001: 68). The organizer is not liable for such damage even on the basis of fault, if the terrorist act was unforeseeable, or if its consequences could not have been avoided or eliminated. However, under the provision on strict liability of the event organizers, the organizer will be held liable for the damage caused after

the terrorist attack, in general disarray caused by the attack perceived as an extraordinary circumstance.

The situation is similar regarding the impact of force majeure. Thus, the event organizer is exempted from liability only if such an incident (*vis major*) is a direct and sole cause of damage (Stanković, 1980: 539; Tomić, 1984: 205); for example, a number of event participants die in a devastating earthquake or as a result of being struck by lightning during the event. In this case, as the damage was not caused by the action of the assembled crowd, the organizer is not liable. However, an incident that has the properties of a force majeure (earthquake, lightning, weather disaster) is often an extraordinary circumstance that can cause crowd movement or general disarray in a crowd, which may result in bodily injury or death of event participants. The organizer would be held liable for such damage because it is a result of uncontrolled action of a large number of people. He could not be exempted from liability by proving that the crowd movement or general disorder was caused by force majeure (Stanković, 1980: 539) because the direct cause of the damage was not force majeure but the uncontrolled crowd action. Domestic court practice reasons that a weather disaster, which is not the direct cause of the damage but only excites the crowd to cause damage in extraordinary circumstances, is not an exoneration ground for the sports event organizer.²⁹

We conclude that the event organizer can be exempted from the special liability only if he proves that the damage was not caused by the uncontrolled action of the crowd, but due to some other unforeseeable cause.

5. Conclusion

Special liability of the event organizer is still marked with certain dilemmas and doubts. The biggest dilemma pertains to the scope of his liability because we are convinced that he cannot be held liable under special liability rules when damage is caused during any kind of public assembly but only when it is caused by a large number of people gathered at the public event (performance), perceived in the narrow sense. Therefore, the special mode of liability applies only in case of a public event in the narrow sense of the word.

The Obligation Relations Act corroborates the conclusion that the liability of the event organizer must be extended to damage caused by health impairment.

Since the event organization does not constitute a dangerous activity, the grounds for establishing the organizer's liability is not the risk created but fairness. Specifically, as the organizer regularly achieves certain commercial gain, it is fair to charge him at least partially for consequential damages. The

²⁹ Judgement of the Supreme Court of Serbia, Gž. 1735.

possibility of exonerating the event organizer from liability is quite limited as he is required to prove that the damage did not occur as a result of uncontrolled operation of the crowd but for some other unforeseeable reason.

In connection with the above conclusions, we suggest amendments to the provision of Article 337 of the Preliminary Draft of the Civil Code. First, the phrase “organizer of a gathering involving a large number of people” should be replaced by the words: “*organizer of an event (performance) gathering a large number of people*”. Second, the phrase “caused by death or bodily injury”, should be replaced by the words: “*caused by death, bodily injury or health impairment*”.

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ПОСЕБНА ОДГОВОРНОСТ ОРГАНИЗАТОРА ПРИРЕДБИ

Резиме

Одговорност организатора приредби представља један од веома актуелних случајева одговорности за штету, нарочито ако се има у виду све присутније насиље које се, кроз неконтролисано деловање масе људи, испољава на спортским приредбама. Иако се правно уређење тог посебног случаја одговорности од доношења југословенског Закона о облигационим односима од 1978. године уопште није мењало, остала су, све до данас, неразјашњена нека спорна питања која га прате. Штавише, у јавној расправи поводом Преднацрта Грађанског законика Републике Србије отворена су и нека питања која раније нису била спорна. Иако се у потпуности афирмисала као посебан правни институт, ову одговорност још увек прате извесне дилеме.

Најозбиљнија дилема односи се на домашај одговорности организатора приредби. У раду се, насупрот екстензивном приступу већег дела правне теорије и судке праксе, заступа рестриктивни став да то не може бити одговорност за штету коју проузрокује било који облик окупљања већег броја људи, већ само одговорност за штету коју проузрокује већи број људи који су окупљени на некој приредби. У раду се предлаже проширење облика штете за које организатор приредби одговара, тако да поред штета које настају смрћу и телесном повредом, буде обухваћена и штета која настаје оштећењем здравља.

С обзиром на комерцијални ефекат који организатор приредби остварује, правичност се у раду потенцира као основ његове одговорности, с тим што се одговорност организатора искључује само ако докаже да штета није настала неконтролисаним деловањем окупљених људи, већ као непосредна последица радње оштећеног, радње трећег лица или догађаја који има особине више силе.

Кључне речи: *организатор приредбе, изванредне околности, објективна одговорност, смрт, телесна повреда, радња оштећеног.*

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CONTROL OVER ANOTHER'S CONDUCT IN TORT LAW (PART 1)**

Abstract: *In legal literature on tort, the obligation to control another's behavior is mentioned in multiple studies. However, control duty per se remains enigmatic. The author examines the legal nature of control over the conduct of another by analyzing control of minors. The first part of the paper focuses on parental control, as the oldest and most common phenomenon. Besides parents, the role of controller can pass to some other natural persons. The criteria used for evaluating parental control (factual situation, properties of the parents and the child) are classified and described. These criteria have a wider significance because they can be used for evaluating any kind of controller. The author separately examined culpa in educando, which implies the parents' fault for the inadequate upbringing and education, considering that this type of control is more important than the direct control. Parental control is limited by the contemporary educational policy, as well as by the fact that in some situations children are superior to parents. The second part of the paper focuses on school supervision, with particular reference to the control of unpredictable behavior in conjunction with causation, bullying, and a new concept of school supervision understood as a process rather than ordinary monitoring. While the first and the second part of paper discuss forms of control over the tortfeasor, the third part surveys the control over the injured party. In this context, two forms of control are discussed: first, when both the controller and the controlled are the injured party; and second, when they are the two disputing parties on opposite poles of the obligation relationship.*

Keywords: *tort, parents, child, minors, criteria, causation, supervision.*

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1. Introduction

Control over the behavior of another is a very significant topic in tort law. The notion "*culpa in vigilando*" or "*culpa in inspiciendo*" implies culpability for insufficient control over the direct tortfeasor, which results in the liability of the controller. In legal literature, the duty to control the conduct of another is mentioned in the various legal analysis concerning: liability of the state for the acts of its civil servants; liability of the employer for employees' activities, liability of legal persons for the acts of its bodies; liability of a principal for the acts of its subordinates; liability in case the harm is caused by throwing objects or spilling liquids out of the room, or when one provides or gives a dangerous object to another; etc. Control over another's behavior has always been a universal and highly up-to-date issue, from the fragments provided in the *Digesta* on the liability of mental patients' care-takers to the contemporary articles on the liability of parents for children's illegal activities on the Internet.

In this paper, we will focus on the control over minors. The compensation for damage caused by minors is claimable against those persons to whom the damage can be attributed, owing to their inadequate care or supervision over the minor. The duty to supervise a child primarily rests on the parents but it may also be entrusted to school. Other relations between the controller and controlled, mentioned above, will be analyzed in a separate paper. This article is not about vicarious liability, nor about parental or school liability. Our goal is to investigate the legal nature of control over another's conduct in tort law in general: how to define control duty; who should be held liable; which criteria shall be used to assess whether the supervision has been properly exercised? We begin our analysis with minors because control over children has a long history, it is monodisciplinary, and it may be a good starting point since it is a frequent and commonplace relation.

2. Parental control

Parents are liable for damage caused to another by their minor child who has reached the age of seven, unless they prove that the damage occurred without their fault.¹ Their fault can be two-folded: an "acute" deficiency of direct supervision at the time of adverse effect, and a "chronic" *culpa in educando*. The parental liability is quite logical: considering that parents have the statutory authority under the law to control and discipline the child, their failure to exercise control is reflected in the damage/harm caused to another, which may imply their liability to compensate the injured party.

1 Ar. 165, l. 4, Act on obligational relations.

The origins of parental control date back to the times of antiquity. The Roman *familia* denoted a group consisting of a *pater familias* and those under his control. In early Rome, this power was so great that the *pater familias*, as a domestic judge, exercised supreme power over the children. If a child committed a delict (tortious act), a noxal action lay against the *paterfamilias*. Then, he had the choice either to surrender the wrongdoer or to pay the penalty (Stone, 1952: 7). Thus, in Roman law, this alternative was not a result of an idea of *paterfamilias*' fault or his responsibility but as an alternative to having vengeance upon the child (Stone, 1952: 9). The modern concept that the damage caused by the minor may be attributed to the parent, due to the lack of parental care, differs markedly from the Roman law position of the parent being permitted to buy off vengeance (Stone, 1952: 10).

The Prussian Code of 1794 is interesting because lunatics, imbeciles and children under the age of seven were placed in a single category, just like Ulpian had done in Roman law. But, unlike Ulpian, the Prussian Code provided that, if damage was caused by such persons, the compensation should first be sought from the persons charged with their supervision (Stone, 1952: 9). With some modifications, this idea is still present in all modern civil codifications.

In comparative law, it is primarily the parents who have the duty to supervise their minor children but sometimes this duty is entrusted to the persons who have the right of custody or even persons living together with the child. In most countries, the duty to supervise the child derives from child custody, which is regulated by family law rules but it is most commonly linked to parental right. However, in some cases, guardians or public or private institutions may have custody instead. Therefore, in general terms, family law rules are also important for tort law since they indirectly determine who is going to be held liable (Martín-Casals M. et al. 2006: 445).

In Serbia, parents have the right and parental duty to take care of the child. The parental duty includes child-care, raising, upbringing and education.² Parents must not leave a preschool child unattended. Child-care and upbringing are two different concepts. One parent can be responsible for direct care, while both are responsible for upbringing. The provided final judgment of the Serbian Supreme Court is illustrative: "For damage caused by the child of divorced parents under the care of the mother, the father is jointly and severally liable only if the harmful child's actions can be attributed to the general neglect of parental duties. The minor, who is over the age of seven and prone to theft, was entrusted to mother for care after the divorce."³

2 Art. 68, Family Act.

3 Judgment of the Supreme Court of Serbia, Rev. 563/1994.

In some countries (Czech Republic, Germany), case law recognizes *de facto* family relationships. Thus, stepparents who live together with the child are also involved in the education and supervision and, therefore, they may also be held liable. Modern jurisprudence is prepared to construe an implied contractual agreement between the parent and the step-parent, where the latter accepts the supervising duty (Martín-Casals M. et al. 2006: 446). *De facto* custody is also relevant in Serbian court practice. In one case, children caused damage by fire. The court investigated who exercised supervision during the critical period: the parents temporarily working abroad or the grandparents (who had temporary custody). If the child is under the supervision of a *de facto* guardian, he/she is liable if the damage may be attributed to his negligence.⁴

2.1. Criteria for supervision assessment

Parent may be held liable for improper control or failure to exercise supervision over the child. How to evaluate parental output and which criteria should be used? It is obvious that these criteria are irrelevant when parent is strictly liable (for example, in Serbian law, a parent has strict/objective liability for child under the age of seven).⁵ Thus, the criteria for assessing the parental duty to supervise are essential only when parents have subjective liability because they have negligently breached the supervising duty. In general, parents are exonerated from liability when their duty to supervise has been transferred to another.

When evaluating parental supervision, the judge has to consider to what extent the supervision is necessary, and what can reasonably be expected from a supervisor in the individual case. The supervision has to be assessed *ex ante*, from the perspective of a competent impartial spectator. If we want a precise assessment, we have to combine the subjective criteria (individual characteristics of persons involved) and the objective external elements (such as, the immediate environment). The criteria must be fair because we must honor the victim's right to compensation. The decisive circumstances can be grouped in three categories: factual situation, parent-related circumstances, and child-related circumstances.

2.1.1. Factual situation

The intensity of risk, seriousness of impending injury, the value of endangered goods, the time and place of the tortuous act fall into the same group of circumstances. The examination includes all persons and objects involved. Insufficient supervision exists if the child was entrusted to another child or an old incapacitated relative. The more likely the damage, the more extensive is the duty to

4 Decision of the Supreme Court of Serbia, Rev. 1510/2005.

5 Art. 165, l. 1, Obligation Relations Act.

supervise. When the child is playing with dangerous objects (such as: a bow and arrow, or an air rifle), the requirements are very high. When assessing the danger stemming from toys, not only their nature but also the child's development has to be considered (Martín-Casals M. et al. 2006: 45). The parents are not required to adopt every conceivable safety measure, nor to guarantee absolute safety, which is generally impossible. Rather, supervising duty is limited by providing reasonable care and ensuring safety measures that can reasonably be expected (Martín-Casals M. et al. 2006: 242). Parents are not required to continuously supervise their children around the clock. However, they are required to find ways to prevent damage, by securing that the child has no access to dangerous objects, such as matches, electrical household appliances, cars, etc.

There are special criteria for road accidents. Parents have to instruct their children on the appropriate traffic behavior. Secondly, they have to practice and check whether the child observes the rules when they are on their own. Thirdly, they have to assure a sufficient control once their offspring takes to the road. They must not allow children to use the street as a playground. Small children may not walk on the sidewalk without immediate supervision, nor shall be left alone in a car if there is a possibility that they may get out. Likewise, children in the first grade of primary school may not walk to school alone but must be accompanied by an adult. In case of imminent danger, they have to be taken by hand. Older school children may walk to school on their own but only after being provided thorough instruction (Martín-Casals M. et al. 2006: 243). If the parents have not instructed the child on traffic safety rules, they have breached their supervision duty.

Handling dangerous items is a separate issue. The idea that children must be kept away from dangerous objects makes perfect sense, but only at first. In the long run, it is counterproductive. Only by being exposed to sources of danger may the child learn how to reasonably deal with them; moreover, the acquired skills will benefit third parties. The child needs to know how to properly use a dangerous object, and parents have to provide relevant instructions. On the other hand, the reaction to children's disobedience and non-compliance with parental orders has to be appropriate: for instance, when a child repeatedly turns on the oven, a mere warning is not sufficient; parents must keep the child away from the oven and check that it is switched off. Parents have to exercise special care in terms of arson. Therefore, the parents have to warn the child about arson, and to prevent access to matches, lighters and other possible sources of fire. Matches or lighters must be stored out of reach; if they disappear, the child has to be questioned and searched immediately (Martín-Casals M. et al. 2006: 245). There shall be no tolerance for firearms. The fact that the parents had not discovered their son's fully functional gun, and were unable to predict that

he would hurt another person, reveals that they did not have sufficient control over their child's behavior and they failed to perform the proper supervision (Martín-Casals M. et al. 2006: 135)!

The location where damage occurred is also relevant (for example, the proximity of a road or the source of danger, the neighborhood in which the family lives, etc.) Children are given more freedom in rural areas, where it is quite common for minors to play outdoors without a supervisor. The use of knives or even hunting guns is also considered acceptable. In cities, it is considered acceptable for children to play in parks and yards, away from the streets (Martín-Casals M. et al. 2006: 47, 334, 396).

There are cases where the courts wrongly interpreted the specific circumstances, such as ethnicity. In one case, the court explained: "The minor's problematic behavior, reflected in early pregnancy and running away from home, indicates negligent exercise of parental duties, which cannot be justified by the Roma population way of life, nor by the custom that girls marry young and have children early, as the Court of First Instance wrongly concluded."⁶

2.1.2. The parent-related circumstances

The criteria related to the parents are especially important when assessing the scope of reasonable supervision. Thus, it is essential to consider the objective circumstances, such as: the family living conditions, the parents' professional duties and financial standing, the number and the age of the children, etc. The supervisor's incapacitation or disability has no effect on the objective duty of care. However, the supervisor's individual handicap or incapacitation is decisive when establishing fault (Martín-Casals M. et al. 2006: 47). The parent who, due to his/her medical condition, cannot control his underdeveloped child is not liable for damage caused by the child if he/she has previously informed the custodianship authority about the need for placing the child in an appropriate institution (Blagojević, Krulj, 1983: 599).

The supervision should not be too strict, particularly over a child aged 7 or above who does not need close supervision. However, it is not a defense if a lenient parent has been too lax in his supervision. It would not be sufficient for the parent to show that the child had disobeyed the parental orders, if in truth the parent have failed to assert his authority in the past (Stone, 1952: 14). The lack of parental knowledge of potential dangerous activities carried out by their children is not a defense, since parents have the duty to keep themselves

6 Decision of the Court of Appeal in Belgrade, Gž 2241/2013.

informed about the activities of the children, their inclinations and personality (Martín-Casals M. et al. 2006: 397).

If both parents are working, their constant supervision is (generally) not required. The same is true if the non-working parent is occupied with housekeeping or other children. Employed parents must find relevant child-care alternative. They can put another natural or legal person (school or another institution) in charge of supervision, or they may leave the child alone but only if the child is old/mature enough. In that case, their supervision duty turns into an organizational duty. The working parent can delegate the duty to the unemployed parent (Martín-Casals M. et al. 2006: 451, 247).

2.1.3. The child-related circumstances

The most important child-related circumstance is age; the older the child, the less supervision is required. This statement maybe illustrated by a hypothetical situation where a child has to cross a busy street on the way to school. A child aged 7 cannot cross the street on one's own; thus, if the child causes an accident, the parents will be at fault because they let the child do it without supervision. Conversely, a 17-year old minor can cross the street on his/her own; in case of an accident, the parental fault would be presumed but their exculpation would be easier to prove because they acted properly (Martín-Casals M. et al. 2006: 135).

The relevant circumstances are those pertaining to the personal characteristics of the specific child rather than general characteristics of an average child of the same age. The features that are usually taken into consideration are: the level of intellectual development, maturity and autonomy, personality traits (problematic, aggressive, irresponsible child), and habits (frequented places and peer groups, bad company). Permanent supervision, control and surveillance have a detrimental effect on the child's personality, and are not in compliance with the educational policy goals. As tort law does not require conduct that is contrary to the family law principles, the scope of the duty to supervise has to be assessed considering these educational goals (Martín-Casals M. et al. 2006: 246).

There is no dispute that constant supervision of a child is detrimental for minor's development. An empirical rule suggests that very young children need continuous control, while pre-school children usually need to be controlled for half an hour per day, provided that this is enough to identify dangerous situations and act preventively. Older minors approaching the majority age require almost no supervision; it is sufficient if the parents know the child's whereabouts and what the child is doing in his/her leisure time (Martín-Casals M. et al. 2006: 245). As the child grows older and matures, physical control and supervision measures turn into oral instructions (guidance).

Another relevant circumstance is a minor’s propensity to cause trouble or do something extremely dangerous (e.g. to play with fire, to play dangerous games). If a child is problematic and misbehaved, this fact increases the foreseeability of damage and calls for special precaution measures (Martín-Casals M. et al. 2006: 46, 163, 452). Close attention should be given to the child demonstrating aggressive or violent behavior, such as a young offender who may be prone to dirty tricks. Supervision “at every turn” is appropriate if the child is significantly maladjusted and shows pathological predispositions. Parents are required to seek the assistance of public authorities if they are unable to keep their offspring under control themselves (Martín-Casals M. et al. 2006: 246).

2.2. *Culpa in educando*

If the duty to supervise a minor was delegated to non-parent, the injured party still has the right to seek compensation from the parents if the damage occurred due to poor upbringing, bad role models or vicious habits developed by the parents, or if the damage can be attributed to the parental fault.⁷ So, a parent may be liable not only for not having met his duty to supervise his child directly but also for not having raised and cultivated him properly. There is a direct correlation between these duties and immediate control as the scope of the duty to supervise depends on the child’s level of education. Well-raised and educated children need less supervision (Martín-Casals M. et al. 2006: 444). Proper upbringing means proper behavior towards people, society and social rules (for example, traffic rules).

Culpa in educando differs from immediate supervision, and these duties can be divided between mother and father. For example, the absent father is not liable for the damage that was caused while the child was under the mother’s supervision, unless his actions are attributable to *culpa in educando* (general neglect of care and education); the father temporary living abroad at a time when the damage is caused is not liable if parental right is exercised by the mother but the child is not educationally neglected in general (Blagojević, Krulj, 1983: 601).

Schools can use *culpa in educando* to exonerate themselves from liability, or at least improve their position. Case law on this matter is illustrative: “The Court was required to determine who was, at the time of the adverse event, supervising the children, was the control exercised properly, and whether the damage would have occurred despite the careful control. Despite proper control, damage may occur as a result of *culpa in educando*. Based on these circumstances, the Court will determine who is liable for damage: parents, school, or both of them jointly

⁷ Art. 168 l. 1, Obligation Relations Act.

and severally.⁸ In the next case, the school was found liable and required to pay damages, but it was also entitled to seek redress from the parents: “Adverse event is in direct causal connection with inadequate school supervision as well as with unacceptable parental upbringing of minors. The fact that parents did not know what was going on at school, nor were they unaware of the child’s violent behavior, which was reflected in the harsh insults, abuse and severe humiliation of others, cannot be an excuse. Successful upbringing does not entail violent behavior in situations where there is no direct school supervision. It follows that parents and school are jointly and severally liable.”⁹

Case law is very useful for the analysis of *culpa in educando*. In one case, the court explained: “Certainly, there is a parental *culpa in educando* when a child commits a criminal offense of robbery.”¹⁰ The second example is similar: “The minor son (the second defendant) caused death by firing gun on the busy street. His harmful actions can be attributed to the general neglect of parental supervision, manifested by access to gun, as well as his readiness to use it. It is important to establish whether the father (the first defendant) knew that his son had access to the gun, whether he was aware that the gun was in vehicle, and whether he did his best to prevent his son’s access to the gun?”¹¹ The time of the incident and the *modus operandi* also point to *culpa in educando*: “Minors A and B were found guilty for the C’s death. At the time of the incident, they were under parental supervision and care. Homicide happened late in the evening when children of that age should not move without parental knowledge and control. In addition, parents exhibited the utmost disregard of parental duty when they allowed minors to purchase knives. Poor upbringing is expressed through the minors’ premeditated pact to use knives in dealing with the late C. This clearly indicates serious educational flaws in the minors’ upbringing that have contributed to their malicious and violent behavior, for which their parents bear sole responsibility.”¹²

2.2.1. Duty to provide for children’s moral education

Conservatively speaking, parental responsibility encompasses duties to control, supervise or guard children. Therefore, parents should hinder antisocial tendencies, create an environment that diminishes the chances of antisocial behavior (e.g. access to fire arms), and seek help if they themselves cannot provide the

8 Decision of the Court of Appeal in Kragujevac, Gž 338/2011.

9 Judgment of the Court of Appeal in Kragujevac, Gž 1351/2011.

10 Judgment of the Supreme Court of Serbia, Rev. 1869/2007.

11 Judgment of the Supreme Court of Serbia, Rev.1653/2001.

12 Judgment of the Supreme Court of Serbia, Rev. 2548/2004.

aforesaid. Thus, they reduce the chances that the child harms other persons and perform their parental duty (Le Sage, 2008: 794). However, the control interpretation of the parental duty faces serious criticism and objections: 1) the wrong message is sent to the children ("it is not their fault"); 2) there is an extra burden for families that already have severe problems (for instance, poverty) (Le Sage, 2008: 795).

The control duty seems to be acceptable in terms of very young children, who really need to be supervised by parents (or other parent-substitutes). However, in case of adolescents, there are two problems. First, older children are practically impossible to control. Although parents are reasonably expected to have the capacity to control the youngster and ensure that he/she is at home at night or that he/she has no access to guns, they are unable to control every single move the teenager makes. Second, if we take the developmental needs of children seriously, the control duty is too confined (Le Sage, 2008: 795). Parental duties involve much more: parents have to be engaged in the child's moral education and this might entail acting in a way opposite to controlling or supervising. Emphasis on the control duty leads to a legislation that is not justifiable from an educational perspective (Le Sage, 2008: 797).

2.3. The Boundaries of parental control

Since September 2003, the US music industry has filed lawsuits against at least 11,809 individuals for sharing music online. Many of these defendants are the parents of teenage Internet users. The plaintiff has stated that parents need to control their children's online activities (Weber, 2005: 1167). Online computer can be potentially hazardous to a copyright owner. It therefore seems consistent to hold a parent accountable for entrusting a child with a computer if the parent knows that the child has a proclivity to practice piracy (Weber, 2005: 1191). A parent who supplies the child with a computer and Internet, and who consistently fails to take reasonable steps to prevent the infringement, is culpable. As the home is a zone where the parent has complete authority and substantial ability to exercise control, it is natural to expect a parent to assume responsibility when the child causes damage from home (Weber, 2005: 1193).

Quite the reverse, there are numerous arguments against parental liability. There are many steps a parent could take to control the Internet use but a clever, strong "pirate-minded" child could certainly circumvent them (Weber, 2005: 1176). A parent unfamiliar with computers may not comprehend what the child has done. He may not understand that this practice is a violation of copyright law, or he may be confused by legal technicalities (Weber, 2005: 1183). Maybe the child downloaded a song to gather information for a research paper (Weber,

2005: 1184). The parent's motive in providing the child with a computer is not to promote file sharing. Instead, the computer enables the child to complete the homework and communicate with friends. A parent cannot terminate the parent-child relationship or expel the child from home. It is highly unlikely that the parent will fully revoke the child's Internet privileges, given the vast amount of educational material online. Thus, a parent may be able to defend himself successfully (Weber, 2005: 1184).

3. The School as the supervisor

Children increasingly spend more time in state institutions, which envisage where they are educated and raised in line with the state-approved programs and books. For a considerable portion of each day, the child is under other than parental authority (Stone, 1952: 32). Thus, in case a minor has caused some damage while under the supervision of a guardian/custodian, school or another institution, the person in charge of supervision may be held responsible for damage the minor caused to another, unless such a person proves either that the supervision duty was properly fulfilled, or that the damage would have occurred notwithstanding the proper supervision.¹³ After parents, schools are most frequently held responsible for damage caused by children.

School may be also held liable if its employee has failed to act properly. What are the criteria for assessing the teacher's duty to supervise? In comparative law, most attention is given to the case-specific circumstances, particularly concerning the number of pupils under the teacher's supervision, the type and gravity of damage, and the likelihood of causing damage. It may be illustrated by a case where 10 teachers supervised 143 students, which was insufficient. During the preparation for a school competition (in a hotel outside the school premises), there was a verbal confrontation between students A and B when the teacher's was not present in the room. Now deceased student A (age 11) was playing around with a hair dryer in an effort to cause a burning sensation to other children, when student B (resting his hands against the sides of two beds) swung his foot and hit A in the stomach. As a result of the strong impact, student A fell and remained unconscious. Due to severe pancreas bleeding and necrosis, student A subsequently died from injuries. The defendants (B's parents) raised B properly and took good care of him. The tragic event was not the result of poor parental upbringing, nor was B under the influence of bad role models or vicious parental habits. So, there was no *culpa in educando*. The parents were

13 Art. 167, l. 1, the Obligation Relations Act.

fully exonerated from liability since children were entrusted to school when the ill-fated incident occurred.¹⁴

Another relevant circumstance is the place where the incident occurred, as well as the the cost-efficiency and benefits of the possible safety measures. Thus, a court judgment states: "The first instance court found that the minor plaintiff fell down the stairs in the school yard during the physical education class because he was pushed by a classmate. The plaintiff sustained serious bodily injury. At the time of the incident, the children were entrusted to the defendant (the school). The school points out that the first instance court failed to properly establish the essential fact that the accident was caused by negligence of the plaintiff himself, as the school yard is fully adapted to the students, and that students were under the constant teacher supervision. However, the second instance court concluded that the school did not prove the important fact, which could possibly exonerate it from liability, that the supervision over children was carried out in a proper way or that the damage could have occurred in spite of careful control."¹⁵

It is also essential to assess the type of activity that was performed and the exact moment when the damage/harm occurred. Thus, school is liable for damage/harm inflicted during school breaks, and children should be constantly monitored. In a related case, a minor plaintiff suffered bodily injury after being attacked by classmate during school break. The first instance court concluded that the blow came after the school bell, when pupils stayed in the school yard on their own, so the school was found not liable. The appellate court reversed, stating that "The school is liable for damage because it did not prove that it prescribed measures and procedures for children protection and safety, nor did it prove that such measures were implemented."¹⁶

Besides the parental *culpa in educando*, some authors provide additional arguments against holding the school liable. Schools and under-paid educators should be legally protected from constant exposure to liability for the myriad daily decisions (Weddle, 2004: 685). Protecting school treasuries and overburdened educators is a common rationale for seeking immunity for schools in some countries. It hardly seems fair to shoulder school officials with the responsibility for controlling often unpredictable and hidden actions of school children in cases when a child suffered at the hands of a classmate. However, such immunity would preclude the injured party from effectively holding schools accountable. Thus, immunity solves one problem by creating another and protects adults at the expense of the most vulnerable children (Weddle, 2004: 687).

14 Judgment of the Supreme Court of Serbia, Rev. 194/2006.

15 Judgment of the Court of Appeal in Novi Sad, Gž. 4356/11.

16 Judgment of the Higher Court in Subotica, Gž. 523/2012.

3.1. The Problem of foreseeability of damage

In the absence of dangerous objects, educators are liable for foreseeable damage/harm only. Otherwise, the causal link is broken. In a related case, the court stated: “The Injury occurred in the presence of a teacher who acted immediately upon B interrupted the class, ordering him to leave the cabinet. Before exiting, without any previous warning, B suddenly struck the chair which injured the plaintiff. His act was impossible to predict and prevent as B did not show any intention to do it. The supervision was appropriate as the teacher took all possible measures to avoid possible conflict. He responded immediately and ordered B to leave the classroom, since he already knew the history of his problematic behavior. The injury occurred due to unforeseeable and unexpected reaction. As this behavior was not possible to predict and control, the school is not liable, even though B is a student prone to trouble.”¹⁷

Many US courts deem students’ tortious acts foreseeable only where prior knowledge of a threat existed; only then will a school be liable for failing to take reasonable precautions (Weddle, 2004: 688). In a US case, a female student alerted school officials that she had been threatened by other students on the school bus and that a boy named “Andy” had been threatened for trying to defend her. The court held the school partially responsible for failure to act, in light of the fact that Andy was badly beaten at a bus stop soon after the warning threat. The court reasoned that the school had failed to take the necessary steps to alert the bus driver and thereby give him a chance to intervene (Weddle, 2004: 689).

Some courts view foreseeability as a key to causation: when an injury is inflicted by a sudden unforeseeable tortfeasor’s action, a failure to supervise cannot be the legal cause of the injury. Schools cannot prevent what they could not have anticipated, but this logical condition must not be taken too far. In another case, two students attacked another student outside the school doors one morning before class. Although the attack occurred in a racially charged atmosphere, the school had no morning supervision because there had been no prior incidents outside the school doors in the morning. In addition, the attackers “had the reputation of troublemakers”. Although the teachers who were aware of prior confrontations between the victim and attackers had not reported the incidents to the administration, the court concluded that school officials could not have foreseen the attack. To hold that schools cannot foresee injuries from bullying is to ignore reality and maintain a legal fiction that leaves victims alone (Weddle, 2004: 695).

In another case, a student died during a “slap boxing” incident when he fell, hitting his head on the pavement. The incident took place in an area that school

¹⁷ Judgment of Court of Appeal in Niš, Gž. 3364/2010.

officials acknowledged was supposed to be supervised but was not monitored; the physical education department had supervisory responsibility, but no one had ever created an assignment schedule. The boxing had gone on for five to ten minutes, with a crowd of thirty students looking on, but there was a complete absence of supervision. Under those circumstances, the court was willing to conclude that the lack of supervision was a proximate cause of death. In this case, however, the student organization that conducted the hazing had a reputation for violating school rules; the school had enacted specific rule against hazing. Under those facts, the planned hazing was clearly foreseeable (Weddle, 2004: 691-692).

3.2. Redefining supervision

Supervision in schools, which is related primarily to bullying and consequent damage, can no longer be viewed as mere monitoring and intervention. Instead, supervision must be viewed as a global approach to creating a school climate in which students are physically and emotionally safe (Weddle, 2004: 656). Article 42 of the Serbian Act on the Basics of the Education System contains provisions about safety. Thus, each school is obliged to prescribe and implement measures and procedures for the protection and safety of students in the course of educational work and other activities organized by the school, in cooperation with the competent authorities and local government units.

All school stakeholders (administrators, teachers, support staff, students) must be clear about the behavioral standards and how those standards will be enforced. All the areas where students gather shall be actively supervised at all times. Teachers should establish genuine relationships with students while helping them to develop social bonds (Weddle, 2004: 657). Article 43 of the Serbian Act lays down rules of conduct in schools. School should foster mutual understanding, appreciation of the children's personality, as well as good relationships among pupils, staff and parents. Employees are required to contribute to developing the positive atmosphere through their work and overall conduct. Behavior at school and mutual relations among the children, staff and parents are regulated by the written rules of conduct.

School supervision should be aligned with educational research. Experts can explain the specific measures schools should be taking to prevent damage. If the school has failed to implement such strategies in good faith, negligence is indicated (Weddle, 2004: 700-701). A new standard of reasonable supervision means a good-faith implementation of research-based, whole-school approaches and good practice (Weddle, 2004: 703).

4. Control over the injured party

In previous sections we have discussed control over the tortfeasor. However, control over the injured party is equally relevant in tort law. As in previous cases, controllers are usually parents or school, but this time there is no “liability for another”.

Poor parental supervision over a child is a ground for reducing the compensation for the damage the child has sustained. In a related case, the court stated: “The damage suffered by the five-year-old child may be contributed to his mother because she knew that in the vicinity of the playground there was a building construction site with unsecured wire mesh. She left the child to play unattended, hoping that the mother-in-law would occasionally check on the child, and thus she demonstrated poor parental supervision. As the mother’s contribution to damage caused is 30%, the defendant’s compensation to child will be reduced accordingly.”¹⁸ In a similar case, the court stated: “The injured minor (age 7), deprived of parental or adult control, suddenly ran behind a loaded cart onto the road, and was hit by a car; thus, the minor’s behavior contributed to the sustained injuries.”¹⁹

Inadequate parental supervision can even be a reason for reducing the liability of the owner/holder of a dangerous object, who is otherwise strictly liable. A judgment reads: “On the critical occasion, the injured party (girl) was without parental supervision and control in the defendant’s yard. As her parents knew that the defendant had a dog, there is a parental contribution to damage caused by a dog bite.”²⁰

In such lawsuits, it is essential to assess all the circumstances of the specific case. Even if there is a causal link between the child’s behavior and consequent harm, that fact alone does not automatically mean that parents contributed to the damage. For example, parents may not be held liable for inappropriate control in case where their child death was caused by electric shock incurred through child’s contact with a broken power line, if the accident occurred in the village where similar life-threatening circumstances are quite rare (Blagojević, Krulj, 1983: 601).

In the above situations, the supervisors (parents) and the controlled (children) are on the same side of the obligation relationship; they are the injured party. The roles are quite opposite in cases where school exercises poor supervision. Court practice abandons with such cases. In one of them, the court stated: “As for

18 Judgment of the Higher Court in Pančevo, Gž. 1427/2011.

19 Decision of the Supreme Court of BiH, Rev 43 0 P 013587 11.

20 Judgment of the Higher Court in Valjevo, Gž. 1213/2012.

injuries that the student sustained while performing gymnastic exercises during the physical education class, there is a strict liability of the school, under whose supervision such training took place. The court finds that the minor plaintiff did not contribute to his injuries."²¹ In another case, the court found that "The school is strictly liable for injury sustained by the student during professional practice organized by the school, which is in charge of supervising this form of educational activities."²² Here, control is not related to school's *culpa* but it serves as a causation element.

Liability for poor supervision over the injured child is not reserved for schools only; any institution that assumes the obligation to take care of minors will bear the consequences of improper control. For example, the defendant ("Children's Summer Resorts") assumed an obligation to supervise the minor plaintiff (aged 8) and look after his conduct and medical condition during the summer holiday at the seaside. Consequently, the defendant is liable for severe bodily injuries that occurred when the minor plaintiff fell from the window.²³

Taking care of someone's child does not imply strict liability of the supervisor for injury the child has sustained during supervision. School will be held liable for negligence if school employees have failed to exercise their supervisory duty. In a related case, the minor plaintiff was injured while climbing down the school roof, which he had climbed up of your own free will. Article 112 of the Serbian Act on the Basics of the Education System regulates students' duties. *Inter alia*, a student is obliged to observe the school rules and decisions of the school principal, teachers and school bodies. The verbal ban on climbing up issued by teacher was an adequate measure aimed at protecting the minor plaintiff. The teacher reasonably expected that the minor plaintiff was able to understand and abide by the ban. If the plaintiff had obeyed the order, the damage would have been prevented. The teacher acted as she was supposed to act in the given situation, and there was no negligence of any degree. The school was not obliged to put up a protective barrier to prevent students from climbing on the roof because it was reasonably expected that students should respect verbal orders given by teachers. Thus, the school is not liable for damage. The concept of proper supervision certainly does not require from teachers to physically prevent students to climb on the roof. Therefore, it is irrelevant whether the teacher was present in the school yard during the incident, nor does his/her absence constitute a failure of needed supervision.²⁴

21 Judgment of the Higher Court in Novi Sad, Gž 3488/2010.

22 Judgment of the Court of Appeal in Belgrade, Gž 6168/2013.

23 Judgment of the Supreme Court of Serbia, Rev. 301/1982.

24 Judgment of the Court of Appeal in Novi Sad, Gž-4061/2010.

5. Conclusion

Control over the behaviour of minors in tort law is manifested as an obligation to supervise their activities and overall behavior. Breach of this duty entails the controllers' civil liability. In Serbian law, control duty primarily falls on the parents or on a person who is a "*de facto* custodian". Parental control remains even when the child is entrusted to another, but then it turns into an organizational duty. In addition to direct supervision, the parent controls the child's education and upbringing. Failure to act in this capacity is *culpa in educando*. The boundaries of parental control are more prominent than ever before. Children spend extra time outside their home, apart from their working parents. Older minors are almost impossible to control. The concept of control presupposes that the controller is superior to the controlled one(s) but, in the field of information technologies, the children are superior to adults. Parental duty based on control alone sends a wrong message to children: "it is not your fault".

Minors are also supervised by the school or other legal entities that the child may be entrusted to. It should be presumed that the school bullying is predictable; otherwise, the injured party can hardly prove causation. Vigilant school supervision is not limited to observance and response; it should encompass preventive action, too. Educators must not be treated as guards, nor is that the purpose of school and schooling. Excessive control interferes with the child's development and is contrary to the educational goals.

The duty to control minors exceeds mere physical supervision. On the contrary, it is much more complex: as parents have a long-term commitment to a morally educate their child, so is the school obliged to take multiple measures to create a safe environment. These long-lasting forms of control have a far greater social and legal impact, and they are much more demanding than physical, direct control.

Parental and school liability for damage or injury caused by the child does not imply vicarious liability (in Serbian law) because they are liable for their own fault. Their guilt is manifested as acute failure to act, but there is a chronic failure as well (embodied in the parental *culpa in educando* and school failure to curb bullying). The control duty may imply an objective (strict) liability; however, the controller's fault is established by taking into account the subjective criteria related to the persons involved (the controller and the controlled) as well as the external circumstances of the specific case. While assessing control, in order to determine the liability of the controller, the following criteria must be considered: 1) the person under control (age, prior conduct, discipline, character); 2) the supervisor (possible handicap, workload); 3) the factual situation (the ratio of supervisors and the controlled, the intensity of danger/risk, the scope of damage, the time and place of the adverse event, cost-effectiveness of possible safety measures).

Besides the control over the tortfeasor, control over the injured party has a great legal significance. The controller and controlled can be on the same team (when both parents and child are in a role of the injured party). Inadequate control may be the reason for reducing the compensation, in case the injured party contributed to his/her own injury/harm. Quite the reverse, the controller and controlled can find themselves at the opposite poles of the obligation relationship, when a minor sustains injury/harm due to the school's failure to control his/her behavior. Inadequate control is the link in the causation chain, and controller is in the debtor.

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КОНТРОЛА ТУБЕГ ПОНАШАЊА У ОДШТЕТНОМ ПРАВУ

Резиме

Лице неспособно за расуђивање нема деликтну способност што значи да, у начелу, не сноси грађанску одговорност. У упоредном одштетном праву је уобичајено да за штету коју проузрокује такво лице, одговара онај ко је био дужан да води надзор над њим. Међутим, национална права се међусобно разликују по томе да ли надзорник одговара по основу објективне

одговорности или на основу кривице. У неким правима је реч о одговорности за другог, у другим се пак ради о одговорности због сопственог пропуста. У српском праву, за штету коју проузрокује душевно болесно лице или лице са сметњама у развоју, одговара субјекат који је на основу закона, одлуке надлежног органа или уговора, дужан да води надзор над њим, а родитељи одговарају за штету коју проузрокује другом њихово малолетно дете, осим када је дужност надзора поверена другом (нпр. школи).

*Појам који обједињује све поменуто случајеве, доктрина назива „*culpa in vigilando*“ тј. „*culpa in inspicendo*“, означавајући кривицу због недовољног надзора над непосредним штетником. Њен посебан, хроничан облик је „*culpa in educando*“, кривица родитеља због лошег васпитања или порочних навика детета, позната по тешком доказивању.*

*Обавеза контроле туђег понашања у литератури се помиње у анализама различитих проблема, као што су: одговорност државе за службенике; послодавца за запослене односно правног лица за органе; господара посла за помоћнике; у ситуацијама када се штета проузрокује бацањем предмета или просипањем из просторије. У набројаним случајевима јављају се и сродни, али ипак различити концепти – кривица због погрешног избора (*culpa in eligendo*) и пропуста да се дају одговарајуће инструкције (*culpa in instruendo*).*

Отварају се питања: како дефинисати обавезу контроле туђег понашања и ко је њен дужник? По којим критеријумима ценити да ли је надзор вршен исправно? Они се тичу или контролисаног лица (узраст, раније понашање, дисциплинованост), или надзорника (евентуални хендикеп, преоптерећеност обавезама) или самог чињеничног стања случаја (бројчани однос контролисаних и надзорника, интензитет опасности, висина штете). Нарочито је интересантно раздвајање обавезе надзирања (нпр. између родитеља и школе), односно могућност њеног делимичног или потпуног уступања на основу уговора дозвољеног у појединим правним системима.

Контрола туђег понашања је универзална и увек актуелна правна тема, од фрагмената Дигеста о чуварима менталних болесника и одговорности хабитатора за укућане, до модерних прилога о одговорности родитеља за дечије противправно деловање на интернету.

Кључне речи: *culpa, vigilando, inspicendo, educando, штета, контрола, понашање.*

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THE USE OF ILLEGALLY OBTAINED EVIDENCE IN CIVIL PROCEEDINGS**

Abstract: *The ancient dilemma about the use of illegally obtained evidence in civil proceedings has been renewed with pro et contra arguments through the development of the EU Civil Procedure substantive law as well as through the jurisprudence of European Court of Human Rights (ECtHR). Generally speaking, pursuant to the Draft European Rules of Civil Procedure, the use of illegally obtained evidence is prohibited and such evidence should be excluded from civil proceedings. In this paper, the author examines how the national legislations close the existing legal gaps in the national civil procedure legislation, and discusses some circumstances when it may be possible to depart from this rule. The exception “arises” from the “right to evidence”, which has been developed through the ECtHR jurisprudence. Thus, if the illegally obtained evidence is the only way to establish legally relevant facts in civil proceedings, it should generally be admissible. The national civil procedure legislation does not contain specific rules concerning illegally obtained evidence. Considering all the above, the author proposes possible solution(s).*

Key words: *illegally obtained evidence, European Rules of Civil Procedure, right to evidence.*

1. Introduction

The harmonization of rules of civil procedure at the European level had its momentum at the end of the 20th century. The instruments used for this purpose can be generally classified into three groups: coordination of national civil pro-

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ceedings; the establishment of minimum standards that will govern the country when creating civil procedure rules; and the concept of independent procedures (Hess, 2016: 7 - 9)¹. However, it cannot be said that significant progress in this area has been made. Although it can be considered that the European Union Civil Procedure Law is developing rapidly, keeping in mind the number of issued documents, the situation is actually different (Wagner, 2011: 4-8). Most of these documents are of limited scope and apply only to resolving cross-border disputes (horizontal harmonization). Other rules are not reserved only for cross-border disputes, but they are limited to certain areas, such as intellectual property rights and consumer rights (vertical harmonization). To make progress in this area, a working group² was formed in 2014, with the support of the European Commission, with the aim of establishing civil procedure rules in several areas. The solutions presented at the first presentation of the results of the working group are the working version and, as such, they are subject to change. However, these solutions are extremely significant because they provide guidelines for future development of the European Civil Procedure Law.

The proposed solution on the use of illegally obtained evidence in civil procedure attracted my attention for a number of reasons. First of all, this issue is not regulated by national legislation. Then, comparative legislations offer different solutions, and theory offers a different understanding of the concept of “evidence obtained in an illegal way”. The choice of the legislator to decide on a total prohibition or unlimited possibility of using this evidence, as well as a wide range of solutions that lie between these two extremes, shows the attitude of a particular legal system towards substantially important issues of (civil) procedural law in general. It is, above all, the choice between the principle of establishing the material truth and the principle of establishing the formal truth.

1 The first method is considered to be the least “invasive” because, in fact, there is no genuine harmonization of rules. It is still characteristic for divorce proceedings, arrangement of family relations and inheritance. The second method, however, acknowledges different procedural heritage and legal tradition. When it comes to the third method, two “independent” litigation procedures have been established at the EU level so far: the procedure for resolving disputes of small value, and the European procedure in patent litigations (Hess, 2016: 7 - 9)

2 Within the project ‘*Transnational Civil Procedure - Formulation of Regional Rules*’, 2014, the ELI (European Law Institute) and the UNIDROIT formed a working group, divided into several areas, consisting of 30 prominent legal experts. First, they started with the work of groups that were involved in delivering, previous and temporary measures, and access to evidence. Then, the work of the group expanded to the adjudicated matter (*res judicata*) and parallel proceedings and obligations of the parties, attorneys and judges; subsequently, their work included the issue of costs and decisions. They first presented the results of their work to the public at the conference ‘Building European rules of civil procedure’, 26 - 27 November in Trier (Germany) (<http://www.europeanlawinstitute.eu>, <https://www.era.int>, accessed 03/08/2016).

This article is, certainly, not aimed at analyzing in detail each of these questions, but these questions will be subject to analysis to the extent that is required to give a response to the key issues of this article: whether there is a need to regulate the use of illegally obtained evidence by the national legislation, and whether the proposed “European” rule is a good model for national legislation as well.

Given the fact that there is different terminology³ for illegally obtained evidence in the literature, further on in this article, the concept of “evidence” will be used as an “information, notice of a legally relevant fact” and the evidence as “any means of knowledge, which may convince the judge about the truth of a factual assertions”. For the purposes of this study, only the term “evidence” will be used for the sake of consistent terminology. The terms “inadmissible”, “prohibited” and “illegal” are also used as synonyms in the literature⁴. In this paper, the term “inadmissible” will be uses as a broader concept than “illegal evidence”, as it also refers to the evidence that is not obtained by execution of a crime, but a judicial decision cannot be based on them (e.g. a testimony of a lawyer).⁵ Therefore, the subject of this article is the evidence obtained in an inadmissible way during the commission of a crime and those that the court decision cannot be based on, because of violation of procedural law.

3 In Dika’s work (2016), the concept of evidence is used in the sense of “evidence as things and persons as carriers, source of information about facts and other items of evidence which allow the court to obtain this information by their investigation”; the term “evidence” is used in publications (Stanković: 2010, Milošević 2011 and Poznić, Rakic - Vodinelić 2012). In German literature, the term “Beweismittel” (evidence) is used (Rechberger, Simotta, 2010).

4 German theorist use the term “verboten” (forbidden) ((Rechberger, Simotta, 2010); Croatian authors use the term “inadmissible” (Dika: 2016); domestic authors use the terms “illegal” (Milosevic: 2011) or “inadmissible” (Stankovic 2010).

5 According to Dika (2016: 5 – 8), inadmissible evidence are inadmissible if their use is prohibited or restricted, to the extent it is limited. Restrictions may be absolute (e.g. Prohibitions of hearing the parties in the proceedings to secure evidence) and relative (prohibition of using evidence in order to establish certain facts, prohibitions which are derived from rules under which certain facts can be proved only by certain means of evidence and withholding evidence or testimony), amendable and irreversible, indirect and direct. In this paper, the concept of evidence used in the sense “evidence as things and persons as carriers, source of information about facts and other items of evidence which allow the court to obtain this information by their investigation”. Milošević (2011: 874) refers to all this evidence as those obtained in an illegal way, because they were obtained contrary to legal provisions, while others (Stanković, 2010: 414, Poznić, Rakic- Vodinelić, 2012: 251-252) consider under this term only the evidence obtained by violation of criminal law.

2. The use of evidence obtained in an inadmissible way in the civil procedure: the European perspective

Article 6 of the draft rules of the European Civil Procedure Law, which inspired this work, contains provisions on the use of evidence obtained in an illegal manner.⁶

The Article reads as follows: *In principle, evidence obtained by illegal means should be excluded from the proceedings.* In the commentary of this article, it is stated: “It is about a very controversial issue, especially when the evidence obtained by illegal means is the only thing that supports the party’s allegations. In these cases, it seems that the European Court of Human Rights established an exception, which derives from the so-called ‘Right to evidence’ (for example, *L. L. v France*)⁷. However, the general rule should be that this evidence should be excluded, especially when obtained by violating the basic rights of the parties or third parties. The exception to this rule should be interpreted narrowly and only after careful weighing of all interests in the process.”

The draft does not define the concept of evidence obtained in an illegal manner, nor gives their review, not even *exempli causa*. More importantly, the draft does not define the cases in which an exception to the above rule will be made. I consider that any deviation should be strictly regulated in order to avoid arbitrariness of interpretation and differences in the application of this standard.

3. Definition, classification and examples of comparative practice

In procedural law theory, “evidence obtained in an inadmissible manner” is defined in different ways. According to some authors, it can be understood in a narrow and in a broader sense. In a broader sense, this term includes methods of collecting evidence at the disposal of the court and methods of their testing; in the narrow sense, it implies only the former (Triva, Dika 2004: 483). The Austrian doctrine, however, comprehends the term “inadmissible evidence” in three ways. First, it is evidence that refers to the facts that cannot be determined

6 The solutions obtained by the working group are part of the material that was available to the conference participants. The latest report of the working group is available at: <http://www.unidroit.org/english/documents/2016/study76a/sc04/s-76a-sc04-02-e.pdf>, taken 08/24/2016.

7 In the case of *L.L. v France* (*LL v. France*, Application No. 7508/02), the procedure concerned the decisions made in the process of divorce and child custody. The applicant claimed that his wife came into an unauthorized possession of his medical records, and (mis)used it in court proceedings. This procedure is interesting not only because she has not received her husband’s permission to use this documentation but also because this is the documentation whose disclosure violates the principle of doctor-patient confidentiality.

in civil proceedings. Second, it concerns certain evidentiary instruments that cannot be used. Third, it refers to the method of obtaining evidence (Rechberger, Simotta, 2010: 431). In German theory, “inadmissible evidence” is the evidence that was derived from illegal evidentiary material (e.g. the testimony of the doctor), evidence obtained in an inadmissible manner (e.g. illegal surveillance), and so-called “informative evidence”⁸ (Musielak, 2007: 258).

In comparative legislations,⁹ the use of evidence obtained in an inadmissible manner is treated differently.¹⁰ Croatia, initially, did not have a standard regulating the issue of the use of this type of evidence in civil proceedings. However, amendment to the 2000 Croatian Constitution introduced a rule in Article 29 that evidence obtained illegally cannot be used in court proceedings¹¹. Although the Civil Procedure Act still does not include a standard which regulates the use of this evidence, the above rule, as a constitutional principle, applies to all types of procedures. As an example of this evidence, the following evidence is cited: evidence obtained through a criminal offense; evidence obtained by violation of personality rights, and evidence obtained as a result of disclosing an official secret (Triva, Dika 2004: 484). Only one judgment has been delivered so far on the prohibition of the use of evidence obtained by illegal means.¹² The decision was based on Article 35 of the Croatian Constitution, which protects the respect of private and family life, dignity, reputation and honor.

Macedonian law also does not include an explicit legislative or constitutional norm governing the use of evidence obtained in an illegal manner. In procedural law theory, it is considered that the use of such evidence is inadmissible because it is contrary to basic human rights, such as the right to privacy, but also the moral norms that have the same force as a cogent norm. Prohibition of using

8 More about “informative evidence” in: Dika, 2016: 27.

9 For a detailed review of EU countries legislation on the use of inadmissible evidence, see: <https://e-justice.europa.eu>, taken 26.08.2016. For a detailed comparative review, see in: Svilanovic, 1995: 607-613.

10 Until the mid-20th century, in American practice, dilemmas about evidence obtained in illegal way were only associated with criminal proceeding. However, there was a significant change in 1958. In case of *Lebel v. Swincicki* (Mich. 427, 93 N.W.2d 281 (1958)), evidence obtained in illegal way was for the first time excluded from litigation proceeding. It was a toxicology report of a patient who did not give his consent that his blood can be taken for analysis (Shepherd, 1960: 155). For more detail about the use of evidence obtained in illegal way in the USA criminal and litigation proceeding, see: Milošević, 2011: 878 - 879.

11 The Croatian Constitution, Official Gazette 56/90 with subsequent amendments. Although there have been some doubts whether this view of the Constitution applies to civil proceedings, since it is written in the text between provisions related to criminal proceeding, the Croatian doctrine keeps an attitude that it applies to this type of proceeding (Dika, 2016: 11).

12 The Croatian Supreme Court decision Rev-x 35/09-2 (Aras Kramar, 2015: 38).

such evidence should specifically refer to the evidence obtained by using modern technology (Zoroski - Kamilovska, 2007: 408).

Civil proceeding legislations of Slovenia, Bosnia and Herzegovina and Montenegro do not regulate this issue either. The Supreme Court and the Constitutional Court of Slovenia decided on the same case, in which phone footage was used as proof, taken over the speaker without the knowledge of one of the litigants, but no official attitude was taken concerning this issue (Zoroski - Kamilovska, 2007 405 - 406).¹³ All of the above legislations contain provisions relating to persons who can refuse to testify.

Civil Procedure Act of Austria¹⁴ does not contain a provision which explicitly refers to the use of evidence obtained in an inadmissible manner. In principle, the fact that evidence was obtained in an inadmissible way is not a reason for it to be excluded from the evidentiary procedure (Rechberger, Simotta, 2010: 432). This particularly refers to the cases when the norms of private law are violated in order to obtain the evidence, or even when a misdemeanor was committed (Fasching, 1990: 935-937; cited after: Nunner - Krautgasser, Anzenberger, 2015: 44). However, evidence will be unacceptable if it is obtained during the commission of criminal act that violates the basic constitutional norms (Fasching, 1990: 937, cited after: Nunner - Krautgasser, Anzenberger, 2015: 45), human rights and fundamental freedoms guaranteed by the highest international laws, or provisions of civil procedure (Fasching, 1990: 933, cited after: Nunner - Krautgasser, Anzenberger, 2015: 45). The provisions of civil procedure, which indirectly refer to the illegal evidence, are contained in Article 320 of the Civil Procedure Code of Austria. This Article refers to the prohibition of testimony; thus, a person who is not capable of reproducing information that he/she she has heard or seen is not allowed to testify; nor can a person disclose the confidential information he/she has been entrusted in strict confidence (such as a priest or a mediator) or the information which represents a state secret, unless the person is released from the obligation to keep the secrets.

The German Civil Procedure Act¹⁵ does not contain an explicit provision (ban) on the use of evidence obtained in an illegal manner. However, Article 383 of this Act includes a lists of persons who may refuse to testify: priests who have been entrusted some confidential information in the course of religious services; persons who participate or have participated in the preparation, manufacture or distribution of print media or broadcasting radio and television programs, if

13 Slovenian Supreme Court decision No. II Ips 80/98 and Slovenian Constitutional Court decision number 472/02.

14 *Zivilprozessordnung*, RGBl, 113/1895 with further changes and additions.

15 *Zivilprozessordnung*, BGBl. I S, 3202, with further changes and additions.

it constitutes a violation of the confidentiality of the source of information; and persons who are obliged, as part of their professional duty or status, to keep professional secrets either on the basis of the law or given the nature of activities they perform. The same article provides that, even if these persons agree to testify, their testimony should not go in the direction that would be able to breach the duty of confidentiality. Although there is no explicit legal prohibition, the courts will, as a rule, refrain from basing their decisions on evidence obtained by the violation of constitutionally guaranteed fundamental human rights (Wolf, Zeibig, 2015: 23).

4. Legal framework on the use of evidence obtained in an inadmissible manner: domestic law and practice

The Serbian Constitution contains no provision governing the use of evidence obtained in an inadmissible way in legal proceedings or otherwise. The Constitution norms¹⁶ that can be put into the context of evidence obtained in an inadmissible manner are those concerning the inviolability of home (Article 40), the secrecy of letters and other means of communication (Article 41), and the protection of personal data (Art. 42).

The Civil Procedure Act¹⁷ also does not regulate the use of evidence obtained in an inadmissible manner, and contains no definition of this important concept. As mentioned above, domestic authors do not define this term. The same conclusion applies to the current case law.¹⁸

As it has already been mentioned that inadmissible evidence is considered to be all the evidence that a judicial decision cannot be based on, we will focus on the provisions of the Civil Procedure Act concerning the prohibition of testimony. Article 247 of the Civil Procedure Act prescribes that a person, whose testimony would violate the duty of keeping a secret, cannot be a witness, unless such person is released of that duty by the the competent authority. Article 248 states that a witness may refuse to testify¹⁹ about: the confidential client-attorney

16 Constitution of the Republic of Serbia, Official Gazette RS, 98/2006.

17 Civil Procedure Act, Official Gazette RS, 72/2011, 49/2013 - decision CC, 74/2013 - decision CC и 55/2014, hereinafter LCP as well.

18 The literature still states a B&H SC decision from 1978 on admissibility of use of a tape-record (Poznić, Rakić - Vodinelić, 2012: 252).

19 Let me draw your attention to the incorrect use of the phrase “a witness may withhold the testimony”, which indicates that the decision to deny the testimony is a product of his free will, not a clear legal prohibition, actually. The Advocacy Act (Official Gazette RS, 31/2011 and 24/2012 - CC decision) in Article 20 provides that an attorney shall, in accordance with the Statute of the Bar Association and the Code, keep as a professional secret and take care

information; the information that the party or other person entrusted to the witness as a priest; the facts that the witness found out as a lawyer, doctor or during performance of any other profession, if there is an obligation of confidentiality and keeping the professional secret.²⁰

Yet, the question is what mechanisms are available to a client (party) if the witness acts contrary to the prohibition and the court bases its decision on his/her testimony, or if the court fails to warn a witness about the ban on testifying. Article 374 of the Civil Procedure Act explicitly enumerates the important violations of civil procedure. As basing the decision on inadmissible witness testimony is not among them, one can only conclude that this is a relatively substantial violation of civil procedure, which is assessed by the court on the merits of each individual case. According to Article 141 of the Criminal Code, the unauthorized disclosure of a secret is a criminal act.²¹ With this in mind, the evidence obtained contrary to this Article may be said to represent evidence obtained illegally and evidence obtained in an inadmissible manner.²² A lawyer, a doctor or other person, who without authorization discloses a secret learned in the exercise of his/her professional duty, shall be punished with a fine or imprisonment up to one year, unless the secret is disclosed in the public interest or in the interest of another person, which prevails over the interest of keeping the secret. Article 142 of the Criminal Code prohibits the violation of the secrecy of

that persons employed in his law office do it as well, whatever the party or his authorized representative entrusted him, or anything that he finds out or obtains in a different way, during and after the termination of representation in a case where he provides legal assistance. (Official Gazette RS, 31/2011 and 24/2012 - decision CC).

20 This person may be a mediator as well. The Mediation Act (Official Gazette of RS, 55/2014), in Art. 13 para. 2, provides that the parties, their legal representatives and proxies, mediator, third parties who attend the mediation process, and persons who perform administrative services for the mediation are obliged to keep as a secret every information, proposal and statement regarding the mediation, and are liable for damage resulting from a breach of this obligation. The Public Information and Media Act (Official Gazette of RS, 83/2014 and 58/2015), in Article 52, stipulates that a journalist is not obliged to reveal the source of information, unless the information pertains to the offense or the offender, for which the punishment may be imprisonment of at least five years, if the data about the crime cannot be obtained in any other way.

21 Criminal Code, Official Gazette RS, 85/2005, 88/2005 - rev., 107/2005 - rev., 72/2009, 111/2009, 121/2012, 104/2013 и 108/2014. About the evolution of this prohibition in domestic criminal proceeding legislation, see in Brkić. 2011: 183 - 214.

22 In Article 426, the Civil Procedure Act lists the reasons for retrial. These reasons, however, relate only to the decision which was based on the false testimony of a witness or an expert witness, or when the court's decision was a result of a criminal act of the judge, the judge's legal representative or representative of a party, the opposing party or third party, that is not of importance in regard to the evidence obtained in an inadmissible manner.

letters and other mail; Article 143 prohibits unauthorized wiretapping and recording; Article 144 prohibits unauthorized photographing; Article 145 prohibits unauthorized publication and presentation of another's writings, portraits and recordings; and Article 146 prohibits unauthorized collection of personal data.

An example of the Criminal Procedure Code²³ shows that the use of inadmissible evidence was given a thought when creating legal provisions. This Code unequivocally prohibits the use of evidence obtained in an inadmissible manner.²⁴ Article 16 (paragraph 1) stipulates that judicial decisions cannot be based on evidence which is, directly or indirectly, by themselves or by the way of being obtained, inconsistent with the Constitution or this Code, other law or generally accepted rules of international law or ratified international treaties, except in the proceedings carried out for the purpose of obtaining such evidence. According to Article 84 of this Code, such evidence cannot be used in criminal proceedings. They are extracted from the file, put in a separate sealed folder and held by the judge in charge of conducting the preliminary proceedings until the final decision in the criminal proceedings is rendered, after which they are destroyed and the relevant record (minutes) is made about that. The Criminal Procedure Code lists the persons who are excluded from testifying (Article 93); Article 94 lists the persons who are exempt from the duty to testify, whereas Article 94 (para. 4) notes that a judicial decision cannot be based on the testimony of persons examined contrary to the rules in these two Articles.

Domestic scholars have different views in terms of the possible use of evidence obtained in an inadmissible manner. According to one view, the use of such evidence is not permitted because of violation of personal rights, guaranteed by the Constitution. According to another view, the illegality in obtaining the evidence is one matter (a criminal offense), and the use of such evidence is another matter. Thus obtained evidence may be used in the civil proceedings for the purpose of establishing the truth. The objection of the other party to using the evidence obtained in this way represents an act of preventing the use of evidence and the abuse of the judicial authority (both opinions cited after: Stanković, 2010:

23 Criminal Procedure Code, Official Gazette RS, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

24 In the criminal procedural law theory, this prohibition is interpreted in different ways. Krapac, 2010: 1208 believes that this is due to the rule of law principle which limits the state in its repressive activities: the state may not use all measures because, on the one hand, it would take away the moral force of a criminal conviction and, on the other hand, it would violate the postulate of public punishment with only minimal restrictions of fundamental rights and freedoms. The arguments also include fairness and protection of the defendant's private interests by limiting the ways of truth-finding, in order to ensure the observance of fundamental rights and freedoms (Ilić, 2015: 152).

414).²⁵ In favor of the thesis that evidence obtained in an inadmissible manner can be used in civil proceedings, some authors note that there is no legal or constitutional provision that prohibits the use of such evidence, and that this view is based on the interpretation of the Civil Procedure Code, which does not make the use of evidence dependent on how it is obtained (Poznić, 2009: 58). As a supporting argument, it is noted that, according to (the former) Article 7 para. 3 of the Civil Procedure Code, the court was authorized to propose the evidence that the parties did not submit if such evidence was relevant to the decision-making process, which is not the case nowadays. On the other hand, the European Court of Human Rights is said to be moving towards the prohibition of the use of such evidence because it violates the litigants' right to privacy (Poznić, Rakic- Vodinelić, 2012: 251-252).²⁶

5. The principle of establishing the truth, or what lies behind the scene of using the inadmissible evidence

Various factors affect the legislator's choice whether to approve the use of evidence obtained in an inadmissible manner or not. An important factor is the attitude towards establishing the truth in civil proceedings, and the principle of free and legal assessment of the evidence.²⁷

25 Notably, this issue is given little attention in the textbook literature; considering the absence of legislation, it is completely understandable that domestic authors have not tackled this question at all.

26 In this paper, the decision of *Kan v United Kingdom* (Application No. 35394/97) is cited. The applicant was convicted in criminal proceedings as part of a criminal group dealing with drug trafficking. The police came by that knowledge on the basis of a recorded conversation through surveillance equipment and wiretapping set in the house of another suspect. The European Court of Human Rights found that it was not its task to decide whether a certain way of obtaining evidence is inadmissible but to assess whether the proceedings as a whole was in line with the right to a fair trial. This implies evaluation of "inadmissibility" in each specific case and evaluation of the nature such infringement, i.e. if there has been a violation of any other rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this particular case, the Court decided that there was no violation of Art. 6 of the ECHR, but that there was a violation of Art 8 paragraph 2, since the violation of the right to privacy was not in accordance with the law. The first decision in which the question of the use of evidence obtained by illegal means was opened is *Schenk v Switzerland* (Application No. 10862/84) on secretly filmed interview in which the applicant ordered the murder of his wife. Among the recent decisions, we should note the case *Jalloh v. Germany* (Application No. 54810/00), because it was for the first time that ECtHR introduced an absolute ban on the use of evidence obtained in an illegal manner by the use of physical force.

27 The concept of truth is primarily philosophical. Without intention to discuss it here, I note the conception that "science should, preferably, not deal with the issue of truth, and should be satisfied with the establishment of the facts, in order to possibly predict what is

There are two principles of establishing the truth: the principle of material truth and the principle of formal truth. The principle of material truth means that a judge will accept a fact as the base for decision only when he/she is absolutely certain, on the grounds of his free judicial conviction, that the fact actually exists. On the other hand, the principle of formal truth implies that the judge will acknowledge the fact only when the legal conditions are met, regardless of his/her own belief about the truthfulness or falsity of the fact (Marković, 1957: 104).²⁸

The legislator's attitude to the principle of establishing the truth has changed, depending on the socio-economic formations and legal-political objectives pursued in the litigation procedure. The legislation from the early and mid-20th century gave primacy to the principle of establishing the material truth;²⁹ considering all limitations to this principle which were prescribed by law, the subsequently enacted civil procedure legislation may be said to implicate that "truth in litigation cannot be called material but a more perfect form of formal truth" (Grubiša, ODVJ., 2/1961 cited after: Poznić, 2009: 29).³⁰

Since the concept of establishing the material truth has been abandoned in modern Serbian civil procedural law, the pursuit of the truth – as the basic argument supporting the thesis that the decision should be based on evidence obtained in an inadmissible way – seems to be losing its persuasive edge.

likely to have occurred earlier under similar terms and circumstances relatively frequently "(SH-p. Müller, *Was ist Wahrheit?* 1989, p. 7 (preface), cited after: Deckert, 1996: 1168).

28 The terms "truthfulness" or "falsity" of the facts were criticized. It is believed that a fact can either exist or not exist, and that the knowledge of the facts, or the client's claims of knowing/being aware of those facts, may be true. In the context of documents, the term "truthfulness" is a synonym for "authenticity" (Triva, Dika 2004: 483-484).

29 The literature insists on the principle of establishing the material truth associated with ideological reasons and the introduction of the socialist legal order (Poznić, Rakić - Vodinelić, 2012: 248).

30 The 1929 Act on Judicial Procedure marked a departure from the principle of disposition in favor of the principle of establishing the truth (Arandelović, 1932: 12). The 1955 Civil Procedure Act favoured the principle of establishing the material truth but it was not fully exercised. The cause for this is the dispositive nature of subjective civil rights, legal certainty and the need to concentrate and speed up the process (Marković, 1957: 116). The 1976 Civil Procedure Act established the principle of (material) truth that was primarily limited by a provision that the grounds of the court decision were the facts that the Court, as a rule, learned from the parties. The same would be true for the Civil Procedure Acts adopted in 2004 and in 2009. The 2011 Civil Procedure Act includes specific provisions governing the relationship between the principles of investigation and presenting evidence by parties. (Petrušić, Simonović, 2011: 28), which is also reflected on the principle of establishing the truth.

6. Concluding Remarks

In the current legislation and legal theory in the field of Civil Procedure law, there is no clear and definitive answer to the question whether the civil court proceedings may use evidence obtained in an inadmissible manner. The term "evidence obtained in an inadmissible manner" is not defined, and it is often explained by using synonyms: "illegal" and "unauthorized" evidence. The Civil Procedure Act does not provide penalties for the use of such evidence in proceeding, nor does the Constitution contain a norm that would regulate the use of inadmissible evidence.

The fact is that the legislator did not prohibit the use of such evidence in civil proceedings, as opposed to criminal proceedings.³¹ Although the European Court of Human Rights has not issued an unequivocal opinion about the use of inadmissible evidence, recent case law of the Court supports the thesis that the evidence cannot be used if it is obtained contrary to some of the rights envisaged in the European Convention for the Protection of Human Rights and Fundamental Freedoms, most frequently the right to personal and family life.

De lege ferenda, I believe that this issue should be regulated by enacting a clear legal norm, which should stipulate what evidence is considered to be inadmissible, what evidence is deemed to be obtained in an inadmissible manner, whether the use of such evidence constitutes a violation of civil procedure rules, and what type of violation it involves. This can be done either by introducing a legal provision in the Civil Procedure Act or by envisaging it as a constitutional principle, following the example of the Croatian legislation. The solution contained in the EU Civil Procedure Law may serve as a guideline but the legal norm should be more precise and any exceptions should be clearly defined, in order to avoid different interpretations and the inconsistent application of the same rule by different courts.

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³¹ Notably, unlike the 1990 Constitution of the Republic of Serbia, the current Constitution does not include a provision which states that "anything is allowed that is not prohibited by law".

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УПОТРЕБА ДОКАЗА ПРИБАВЉЕНИХ НА НЕЗАКОНИТ НАЧИН У ПАРНИЧНОМ ПОСТУПКУ

Резиме

Стара дилема о могућности употребе доказа на незаконит начин у парничном поступку и њеној контроли обогаћена је новим pro et contra аргументима развојем Грађанског процесног права ЕУ и кроз јуриспруденцију Европског суда за људска права. Начин “попуњавања” законске празнине у националним прописима којима је уређена парнична процедура сагледан је у светлу Предлога правила европског грађанског процесног права којима је, начелно, забрањена употреба доказа прибављених на незаконит начин. Размотрени су, такође, и случајеви у којима би се могло одступити од овог правила, а тичу се ситуација када је незаконито прибављен доказ једини којим се могу доказати правно релевантне чињенице у парничном поступку. На тај начин штити се тзв. “право на доказ”, развијено кроз праксу Европског суда за људска права.

Кључне речи: докази прибављени на незаконит начин, парнични поступак, право на доказ.

TRADE LAW AND ECONOMICS

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MANAGEMENT AND CONTROL OF EUROPEAN STRUCTURAL AND INVESTMENT FUNDS IN BULGARIA

Abstract: *The present paper aims to review the Management and Control system for public funds from European Structural and Investment Funds (ESI Funds) in the Republic of Bulgaria. The main concepts serve as basis for the recently adopted Management of ESI Funds Act, effective as of December 2015¹.*

Keywords: *Cohesion policy, Management and Control, Financial Law, Administrative Law.*

1. Challenges and lessons learnt from programming period 2007-2013

The idea for a designated Management of ESI Funds Act is not novel. It was discussed as early as the onset of preparations for the 2014-2020 programming period, with view of the experience of several other EU Member States, such as: Denmark, Estonia, Greece, Latvia, Slovakia, Finland and Sweden. All of these countries have adopted specific legislation regulating EU funds. The argument in support of a specific Act is that the system of by-laws regulating the implementation of programmes for the 2014-2020 programming period (Council of Ministers of RB. Single Information Portal) in Bulgaria has so far been characterized by:

- A lack of a unified, flexible, comprehensible and easily-applied approach to management of ESIF programmes, the management authorities of which tend to each use different procedures for project and programme implementation;

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1 Promulgated, SG No. 101/22.12.2015, amended and supplemented, SG No. 43/7.06.2016

- Multiple exceptions or the inclusion of specific provisions even where general rules apply, which results in fragmentation of programme-specific rules and unnecessary complexity; and
- Severe fluctuations and lack of predictability of the environment (Audit Agency, 2014).

2. Legal Doctrine and Recent case law of the Supreme Administrative Court

2.1. The Legal Doctrine

The representatives of Bulgarian administrative and financial legal doctrine share the opinion that: the state, represented by its bodies within the system of public funds from ESI Funds and the Common Agricultural Policy (managing authorities, certifying authorities, audit authorities), *does not stand as an equal party within public relations in the system and is not devoid of its imperium*, especially when participating in shared management of the funds together with the European Commission in accordance with Article 4 and Article 317 TFEU.

The very terms used to explain the legal nature of relations within the system of EU funds are related, both terminologically and semantically, to public law, finance, budgeting, imperative legal norms and authoritative regulation: “management and control system”; “public finances”²; “European funds”; “state aid”; “public funds”; “grants”; “public state and municipal receivables”; “public expenditure”, etc.

According to the generally adopted financial and administrative legal theory, “a central place in the national financial system is held by the budget³, which concentrates the national centralised fund of cash resources.... The significance of the budget is determined not only by its volume, but also by its leading role in the financial system... The law is the instrument ensuring implementation of the financial policy of the state, and henceforth – of the social and economic development programme for the country” (Petkanov, G., 1988).

It must be noted that when attempting to clarify the legal nature of the relations within the system of public funds from ESI Funds, an interdisciplinary approach would be appropriate, given that the relations arising in connection with the

² Public Finance Act, promulgated State Gazette No. 15/15.02.2013, effective 1.01.2014, last amended SG. No 43/07.06. 2016

³ Several authors – legal experts – have turned their attention towards budget law: Angelov, A. (1979); Kuchev, S. (2004); Stoyanov, I. (2011); Kostov, M. (1976); Hristoforov, V. (1949-1950); Petkanov, G (1984).

management, coordination and control of these funds cannot be qualified solely as financial legal relations (budgetary relations).

Public relations which arise, develop and are settled within the system of public funds from ESI Funds are hence presented from two points of view: (1) *as an aggregation of financial legal relations related to management and control; and (2) as the sum of state authorities carrying out financial activities.*

The Cohesion Policy for 2014-2020 will serve as a medium and long-term investment policy. Hence, with view of the complementary effect of European funds for the development of national economy and for successful intervention in reform-requiring fields, coordination between national and EU policies must be strengthened. Transparent public finances and a clear vision for the overall development of the country will be necessary in all areas. The new Cohesion Policy rules require unconditional adherence to strict budget discipline by all constitutional players participating in the financial system of the Republic of Bulgaria. This, in principle, applies to all member states.

The key word at both European and national level should be coordination of EU funds management between all institutions at European and the national level, respectively, given that ESI Funds are managed jointly by the European Commission and Member States under the rules of shared management as per Article 59 of Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, and Articles 72, 73 and 74 of the newly adopted general Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

In theory, the coordination of common European objectives at the European level is reflected in the Europe 2020 Strategy. Strategy implementation is supported by the Multiannual Financial Framework for 2014-2020 (i.e. the budget for Europe 2020), the expenditure side of which determines ESI Funds contributions. As for coordination between individual Structural and Investments Funds at European level, this has already been achieved through the adoption of the above Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013. This Regulation reflects Europe 2020 through

the 11 thematic objectives to be addressed by the funds. As for individual Member States, national-level coordination with common European and national objectives should be achieved by means of the Partnership Agreement and the individual programmes. Additionally, coordination in the field of management and control of public relations arising within the system of ESI Funds contributions was achieved in Bulgaria through the adoption of an Act regulating ESIF management.

Shared management (Article 4 of the Treaty on the Functioning of the European Union – TFEU; the Financial regulation and ESI Funds Regulations) presumes coordination of management of EU funds between all responsible institutions, strengthening of administrative capacity and sound management.

How does Bulgaria address the challenges of the new cohesion policy? Mainly by using legislation as a social regulator. According to the Regulations, *the legal and institutional framework for ESI Funds management and control must be set up in accordance with the constitutional structure and traditions of each Member State.*

2.2. Recent case law of the Supreme Administrative Court

The above thesis is also upheld in the practice of the Administrative courts and the Supreme Administrative Court (SAC). In its more recent practice, the SAC has abandoned its notion of the civil-law nature of relations between the Managing Authority/Payment Agency. The motives noted by the court in its Decision No 2126/30.03.2015 under administrative case No. 8513/2013, reviewed by the Administrative Court of Sofia, are as follows:

“Regarding admissibility of the appeal:

1. Provision of financial assistance for projects under Operational Programmes (OP) takes place in two phases: approval, resp. rejection of the application, and grant provision. In the first phase, the relations between the parties are entirely administrative in nature and there is no contradiction in law enforcement in this case. Ambiguity arises in the classification of the second element – contract conclusion and implementation. This ambiguity should not be resolved on the basis of formal assignment of the arising rights and obligations to contractual law, but rather on the actual legal situation of the parties and the specifics of the relations between them. The managing and contracting authority under the respective OP are delegated certain statutory functions, namely for project approval and public spending (funds of mixed origin — in the case of co-funding between state budget, and Funds from the European Regional Development Fund). This combination between the functions of a state body and

budget spending authority (for both state and European funds) marks the said authority as a subject of public law — bearer of rights of an administrative and legal nature, regardless of the fact that it has taken on the ancillary status of a contract party. ... This function of the contract does not affect the nature of the legal relations (analogous to the theoretical concept for the ‘administrative contract’, the characteristics of which have, as yet, not found a legal expression).

2. The fact that the MA is an administrative authority within the meaning of § 1, item 1 of the Supplementary Provisions of the Administrative Procedure Code (APC) combined with the nature of the rights exercised thereby, imparts on the challenged decision the characteristics of an individual administrative act (decision) as per Article 21, para 1 APC. The decision reflects negatively on the property of the municipality because the deduction reduces the amount of the advance payment under the contract of 2012, i.e. the legal consequence of the decision is a direct effect on the rights of the addressee as an objective element of the administrative act concept. The proposition for admissibility of legal appeal against decisions imposing deduction of amounts under grant agreements⁴ is adopted in more recent SAC case law (See, for example, Decision No 10168/18.07.2014 under administrative case No № 8672/2014, ruled under similar proceedings).⁵

Decision No 10878/19.10.2015 under administrative case No. 1039/2015 SAC, panel 8, notes that: Issues similar to the reviewed disputable legal issue have already been discussed as part of the interpretative portion of Interpretative case No 1/2015 of SAC’s General Meeting of Civil Divisions under item 1, namely: “What is the legal nature of decisions made by the bodies of Agriculture State Fund Paying Agency under Article 26, para 1, item 3 and Article 33 of Ordinance No 9/2008 issued by the Minister of Agriculture and Forestry and are they appealable under APC?”. Although as yet unpublished, a judgement has been reached under this issue with the majority of judges in the Supreme Administrative Court being of the opinion that in this case, which is analogous to the disputed issue, such acts are subject to appeal under APC as individual administrative acts.”

4 See: Joined Cases C-260/14 and C-261/14

5 The same argument is supported in: Decision No 15062/12.12.2014 under administrative case No 14629/2014, 5th panel of the Supreme Administrative court; Decision No 930/27.01.2015 of the SAC under administrative case No 13877/2014, panel 3; Decision No 10168/18.07.2014 under administrative case No 8672/2014; Decision No 5615/18.05.2015 under administrative case No 1150/2015, panel 3, Division I of SAC; Decision No 13764/16.12.2015 under administrative case No 7197/2015, panel 7 of SAC.

Interpretive Decision No 8/2015 under Interpretive Case No 1/2015 (Supreme Administrative Court, 2015) was issued and published on the website of the Supreme Administrative Court on 11.12.2015.

2.3. The New Management of ESI Funds Act

The motives underpinning the adoption of the Act specify that: The scope of the Management of ESIFunds Act includes the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund, regulating common procedures for absorption of the funds provided thereunder during programming period 2014 – 2020. The main challenge faced during drafting of the Act was related to the creation of a predictable and effective legal framework regulating the management of European funds. The positive outcomes expected through adoption of the Act are:

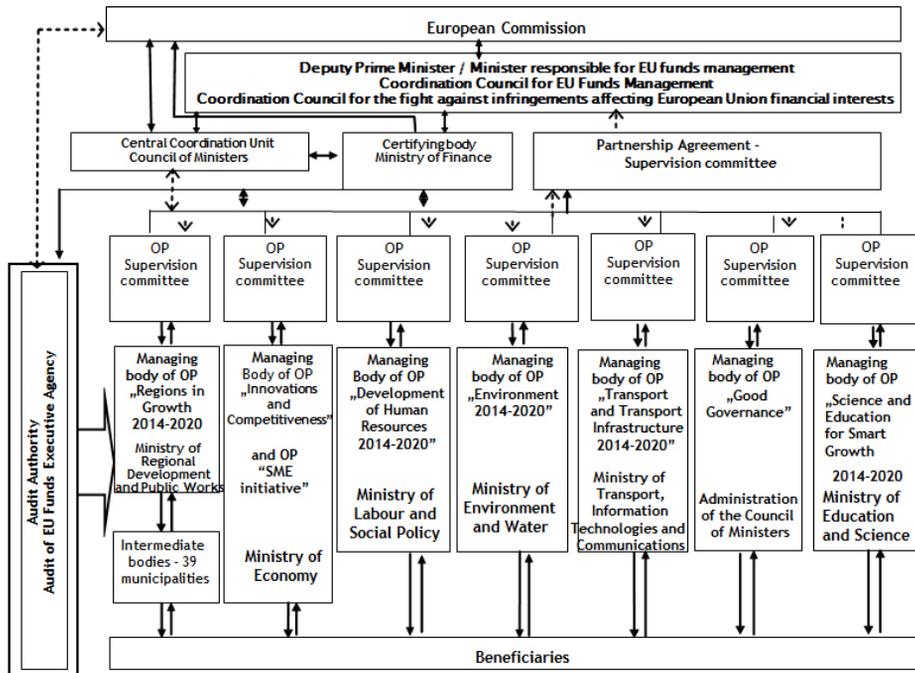
- Creation of a predictable environment for implementation of programmes funded through ESI Funds, with clearly defined rights and obligations for all process participants;
- Elimination of the existing fragmentation in legislation by eliminating the defects of existing by-laws;
- Codification and unification of implementation procedures;
- Endorsement of the public law regime in the relations between managing authorities and beneficiaries of financial aid, which corresponds to their subject – funds from ESIF and public funds;
- Introduction of accelerated appeal procedures, which will not impede the process of absorption of resources from ESI Funds.

In this respect, the New Act will ensure:

- Retaining of the existing institutional framework;
- Strengthening of coordination at all management and control levels;
- Predictability;
- Transparency and a more comprehensible and efficient system of EU funds as part of the financial system of the Republic of Bulgaria;
- Unification and simplification of procedures;
- Grant provision under an administrative contract or individual administrative act;

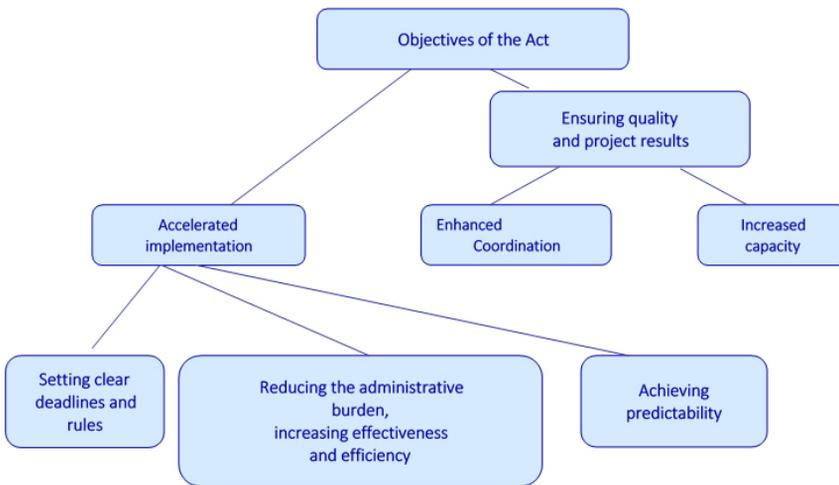
- Placing of state receivables from financial corrections due to irregularities on the same footing as public state receivables for the programming period 2007-2013 and programming period 2014-2020;
- Efficient protection of the rights of beneficiaries before administrative courts and the SAC. This Act will be special with regard to the APC.

Institutional Framework⁶:



The main objectives of the Acts are as follows:

6 Source: Ministry of Finance



The Act regulates that financial aid will be provided by Managing Authorities/ Paying Agency to beneficiaries on the basis of an administrative contract⁷, which is a relatively new concept, or an individual administrative act. “Public contract”, “public body”, “administrative legal relations”, “public interest” — these are just some of the terms which underlie decoding of the legal nature of the “administrative contract”.

In this light, the Council of Ministers, when submitting the draft, motivates its decision as follows: „Legal regulation focuses on the establishment of clearly defined administrative relations between managing authorities and beneficiaries. These relations arise from two different institutes of administrative law: The Administrative contract is the main form for grant provision; financial corrections, on the other hand, are determined, in terms of grounds and amounts, by means of an individual administrative act. As opposed to the individual administrative act, the administrative contract is not defined as a legal concept within the codification of the administrative process, except as a variant to the agreement under Article 20 of APC. At the same time, the opportunities provided by this institute have been investigated in depth by Bulgarian administrative doctrine; it has been adopted in the positive law of several European countries, where it has found its place as the regulator of relations arising in the course

7 Within the meaning of this Act: “Administrative contract” means an express statement of the will of the head of the managing authority for the granting of financial support through ESIF resources whereby and with the consent of the beneficiary rights and obligations shall be created for the beneficiary to implement the approved project. The administrative contract shall be drawn up in the form of a written agreement between the head of the managing authority and the beneficiary, replacing the issuance of an administrative act.

of provision of financial support through European funds. The same legal logic, which supports establishment and development of the relations between managing authority and beneficiary along the plane of administrative relations, is also the cornerstone for clear regulation of the financial corrections procedure. This procedure culminates in an act, which expresses the prerogatives of power of the administrative authority. With view of the requirement of Article 74 Regulation (EC) No 1303/2013, namely that Member States shall ensure that effective arrangements for the examination of complaints concerning the ESI Funds are in place, the draft introduces clear regulation regarding the right of beneficiaries to protection against decisions of the administrative bodies, based on the general provisions of Article 120 of the Constitution of the Republic of Bulgaria. Given the necessity to guarantee efficiency in the absorption of ESIF funds and to minimise the risk of loss, the draft envisages several specific rules with regards to court control over administrative decisions which derogate from the general appeal process under APC.“

The Act also provides the basis for the establishment of the Fund of Funds⁸, which will function based on agreements with the managing authorities of the respective Operational Programme. Financial instruments are envisaged for five programmes, which will combine grants and financial instruments and one operational programme, which will depend entirely on a financial instrument.

The Act also sets out special provisions for public procurement and contract award which will be applicable to beneficiaries outside the scope of the Public Procurement Act; the rules for application of the Act with regard to grant award, procurement, irregularities and sanctions, which will be adopted within a six-month period of the Act's entry into force.

Given the above, the Republic of Bulgaria will be able to respond, by means of the adopted legal and organisational changes, to all management and control challenges related to the programmes and the new cohesion policy rules.

3. Conclusion

To conclude, regulation of the budgetary relations in the Republic of Bulgaria, as described above, by means of a designated legal act ensures solidity and predictability of legal rules. Accurate definition of the competences of state authorities and clarification of the procedures providing protection against their acts and decisions will ensure effective, efficient and economical use of resources from European funds and will guarantee the rights of organisations using such resources for their activities.

⁸ Fund Manager of Financial Instruments in Bulgaria EAD

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**УПРАВЉАЊЕ И КОНТРОЛА ЕВРОПСКИХ СТРУКТУРНИХ
И ИНВЕСТИЦИОНИХ ФОНДОВА У БУГАРСКОЈ**

Резиме

Рад има за циљ да размотри неколико актуелних питања у вези са проблематичним областима у систему управљања Европским структурним и инвестиционим фондовима (ЕСИ фондови) у Републици Бугарској, чијим решавањем се тренутно баве представници Владе, бугарска Народна скупштина, Врховни управни суд, правна пракса и академски кругови. Главни концепти служе као основа за недавно усвојен Закон о управљању ЕСИ фондовима, који је ступио на снагу децембра 2015. године. Информације, концепти и импликације наведене у овом раду могу допринети бољем разумевању кохезионе политике и контроле управљања, као и досадашњих достигнућа у Бугарској. Имајући у виду да је буџет (европски и национални) у средишту система јавних средстава из ЕСИ фондова, усвајање новог закона довело је до поједностављења процеса унутар система на националном нивоу. Читава филозофија овог Закона произилази из идеје да поједностављење процеса на националном нивоу захтева координацију јавних односа у циљу контролисања и управљања ЕСИФ средствима, као и одговарајуће национално суфинансирање, чиме би се законски регулисала ова материја у складу са уставним системом, правном традицијом и праксом државе чланице.

Кључне речи: кохезиона политика, управљања и контрола (ЕСИ фондови), финансијско право, управно право.

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THE SCOPE OF INDEPENDENT AUDIT IN TURKISH COMPANY LAW: IDEALS AND DISAPPOINTMENTS**

Abstract: *The Turkish Code of Commerce¹ came into force in 2012 as a reflection of efforts for harmonization of Turkish legislation with the European Union legal system. The new Code had a significant role for reforms in the field of company law. Independent audit for stock market companies was one of the main institutions which were regulated for the first time in Turkish company law. According to the legislation related to independent audit, independent audit was a must for all stock market companies. However, the legislator reacted in a populist way and changed the scope of independent audit. This change resulted in disappointment regarding the scope of independent audit in the last-updated legislation.*

Keywords: *independent audit, audit, Turkish Company Law, Turkish Code of Commerce.*

1. Introduction

The year 1999 means a lot for Turkey and European Union affair which has been continuing since 1959 as a melancholic one-sided love story. In 1999, at the Helsinki Summit, Turkey gained the EU candidate status and undertook to harmonize its legal system in line with the European Union norms. One of the codifications for this adaptation was the new Turkish Code of Commerce (No. 6102) which came into force in 2012. The new Turkish Code of Commerce (TCC) has given effect to amendments in the nature of reform comparing the previous regulation. This codification repealed the theory of Ultra Vires (as elephant feet), and allowed the incorporation of joint stock companies and limited liability

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1 The Turkish Code of Commerce, Official Gazette, 14.02.2011.

companies with one member; precautions were taken for protecting the capital as a requirement of corporate governance principle, as a reflection of Sarbannes Oxley Act in USA, and mechanisms for upper oversight and control authority of state on stock companies were established. In addition to these amendments, as the most remarkable feature which constituted the reformist character of new Turkish Code of Commerce, independent audit system for stock companies gained validity instead of the internal audit performed by company organs.

2. The Stages of Independent Audit Legislation in Turkish Company Law

2.1. Reasons for Adopting Independence Audit

It can be considered that independent audit's becoming effective for stock companies is a requirement of transparency principle which dominates the Turkish Code of Commerce (TCC). The legislator aimed stock companies to be in accordance with investment atmosphere of European Union. In the preamble of the TCC, it was noticed that independent audit was a must for stock companies in order to establish a more powerful capital structure, to respond to the requirements of corporate governance more easily and to become more competitive. The main characteristics of independent audit are: professionalism, impartiality, objectivity, totality, realism, necessity and continuity. As a result of this, in the first text of the Code which was adopted by parliament, independent audit was regulated as an obligation for all joint stock companies and limited liability companies without any discrimination.

2.2. Amendments on the Regime of Independence Audit

Given such an approach of legislator, according to the data from 2011, more than 800,000 stock companies were subjected to independent audit. Those numbers were quite a sensational innovation for the legal regime which had been adopting the internal audit performed by internal bodies. However, after the TCC had passed in 13.01.2011 in parliament and had been published in the Official Gazette in 14.02.2011, the dynamics of trade in Turkey directed its criticism. Independent audit was in the focal point of criticism. According to the TCC, more than approximately 800,000 stock market companies were obliged to become compliant with the requirements of independent audit before the entry into force until 01.07.2012. This obligation was considered impossible, by the civil dynamics and especially by the Union of Chambers and Commodity Exchanges of Turkey. As a response to all these objections and resistance, the government unfortunately reacted in a populist way and made some basic amendments on more than 90 Articles even before the original text came into force. The most

striking embodiment of the amendments made by Code numbered 6335,² which came in to force just one day before, was related to the scope of independent audit.

As a result of Code numbered 6335, independent audit lost the legitimacy in case of all stock capital companies. Thus, the Board of Ministers were shouldered both the authority and the task to determine the companies subject to independent audit. As the first time, the Board of Ministers used their authority by the Decision which was published in Official Gazette in 23.01.2013, and specified the scope of the companies which were subject to independent audit with objective criteria. However, between 01.07.2012 and 23.01.2013, there was a question of uncertainty regarding the companies which are subject to independent audit and, during this period, both joint stock companies and limited liability companies were lacking audit both *de facto* and *de jure*. We have to admit that this uncertainty and space should be characterized as weirdness in terms of codification techniques for legal history.

Due to the criteria accepted by Decision of the Board of Ministers in 2013, the total number of all stock capital companies subject to independent audit was not more than 2,500. That result was described as a disappointment considering the will of the legislator which aimed all joint stock companies and limited liability companies to be subject to the scope of independent audit in the preparations of the TCC. The Board of Ministers made updates on the Decision concerning the scope of independent audited companies in the following years 2014 and 2015, by issuing new Decisions. The Board of Ministers made the most recent update by the Decision No. 2016/8546 in 16.02.2016. This Decision was published in Official Gazette in 19.03.2016 and came into force as effective from 01.01.2016.

3. The Scope of Independence Audit According to the Positive Law

Now, we shall examine the last updated criteria which are valid to determine the scope of companies which are subject to independent audit system.

3.1. Listed Companies without Additional Condition

According to Decision dated 2016, there are listed companies which are subject to independent audit without any additional condition³. The numbers of these listed companies are limited by the Board of Ministers. These are:

² Published in OfficialGazette in 31.06.2012.

³ Decision Article 3.

- 1) The companies regulated in the Capital Market Code, including: investment enterprises, collective investment enterprises, portfolio management companies, mortgage finance enterprises, assets leasing companies, central clearing house, central depository institution, data storage enterprises, rating enterprises, valuation firms, joint stock companies which have capital market instruments, joint stock companies which issue capital market instruments.
- 2) The companies regulated in the Banking Code, including: banks, rating enterprises, financial holding companies, financial leasing companies, factoring companies, financing companies and assets management companies.
- 3) The companies regulated in the Insurance Code and the Individual Pension Code,
- 4) The companies operating in İstanbul Gold Market,
- 5) The companies regulated in the Storage of Agricultural Products Code,
- 6) The companies regulated in the Public Warehouse Code, and
- 7) The companies operating in the sector of terrestrial and satellite TV broadcasting.

3.2. Companies Subject to Independent Audit with Additional Conditions

3.2.1. General Joint Stock Companies and Private Limited Companies

In addition to the companies listed above, other joint stock companies and limited liability companies which match at least two criteria of three listed below are also subject to independent audit. In terms of being subject to independent audit, there is no difference between being established as a joint stock company or a private limited company, as long as companies match two out of three criteria⁴. These criteria are:

- a) Having total assets amount of 40.000.000 Turkish Liras and more (12.000.000 €),
- b) Having net income on sales amount of 80.000.000 Turkish Liras and more (24.000.000 €)
- c) Employing 200 or more working personnel.

⁴ Decision Article 3.

3.2.2. Companies with 25% Capital Condition

Joint stock companies and private limited companies whose at least 25 % capitals directly and indirectly belong to public occupational organizations, trade unions, associations, foundations, cooperatives and supreme institutions are also subject to independent audit as long as they match at least two out of three criteria listed below. These criteria are:

- a) Having total assets amount of 30.000.000 Turkish Liras and more (9.000.000 €)
- b) Having net income on sales amount of 40.000.000 Turkish Liras and more (12.000.000 €)
- c) Employing 125 or more working personnel.

3.2.3. Companies Publishing Newspapers

Companies that publish daily newspapers nationwide are also subject to independent audit as long as they match two out of three criteria listed below.⁵ These criteria are:

- a) Having total assets amount of 40.000.000 Turkish Liras and more (12.000.000 €)
- b) Having net income on sales amount of 60.000.000 Turkish Liras and more (18.000.000 €)
- c) Employing 175 or more working personnel

3.3.3. Companies Related to Electronic Signature and Communication

Companies which are subject to the Electronic Signature Act, the Electronic Communication Act as well as companies which are subject to the control of Information and Communication Technologies Authority are also subject to independent audit as long as these companies match two out of three criteria listed below. These criteria are:

- a) Having total assets amount of 30.000.000 Turkish Liras and more (9.000.000 €)
- b) Having net income on sales amount of 60.000.000 Turkish Liras and more (18.000.000 €)
- c) Employing 200 or more working personnel.

⁵ Decision Article 3.

3.3.4. Companies which are Categorized as Market Companies

Companies which are subject to Electric Market Act, Natural Gas Market Act, Petrol Market Act, Liquefied Petrol Market Act are subject to independent audit as long as they match two out of three criteria listed below. These criterions are;

- a) Having total assets amount of 30.000.000 Turkish Liras and more (9.000.000 €)
- b) Having net income on sales amount of 60.000.000 Turkish Liras and more (18.000.000 €)
- c) Employing 200 or more working personnel.

3.3.5. State Economic Enterprises and Other Institutions

Public enterprises, their subsidiary companies and companies whose at least 50% capitals belong to municipalities are also independent audit as long as these companies match two out of three criteria listed below⁶. These are

- a) Having total assets amount of 30.000.000 Turkish Liras and more (9.000.000 €)
- b) Having net income on sales amount of 40.000.000 Turkish Liras and more (12.000.000 €)
- c) Employing 125 or more working personnel.

4. Conclusion

Although the Board of Ministers has been exerting efforts to expand the scope of independent audit by Decisions issued every year from 2013 until 2016, the total number of stock capital companies which are subject to independent audit is still far from the level desired in the Turkish Code of Commerce (TCC). Until adopting the criteria which have been given validity by Decision of 2016, the total number of the companies which are subject to independent audit is estimated to be around between 6.000 and 7.000. Considering that the total numbers of active stock capital companies is more than 800.000, according to the statistics published by the Ministry of Customs and Trade in 2014 (including 713.861 limited liability companies and 94.828 joint stock companies), the current situation of having less than 7.000 companies subjected to independent audit is quite disappointing. This disappointment has two other implications. The first is the failure on Turkish company law reform aimed at establishing transparent, professional, competitive companies, which are connected to the

6 Decision Article 3.

corporate governance principle and compatible with investment atmosphere. The second implication is a bad example for other European Union candidate members in terms of their company law codifications perspective.

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ОБИМ НЕЗАВИСНЕ РЕВИЗИЈЕ У ТУРСКОМ КОМПАНИЈСКОМ ПРАВУ: ИДЕАЛИ И НЕИСПУЊЕНА ОЧЕКИВАЊА

Резиме

Нови турски Закон о трговини бр. 6102 ступио је на снагу 01.07.2012. као резултат напора да се турски правни систем усклади са правом Европске уније. Турски Закон о трговини је један од темељних закона који сведоче о авантури у коју се Турска упустила у циљу придруживања Европској унији, која безнадежно траје као једнострана меланхолична љубавна прича. Главни разлог лежи у чињеници да нови турски Закон о трговини уводи нове институте за које се може рећи да су реформске природе. Један од ових прописа односи се на ревизију система јавних компанија са ограниченом одговорношћу (акционарских друштва) и приватних компаније са ограниченом одговорношћу. Наиме, законодавац је ставио ван снаге ревизију коју спроводе унутрашњи органи јавних и приватних компанија са ограниченом одговорношћу, и признао валидност независне (екстерне) ревизије у овим компанијама, како би ускладио турско законодавство са правом Европске уније. Основни принципи тог независног ревизорског система који је успостављен новим Законом о трговини су: обавезујуће дејство независног ревизора, непристрасност, професионализам и интегритет.

Према оригиналној верзији турског Закона о трговини (објављеног у Службеном листу 14.02.2012), независној ревизији подлежу све јавне и приватне компаније са ограниченом одговорношћу без икакве разлике. Међутим, пре него што је Закон о трговини ступио на снагу, Законом бр. 6335 извршене су значајне измене и допуне у овој области, чиме је обим независне ревизије знатно сужен, првенствено као одговор на реакције учесника у привредном животу, а упркос противљењу теоретичара који се баве изучавањем компанијског права. Као резултат тога, јавне и приватне компаније са ограниченом одговорношћу су класификоване као компаније које подлежу или не подлежу независној ревизији. Законодавац је овластио Савет министара да идентификује компаније која подлежу независној ревизији. Према овој одредби, Савет министара је овлашћен и има обавезу да одреди критеријуме на основу којих ће јавна и приватна друштва са ограниченом одговорношћу бити предмет независне годишњем ревизије. Заправо, најновији пропис по овом питању је Одлука Савета министара, објављена 19. марта 2016. Надзорни орган за јавну контролу рачуноводствених и ревизорских

стандарда имао је важну улогу у фази припреме одлуке Савета министара о компанијама које подлежу независној ревизији. Одлуком Савета министара (од 19.3.2016) утврђено је да је број компанија које подлежу независној ревизији и даље прилично органичен упркос свим уложеним напорима законодавца од 2012. до данас. С обзиром да је у Турској регистровано преко 900.000 јавних и приватних компанија са ограни-ченом одговорношћу, Савет министара је на основу датих критеријума закључио да проценат компанија које подлежу независној (екстерној) ревизији не прелази чак ни 1%, што подразумева измену и допуну критеријума.

Мора се прихватити чињеница да постоји значајна разлика између полазне тачке и тренутне ситуације у погледу независне ревизије, која се сматра једним од темељних стубова реформе у оквиру новог турског Закона о трговини. Та разлика може се исказати као однос између идеала и неостварених очекивања. Иако је законодавац у великој мери идеали-зовао институт независне ревизије који се може применити на све врсте друштава капитала, може се уочити да су приватна друштва са ограни-ченом одговорношћу (акционарска друштва) скоро ван домета независне ревизије, док се независна ревизија примењује код доста ниско ранги-раних јавних компанија са ограниченом одговорношћу, што подразумева неостварена очекивања. Такође се мора признати да се овај резултат ни на који начин не поклапа са циљевима турског компанијског права, где се истиче посвећеност усклађивању закона са правом Европске уније, унапређење инвестиционе климе и конкуренције, као и испуњење захтева корпоративног управљања који су наведени у преамбули турског Закона о трговини. У том погледу, мора се прихватити чињеница да су решења у турском компанијском праву, бар она која се односе на независну ревизију, неуспешна. Дакле, било би добро да законодавац, доктрина и пракса извуку релевантне поуке из овог искустава, које би биле од користи у предстојећим кодификацијама.

Кључне речи: независна (екстерна) ревизија, турско компанијско право, Закон о трговини.

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ADVANCING BUDGET CONTROL IN CONTEMPORARY BUDGET SYSTEMS**

Abstract: *In the current circumstances, successful operation of the public sector is inconceivable without proper application of the budget system and the existence of adequate budget control, which is put into effect through three basic forms: administrative (internal) control, institutional (external) control and parliamentary (political) control. Taking into consideration the large amount of funds included in the implementation of the budget, the advancement of budget control is an inevitable task in contemporary states. Budget control should be used to provide a higher form of protection for the distribution of public funds and state property, that is, it should be legal, purposeful, right and effective. The paper aims to shed more light on the role, significance, range and limits of budget control in contemporary budget systems. On the basis of the performed analysis, the following question should primarily be answered: "Can the existing forms of budget control respond, in a timely manner, to many challenges in the field of spending budget funds, and prevent potential misuse?" The construction of an appropriate capacity of budget control, including its independence, is one of the most challenging goals of the entire institutional development. It also refers to the inevitable parameter in the process of defining the level of democratic structure of a state.*

Keywords: *state, public expenditure, budget, budget system, budget procedure, budget control.*

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1. Introduction

More and more prominent demands on ensuring transparency in the actions of the users of budget funds, the requirement to account for each undertaken activity and the need for the public expenditure to provide certain value as a result (*value for money*) have imposed the need to introduce strong budget controls in the public sector of numerous countries. Namely, the advanced mechanisms of control in the segment of managing public finances and distributing the property of the state have become a necessary prerequisite for the development of the contemporary society. Responsible budget management by state authorities has become an imperative of the contemporary age. Thus, the countries all over the world shape the environment which is suitable for achieving an accelerated economic growth, healthier economy, permanent attraction of direct foreign investments, improvement of infrastructure and an increase in the employment rate.

Budget is the basic institution of public finances and one of the most important instruments which are used to satisfy the largest part of public expenditure. In the conditions of global economic crisis, which has marked the first decades of the 21st century, the increase in the quality of budget control should contribute to a more efficient and more complex performance of control of public funds, referring to their legal, rational and expedient expenditure. Reliable budget control may promote the functioning of the public sector, by ensuring the protection of fundamental values of the state and raising the question of responsibility in terms of whether the public affairs and inevitable spending of public resources is in accordance with the current legislation. This is particularly important given the fact that the money spent in the public sector comes from citizens (the taxpayers) who have been facing a number of existential challenges as a result of a series of unfavourable economic events.

The subject matter of analysis in this paper are the changes aimed at improving the system of budget control. The aim of the paper is to point out whether, in the current circumstances, they are suitable for preserving the integrity of budget control and the budget system itself. The paper is structured along the lines of the defined aim. The introduction is followed by a general overview of the concept/definition and different types of budget control. The author then elaborates on the primary classification of budget control into: administrative, institutional and parliamentary control, with specific reference to the distinctive features, advantages and disadvantages of these forms of control. In particular, the analysis focuses on the possibilities of their improvement and instituting a more integrated action approach in terms of protection of the national interest in the sphere of public expenditure.

2. General Overview of Budget Control

Budget control is an element of the budget law of a particular country. Budget control is tasked to provide supervision over the proper and lawful execution of the state budget, and to secure the control of the representative body (parliament) over the executive authority, in the area of gathering and spending budget funds. Budget control is a form of legal control, given the fact that the entire budget control procedure is regulated by legal norms. Subjects of budget control have different levels of legal authority, depending on the forms of budget control (Tošić, 2013: 196). In this context, budget control represents a legally regulated relationship between the controller and the controlled subject, concerning proper and lawful management of budget funds, whereby the controller is entrusted with certain legal authority. As any other legal control, budget control includes specific elements that distinguish it from other forms of control. Budget control is composed of four elements: the subject who exercises control – the controller; the subject who is controlled; the object of control; and the legal authorities (competences) vested in the controller for the purpose of ensuring the protection of regularity and lawfulness of budget funds management (Paović-Jeknić, 2007: 119).

Depending on the subject (body) who performs the control, budget control can be classified as: *administrative (internal) control*, which is performed by the administrative body; *institutional (external) control*, which is performed by independent audit institutions or courts of auditors; and *parliamentary (political) control*, which is supported by the work of parliamentary boards of budget control. This classification of budget control is fundamental.

Considering that budget control implies supervision over the work of state authorities (bodies/subjects) which are tasked to execute the budget, we may distinguish two forms of control: control over the persons in charge of giving orders and the control over persons in charge of accounting departments. As a reminder, the the subjects in charge of giving orders are administrative bodies which are authorised to manage the property of the state, ensure the collection of state revenues, and independently decide about the distribution of income they have been allocated by the budget for the given year. These functions are vested in (and performed on behalf of these authorities by) the managers of these administrative bodies (ministers, secretaries, directors of national agencies, etc.). The subjects in charge of accounting departments are persons who are entrusted with direct control over the state property and funds. In practice, it refers to the heads of accounting departments in these public administration authorities.

The object of control is the budget, i.e. the proper and lawful execution of the approved budget. In fact, budget control is used to examine whether the financing of national needs has been conducted properly and by the rules, that is, whether it was rational or, in certain cases, effective. Therefore, according to the contents, budget control is divided into the control of legality and the control of effectiveness, that is, there is a legal and a financial aspect. From the legal perspective, budget control comes down to investigating and determining the lawfulness of legal acts by means of which the budget is executed. Viewed from a financial aspect, budget control is aimed at determining the effectiveness of spending, and not only the lawfulness of the allocation of funds (Matejić, 1965: 23). The control of authorities who give orders focuses on the legality and effectiveness of using the approved budget funds as well as the political responsibility of the executive bodies towards the parliament. The control of persons in charge of accounting departments focuses on how they managed the allocated funds and whether they abided by the legal norms. Whereas persons in charge of giving orders have political responsibility, the responsibility of persons in charge of accounting departments implies disciplinary and criminal liability (Paović-Jeknić, 2007: 131; Andjelković, 2010: 90).

Besides the aforementioned forms of budget control, there are also other forms of budget control. Thus, according to the method applied, budget control can be documentary control and field control. Documentary control is conducted by an authorised controller at his/her workplace, where he/she controls contracts, accounts, invoices and other financial documents. Field control is conducted on-site, by the authorised controller who performs control directly at the institution/body which has been entrusted with the budget funds or state property. These two forms of control are often combined, meaning that the entire documentation is first collected at the controlled institution/body (the user of budget funds) and, then, the collected documentation is analysed and processed at the official workplace of the controller. In case the criterion is the time of conducting control, budget control can be previous (*ex ante*) and subsequent (*ex post*) control. The *ex ante* (preventive) control is conducted before the budget funds are paid out, that is, it precedes any official use of budget funds. After the authorised controller has determined by examining the submitted documents that the use of budget funds is lawful, the controller approves the payment of funds from the budget. The *ex post* (subsequent) control is conducted after the funds are paid out and spent. Unlike the *ex ante* control, the *ex post* control cannot prevent harmful consequences incurred on the budget due to incorrect and unlawful spending of the budget funds, but it can "rectify" the illegal and non-effective spending of budget funds by making the perpetrators of such activities accountable, by taking appropriate disciplinary, criminal and

political measures against the perpetrators of such unlawful acts, and by seeking compensation for damage (Trklja, 1998: 137-138; Paović-Jeknić, 2007: 129-130).

Therefore, the subjects who perform budget control have structurally different legal authorities depending on the given form of control. In case of establishing the irregularity and unlawfulness in budget execution, it is necessary to take measures in order to remove them. In other words, the scope of legal authorities includes passing legal acts and recommendations, requesting from the users of budget funds to remove the observed omissions in financing public expenditures, as well as the non-adoption of legislative proposals on the budget or the final balance account of the budget in Parliament, which implies that the government does not enjoy the confidence of parliament. The logical sequence of events is the resignation of the Government. In fact, budget control only makes sense if it results in a high level of budgetary discipline.

3. The Status and Perspectives of Budget Control in Contemporary States

Most of contemporary states are faced with the necessity of taking the measures of fiscal consolidation. This fact reaffirms the veracity of some earlier statements on this matter. Thus, considering the current condition in public finances in many contemporary states, the humorous claim that “no miser feels a heartache when the money comes from the state treasury” proves to be true. The observation that wasting money is an important characteristic of numerous countries and their budgets has repeatedly proved to be indisputable. In fact, a high level of public debt and significant budget deficits show that the budget control in contemporary states must be permanently improved in order to appropriately justify the (financial) motive of its existence: to prevent the waste of money within the state (Duverger, 1963: 323). Therefore, creating conditions for preserving the credibility of the budget implies making adequate changes in the segment of administrative, institutional and parliamentary budget control.

3.1. Administrative (Internal) Budget Control

Budget execution, which includes the collection of budget revenues, the allocation of these revenues among the users of budget funds, and spending a certain amount of those funds and for specific purposes, is entrusted to the public administration authorities. The administrative budget control may forestall the irregularities which could occur in the process of budget execution. It is an internal control, based on hierarchical structure, where the higher ranking administrative bodies control the lower ones. Being conducted among the users of budget funds, the administrative budget control is often described as the control

over the persons in charge of giving orders (*ex ante* control) and the persons in charge of accounting departments (*ex post* control) (Tošić, 2013: 204).

The higher ranking administrative bodies are responsible for the financial discipline and lawful spending of funds within certain administrative units, for which reason they are obligated to monitor and check the work of lower bodies in terms of their use of budget funds. However, considering that the main rule of budget control is that all institutions/bodies and persons who participate in budget execution are subject to control, the highest administrative bodies (as those in charge of execution) are subject to the administrative control of the Minister of Finance (Paović-Jeknić, 2000: 85; Rabrenović, 2007: 800-801).

The models of functioning of the administrative budget control can be generally divided into two groups: centralised and decentralised models. In the states of the European continental legal system (France, Portugal, Spain), the organisation of control is based on the centralised model where the administrative control, as an *ex ante* control over the lawfulness and regularity of financial transactions, is conducted by the Ministry of Finance or an authorized body of this ministry. In the states such as Great Britain, the Netherlands, Sweden, and Norway, the administrative control is based on the decentralisation model which implies that the Ministry of Finance delegates the control authority to the competent management of linear (individual) ministries. In the decentralised model, the Ministry of Finance has the role of the coordinating body but it still remains responsible for the entire effectiveness and consistency of the system of administrative control at the state level (Allen, Tommasi, 2001: 260-261; Radulović, 2008: 18). The centralised model of administrative control is more focused on the legality and regularity of public spending, while the decentralised model is primarily focused on accomplishing the priorities and operative goals of administrative bodies, as well as better effects of the public sector expenditures (OECD, 2005: 2).

It may be interesting to point out that, in a number of countries, the centralised model of strict *ex ante* control of the Ministry of Finance is increasingly adopting the features of the decentralised model which, as already noted, implies that the function of administrative control is delegated to the management of the competent ministry (administrative organisation). Thus, the management of an administrative organization is fully responsible for managing the allocated budget funds, while the role of the Ministry of Finance gradually weakens. By delegating more authority for spending funds to administrative bodies, the management structure of administrative bodies faces greater responsibilities in terms of proving that it not only acted according to legal provisions but also spent the allocated budget funds in an efficient, economical and effective way (Rabrenović, 2007: 801).

The question that can reasonably be posed is: “Is it justifiable to apply a decentralised model of administrative budget control in the circumstances of unstable economic and political environment in a particular state?” We share the opinion that it is not a good solution; considering the fact that the Ministry of Finance delegates the authorities to other ministries (administrative organisations) to spend within the boundaries of relatively widely set budget limits, it creates considerable space for irregularities and abuse. If the aim is to shape a more reliable system of administrative budget control, formulating strong mechanisms of *ex ante* control by the Ministry of Finance should be of primary concern rather than creating the system based on management accountability (Rabrenović, 2007: 810).

Administrative budget control has an appropriate place in the system of budget control. Yet, taking into account that administrative bodies actually control themselves, its objectivity and independence can always be doubted. For these reasons, the system of budget control includes not only administrative but also institutional and parliamentary budget controls.

3.2. Institutional (External) Budget Control

In order to ensure the effective operation of the public sector, the institutional control over the use of public finances and state property is of particular importance. Its existence reduces the possibility of malversation related to public funds, increases the level of responsibility in their spending and enhances the level of the citizens’ trust in the state while, concurrently, encouraging them to fulfil their tax and other fiscal obligations.

In modern parliamentary democracies, institutional budget control represents one of the key mechanisms of subsequent control of budget execution, on the basis of which the public is provided complete, accurate and prompt information about the spending of funds by the users of budget funds. Political budget control which is conducted by Parliament cannot be real, truthful and efficient if there is no external, independent, objective and professional control of the budget execution; this control is exercised by relevant subjects who are obliged to issue regular periodical reports to Parliament about the exercised control over the spending of budget funds, and who are only accountable to Parliament for their work. Only on the grounds of this kind of examination and regular reporting by the institutional (external) budget control, the parliament will be able to efficiently exercise political control over the spending the budget funds in a modern and democratic state (Paović-Jeknić, 2006: 80).

In order to adequately provide for accomplishing the goals of the institutional budget control, it is necessary to meet the following requirements: to ensure the

rule of law; the separation of legislative, executive and judiciary powers; and the supremacy of Parliament over the Government. The rule of law implies creating a suitable setting for the operation of independent and professional external budget control because it contains a clear separation of powers and rights of all three branches of government, the superiority of the legislative branch over the executive authorities (government), and the exclusive accountability of the institution which performs the auditing of public expenditure to Parliament (Paović-Jeknić, 2007: 137).

Nowadays, there is no uniform model of institutions which perform external budget control. Namely, in practice, there are *Supreme Audit Institutions* headed by the general auditor of public expenditure, whose distinctive characteristics will be analysed further on in this paper, as well as *the Courts of Auditors*. The Supreme Audit Institutions are present in Great Britain, the United States of America, Canada, Japan, Russia, Denmark, Austria, Hungary and Greece. The Courts of Auditors have been established in France, Italy, Germany, Romania and Slovenia. These two models of institutional budget control differ in terms of organisation and mode of work. According to the definition provided by the World Bank, the purpose of the Supreme Audit Institution is to "oversee the management of public funds and the quality and credibility of financial data reported by the governments". The Courts of Auditors are, generally speaking, part of the judicature system and they have their own administrative and criminal law authorities in terms of sanctioning legal entities in the process of taking legal measures to rectify unlawful acts. The common features of supreme audit institutions and courts of auditors are reflected in their independence, objectivity, professionalism and accountability to parliament (Paović-Jeknić, 2007: 136-137; Radulović, 2008: 31; Tošić, 2013: 206).

When the state audit institution is analysed more concretely, the state is required to ensure as follows: a constitutionally-defined position of the supreme independent audit institution; legally regulated competences, organisation and procedure for establishing such an institution; expert and professionally trained audit personnel; the implementation of international audit standards in the field of public sector auditing, in procedures and audit activities. These requirements are essential for the state audit institution to exercise its function and provide control, transparency and accountability in the management of public finances and public property (Radulović, 2008: 25; Centar za evropske studije, 2012: 12). This will be attainable only if it collects relevant evidence which will be used to determine whether the users of budget funds have accomplished the anticipated goals, whether their financial reports are made so as to present the real state of affairs, and whether the budget users have spent the allocated budget funds efficiently and lawfully (Adamović, 2014: 7).

Auditing is performed in the manner and according to procedures which are determined by the standards of the International Organisation of Supreme Audit Institutions (INTOSAI). The framework of these standards consists of documents adopted by the congress of this organisation. Professional standards governing the operation of supreme audit institutions can be divided into the following groups: basic standards; prerequisites for the work of supreme audit institutions (general standards); auditing standards; and reporting standards (Stanojević, Vidović, 2014: 19).

Certainly, state auditing is not exercised for its own sake; it is, indeed, an inseparable part of the regulatory system which can be used to determine early enough the violation of the principles of legality, efficiency, economy and effectiveness of the management of public finances, in order to take corrective measures which would prevent and reduce the occurrence of negative consequences arising from irresponsible behaviour of individuals in positions of public authority. Its basic function is to support and promote the responsibility of holders of public offices (Sretenović, Janković Andrijević, 2015: 79).

Having no intention to diminish the importance of independent auditing of public expenditures in terms of exercising an effective financial control, we consider it important to point out to some of its limitations. Given that, in most countries, state auditing is exercised as a subsequent control, the main objection is that it comes too late, when the irregularities have already occurred. In practice, the auditing procedures are sometimes characterised by insufficient transparency and openness. Due to the fact that financial transactions are subject to a subsequent control, state auditing cannot yield satisfactory results if there is no adequate administrative budget control. Besides, the presence of quality parliamentary budget control is also highly important.

There is a close interrelation between the parliament and state auditing, which is based on a balanced system of responsibility of those in power. Through the Supreme Audit Institution, the legislative authority (parliament) supervises the government and public administration. On the basis of the audit reports, parliament is required to take necessary action, that is, to demand from the government to account for the ways of spending public funds. In fact, additional pressure is exerted on the government by the importance which the parliament (parliamentary committee) gives to audit reports, which ultimately creates an adequate environment for monitoring and implementing the recommendations and measures of the Supreme Audit Institution (OECD, 2002: 11-27).

3.3. Parliamentary (Political) Budget Control

Parliamentary budget control is exercised by the legislative institution of the state (such as the national assembly). It is designated as political budget control because it focuses on the work of the public officials in charge of giving orders, (ministers and directors/managers of state institutions), who can be replaced due to determined irregularities in their work. It certainly does not exclude their criminal, civil or other kind of responsibility, which may be determined in the procedure before the competent state authorities. Unlike the administrative and the institutional control which are conducted during the budget execution, parliamentary budget control (as a rule) pertains to a past period and it must be conducted in the process of reviewing and adopting the final balance account of the budget. This form of subsequent budget control should inevitably be supported by strong institutional budget control and assistance of the parliamentary budget committees whose members have the necessary knowledge on public finances and who will provide the parliament with additional information about the facts pertaining to the budget control. The establishment of budget committees within the parliament is an institutional novelty which enables the legislative authority to participate in the budget process in a more objective, effective and responsible way (Santiso, Varea, 2013: 2; Robinson, 2011: 125). Thus, parliament is put into a more equal position with the executive authorities in the course of making decisions on the implementation of fiscal (budget) policy (Anderson, 2009: 3).

It is increasingly more obvious that parliaments, whose influence has been undermined in the former period, are gradually but steadily assuming a more active role in considering the question of public budgeting. This is a logical sequence of events considering that the situation in domain of state finances cannot improve if the parliament is a passive observer of the budget process. The strengthening of the parliament's reputation and influence in the budget area will certainly reinforce the parliamentary budget control.

The right of the public sector to allocate and dispose with the budget funds (i.e. *the power of the purse*) is very important. In this sense, it the duty of parliament to ensure that the measures concerning public expenditures and public revenues are fiscally justified, that they suit the needs of the population and that they are properly conducted. If this is not the case, the budget procedure in parliament is indeed "a total waste of time" (Blöndal, 2001: 54). A "withdrawal" of the parliament from the budget process, which actually exists in such circumstances because the parliament does not perform its budget function in a quality way, is detrimental for the budget integrity and the public interest. Concurrently, there is a huge space for abuse if the executive power has not adopted and does not

abide by the basic standards of the budget process, and if no rules of ethics are observed in the process of the budget execution.

In the time ahead, the increasing role of parliament in budget control and the growing significance of parliamentary budget control should exert a positive impact in the field of fiscal responsibility. The joint action of administrative, institutional and parliamentary budget control is a “key” for solving a considerable part of problems underlying budget funding in many states. If efficient, these forms of budget control may undoubtedly be a limiting factor in terms of arbitrary financial action of state authorities but also a guarantee of the appropriate and lawful budget execution.

4. Conclusion

The budget system is a reflection of the existing social-economic and political milieu in each state. It is directly related to the nature of the government system, the degree of state centralisation, and the role of state authorities in performing certain state functions. Attaining a higher degree of budget control development in contemporary budget systems is an extremely important issue, as it leads to instituting a better control of the application of approved budget (fiscal) policy, ways of accessing budget funds, and preventing possible unlawful actions in this area. Taking into consideration the constant increase in public expenditure and its large participation in the gross domestic product in these times of crisis, it does not come as a surprise that states increasingly insist on budget control and good performance results in spending public funds.

Reluctance to innovate and advance budget control is “a step backwards” and a serious obstacle to the overall development in a particular state. To prevent that, it is of the utmost importance to reform budget control. In every state, it is primarily important to find solutions in the domain of budget control and responsibility of the authorities which would yield the best results in the context of current development of its democratic institutions, legal and administrative culture and tradition. Also, it should be borne in mind that modelling effective and rationally configured mechanisms of budget control requires constant activities, highly specialised knowledge and equally specialised expertise. They are very important because their insufficient representation (or absence) contributes to generating and preserving the environment in which unprincipled individuals can dishonestly, illegally and without being subject to legally prescribed sanctions create and increase their financial and any other power at the expense of the system of public finances and other people. This shall not be allowed since this kind of power, as history teaches us, is destructive for the achieved level of social progress. Besides, taxpayers have the right to know who spends the

budget funds which they provide by paying their taxes, for what purposes and in which amount; they have to be aware whether the public funds are spent in compliance with the legal norms and the public interest, and not contrary to the interests of the society they live in.

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УНАПРЕЂЕЊЕ БУЏЕТСКЕ КОНТРОЛЕ У САВРЕМЕНИМ БУЏЕТСКИМ СИСТЕМИМА

Резиме

Савремена држава обилује бројним функцијама у различитим областима привредног и друштвеног живота па је, с тим повезано, повећан и број корисника буџетских средстава. Значај буџета као доминантног инструмента за финансирање јавних расхода, који у себи апсорбује и редистрибуира велики део националног дохотка, опредељује и улогу и важност буџетске контроле. Наиме, пред буџетском контролом се поставља захтев установљавања облика и метода контроле, са специфичном садржином и поступцима, погодних да се јавна средства заштите од незаконитог, нерационалног и нецелисходног трошења. У актуелним кризним условима наведени захтев се све учесталије истиче.

„Ризница без надзора је бесмислица“ па државе, сходно томе, установљавају разгранати систем буџетске контроле. Постојање вишеструке буџетске контроле, у различитим моментима извршења буџета, претпоставка је њеног квалитета, али и показатељ спремности да се адекватно управља националним јавним финансијама.

У раду се анализирају обележја, предности и недостаци разних облика контроле буџета (управне (интерне) контроле, институционалне (екстерне) контроле, парламентарне (политичке) контроле). Традиционална улога парламента као „чувара националног новчаника“, у већини савремених буџетских система, несумњиво је изгубила на значају док је моћ извршне власти, у погледу утврђивања и извршавања јавних расхода, постала све израженија. Аутор разматра могућности унапређења постојећих облика буџетске контроле, као и стварања јачег „савезништва“ парламентарне, интерне и екстерне контроле у циљу побољшања транспарентности јавне потрошње и успостављања завидног нивоа одговорности извршне власти за трошење буџетских средстава.

Кључне речи: држава, јавна потрошња, буџет, буџетски систем, буџетска процедура, буџетска контрола.

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ANALYSIS OF EFFECTS OF THE STATE AID CONTROL ACT**

Abstract: *The subject of analysis in this paper is the scope and structure of state aid in the Republic of Serbia before and after the implementation of the 2009 Act on State Aid Control in the periods from 2004 to 2009 and from 2010 to 2014, respectively. The aim is to examine whether there is a statistically significant difference in the allocation of state aid funds (in the total amount and according to their structure) before and after the implementation of this Act, as well as whether there is a correlation between the scope of state aid and the position of our country in the world according to the competition indicator within the composite Global Competitiveness Index (GCI). The relevant legal framework (before and after the implementation of this Act) is the independent variable which is used as a point of reference for measuring the dependent variables: the total level of state aid (TSA), the level of horizontal state aid (HSA), the level of sectoral state aid (SSA), and the level of regional state aid (RSA). We assumed that there is a statistically significant increase in the total level of state aid granted after the application of the Act as related to the period prior to its application, and that there is a correlation between the increase in regional and sectoral state aid, as well as the decrease of horizontal state aid level, and Serbia's lower position in the world according to the competition indicator within the GCI. The results of this study have confirmed these hypotheses.*

Keywords: *state aid, horizontal, regional, sectoral, competition, correlation.*

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1. Theoretical framework of the research

State aid is a special type of state intervention which, as such, must fulfil the following criteria: to be assigned by the state; to create an advantage for its recipients; to create an advantage for selected market participants in the exercise of their economic activities; to affect the exchange of goods and services in the market; and to lead to a distortion of competition (Begović, Pavić, 2012: 108-111). State aid is granted from the public funds of the republic, province, the local governments or the legal persons with public authorities on a selective basis, wherefore their users gain an economic advantage over their competitors and thereby distort or threaten to distort the competition in the market.

State aid may be classified into the following categories: the regional state aid (RSA), the horizontal state aid (HSA), and the sectoral state aid (SSA). According to the EU methodology, RSA, HSA and SSA are the categories of state aid within the *sector of industry and services*, as opposed to the agricultural sector which is considered as a separate sector.¹

The *regional state aid* (RSA) is a form of state aid which is intended for underdeveloped or undeveloped regions (the regions with low living standard or high unemployment); it includes: the regional investment state aid, the regional aid for newly created small business entities, and the regional aid for operational business (aimed at reducing business costs). The *sectoral state aid* (SSA) is intended for business entities in certain sectors or business activities (e.g.: steel, coal, transport, etc.). The *horizontal state aid* (HSA) is designed for a larger number of *ex ante* unspecified users, and it includes: the state aid to small and medium-sized enterprises (SME); the state aid for research, development and innovation; the state aid for environmental protection, etc. For the purposes of this study, it is important to emphasize that the HSA distorts or threatens to distort competition to a considerably lesser extent than the SSA, due to a lower level of selectivity.

State aid has been the subject matter of research of many economic theorists (for example: Stojanović, 2010; Prokopijević, 2015). While Stojanović studied the regulation and perspectives of applying state aid at the outset of creating its legal framework (2010), Prokopijević primarily examined the economic effects of state aid, pointing out to its harmful effects, mainly reflected in: spending the taxpayers' money, the distorted incentives that state aid creates to the enterprises (primarily non-profit ones), the decline in the quality of goods and services, the distortion of competition, the likelihood of corruptive behaviour, etc.

1 From 2010 onwards, the state aid for the agricultural sector and the state aid for the industry and services sector have been considered as separate categories in the reports on the allocation of state aid.

Starting from the premises underlying the public choice theory, Prokopijević concludes that it is necessary to reduce the level of state aid or switch to its less harmful forms, such as the horizontal state aid. In this connection, the European Union emphasizes fostering horizontal objectives of the state aid (such as: research and development, employment, regional development, environment, training), since they are important for the economic development and competition of each country. As a matter of fact, taking into account these actual or potential negative economic effects of state aid, its allocation and usage are regulated by special regulations of the EU; in Serbia, this subject matter was regulated by a special *Act on the State Aid Control*, adopted in 2009 (hereinafter: the SAC Act).²

This subject matter has also drawn attention of some legal scholars, who have explored it in form of a doctoral thesis (for example: Domazet, 2012) or as a special part of legal textbooks (Begović, Pavić, 2012: 108-120).

The SAC Act regulates the general conditions and procedure for state aid control, which may be performed either as *ex ante* control and *ex post* control, and is conducted by a special body established by the Government - *the Commission for State Aid Control*.³ *The object of protection under this Act is the free competition in the domestic market*, as the primary objective of this Act, which was *inter alia* adopted in order to fulfil the obligations arising from the signed international agreements, specifically, the Stabilization and Association Agreement.⁴

Statistical data show that, in Serbia, there is a high level of state aid, which is even five times higher as compared to its average level in EU countries. As an illustration, the average scope of state aid granted by the 27 EU countries (measured as a share of GDP) in the period from 2011 to 2013 amounted to 0.51%. The situation was not much different in 2014, when the average scope of state aid granted by the 28 EU countries amounted to 0.50% of the GDP (the Commission for State Aid Control of Montenegro, 2014). In Serbia, the average share of state aid in the GDP for the period 2011-2014 amounted to 2.54% (the Commission for State Aid Control of RS, 2011, 2012, 2013 and 2014). In addition, at the EU level, the horizontal state aid (which includes the regional one) represents a dominant form in the structure of state aid. For example, in the period 2005-2011, the share of the horizontal state aid for the 27 EU countries in average represented 84% of the total state aid, while the sectoral state aid accounted for 16% (Stanišić, 2013: 184).

2 The Act on the State Aid Control, *Official Gazette of RS*, 51/09.

3 The competences of the Commission are defined in Article 9 of the SAC Act.

4 Art. 1. par. 1. of the SAC Act.

Our economy, faced with the transition problems, still has not done away with the state aid granted to some enterprises or sectors, which considerably distances Serbia from the developed EU countries. Hence, in comparison to the developed EU countries, the total scope of state aid granted in Serbia is quite high and its structure is rather unfavourable (due to the marginalization of horizontal state aid). This conclusion is supported by a number of recent papers which have analyzed the state aid in Serbia in the past several years and compared it with the state aid granted in the EU countries or countries in the region (for example: Vučetić, 2015).

In effect, the unfavourable structure of state aid, rather than the granted amounts, may have a negative impact on competition; namely, the scope of state aid in some EU countries (such as, Scandinavian countries) is *above* the EU average and they concurrently rank high on the global competitiveness ranking list of the World Economic Forum (WEF),⁵ including the rank according to the indicator of competition.⁶ Whereas the SAC Act was adopted in order to safeguard the competition on the market, Serbia has moved down on the global competitiveness ranking list, dropping to a lower position (particularly according to the indicator of competition). This fact raises *the question of correlation between these variables (the state aid and the competition) as well as the question of whether the SAC Act fulfilled the expectations in terms of protection of competition.*

2. The subject matter, goals, hypotheses, variables and significance of the research

This paper focuses on exploring the scope of state aid granted in Serbia (in the total amount and according to its structure) before and after adoption of the SAC Act (2009), and pursues a response to the question whether there were significant changes in the scope and structure of state aid in the period 2004-2009 as related to the period 2010-2014.

The research aims were *twofold*. The first goal was to examine whether there is a statistically significant difference in the allocation of state aid (in the total amount and according to its structure) before and after the implementation of

5 The WEF publishes annual reports on the competitiveness of individual economies in the world, which is expressed through the so-called *the Global Competitiveness Index (GCI)*. The latest 2015 Report is available at: <http://reports.weforum.org/global-competitiveness-report-2015-2016/>

6 According to the 2015 Report, out of 140 countries, Sweden holds the 9th position in terms of competitiveness and the 17th position in terms of the goods market efficiency (GME), which is an indicator of competition. Denmark holds the 12th and the 20th position (respectively), and Finland holds the 8th and 21st position (respectively).

the SAC Act. The second goal was to explore the correlation between the scope of state aid and the position of our country in the world according to the indicator of competition (within the composite GCI).

Two hypotheses have been derived from the specified research aims. The first one is that there is a statistically significant increase in the total level of state aid granted after the implementation of the SAC Act as related to the period prior to its implementation. The second one is that there is a correlation between the increase in regional and sectoral state aid, as well as the decrease of horizontal state aid, and Serbia's lower position in the world according to the indicator of competition within the GCI.

The relevant legal framework (before and after the implementation of the Act) was the *independent variable* which was used as a point of reference for measuring the *dependent variables*: the total level of state aid (TSA), the level of horizontal state aid (HSA), the level of sectoral state aid (SSA), and the level of regional state aid (RSA). These dependent variables (TSA, HSA, SSA and RSA) were designated as the basic research variables.

In addition to these basic variables, the aforementioned *Global Competitiveness Index (GCI)* was used. This composite index⁷ was not comprehensively analyzed but the author focused only on the sixth pillar of competitiveness: *the goods market efficiency (GME)*.⁸ In effect, many aspects of competition are contained in this pillar of competitiveness, which measures: 1. *domestic competition* (the intensity of local competition; the extent of market dominance; effectiveness of anti-monopoly policy; the effect of taxation on incentives to invest; the total tax rate; the number of procedures required to start a business; the time required to start a business, the agricultural policy costs); 2. *foreign competition* (the prevalence of non-tariff barriers; trade tariffs; the prevalence of foreign ownership; the business impact of rules on foreign direct investment (FDI); the burden of customs procedures; imports as a percentage of GDP); and 3. *the quality of de-*

7 The GCI is a composite index based on 12 pillars of competitiveness which are organized into three groups: *the basic requirements* (institutions, infrastructure, macroeconomic environment, health and primary education); *the efficiency enhancers* (higher education and training, goods market efficiency, labor market efficiency, financial market development, technological readiness, market size); and *the innovation and sophistication factors* (business sophistication, innovation).

8 The notion of *competitiveness* does not have the same meaning as the notion of *competition*. *Competitiveness* refers to the economy of a country, which means that it is a broader term that includes competition. *Competition* can be seen as a rivalry of market participants on the supply side or the demand side. Enhancing competition, *ceteris paribus*, leads to improvement of economic competitiveness, while improving the competitiveness does not necessarily improve competition.

mand conditions (the degree of consumer orientation; the buyer sophistication). Accordingly, *the competition variable was operationalized through the indicator of competition (GME) within the GCI.*

This paper is an effort to carry out a comprehensive statistical analysis of the scope and structure of state aid from 2004 to 2014, taking the 2010 (when the Act came into force) as a break-even year. In addition, we strived to examine the link between the scope of state aid and competition in Serbia, according to the GME indicator. The statistical analysis was supposed to serve for testing the effects of the Act and, eventually, point to the need for introducing possible changes. Given that the SAC Act became effective five years ago, it is now viable to give a preliminary assessment of the effects of this Act, primarily on the competition.

The data used in assessing the effects of the SAC Act were collected from the annual reports on state aid granted for the period 2004-2014.⁹ On the other hand, the data on the position of our country on the world competitiveness ranking list (and specifically to the GME indicator) originate from the WEF Reports¹⁰ for the period 2007-2014.¹¹ These data have been analyzed and presented by applying the method of descriptive statistical analysis, for which purpose we used the SPSS program (version 19).

3. Results and discussion

Table 1. State aid in the Republic of Serbia in the period 2004-2014.

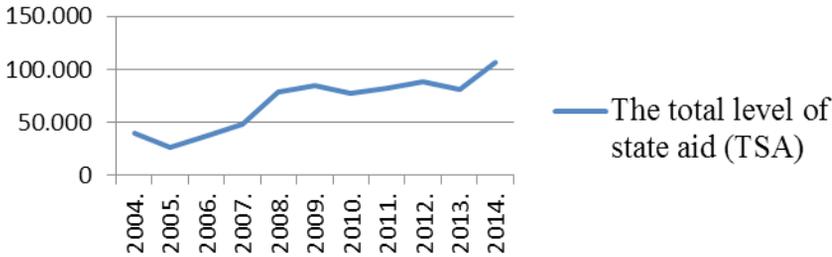
Year	Total state aid (mil. din.)	Share of state aid in GDP (%)	Horizontal state aid (mil. din.)	Sectoral state aid (mil. din.)	Regional state aid (mil. din.)	Competitive position and IGC	Goods market efficiency
2004.	39,686	2.8%	14,655 (36.9%)	20,093 (50.6%)	4,938 (12.5%)	89 (3.23)	
2005.	26,516	1.5%	12,425 (46.8%)	11,816 (44.6%)	2,275 (8.6%)	85	
2006.	37,005	1.7%	25,157 (68%)	10,799 (29.2%)	1,049 (2.8%)	87 (3.69)	97 (3.66) ¹
2007.	47,892	2%	36,453 (76.1%)	9,350 (19.5%)	2,089 (4.4%)	91 (3.78)	114
2008.	79,111	2.83%	36,535 (68.3%)	13,777 (25.7%)	3,233 (6%)	85 (3.90)	115 (3.68)
2009.	84,729	2.86%	53,021 (78.3%)	11,717 (17.3%)	3,020 (4.4%)	93 (3.77)	112 (3.7)

⁹ The annual reports are available at: <http://www.kkdp.gov.rs/izvestaji.php>

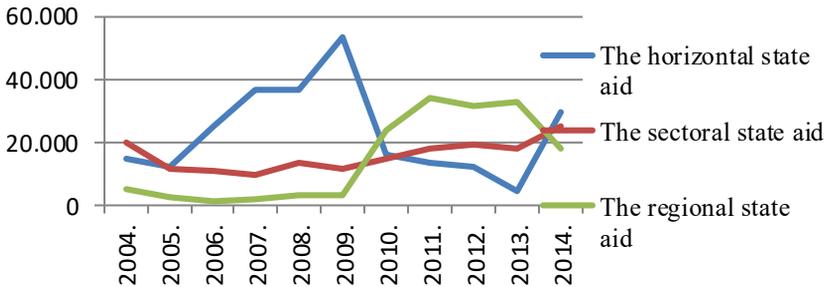
¹⁰ The reports are available at the WEF website.

¹¹ This period was selected due to the fact that, until 2007, the collected data referred to the State Union of Serbia and Montenegro. Since 2007, the statistical data pertain to the Republic of Serbia alone.

2010.²	77,619	2.64%	16,118 (20.7%)	14,526 (18.7%)	23,768 (30.7%)	96 (3.84)	125 (3.57)
2011.	82,447	2.60%	13,442 (16.3%)	18,260 (22.1%)	33,857 (41.1%)	95 (3.88)	132 (3.49)
2012.	88,009	2.60%	12,021 (13.6%)	19,317 (22.0%)	31,513 (35.8%)	95 (3.87)	136 (3.57)
2013.	81,451	2.25%	4,767 (5.9%)	17,943 (22.0%)	32,490 (39.9%)	101 (3.77)	132 (3.64)
2014.	106,074	2.74%	29,787 (28%)	25,137 (23.7%)	18,237 (17.2%)	94 (3.90)	128 (3.78)



Graph 1. Trend in the total state aid (TSA)



Graph 2. Trend in the horizontal, the sectoral and the regional state aid

Graph 1 shows the trend of the total state aid, while **Graph 2** indicates the trends of the state aid categories (horizontal, sectoral and regional) in the period from 2004 to 2014. There is an obvious *continuous increase in the total state aid from 2005 to 2014*, which includes a period after the SAC Act entered into force (in 2010). Then, there is a visible *continuous growth of the sectoral state aid from 2009 to the end of the observed period*, including a slight stagnation in 2013. Furthermore, *the regional state aid rapidly grew in the period from 2009 to 2013*, which was followed by a certain decline in 2014. Finally, *the horizontal state aid was constantly on the rise from 2005 to 2009*, reaching its peak in 2009 (before the SAC Act was implemented), which was followed by a sharp drop starting from the year 2010 (when the Act just started being implemented), until hitting

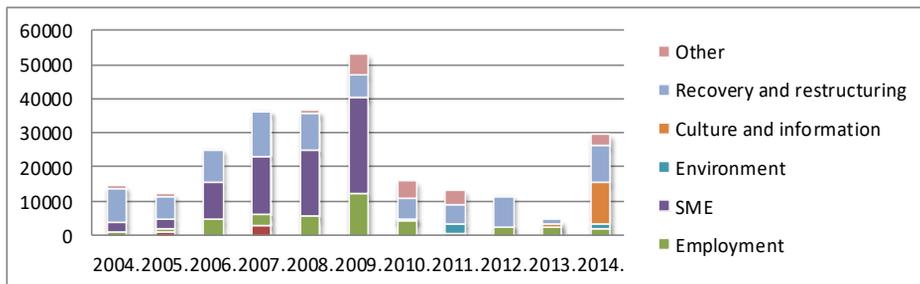
the lowest point in 2013. In 2014, this category recorded a significant rise as compared to the previous year.

Table 2. The horizontal state aid by type (in mil. RSD dinars)

	2004.	2005.	2006.	2007.	2008.	2009.	2010.	2011.
Research and development	-	-	-	22	2	0	17	83
Training course	344	1,283	6	2,985	-	0	2	2
Employment	942	661	4,646	3,077	5,614	12,344	4,375	468
SME ³	2,512	2,749	10,767 ⁴	17,268	19,228	28,277	458	1
Environment	-	-	-	-	-	5	63	2,923
Culture and information ⁵	3,238	2,135	-	-	-	-	22	144
Recovery and restructuring	9,889	6,732	9,430	12,771	10,882	6,241	6,035	5,228
Other ⁶	968	1,000	308	330	809	6,154	5,146	4,593
In total	14,655	12,425	25,157	36,453	36,535	53,021	16,118	13,442

	2012.	2013.	2014.
Research and development	9	7	0
Training course	4.1	8.9	0
Employment	2,511	2,351	2,089
SME ³	107.8	101	0
Environment	15.3	0	1,522
Culture and information ⁵	28.1	771	12,133
Recovery and restructuring	8,696	1,529	10,505
Other ⁶	650	0	3,538
In total	12,021	4,767	29,787

Graph 3. The types of horizontal state aid



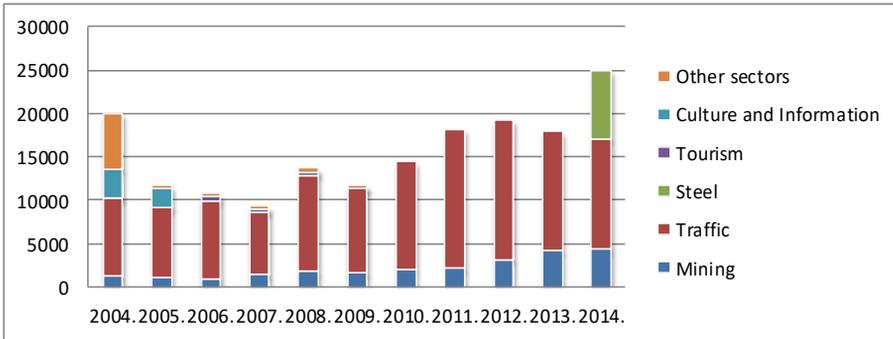
Within the structure of *the horizontal state aid* (Table 2, Graph 3), the funds allocated to *small and medium enterprises* (the largest amount was granted in 2009) prevailed as compared to the other types of HSA, but they were drastically reduced after the SAC Act entered into force (2010) and boiled down to zero in 2014. The funds allocated for *the recovery and restructuring* purposes are noticeable during the entire period. The funds allocated for *the employment* purposes are in the third place (the largest amount was granted in 2009). The resources aimed at *overcoming the negative effects of the global economic crisis in 2009, 2010 and 2011*, the funds allocated for *culture and information* purposes, as well as the funds granted to *business entities in the privatization process in 2014* are also worth noting. The field of *environment* was also granted significant funds in 2011 and 2014. The resources for *research and development* as well as the funds for *training courses* are at the lowest level in the HSA structure.

Table 3. The types of sectoral state aid (in mil. RSD/dinars)

	2004.	2005.	2006.	2007.	2008.	2009.	2010.	2011.
Mining	1,250	1,150	1,000	1,440	1,850	1,715	2,126	2,219
Traffic	8,978	8,006	8,858	7,239	11,108	9,646	12,400	16,041
Steel			0	0	-			
Tourism	152	95	561	379	301	76	-	-
Culture and information⁷	3,238	2,135	-	-	-	-	22	144
Other sectors	6,475	430	380	293	518	280		
In total	20,093	11,816	10,799	9,351	13,777	11,717	14,526	18,260

	2012.	2013.	2014.
Mining	3,236	4,300	4,576
Traffic	16,081	13,643	12,716
Steel	-	-	7,845
Tourism			
Culture and information⁷	28.1	771	12,133
Other sectors			
In total	19,317	17,943	25,137

Graph 4. The types of sectoral state aid

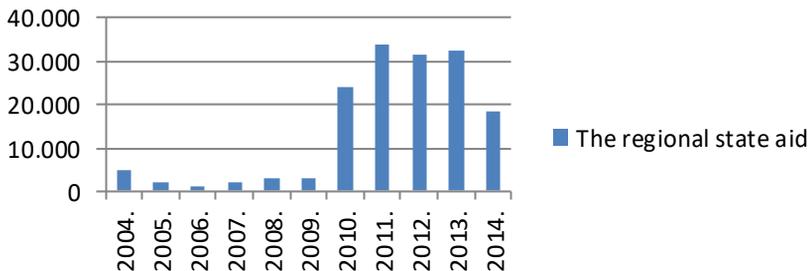


In the structure of *the sectoral state aid* (Table 3, Graph 4), the funds for *the traffic sector* prevailed during the entire period. On average, this sector was allocated 1.5 times more funds in the period after the Act started being implemented (14,176 million dinars) as compared to the period before the Act was implemented (8,972 million dinars in average). Then, significant resources were granted to the *mining sector*, which recorded continuous growth in the period from 2009 to 2014 (when the Act was already in force). On the average, 2.3 times more funds were allocated to this sector in the period after the Act started being implemented (3,291 million dinars) than in the period before it was implemented (1,400 million dinars). Finally, *the steel sector* received a huge sum only in the year 2014.

Table 4. The regional state aid (in mil. RSD/dinars)

	2004.	2005.	2006.	2007.	2008.	2009.	2010.	2011.
Regional state aid	4,938	2,275	1,049	2,089	3,233	3,020	23,799	33,857

	2012.	2013.	2014.
Regional state aid	31,513	32,490	18,237



Graph 5. The regional state aid

There is a huge difference in the allocation of *the regional state aid* in the period before and after the implementation of the SAC Act (**Table 4**, *Graph 5*). On average, after the Act started being implemented, in the period from 2010 to 2014, *ten times more funds* were granted (the average value for the period amounted to 27,979 million dinars) than in the period before the implementation of the Act (the average value for the period amounted to 2,767 million dinars).

Table 5. The agricultural state aid (in mil. RSD/dinars)

	2004.	2005.	2006.	2007.	2008.	2009.	2010.
Agricultural sector	-	-	-	-	25,566	16,971	23,176
Share of the TSA (%)					32.3	20	29.9

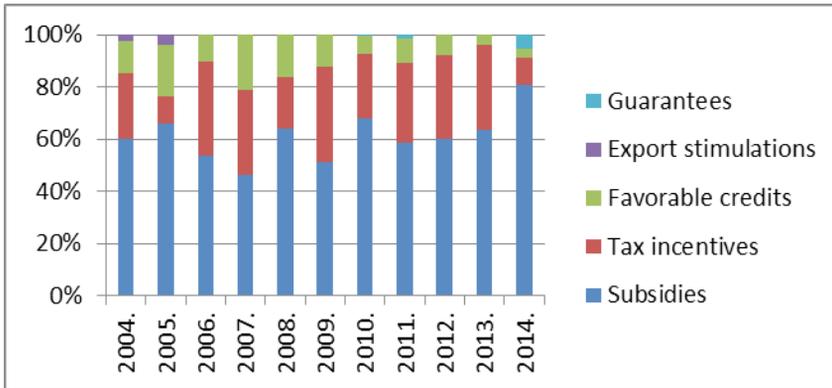
	2011.	2012.	2013.	2014.
Agricultural sector	16,888	25,158	26,251	32,913
Share of the TSA (%)	20.5	28.6	32.2	31

Since 2010, the agricultural sector has been considered as a separate category in the reports on granted state aid. Notably, there was a continuous growth of resources allocated to this sector from 2011 to 2014 (**Table 5**). On average, the agricultural sector was allocated 24,877 million dinars in the period after the SAC Act started being implemented; before the implementation of this Act (according to available data for 2009 and 2008), it was granted 21,268 million dinars. On average, 27.7% (as a share of total state aid) was allocated for the agricultural sector in the period 2008-2014, with no significant difference in the period before and after the implementation of the Act (28.4% after and 26.15% prior to its implementation).

Table 6. The instruments of state aid (in percent)

	2004.	2005.	2006.	2007.	2008. ⁸	2009.	2010.
Subsidies	59.9	66.1	53.4	46.4	64	51	68
Tax incentives	25.2	10.3	36.1	32.4	20	36.8	24.6
Favourable credits	12.5	19.8	10.5	21.2	16	12.2	7.2
Export stimulations	2.4	3.8	-	-	-	-	-
Guarantees							0.2

	2011.	2012.	2013.	2014.
Subsidies	58.5	59.8	63.6	80.9
Tax incentives	30.7	32.6	32.3	10.1
Favourable credits	9.4	7.6	4.1	3.4
Export stimulations	-	-	-	-
Guarantees	1.4	0	0	5.6



Graph 6. The state aid instruments (in percent)

Table 6 and *Graph 6* clearly show that *subsidies* represent a dominant state aid instrument throughout the period. On average, about 66% of the funds were allocated through subsidies *after* the Act started being implemented and 57% prior to its implementation. This insignificant difference is primarily a result of the substantial amount of subsidies in the year 2014 when 80.9% of the funds were allocated by means of this instrument. Moreover, in the agricultural sector, subsidies were the sole instrument of the state aid in the period from 2010 to 2014 (with only one exception in the year 2012), whereas a combination of direct instruments (subsidies) and indirect instruments was used for accomplishing the horizontal, regional and other sectoral goals (excluding the agricultural ones). In second place were the resources allocated in the form of *tax incentives*, in respect of which there is no difference in the mean values before and after the implementation of the Act. It may only be noted that the funds allocated for tax incentives in the year 2014 were reduced three times as compared to those granted in 2013 and 2012. Then, the third place was occupied by *the favourable credits*, the amount of which continuously decreased in the period from 2011 to 2014, when it reached the lowest value during the entire period. Finally, there is a new instrument for granting state aid – *the guarantees*, which has been included in the reports since 2010. This instrument made up 5.6% of the total state aid granted in 2014. These were the guarantees of the *Fund for Development of RS*, issued to secure the obligations of the *Smederevo Ironworks*, and two guarantees issued to secure the obligations of the *Agency for Export Insurance and Financing*, which were put into effect in 2014.

Table 7. *De minimis* state aid (in mil. RSD/dinars)

	2004.	2005.	2006.	2007.	2008.	2009.	2010.
<i>De minimis</i> state aid	-	-	-	-	-	-	298

	2011.	2012.	2013.	2014.
<i>De minimis</i> state aid	3,767	2,650	1,463	1,081

A special form of state aid is *the state aid of small value (de minimis state aid)*, which is shown separately in reports and whose value has been continuously declining since 2011.

Table 8. Statistically significant correlations between basic research variables (TSA, RSA, SSA and HSA) (2004-2014)

	TSA	RSA	SSA	HSA
TSA	-	.623* .041		
RSA	.623* .041	-		-.610* .046
SSA			-	
HSA		-.610* .046		-

*. Correlation is significant at the 0.05 level (2-tailed).

**. Correlation is significant at the 0.01 level (2-tailed).

Table 9. Statistically significant difference in the mean values of the basic variables

(TSA, RSA, SSA and HSA) before and after the implementation of the SAC Act

	The mean value before application of the Law	The mean value after application of the Law	The mean value for the entire period	Statistical significance
TSA	52,489.83	87,120.00	68,230.81	.016
RSA	2,767.33	27,973.00	14,224.45	.000
SSA	12,925.33	19,036.60	15,703.18	.027
HSA	29,707.66	15,227.00	23,125.54	.099

Table 8 shows statistically significant correlations between the basic research variables throughout the observed period (2004-2014). The first finding is that only *regional state aid (RSA)* is positively correlated with the total state aid (TSA), which means that an increase in the regional state aid (not the sectoral one)

significantly contributed to the increase in the total state aid. The second finding is that *the horizontal state aid (HSA) is negatively correlated with the regional state aid (RSA) during the entire period*. In other words, there is a statistically significant correlation between the decrease of the horizontal state aid and increase of the regional state aid, but there is no correlation with the increase of the sectoral and the total state aid.

Table 9 shows statistically significant differences in mean values of the basic research variables (TSA, RSA, SSA and HSA) before and after the implementation of the SAC Act. The statistical significance was manifested within the TSA, the RSA and the SSA, but not in the HSA. At the same time, the major difference exists within the RSA (which, as we have seen, positively correlates with the TSA). The most important finding is that *the TSA has significantly increased after the implementation of the Act*, and it is largely influenced by an increased allocation of funds for the RSA and decreased allocation for the HSA.

Table 10. Statistically significant correlations between the basic research variables

(TSA, RSA, SSA and HSA) and the IGC and the GME (2007-2014)

	TSA	RSA	SSA	HSA	IGC (position)	GME (position)
IGC		.759* .029			-	
GME		.962** .000	.756* .030	-.893** .003		-

Table 10 shows that the increase of the regional state aid is the only one that significantly correlates with Serbia's lower position on the Global Competitiveness Index (GCI) list for the period 2007-2014.¹² On the other hand, for the purposes of our analysis, a more important finding is that *the increase of the sectoral and the regional state aid, as well as the decrease of the horizontal state aid, significantly correlates with Serbia's lower position in the global competitiveness rankings according to the competition indicator (GME) in the period*. To put it simply, the obvious decline of Serbia's position in the list (according to the competition indicator) is in correlation with the decrease of the HSA and the increase of the SSA and the RSA.

¹² The correlation is positive due to the fact that the higher number on the GCI list implies the lower rank (position) on the list.

4. Conclusion

By analysing the scope and structure of state aid in the Republic of Serbia in the period from 2004 to 2014, we came to the following relevant findings. The first and most important finding is that *there is a statistically significant increase in the total state aid granted after the implementation of the Act on the State Aid Control as related to the period before its implementation, which is significantly influenced by an increase of the regional state aid*. Hence, the first starting hypothesis has been confirmed.

Then, *the increase of the sectoral and the regional state aid, as well as the decrease of the horizontal state aid, significantly correlate with Serbia's lower position in the global competitiveness rankings according to the competition indicator (goods market efficiency) in the observed period*. Therefore, the second starting hypothesis has been confirmed. Of course, this finding does not mean that Serbia's lower position in the global competitiveness rankings (according to the GME indicator) has been affected merely by this factor (the level of state aid) but just that there is a *link* between the given variables.

Furthermore, considering the overall level of *the horizontal state aid*, it is evident that it fell sharply after the implementation of the SAC Act (in the period from 2010 to 2013), but there is no statistically significant difference as compared to the period before its implementation. In addition, *there is a statistically significant negative correlation between the decrease of the overall level of horizontal state aid and the increase of the overall level of regional state aid*. Finally, *sectoral state aid does not correlate with other forms of state aid, but it was significantly increased after the implementation of this Act*.

From the economic point of view, an increase in the total level of state aid, and in particular an increase in the sectoral state aid, cannot be assessed positively. It is also obvious that the structure of state aid is inadequate due to the marginalization of the horizontal goals. Research and development, training and environment are at the lowest level in the horizontal state aid structure, while expenditures on recovery and restructuring of business entities prevail. The structure of the horizontal state aid depends on the external factors (long-time problem of enterprises in the restructuring process and inefficiency of certain economic sectors) but it is economically unjustified anyway.

Thus, these findings imply that Serbia should continue to redesign the policy of state aid towards increasing the horizontal state aid and decreasing primarily the sectoral state aid. Such a policy would generate positive effects on competition in the domestic market and possibly correct the position of our country in the global competitiveness rankings.

A recent study of the system of state aid control in Serbia (Transparency Serbia, 2015) points to the numerous shortcomings of the SAC Act, which ultimately lead to the inefficiency of the system: the inadequate control mechanisms, lack of accountability and authority to sanction those authorities that awarded state aid outside the framework of the SAC Act, the undefined legal status of the Commission for State Aid Control and its inconsistent practice, uneconomical spending of funds under the state aid system which may be supported by a numerous examples (for instance, the state aid granted to the *Serbian Railways Corporation* or *Simpo Corporation*). One of the most important finding of this research is that the state aid control system is designed to meet the obligations related to the protection of the European market, while the protection of the domestic market has been neglected. In that context, the recommendation is a closer cooperation and integration of this system with the competition protection system. Above all, this research shows that the SAC Act was only formally adopted in order to meet the requirements imposed by *the EU accession process*, and that there are numerous problems in the implementation of this Act. Therefore, the Act has not fulfilled the expectations, above all, in terms of protecting the market competition. This conclusion is supported by the findings of this research, primarily in terms of the trends in the level of state aid (in the total amount and according to its structure) before and after the implementation of the SAC Act, as well as in terms of the established correlation between the level of state aid and Serbia's position in the global competitiveness rankings.

In addition, the latest European Commission Report (European Commission, 2015)¹³ on Serbia's progress in the EU accession process clearly indicates that *our country needs to make substantial progress in aligning its legislation on the control of state aid with the EU acquis since the control of state aid still has significant flaws*. Accordingly, Serbia has been recommended to do as follows: to create a map for regional state aid; to strengthen the monitoring of cumulation of state aid; to better present the operative independence of the Commission; to strengthen the capacity of the Secretariat of the Commission for State Aid Control; to ensure that all state assistance measures are reported to the Commission and approved by the Commission before they are granted; to strengthen the transparency of aid measures; etc.

In general, we can say that *the state aid system in Serbia is not efficient since it generates significant funds, which are not always purposefully spent and which are not adequately distributed* (due to the problem of state aid structure). The problems underlying the operation of this system are a result of *the deficient legal*

13 European Commission (2015). *Republic of Serbia. 2015 Progress Report*. The report is accessible at the website of the Office for European Integration of the Government of the Republic of Serbia. <http://www.seio.gov.rs/dokumenta/eu-dokumenta.211.html>

framework but also *the inadequate state aid policy*, which is a mere reflection of the dominant economic philosophy in our country that the state prevails over the free market; while formally supporting the strengthening of the free market, there is a wide-spread belief in the state-imposed mechanisms for resolving economic problems. The state aid system is perfectly suitable for putting such ideas into practice.

In the future, we may expect improvement of the legal framework, as part of the harmonization of our legislation with the European law. Yet, the remaining question is the extent of the shift in the dominant economic philosophy in our country, which would eventually lead to reducing the state aid to a reasonable level.

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(Footnotes)

1 The year 2006 is omitted because the data for the year 2006 refer to the efficiency of the market as a whole (rather than the efficiency of market for goods) as well as to the State Union of Serbia and Montenegro (rather than the Republic of Serbia alone).

2 For the years 2010, 2011, 2012, 2013 and 2014, *Table 1* does not contain the amount of state aid allocated for agriculture (hence, the TSA does not match with the sum of HSA, RSA and SSA). In particular, the agricultural state aid is shown in *Table 5*. For the purposes of this analysis, we used the absolute amounts of state aids (in the total amount and structure) expressed in RSD (*dinars*) in order to compare the scope of state aid for different years, taking into account the change in the methodology of preparing reports subject to the new Rule

Book on the methodology of compiling the annual report on granted state aid, No. 110-00-00621/2010-26 of 17.1.2011.

3 Small and medium-sized enterprises.

4 The 2006 report specifies a total of 10,913 million dinars, while the 2008 report contains a total of 10,767 million. The difference is insignificant for the purposes of analysis in this paper.

5 In the years 2008, 2007, 2006, 2005 and 2004, *culture and information* were classified into the sectoral state aid, and its value will be left out when calculating the total value of horizontal state aid for these years.

6 The "other" category includes: *the allocation for export promotion* in 2008, 2007, 2006, 2005 and 2004; the funds allocated *to overcome the negative effects of the global economic crisis* in 2011, 2010 and 2009; and the funds intended *for business entities in the privatization process* in 2014, 2013 and 2012.

7 Since 2009, the sector of culture and information has fallen into the category of the horizontal state aid; therefore, its value is excluded from the total value of sectoral state aid in the period from 2009 to 2014.

8 Agriculture has been included since 2008.

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АНАЛИЗА ЕФЕКТА ЗАКОНА О КОНТРОЛИ ДРЖАВНЕ ПОМОЋИ

Резиме

У раду смо анализирали обим и структуру државне помоћи у Републици Србији у периоду од 2004. до 2014. године. Будући да је Закон о контроли државне помоћи почео да се примењује 2010. године, издвојили смо два периода: од 2004. до 2009. године и од 2010. до 2014. године. Циљ рада је био двострук: прво, да испитамо да ли постоји статистички значајна разлика у додели државне помоћи (у укупном износу и према структури) пре и након почетка примене Закона; друго, да установимо да ли постоји корелација између обима државне помоћи, с једне стране, и позиције наше државе у свету према индикатору конкуренције у оквиру композитног индекса глобалне конкурентности (ИГК), с друге стране. Релевантни законски оквир (пре и након почетка примене Закона) представљао је независну варијаблу у односу на коју смо пратили кретање зависних варијабли: укупан ниво државне помоћи (УДП), ниво хоризонталне државне помоћи (ХДП), ниво секторске државне помоћи (СДП) и ниво регионалне државне помоћи (РДП). Пошли смо од тога да постоји статистички значајно повећање у додели укупне државне помоћи након примене Закона у односу на период пре примене, као и корелација између повећања регионалне и секторске, као и смањења хоризонталне државне помоћи, с једне стране, и снижења позиције наше државе у свету према индикатору конкуренције у оквиру ИГК-а.

Најважнији налаз јесте да је УПД статистички значајно повећана након примене Закона, а на то је највише утицало повећано издвајање средстава за РДП и смањење за ХДП. Други налаз јесте да је пад позиције Србије на глобалној листи конкурентности у вези са споменутиим кретањем различитих облика државне помоћи. Генерални закључак јесте да систем државне помоћи у Србији није ефикасан, будући да генерише значајна новчана средства (која се не троше увек сврсисходно) и да иста нису адекватно расподељена. Налази имплицирају да би наша земља убудуће требало да редизајнира политику државне помоћи у правцу повећања хоризонталне, и снижења, пре свега, секторске државне помоћи.

Кључне речи: државна помоћ, хоризонтална, регионална, секторска, конкуренција, корелација.

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PERSONAL BANKRUPTCY AS A CONSUMER PROTECTION MECHANISM

Abstract: *Personal bankruptcy is a special bankruptcy procedure that allows a conscientious debtor (consumer), who otherwise would not have been able to repay debts, to declare a personal bankruptcy, whose purpose is to provide and promote a new financial start for debtors through a relief payment of obligations, including the possibility of debt forgiveness, by excluding certain debtor's assets from the execution. The main function of this institution is to provide the individuals who declare personal bankruptcy the so-called financial recovery (rehabilitation), or a chance for a new financial start. The institution of personal bankruptcy does not exist in the Serbian legal system, but it is known in many foreign legislations. The aim of this paper is to point out to the advantages of adopting the law on personal bankruptcy of consumers in the Republic of Serbia. Given the importance of the subject matter of personal bankruptcy of consumers, the authors have tried to provide an insight into this institute which is not envisaged in the domestic legal system. The authors advocate for the adoption of the law on consumers' personal bankruptcy. This paper is the first in a series of articles which will elaborate on the rights and obligations of consumers who are involved in personal bankruptcy proceedings.*

Keywords: *personal bankruptcy, consumer (debtor), creditor, insolvency, restructuring existing liabilities, global economic crisis, legislation.*

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1. Introduction

The global economic crisis, which has a vertical economic depth impact, has affected not only those who are managing considerable financial assets but also those who do not have free funds, i.e. who are not liquid. In the Republic of Serbia, the nature of privatization of enterprises and the promotion of large capital have generated considerable attention in recent years, but little or no attention at all has been given to the national social-economic character of privatization from the perspective of the consumer.

The period from 2008 (when global crisis began and when its effects were felt on the global capital markets) onwards served to substantiate the claims of some local economic experts who suggested that the crisis was an opportunity for economic development, that there would be a spill-over of capital from the West, that its effects should be exploited, and that foreign capital should be attracted to the Serbian market. The key arguments supporting the capital spillovers were: a) cheap and skilled labor force, b) legal regulations harmonized with the EU legislation guaranteeing legal security to foreign investors, and c) the state subsidy for each new job created. Although the promises of "benefits" that the migration of capital from the West could bring for our market sounded too optimistic (with a touch of euphoria, just like in the years after 2000), it soon became clear that this is yet another in a continuous erroneous projections of local representatives of the neo-liberal economic thought. The advocacy and implementation of the position that industrialization is obsolete, that privatization must be carried out at any cost, and that we should turn to the services sector, resulted in a considerable number of unemployed people.¹ In spite of the slight decrease in the number of unemployed people² recorded in the past few years, unemployment is still one of the most acute problems of Serbian economy. In the given circumstances, Serbia has no appropriate answer; according to the National Employment Bureau from July 2016, there are 700,041 unemployed persons in the Republic of Serbia.³ In the circumstances when the GDP *per capita* is \$6154,8⁴ low purchasing power is unavoidable; it inevitably brings about a

1 More about statistics on projection of the number of unemployed in period 2005 – 2015, see in: the Report of the National Employment Bureau; http://www.nsz.gov.rs/live/digitalAssets/6/6078_bilten_nsz_07_2016_-_broj_167.pdf (Accessed in August 2016).

2 Available at: http://www.nsz.gov.rs/live/digitalAssets/6/6078_bilten_nsz_07_2016_-_broj_167.pdf (accessed in August 2016).

3 Available at: http://www.nsz.gov.rs/live/digitalAssets/6/6078_bilten_nsz_07_2016_-_broj_167.pdf (accessed in August 2016).

4 According to the UN data for 2014, GDP *per capita* was 6154.8 US\$. Available at <http://data.un.org/CountryProfile.aspx?crName=Serbia> (accessed in August 2016).

higher population debt and gives rise to creation of problematic loans.⁵ The problematic loans of the population grow continuously, amounting to up to 16.1% (71 billion RSD – dinars) of the total amount of problematic loans. The indicator of problematic loans of the population was (for the first time) above 10% in May 2014, and by the end of 2015, when it reached 10.9%. By the end of April 2015, gross indicator of problematic housing loans⁶ was 9.0%.⁷ It should be noted that decrease in quality of housing loans was primarily conditioned by increased unemployment rate, stagnated earnings, and depreciation of the domestic currency.⁸

In the circumstances of such high unemployment growth and stagnating earning levels, we now have around 130,000 citizens unable to repay loans (as they are left jobless and have no earnings), and 250,000 people who are in permanent overdraft on their accounts (whose debt, coupled with debt on credit cards, exceeds 600 million Euros); as a consequence, a total debt amounts up to 5 billion Euros for various loans, where housing loans and cash loans constitute a considerable percentage.⁹

5 These are loans:

“- based on which the debtor is late in payment (in the manner prescribed by the decision regulating classification of balanced sheet assets and off balance sheet assets of the bank) longer than 90 days, or based on interest of principle debt payment;

- based on which the interest rate is equal to the quarterly amount (or higher) attributed to long, capitalized, refinanced, or delayed its payment;

- under which the debtor is overdue less than 90 days, but the bank estimated that the debtor's ability to repay is worsened and that the debt repayment of the full amount is in question.” The Decision on reporting of banks „*Official Gazette of RS*”, no. 125/14 and 4/15 - Annex 8 (NPL 1).

6 The portal „*Добов - Dobos*”, which has been advertising real estates that are collateral for the loan since 2010, reports that, at present, there are 1,670 properties (mainly houses and flats) which is 60 % of the total number of real-estate that is for sale. Since the beginning of 2016, the number of ads has raised to 4-6% per month, which does not necessarily mean that more property went under the hammer nor that the economic situation in Serbia is worse, but that these sales only matured, considering it is about loans from five years ago.- <http://www.politika.rs/sr/clanak/356159/Zakon-o-licnom-bankrotu-u-pripremi> (Accessed on September 2016).

7 <http://www.rsjp.gov.rs/strateg/64/nac/1%20Predlog%20Strategije%20za%20NPL.pdf> (Accessed on August 2016).

8 <http://www.rsjp.gov.rs/strateg/64/nac/1%20Predlog%20Strategije%20za%20NPL.pdf> (Accessed on August 2016).

9 <http://www.ubs-asb.com/>(Accessed on July 2016).

The aforementioned statistics indicates that a large number of Serbian citizens are in financial difficulty, and many of them are over-indebted (insolvent).¹⁰ On a larger scale, citizens' over-indebtedness leads to disturbances in debtor-creditor relations and causes a "domino effect", i.e. a series of negative consequences concerning the interests of both creditors and debtors, but also interests of a wider community.

2. The issue of overdebthness of citizens-consumers

The problem of over-indebtedness of individuals (consumers) is a complex socio-economic problem. It burdens the debtor and his family, causes suffering and entails sacrifice. When a household is unable to respond to the obligations in the future, the situation often causes serious consequences for members of the household and the society. Indebtedness could result in the exclusion of individuals and families from society, a loss of motivation to engage in productive activities, exclusion from social activities, and health problems. This is not only harmful for the affected individuals and families but also for the society as a whole, which sustains apparent financial losses. Financial losses caused by over-indebtedness include: social security costs, tax losses, medical expenses, accommodation expenses for those who were expelled from their homes as a result of sequestration, a lesser degree of settlement with creditors, the loss of members who could potentially contribute to the economy, and overall well-being of the society.¹¹

In the EU member states, the over-indebtedness of the population and citizens/consumers became a central legal and political issue especially during the 1990s. The reason was deep economic depression that struck European countries in the early 1990s. The consequences of this economic downturn were manifested in increased indebtedness of households. In addition to families with low income, many middle-class households fell into serious economic difficulties due to housing loans and mortgages, loans for small businesses, guarantees for business and private loans, as well as consumer loans. In this situation, EU governments were under pressure to find a solution for the problem.¹²

10 The situation of over-indebtedness (bankruptcy) is a condition in which the debtor faces extremely difficult situation, or is not able to properly and regularly meets financial obligations owed on different bases, resulting in a longer period of being overdue.

11 *Legal solutions to debt problems: Recommendation Rec(2007)8 and explanatory memorandum*, online at <https://wcd.coe.int/ViewDoc.jsp?id=1155927&Site=CM&BackColorInternet=9999C&BackColorIntranet=FFBB55&BackColorLogged=FFAC75#>. (Accessed in September 2016).

12 Johanna Niemi-Kiesiläinen & Ann-Sofie Henrikson, Bureau of the European Committee on Legal Co-Operation (CDCJ-BU), *Report on Legal Solutions to Debt Problems In Credit Societies* (2005), online at: http://www.coe.int/t/e/legal_affairs/legal_co-operation/

Legal developments in this field were intensive, and one of the most famous intervention in response to the problem of insolvency of individuals was emergence of the first laws which introduced a new form of bankruptcy, called *consumer (personal) bankruptcy*, in several countries of central and northern Europe. The wave of these legislative changes and reforms started in Denmark in 1984. The Danish law was an important model for the other Scandinavian countries when they drafted their legislations. In Finland and Norway, legislative acts on judicial debt adjustment for consumers entered into force in 1993, and in Sweden they entered into force in 1994 (Niemi-Kiesiläinen, 1999:482). Since then, introducing the institution of personal bankruptcy in the bankruptcy legislation of the EU member states has been an ongoing process; the last EU member state that adopted such legislation in 2015 was Croatia.¹³

3. Personal bankruptcy as one of legal mechanisms for solving the problem of citizens/consumers' over-indebtedness (insolvency)

Personal bankruptcy¹⁴ is a special bankruptcy procedure that allows a conscientious debtor/consumer, who otherwise would not have been able to repay debts, to declare personal bankruptcy, whose purpose is to provide and promote a new financial start for debtors through a relief payment of obligations, including the possibility of their debt forgiveness, through exemption of certain debtor's assets from execution. The main function of this institution is to provide individuals who declare personal bankruptcy the so-called financial recovery (rehabilitation), or a chance for a new financial start. It is certainly in the interest of the debtor (consumer) but also in the interests of creditors and the society (the state). This institute is in the interest of creditors because creditors do not benefit from rigid application of contract law theoretical rule *pacta sunt servanda*, which enables them to collect in situations where debtors simply lack the means to meet their obligations. But, creditors would benefit from a collective system of collection in bankruptcy procedure that would offer debtors an incentive to be productive and meet their obligations to the extent possible: relief in the form of a discharge of unpaid debt in exchange for a limited period of "best efforts" payments on those debts. Because of that, the collective system of collection avoids the multiplication of expenses in individual enforcement system, averting a disastrous battle of interest among the creditors themselves. Finally, the

steering_committees/cdcj/cj_s_debt/CDCJ_BU_2005_11e%20rev.pdf and http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/CJ_S_DEBT/. (Accessed in September 2016).

13 Narodne novine Republike Hrvatske, no. 100/15.

14 In addition to the term "personal bankruptcy", we also use other terms such as: consumer bankruptcy, individual bankruptcy, and the like.

institute is also in the interest of the society (the state) because it softens social tensions, and prevents over-indebted borrowers from becoming "social cases". Consequently, a relief system achieves a *win-win-win* situation, as creditors benefit from greater and more even distributions, debtors benefit from a fresh start and renewed incentive for productivity, and the society benefits from the debtors "renewed vigor" and avoiding the well-documented social costs of allowing debtors to languish in over-indebtedness (Huls, 1993:221-223)(Kilborn, 2010:3).

Today, all legal regimes or systems of personal bankruptcy known to modern legislation fall into the category of either liberal or conservative model of consumer bankruptcy law (Radović, 2006). A typical representative of the liberal model of personal bankruptcy is the US bankruptcy law; this group more or less includes personal bankruptcy legislation of other common law countries. In contrast to this model, Europe is mostly dominated by the so-called conservative model of personal bankruptcy; a typical representative of this model is Germany but it also includes consumer bankruptcy legislation of other countries of the European-continental legal system.¹⁵

3.1. The liberal (US) model of personal bankruptcy

The main characteristic of the liberal personal bankruptcy model is a smaller number of preconditions for launching the personal bankruptcy proceedings (i.e. open access), which naturally results in a lighter approach to this procedure, but in practice results in a large number of bankruptcy cases. Open access refers to the idea that an individual who is insolvent (i.e. is unable to pay debts as they fall due) may get access to a bankruptcy procedure that could ultimately lead to full discharge from debt. The possibility of getting discharge from debt is the essential feature of this model whose basis lies in the idea of providing the customer/individual a chance for a fresh start, which is the fore of debtor-interest of consumers, and the risk is transferred to the creditors as economically stronger side (Bodul, 2014:340).

The philosophy of a new beginning relates to the right of a debtor to be relieved of debt incurred prior to the opening of bankruptcy through a relatively short and formal bankruptcy (Reifner, Kiesilainen 2003:165-166). Bankruptcy legislation of the United States represents the founder of the development of legislation on personal bankruptcy worldwide. The Bankruptcy Code of 1978,¹⁶ which

¹⁵ Systems belonging to this model are characterized by a high degree of similarity in terms of fundamental orientation; they are based on the same philosophy concerning the issue of personal bankruptcy, but these systems differ in individual solutions through which, of course, they reflect national specificities.

¹⁶ Bankruptcy Reform Act of 1978 (*Pub. L. 95-598, 92 Stat. 2549, November 6, 1978*).

also regulates personal bankruptcy, provides two basic forms of bankruptcy procedures. Natural persons (consumers) can initiate the procedure for opening a personal bankruptcy, either under Chapter 7 or pursuant to Chapter 13 of the Code.

Bankruptcies under Chapter 7 are far more common in practice. According to the provisions of Chapter 7, any individual (natural person) may initiate proceedings for the opening of (personal) bankruptcy, regardless of the scope of responsibilities and available property. The procedure is initiated upon the proposal of the debtor, where the debtor, upon submission of the application, must pay a court fee, which amounts to about \$300. In the submission, the debtor must indicate a series of data: the total amount of debt and the amount of individual payment obligations, which it has under certain creditors, details of creditors, the amount of his income and expenses, as well as an exhaustive list of all his assets. Following the submission, a hearing is held in which the court checks the information contained in the submission. Immediately upon the filing of a petition, an automatic stay becomes operable and a bankruptcy estate is created consisting of non-exempted assets. The debtor must submit at disposal all of the so-called non-exempted assets to an appointed supervisor or commissioner (trustee) for its liquidation or sale in satisfaction of creditors. Non-exempted assets comprise items that fall into specific categories of assets that debtor can keep (such as a certain amount of clothing, household items, working equipment, and in some instances, vehicles, and family home). The bankruptcy trustee takes handed-over assets (if any) and sells them, and the obtained amount is distributed to the debtor's creditors in proportion to their claims. The key features of this procedure are: first, that it allows the debtor, against whose property the bankruptcy is opened (bankrupt individual), to obtain a discharge of all or most pre-bankruptcy petition debts without incurring future debt payment obligations (Levis, 2006:38); and second, it allows the debtor to repay creditors in an orderly manner to the extent that the debtor has assets available for payment (Gerhard, 2009:2).

Specifically, for persons who are bankrupt, future income, i.e. income that the debtor acquires after the opening of bankruptcy proceedings, does not become part of the bankruptcy estate, and the debtor can freely manage and dispose of it. The only financial commitment that affects consumers is to hand-over all non-exempted property to the appointed supervisor or the Commissioner at the time of the opening of bankruptcy for its liquidation and distribution to creditors (Levis, 2006:38).

In addition, the debtor who successfully goes through the appropriate four-month procedure will be entitled to debt relief pursuant to § 727 (a). In other

words, after 4 months from the initiation of bankruptcy proceedings, i.e. submitting a proposal for declaration of bankruptcy, the debtor is provided a new financial start. The discharge replaces the automatic stay. To that extent, the possibility given to insolvent consumers, through declaration of personal bankruptcy procedures in accordance with Chapter 7, is reflected in the protection of future earnings; the possibility to enjoy prospective wage protection is a critical and unique feature of the American "fresh start" (Levis, 2006:38).

Although insolvency procedure pursuant to Chapter 7 of the Bankruptcy Code is the norm (i.e. individuals usually resort to this proceeding), there is a possibility that personal bankruptcy procedure is initiated in accordance with the provisions contained in Chapter 13 (Levis, 2006:38). This procedure provides "qualified" individuals (i.e. persons who meet certain conditions of the so called "suitability test") the ability to reorganize their financial affairs and fulfill part of their liabilities (debts) from future income over a period of 3-5 years. After this procedure, the debtor can preserve much of his property, but it does not include the immediate release of the debt; yet, it includes pre "reorganization" of debt in the form of the so-called "payment plan." Namely, in contrast to the provisions contained in Chapter 7, Chapter 13 does not oblige the debtor to give up non-exempted assets in satisfaction of creditors. However, Chapter 13 of the Code provides that the debtor is required to waive part of his income for the benefit of the creditor in the next 3-5 years (depending on the amount of income). Accordingly, under this procedure, the debtor must adhere to a payment plan during the period of 3-5 years but, at the time of completion of the payment plan, the debtor is no longer responsible for the remaining part of the debt, i.e. he is automatically released of the remaining debt. Therefore, procedures in Chapter 13 are based on the assignment of future earnings and other future income of the debtor to bankruptcy commissioner for his management to the extent that is necessary for the execution of the debt payment plan. In principle, the plan must satisfy the condition that conforms projected disposable income, which essentially means that charging the projected disposable income requires prediction how much the debtor will make (gain) during the plan period (3-5 years), and how much should be deducted from the amount of costs that are reasonably necessary for the maintenance of the debtor and his family. The resulting amount must then be used to finance the payment plan.

Until 2005, the greatest number of insolvent US citizens, when submitting a proposal for launching a personal bankruptcy, relied on the procedure laid down in Chapter 7 (liquidation), in spite of the possibilities given under Chapter 13 (the debt payment plan). The reasons for this option are exemption provisions, which enable debtors to save large amounts of their assets from liquidation. In other word, in those cases where bankrupts do not own any non-exempt prop-

erty, they may enjoy a fast track to discharge. In practice, there were significant abuses because those who had sufficient income, and were thus able to initiate bankruptcy under the provisions of Chapter 13, opted for the bankruptcy proceedings under the provisions of Chapter 7.

In order to combat such practices and prevent further abuse, bankruptcy procedures were modified in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).¹⁷ The US legislators introduced a key innovation: a complex mathematical (econometric) “eligibility test”, which identifies who is eligible, i.e. who meets the requirements for bankruptcy in terms of Chapter 13 and has applied for bankruptcy under Chapter 7; by the decision of the court, he can be transferred into the procedure envisaged in Chapter 13. Thus, the foreseen changes or introduction of the aforesaid mathematical formulas and test made it impossible for the debtor who has income from which he could pay creditors to opt for the Chapter 7 procedure, which could make him equal with the debtor who does not have income or assets that could be used to settle obligations. Accordingly, the aforementioned Act from 2005 prevented fraudulent behavior of potential debtors at the expense of the creditor.

On the one hand, the introduction of the econometric test i.e. mathematical test of eligibility was a significant step towards establishing a fairer system of protecting the interests of debtors who do not possess real property; on the other hand, it was important for protecting the interests of the creditor from those debtors who have enough assets (income) and who abused their position. These amendments prevented the person who has sufficient funds to pay debts to “deceive the system”. However, these changes have not led to significant use of Chapter 13 in practice. The procedure of opening personal bankruptcy under Chapter 7 is still the dominant way¹⁸ of solving problems of over-indebted American citizens (Gerhard, 2009:2).

3.2. The Conservative (European) model of personal bankruptcy

Contrary to the liberal (American) model of personal bankruptcy, the European countries did not accept the philosophy of a new beginning as a guiding principle, or the idea of an easier or even automatic exemption from debts. The philosophy that permeates the European-continental laws on personal bankruptcy is based on the view that the debtor should “earn” the relief of debt. Thus, the normative

17 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), (*Pub. L. 109-8, 119 Stat. 23*, enacted April 20, 2005).

18 In 2008, most consumer bankruptcy is carried out according to Chapter 7: 67% of all non-business bankruptcies were launched on the grounds of Chapter 7, and another 33% on the basis of Chapter 13.

solution built-in all European laws on personal bankruptcy debt relief is not an automatic right (something that inevitably follows the debtor's opening of personal bankruptcy) but a privilege, something that debtors have to gain or earn by their good behavior after the opening of bankruptcy. As a rule, it implies an orderly completion of the debt repayment plan.

Therefore, as a condition for exemption from debts, all European countries envisage at least partial payment of debts in accordance with the repayment plan, which usually takes several years.¹⁹ The payment plan is perceived as a "price" for getting a chance for a new start, but there are different views on what this price should be. It is undisputed, however, that the so-called "new economic start" is acquired only after the lapse of a relatively long and demanding debt repayment plan. Therefore, it is characteristic for this European model that, instead of a new start, there is deferred or deserved (acquired) new beginning - "earned new start".

During the debt repayment plan, the point is to provide as large as possible collectability of receivables to a creditor, and to ensure that the monthly repayment amount that has to be settled by the debtor is "reasonable", i.e. such that the debtor could handle it financially (Niemi-Kiesilainen, Henrikson, 2005:29). Accordingly, with respect to this difference from the discharge of debts of natural persons over whose assets the bankruptcy is opened, there is an enrooted opinion that the American model of personal bankruptcy is more liberal and more favourable for debtors (consumer-friendly), whereas the European model is more restrictive, more favorable to creditors (creditor -friendly) and, as such, conservative.

A typical representative of this model is the German law, where personal bankruptcy is governed by unique law on bankruptcy. The institute of personal bankruptcy was introduced into the 1994 Insolvency Act with the intention "to offer debtors perspectives for the future, an incentive to remain productive, rather than capitulate to the life of welfare dependency and essential forced service to creditors." Although passed in 1994, the Act came into force in 1999 as it was thought that so much time was needed to prepare the court system for these changes.

The German 1994 Insolvency Act introduced strict conditions that had to be met by debtors in order to deserve to be discharged of debt through the personal bankruptcy procedure. This process takes place in three stages (Braun, 2005:59-70). First, it insists on a non-judicial stage. Extrajudicial stage is a mandatory part of the whole procedure. During this phase, the debtor first attempts to reach an

¹⁹ The length of a payment plan is usually 5 years but, in recent years, there is a noticeable tendency to shorten this period to three years.

agreement with all creditors on regulating the debt, with the help the so-called “suitable persons or office” i.e. services designated by each German province (Ländes). The regulation of debt usually involves agreeing on a repayment plan for a certain period, but the Act does not specify the content of the plan, which is subject to negotiation with all the creditors, even for the so-called “zero debt repayment plan” under which creditors get nothing from their claims (Bodul, 2014:344).

However, the consent of all creditors about the content of the plan is required for such an arrangement to take effect. If there is no agreement, i.e. in case of unsuccessful attempts to reach a court agreement with creditors, the debtor may file a motion with the court to open proceedings of personal bankruptcy. At this stage, the debtor again tries to reach an agreement with creditors on settling the debt but now it occurs in legal proceedings, where the repayment plan is proposed to creditors once again. However, at this point, the plan has to satisfy additional conditions. This is because the court may force the dissenting minority of creditors into a plan (cram-down), if the majority agrees on the repayment plan proposed by the debtor (Kilborn, 2004).

In order to avoid the imposition of this plan by the court, it is required that the plan offer an appropriate share of any creditor in the bankruptcy mass, which is proportional to the size of his claims in relation to the claims of other creditors, and creditors who oppose must not receive less than they would have received if the case went through liquidation and repayment plan.²⁰ The outcome could lead to debt relief or termination of debt.²¹ Finally, if the creditors do not accept the repayment plan through legal proceedings, the court cannot substitute a lack of creditors’ approval with its decision; in that case, the third phase ensues, which entails a simplified bankruptcy proceeding.

The court sets a trustee and determines a multi-year debt repayment plan. During the application of the debt repayment plan, the debtor gives the trustee all non-exempt work-related income, and he must turn over to the trustee half the value of any property acquired by inheritance (Kilborn, 2004); the bankruptcy trustee manages these funds and their distribution in satisfaction of creditors. In addition, after each year, the trustee distributes the percentage of income which was transferred to him during that year to creditors (Kilborn, 2004).

20 Study on means to protect consumers in financial difficulty: Personal bankruptcy, datio in solutum of mortgages, and restrictions on debt collection abusive practices, Final Report, London Economics, December 2012, 44.

21 In practice, this part of the process proved so unsuccessful that it quickly lost support. Therefore, there were several amendments to the 2001 Law, it became optional, with a discretion given to the court to apply it or not. By 2003, it became clear that, in practice, most courts opted to not apply it.

During the application of the multi-year repayment plan, the debtor's behavior is monitored (Bodul, 2014:345); during this verification period of "good behavior" (Kilborn, 2004), the debtor must have income from work and he must exert his best efforts to find suitable employment if he is out of work, or take even temporary work, which should enable the debtor to fulfill the obligations in line with the debt repayment plan. If it is estimated that during this period the debtor demonstrated good behavior and that he did his best to fulfill his obligations in line with the debt repayment plan, after the expiry of the period of verifying the debtor's good behavior, the court will issue decision discharging the debtor of the remaining obligations.

4. Implications (Lessons) for Serbia

The available statistics show a relatively high level of indebtedness of Serbian citizens, whereas numerous empirical data indicate the socio-economic problems of insolvent individuals and their families. These problems cannot be resolved through the existing bankruptcy legislation because it does not cover cases of insolvency of individuals as natural persons. Serbia is one of the few countries that does not have legislation on personal bankruptcy. One of the possible options for resolving the problem of over-indebtedness of citizens could be the introduction of the institution of personal bankruptcy in the legal system of the Republic of Serbia, by enacting a special legislative act on insolvency, as it has been done in many other countries in the region, in Europe and worldwide.

Over the past 30 years, a vast majority of countries worldwide have responded to the problem of over-indebtedness of its citizens by introducing a special legal regime for the treatment of due over-indebtedness through the institute of personal bankruptcy. But, when comparing the liberal US model with the conservative European model, we note huge differences in legislation. In the US, the approach is rather supportive of the consumer. In Europe, insolvency laws and regulations tend to give priority to the creditor's right.

The normative framework of the institute of personal bankruptcy is a serious economic and legal challenge for any legislative authority, which has to reach an important decision on instituting a relevant model of personal bankruptcy. This institute is certainly favourable for the debtor (consumer) because it is a mechanism for settling the payment obligations in accordance with the debtor's financial capacity. It also meets the interests of creditors who thus may collect the due debts. Finally, it meets the interests of the state (society) because it amortizes social tensions and prevents over-indebted borrowers from turning into social welfare users. For these reasons, the authors argue for a balanced solution. In the circumstances of global economic crisis, it is essential to establish

a balanced model of personal bankruptcy which would evenly distribute the burden of economic crisis between the key stakeholders, taking into account the interests of the creditors, insolvent debtors and the society as a whole.

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ЛИЧНИ СТЕЧАЈ КАО МЕХАНИЗАМ ЗАШТИТЕ ПОТРОШАЧА

Резиме

Светску економску кризу која има вертикални економски дубински ефекат осећају како они који располажу знатним финансијским средствима тако и они који не располажу слободним финансијским средствима, тј. нису ликвидни. У протеклим годинама у Р. Србији у знатној мери се придавао значај приватизацији привредних друштава и промоцији крупног капитала, а веома мало или нимало се придавао значај националном социјалном-економском карактеру приватизације из угла потрошача. Један од механизма социјал-економске заштите „обичног човека“ – потрошача је и институт личног стечаја (лични банкрот). Правни институт личног стечаја (личног банкрота) или стечаја над имовином физичких лица (дужник-потрошач) постоји у многим земљама и познају га многа развијена законодавства. Порекло вуче из Енглеске, најширу примену има у САД, а постоји и у Земљама ЕУ, Русији, Канади, Аустралији, Хонг Конгу, Јапану, Израелу, Јужној Африци, Бразилу. Он представља релативно нов правни институт који свој смисао постојања налази особито у условима економских криза и општег осиромашења грађана. У таквим условима расте број људи који остају без посла а тиме и извора редовних прихода услед чега нису у стању да уредно измирују своје обавезе. Институт личног стечаја омогућује савесном дужнику (потрошач) који не би био у стању да враћа дугове да отвори лични стечај, чији је смисао да обезбеди и промовише нов финансијски почетак за дужника, кроз олакшање плаћања преузетих обавеза и изузимање одређене имовине дужника од извршења.

Суштински институт личног стечаја ипак није средство ослобађања инсолвентног дужника-физичког лица од плаћања обавеза. Он само ствара привид једног таквог дејства. Обавезе дужника и даље постоје, само се налази механизам да он доспеле обавезе измирује у складу са економским могућностима, тј. врши се реструктурирање постојећих обавеза, остављајући му довољно средстава за подмиривање текућих дневних потреба. Дакле, реч је више о једном средству олакшања подмиривања обавеза у складу

са измењеним економским приликама. То је свакако у интересу дужника (потрошач), али и у интересу поверилаца и друштва (државе). За повериоце овај институт је у интересу јер ако се одређено лице као потрошач или корисник услуга доведе у крајње неповољан економски положај да оно не може уопште више задовољити ни своје основне потребе, оно тим пре неће бити мотивисано да постојећа слободна расположива средства пласира на тржишту кроз потрошњу – куповину. Коначно, овај институт је и у интересу друштва (државе) јер амортизује социјалне тензије и онемогућује да презадужени дужници постану „социјални случајеви“.

Сама нормативна концептуализација института личног стечаја представља, међутим, озбиљан економско-социјално-правни изазов за сваког законодавца, те зато јако важно за какав модел закона ће се одлучити законодавац. Суштина је да се у условима економске кризе успостави избалансиран модел којим би се равномерно распоредио терет кризе између укључених субјеката, тј. којим би се водило рачуна о интересима и поверилаца и дужника и друштва.

Кључне речи: *лични стечај, дужник (потрошач), поверилац, инсолвентност, реструктурирање постојећих обавеза, економска криза, законодавство.*

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THE JURISDICTION OF THE EUROPEAN COURT OF AUDITORS AS A DETERMINANT OF FISCAL SUSTAINABILITY**

Abstract: *The subject matter of analysis in this paper is the role of the European Court of Auditors in the process of efficient management of public finances of the European Monetary Union (EMU) member states. In this regard, the first part of the paper indicates the reasons for establishing the European Court of Auditors (ECA) and setting the standards for auditing public finances. The provided analysis focuses on the legal nature of decisions and internal documents of the Court (reports and opinions) which are aimed at supporting financial governance in the EMU. In conjunction with fiscal rules, the internal decisions of the Court contribute to financial legitimacy and inform citizens about the areas in which the Court exercises control over public spending. In this context, the author analyzes the strategies used by the Court to initiate auditing changes in the public sector by establishing priorities in areas related to economic growth, employment and climate change. In particular, there is a focus on different types and characteristics of audit, the audit phases and methodology by which the European Court of Auditors exercises its jurisdiction. Further on, the author discusses the relations between the European Court of Auditors and other communitarian authorities, and national audit institutions. In the author's opinion, they are a *conditio sine qua non* of responsible, transparent and efficient management of fiscal and monetary policy.*

Keywords: *European Court of Auditors, audit, monetary law, fiscal sustainability, financial legitimacy.*

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1. Introduction

The main tasks of audit institutions were established by the *Lima Declaration* (1992), adopted by the International Organization of Supreme Audit Institutions (IOSAI) at the Congress held in 1977. These tasks include: effective and proper use of public funds, the development of a consistent financial management, proper execution of the administrative activities and the exchange of information with other public-legal institutions, and timely notification of the public about the results of the audit process (The Lima Declaration, 1992). In modern states, the exercise of the audit function is viewed as an integral element of the democratic legitimacy of public institutions activities. In the European Union, perceived as confederation *sui generis*, the democratic legitimacy of the main communitarian institutions is two-fold: the so-called *input legitimacy* and *output legitimacy* (Scharpf, 2016:1-3). Historically, output legitimacy was first created and has its origin in the primary sources of law, specifically in the provisions of the founding treaties explicitly stipulating that communitarian bodies must act for the benefit of the citizens, provide solutions for the problems they are facing in the sphere of economic relations, and preserve the values of the domestic market based on the free movement of capital, goods, services and labor. Input legitimacy is relatively recent and has its roots in the emerging institutional democratic deficits of major communitarian bodies during the 1980s, when it became clear that the European institutions do not necessarily work only in the interest of the citizens of the Union, given that the politically more influential Member States could have a considerable impact on the course of EU institutions competences for their own benefit.

In this context, we may note that input legitimacy was fully recognizes as a distinctive form of legitimacy in the course of revision of the founding treaties and in the provisions of the secondary legislation aimed at resolving the problem of legal gaps regarding the jurisdiction of communitarian institutions in the domain of European monetary law (the principle of *lex loci*). A special form of democratic legitimacy, which is of particular importance for coordinated management of public finances of the EU Member States, is the concept of the so-called *system legitimacy*. This form of legitimacy refers to the efficiency of the rules, structures and processes aimed at promoting operational responsibilities, which ultimately result in increasing the degree of citizens' confidence in the activities of political institutions (Laffane, 2003: 762-768). Global economic and financial crisis has highlighted the absence of full system legitimacy in the EMU and caused the need to strengthen the position of the European Court of Auditors in new models of economic management (embodied in the inter-State agreements aimed at preserving the monetary stability and attaining fiscal sustainability). Weak system legitimacy is a direct result of inadequate fiscal

responsibilities of Member States in maintaining the fiscal criteria and financial convergence established by the Maastricht Treaty and the Stability and Growth Pact. For this reason, in the near future, the European Court of Auditors must be vested with the authority to issue legally binding decisions to irresponsible supranational subjects of fiscal policy. This is the only way to create the optimal legal mechanism to control the spending of budget funds in the European monetary law which will, together with the newly established jurisdiction of the European Court of Justice and the new role of constitutional courts (as the guardians of fiscal discipline) provide solid grounds for maintaining the fiscal framework of the Euro zone.

2. The creation and development of the European Court of Auditors

The European Court of Auditors was established on 22 July 1975, as a body of the European Communities, on the occasion of signing of the Brussels Treaty¹, which made certain revisions of the Treaties of Rome (in terms of the financial fees and constituting a single Council). The *ratio legis* of establishing the European Court of Auditors was to exercise a comprehensive audit of the Union's finances. The audit was envisaged to cover all EU policies and the EU budget, with particular focus on the areas related to economic growth and development, employment policy, revenues from the value added tax, environmental policy and climate changes. This EU institution corresponds to the institutional control of spending budgetary funds, as the most important and most comprehensive form of budget control.

It may be interesting to note that the European Court of Auditors initially did not have the status of a communitarian institution, which was eventually shaped and recognized by the Treaty of Maastricht. In our opinion, such a change of circumstances and perception of the positions of the European Court of Auditors came as a result of the new awareness of communitarian subjects of economic policy about the importance of the scope of operative activities of this Court, which was to play the central role in the process of reconciling the national fiscal policies. Also, *in our opinion*, the deferred legislative initiative for establishing its final framework and recognizing it as a communitarian institution are actually the cause of the current poor results in the field of harmonizing national budget policies, public debt management policies, and the unsatisfactory application of the legal restrictions on the scope of the budget deficit and public debt in the national and European monetary law.

1 Treaty amending certain financial provisions of the Treaties establishing the European Economic Communities and of the Treaty establishing a Single Council of the European Communities, signed in Brussels on 22 July 1975.

The European Court of Auditors performs the role of the external auditor; it is made up of 27 members who are delegated by the Member States for a period of six years (Amsterdam Treaty, Art. 282-283). After consulting the European Parliament, the qualified majority of the European Council shall adopt the list of Court members who are proposed by Member States. Auditors perform their work in groups, which may be assigned to a number of departments, whose managers participate in co-ordinating the group activities and collecting the results, audit methodologies and strengthening mutual trust (ECA Archive Guides, 2007:10-12). The formation of the Court of Auditors was motivated by spreading the European Parliament's competences in the area of budget control and using own resources to fund a unified EU budget. In fact, in this period, the European Parliament was given the authority to approve the execution of the budget but, on a functional and structural level, there was a need for creating independent institutions that would control the spending of public revenues and expenditures of the Communities. A major initiative for constituting an independent communitarian body responsible for budgetary control was launched by President of the European Parliament's Committee for budgetary affairs during 1973, which ultimately resulted in the creation of the European Court of Auditors in 1975. However, the Court became operative only at the end of October 1977 and, in the years that followed, it established the auditing structure, procedures and methodologies which eventually spread to the area of coordinated financial management. The formation of the Court of Auditors in monetary and financial law of the Union confirmed the need for establishing the *financial consistency* in conceiving the agenda of monetary and fiscal policy at the supranational level. With the formation of the EMU, financial consistency becomes an imperative in implementing of the national economic policies, where the discretionary powers of national operators are limited by supranational norms. This confirms the substantial value of financial compliance in the broadest sense (especially in terms of crisis) and reinforces the reputation of supranational bodies in charge of implementing it (primarily judicial authorities, which ensure the much needed legitimacy and transparency of the process).

3. The strategy of the European Court of Auditors and the audit process

From the outset of its establishment, the European Court of Auditors has performed the role of the innovator and the leader of change in the auditing process, thereby determining audit priorities and planning strategic development. The Court goals are specified in long-term *strategies*. It is interesting that the first strategy was published in 2009 which, *in our opinion*, only confirms the thesis about the lack of involvement of the Court in the budget funds control until the outbreak of the 2008 debt crisis. Hypothetically, it is possible to imagine a

scenario in which the consequences of the crisis would have been significantly reduced if the Court had had similar strategies and a wider range of responsibilities (in addition to the ones conservatively established in the provisions of primary legislation, i.e. in the traditional mechanisms of economic governance in the Eurozone which proved to be unsustainable). Concurrently, it would have resulted in timely and indirect derogation of the existing coordination mechanisms (at least in the field of budgetary policy, where the achieved degree of economic unity and supranational fiscal responsibility shows numerous deficiencies).

The goal of the original strategy from 2009 was to raise the level of Court's operative efficiency but the goal, as such, was stipulated in too general terms, without providing more concrete benchmarks for different segments of the fiscal policy, as there were no observable results in the field of fiscal sustainability. The aforementioned deficiencies were corrected in the course of devising the next strategy, which was adopted for the period 2013-2017. Thus, besides the apparent extension of the strategy validity period to four years (as compared to the formerly established three-year period), considering that the process of accomplishing the anticipated results required a longer time frame, the priorities were established on real and actual needs of the *fiscus* (of the member states). This is best confirmed by the fact that long-term priorities include: collaboration with other institutions in order to encourage financial accountability; more aggressive development of the Court as a professional institution acting on the principle of *de lege artis*; developing auditors' expertise and professional skills; promoting the Court as a communitarian body and ensuring credible demonstration of efficient business practices (ECA Strategy, 2013: 1-10).

The Court of Auditors activities are a result of *long-term planning*, which provides sufficient maneuver space for harmonization purposes. The rationale of such planning is reflected in the clearer designation of the strategy goals and the possibility to modify their content in light of the dynamism of the legal-economic relations which are quite changeable in the EMU. The annual plan defines the tasks that must be implemented with the fixed periods during the year. In the course of devising the operative plan, it is certainly necessary *to designate specific tasks by parity* because the funds for the implementation of each task are assigned according to the degree of priority. Given that transparency is an important component of democratic and financial legitimacy, the President of the Court has a duty to present the annual program of the Court to the public by acting the European Parliament Committee for budget supervision.

The European Court of Auditors performs the function of an external auditor and, as such, it carries out *three* types of audit: *financial audit, compliance audit, and review of the effectiveness of business operations* (Auditing the Public Finances of

the European Union, 2005-10-12). When performing financial audits, the Court assesses the accuracy, reliability and integrity of the submitted reports. It is important to determine whether reports reflect the actual financial situation, cash flows from previous years and performance results according to applicable financial reporting standards. At this point, we have to recall the *modus operandi* by means of which some States became EU members. The disputable activities were directly connected with the financial audit which was carried out in an adequate way; thus, owing to the methods of "creative auditing", some countries (such as: Greece) became members of the Union and later the European Monetary Union (EMU). In this sense, the term "*creative auditing*" implies the actions of the EMU Member States which are neither lawful nor unlawful in terms of their legal nature (Prokopijević, 2007:79-82). They embodied the conduct which circumvented the intention of the legislator, which in this case specifically pertains to the content of auditing rules and standards. In practice, this involves taking advantage of *legal gaps*, which are inevitable both in the national and communitarian law due to the inability of lawmakers to predict all socio-economic relations which need to be regulated by the legal norm. In such conduct, transactions are not expressed in a revenue-neutral way, but in a way that fits them into the desired result. In particular, *we may note* the peculiar stance of the Commission, i.e. its passive attitude in terms of the procedures some countries used in order to become members of the Monetary Union.

When performing *compliance audits*, the Court assesses whether the Union revenue and expenditure transactions are accurately calculated and whether they comply with the applicable normative framework. In case of the *review of the efficiency of business operations*, the Court analyzes the value of invested financial resources and identifies the expense ratio. In assessing the effectiveness of business operations, special attention is given to the study of programs, operations, management systems and procedures of all bodies that manage the Union funds, aimed at assessing the efficiency of using funds. Although this form of review covers a wide range of topics, it particularly focuses on the areas of economic growth and employment; reviews on these issues are published in separate thematic reports. Another subject matter of analysis in the process of auditing the efficiency of business operations is the assessment of various aspects of public interventions, including *invested resources* (i.e. financial resources, human resources, financial and regulatory-organizational resources), *output products* (performance results), *results* (immediate effects of the program for direct beneficiaries), and *effects* (understood in terms of long-term changes in the society resulting from the action of the EU as a supranational organization) (Auditing the Public Finances of the European Union, 2005: 16).

The question of viability of invested resources and recovery of their opportunity costs is always a topical issue in the finances of the Union, especially in the circumstances of recession and crisis. The importance of this type of auditing implies the need for constant training and professional development of the judicial staff, as well as for introducing and developing new audit methodologies that increase the rate of the return of the invested Union funds (although the audit itself is carried out in line with the international auditing standards and code of ethics). The European Court of Auditors is authorized to issue a warranty statement, which implies an annual process that includes financial audit and compliance audit; this statement includes the final review of reliability of EU financial reports and regularity of related transactions.

In performing these audits, the Court uses different *manuals* that contain detailed technical instructions governing the activities (ECA Manuals, 2008: 10-11). The *Manual for financial audit and compliance audit* provides clear guidelines for performing the audit, the checklist and specific instructions on using information technologies. In addition to the international auditing standards, the *Manual for the review of the efficiency of business operation* includes *customary principles* developed through the Court practice of reviewing the effectiveness of business operations. The importance of this manual is reflected in the professional support provided throughout the entire auditing process; notably, it makes the application of guidelines contained in this manual fairly complex in practice (as compared to the aforementioned one). In practice, the implementation of this manual is facilitated by drafting *guidelines for concrete audit methods*. As these guidelines have been developed as a result of the long-standing auditing practice of the Court, their instructive nature and unquestionable value significantly help auditors to perform a variety of tasks. Of particular importance are the guidelines concerning the analysis of issues and drawing conclusions, guidelines for setting audit objectives, and guidelines for evaluation and risk assessment when auditing business efficiency. Certainly, the list of guidelines is not final, considering that their number and content will diversify over time in line with the evolving role of the Court of Auditors in the institutional structure of the new economic government in the EMU.

Regardless of the differences in the forms and types of audit, each of them has to be based on common grounds which imply the use of a solid methodology based on professional standards and the adoption of best practices and principles that reflect the degree of quality required for changes in the mode of management of public finances (Reed, 2014:17). In this context, it is clear that auditors in current circumstances must have critical thinking skills, common sense for innovation, creativity and managerial qualities that enable them to maintain good *internal relations* (interpersonal relations with other auditors within the Court)

and good *external relations* (developed in the course of cooperation with other communitarian institutions that participate in the supervision of the Euro zone fiscal framework of the Euro zone).

4. The relationship between the European Court of Auditors and other communitarian institutions

The global financial crisis has revealed new challenges that the Supreme Auditor Institutions must face in a legally valid manner. The report of the European Court of Auditors, which was a result of its cooperation with other national audit institutions, points to the *five key areas* that require a more coherent action of national audit bodies. These areas include: the sustainability of public finances (with special emphasis on fiscal transparency, in order to motivate the subjects of economic policy to consider the consequences of short-term decisions on long-term financial and fiscal stability); review of implicit Government bonds for large financial entities (primarily banks and institutional investors) in order to prevent the occurrence of systemic risk; control of operations of the central banks (but with endangering their operative independence at work); improving coordination and cooperation, and developing new auditing standards that increase the reliability of financial statements (Barruesco Sanchez, 2015: 78). Unlike the jurisdiction of similar national courts and audit institution, the jurisdiction of the European Court of Auditors is defined as *ratione personae*, whereby the any public administrative authority irrespective of the origin of funds at its disposal may be subject to the Court review.

The contribution of the Court of Auditor to maintaining fiscal sustainability can be observed through the exercise of *primary* and *secondary* functions. *The primary function* of the Court of Auditor implies the control of all public revenues and expenditures in order to ensure the proper execution of the Community budget. The Court may perform the audit either before or after the adoption of the final budget accounts. The Treaty envisages that the Court may conduct an on-site field control, on the premises of any administrative body which has the authority to manage the Union budget funds. The Court also carries out the control in the EU Member States, in cooperation with the national parliaments or competent administrative authorities. The Court cooperates with national budget institutions in charge of controlling the spending of budget funds; this cooperation is based on the principles of mutual respect for independence and trust, but the national authorities are obliged to promptly inform the Court whether they are interested in cooperation. In case of establishing an infringement of the principles of legality and/or other irregularities, the Court of Auditors is obliged to draft a separate memorandum, which is forwarded to Parlia-

ment and the Council. The Court may also exercise control over the spending of extra-budgetary resources, which used to be at the disposal of the European Community for coal and steel, joint enterprises of Euro-atom and the European Development Fund (Radivojević, Knežević-Predić, 2008: 219). The Court of Auditors is also obliged to deliver statements on the accuracy and legality of the final balance accounts and business operations to the European Council and the Parliament, which are published in the official gazettes of the Union. Acts of the Court of Auditors may not be subject to complaint for assessment of legality at the European Court of Justice, but the Court of Auditors has active legitimacy (legal standing) to file a complaint for annulment of acts of other Union bodies (if they undermine the Court authority).

Secondary functions are particularly significant in the field of fiscal policy coordination. These functions include activities on coordination of financial management (Budget Committees) of the EU member states and ensuring the transparency of the entire budget system (El-Agraa, 2007: 49-50). The Court is not authorized to make legally binding decisions in cases of financial fraud, but the lack of this authority is substituted by co-operation with the European Anti-Fraud Office (French: *Office de Lutte Anti-Fraude - OLAF*). The Court is authorized to present its views on adoption of financial and legal regulations, and it can draw public attention to specific problems in the fiscal policies that require urgent resolution. The Court is obliged to respond to all requests from other EU bodies and its activities are aimed at drawing attention of the European Parliament, the Commission and the Council to the current challenges in the domain of budget policy.

We may note that, in practice, the performance of these functions contribute to creating the common standards concerning the collection, disposal and spending of budgetary funds, which leads to uniformity of other institutions and EU Member States. In conjunction with the acts of secondary legislation, such standards are the first step towards a successful co-ordination of national fiscal policies, which is a major challenge for the European legislator because the states do not want to limit either their financial sovereignty (subjective budgetary law) or the components of fiscal sovereignty (the authority to introduce, control and collect taxes).

Although the position of the Court of Auditors in the process of coordination is quite prominent, its relationship with other entities regarding the harmonization of national economic policies seems pretty incoherent. Therefore, *we consider* that it is necessary to work on strengthening the position of the Court of Auditors in the macroeconomic dialogue, as a specific kind of forum where the main EU institutions may exchange their views; this dialogue may reduce

transaction costs, solve the problem of moral hazard and asymmetry of information in the process of harmonizing various macroeconomic and structural policies. Analysis of Court reports points to a tendency that the Court actions are frequently quite opposite to the Commission activities, for which reason it is sometimes deemed not to act in the best interest of communitarian law (Craig, De Burca, 2011:77). The reason for these differences of opinion may lie in the fact that the control of spending budget funds exercised by the Court of Auditors is supplemented by other forms of control, primarily the control exercised by the Commission Department for internal control of national administrations. This type of control is necessary because the EU budget funds are transferred via national bodies, which entails the likelihood of diverse abuses. For this reason, *Anti-Fraud Committees and Units for combating fraud* were established, whose activities are monitored by the OLAF (Prokopijević, 2012: 126-127).

The Court's relationship with the European Parliament seems to be stable and cooperative, but its relationship with the European Council entails a kind of "ignoring" attitude demonstrated by the Council. The need for developing closer co-operation between the European Court of Auditors and the European Parliament originates from the close cooperation of supreme audit bodies and other national parliamentary committees on budgetary questions, which has a strong foothold in the national laws of the member states. In fact, although the supreme auditor institutions (depending on the solutions envisaged in the national legal order) may be part of the executive or legislative authorities, or may be organized as an independent body, *we can observe* that there is always a solid collaboration with the national representative body. These differences arise from different historical, cultural, political and other factors. Yet, the common feature is a result of the fact that, regardless of the organizational structure and formal position of audit institutions in the State apparatus, the legislator recognizes the need to guarantee their independent work in order to provide an adequate contribution to the parliamentary scrutiny of spending taxpayers' money (OECD, 2011: 11-12). *We may note* that the relationship between the Court of Auditors and the representative bodies of the EU Member States seems to be quite abstract as the states are generally unaware of the Court scope of work, which is perceived as "virtual" rather than factual. This statement may be supported by the fact that the Court of Auditors, in the course of exercising control, has never authorized the execution of the budget as a whole; as a body of the Union, the Court should not take risks and issue reports including "*too harsh formulations in terms of ways of spending the funds*" (in order not to jeopardize Euro integrations and cause the citizens' disappointment), for which reason it resorts to softer wording in its reports, which a truly independent audit body would never resort to. In terms of developing future relations with the European Parliament, it is neces-

sary to intensify efforts to establish special committees which would facilitate the Court's financial audit and cooperation with the national courts of auditors. Also, a huge drawback in conducting successful audits in the public sector is the absence of *common standards* governing the control of spending budget funds, both at the level of the Member States and at the EU level. Notably, the Court of Auditors has initiated the establishment of the so-called *Contact Committee*, which should ensure the development of an integrated auditing framework in the EU by introducing mandatory standards for conducting audits in the public sector, and shape new functions, tasks and role of external auditors in the new institutional framework of the EMU (Laffan, Lindner, 2005: 210-211).

In practice, the cooperation between the Court of Auditors and the European Investment Bank (EIB) has faced numerous challenges. At first, the Court was allowed to exercise its audit function only provided that there was a special tripartite cooperation agreement, whose signatories were the Court, the EIB and the European Commission. The control exercised by the Court was either documentary or field (on-site) control; it was limited in scope and quite slow-paced because it was burdened by varied technical formalities. Today, the Court can exercise control over the funds at the disposal of the European Investment Bank even in case no co-operation agreement has been signed, if there is a need for the collection of such information for legitimate and effective spending of funds (Skiadas, 1998: 126-127).

In order to enhance the effectiveness of budgetary control, in 2002 the European Council gave a mandate to the Commission to carry out administrative reform. The Commission adopted the so-called "*White Paper on Reform Strategies*", whose priorities were related to the adoption of the new *Financial Regulation*. This Regulation envisaged a series of synchronized administrative changes, which primarily implied establishing an *internal auditor* within the Commission and similar bodies in each of its general directorates. Major novelties include: adopting the principles of active budgeting, professional training of employees in charge of exercising control, decentralization of responsibilities within the body in charge of exercising control, instituting modern auditing systems as well as a systemic exchange of information. In spite of the indisputable advantages, the new financial strategy cannot ensure the establishment of effective mechanisms that would be valid for a longer period; due to the great complexity and dynamism of social relations, this strategy has to be revised and updated all the time. Apparently, the co-operation between national courts of audit and the EU Court of Auditors is essential for the harmonization of fiscal policies of the Member States of the Eurozone; namely, practice has shown that the conclusion of inter-state agreements is ineffective without enhancing and deepening the cooperation between the competent national authorities of the Member States and communitarian institutions.

The role of the European Court of Auditors will be particularly significant when the concepts of banking and fiscal union take full effect and enable the finalisation of the concept of economic and Monetary Union. The concepts of banking and fiscal union are elements of the new EMU architecture, which has its own material and formal dimension (Craig, 2014:20-25). The material dimension includes actions that have been taken in order to provide financial support for the Eurozone Member States, as well as measures taken in the field of supervising national budgetary policies. The formal dimension includes measures that have ensued as a result of adapting the norms of primary law and secondary legislation. Controversy about the concepts of banking and fiscal Union became more prominent when the EU economic policy makers realized that the preservation of the financial stability is a common task of banks and other financial institutions. Until the outbreak of the crisis, financial stability was considered as a discretionary concept that was perceived in negative terms, which implied the stability of the price system and the system of settlements. In the circumstances of economic crisis, it became clear that the stability of public finances could be provided by ensuring a more efficient use of the cumulative system of fiscal transfer, the supervision system and the evolving role of the Central Bank, which shall perform duties as the bank of the last resort (Lastra, 2015:126-127). In this context, the Agreement on establishing a Single Resolution Mechanism and the Agreement on establishing a Single Supervisory Mechanism regulate the activities of the Court of Auditors aimed at preserving the fiscal sustainability of the Eurozone primarily in the domain of approval of loans by the European stabilization mechanism, which instituted a form of collective responsibility of the Community for public debt.

5. Conclusion

Harmonization of national fiscal policy is inconceivable without the European Court of Auditors, whose activities contribute to shaping the *modus operandi* for keeping healthy public finances based on the rules of fiscal and financial convergence. Fiscal policy is not spared of the impact of contemporary coordination factors, which are no longer linked only to the problem of fluctuation effects and troubleshooting problems encountered by free users but also include climate change and the problem of aging population. For these reasons, it is necessary to make adjustments in the field of monetary and fiscal policy action, which ultimately implies expanding the competences of all communitarian institutions, including the jurisdiction of the European Court of Auditors. It follows that the success in maintaining optimal fiscal framework of economic and Monetary Union is conditioned by the need to revise the provisions of the founding treaties (hard law) and acts of secondary legislation (soft law); it will

facilitate the adoption of legally binding decisions of the European Court of Auditors, ensure a wider scope of competences to the Court chairman, contribute to increasing the number of Auditors and establishing special departments which would reduce the Court workload and provide for a better allocation of related tasks and job-specific competences. A critical analysis of the current practice of the Court of Auditors shows that a *conditio sine qua non* of successful control of spending budget funds is to improve the legal conditions underlying the operation of related EU institutions (including not only the European Court of Auditor but also the European Council, the European Parliament, the European Commission and the EU Court of Justice), all of which jointly participate in the macroeconomic dialogue aimed at supporting the effective use of public funds. This is the only way to provide a better framework for preserving the common goals of the auditing process (embodied in the opinions, guidelines and methodology of the Court) and to create a favorable institutional environment for their implementation, which ultimately provides the much needed legitimacy, transparency and citizen support to the auditing process.

The overall conclusion is that “discrediting” the Court of Auditors may be precluded by adopting new provisions of hard law, which will enable the Court to become *an ex post* guardian of fiscal discipline and decide how the budget funds shall be spent. Similarly, upon the ratification of the Fiscal Agreement (as an inter-state agreement *sui generis*), the national constitutional court has become an *ex ante* guardian of the national fiscal discipline, which decides on the compliance of the national budget with the mid-term budget goals (stipulated by the European Commission) and has the authority to make such a program ineffective. Key to the successful co-ordination of budgetary policies lies in exploiting the potential of both national and supranational institutions, which may be accomplished by ensuring a clear differentiation of competences, a better mutual communication and respect for decisions. The role of judicial auditing authorities in the process of managing public finances provides legitimacy and a counterbalance to certain political pressures that could potentially jeopardize the stability of the Eurozone. Therefore, the activities aimed at strengthening the national courts of audit and their cooperation with the European Court of Auditors should be intensified in the future period.

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НАДЛЕЖНОСТ ЕВРОПскоГ РАЧУНОВОДСТВЕНОГ СУДА КАО ДЕТЕРМИНАНТА ФИСКАЛНЕ ОДРЖИВОСТИ

Резиме

Предмет анализе у овом раду јесте улога Европског рачуноводственог суда у процесу ефикасног управљања јавним финансијама у земаљама чланица Европске монетарне уније. У том смислу се, у првом делу раду указује на разлоге оснивања Европског рачуноводственог суда, одређивање стандарда за ревизију јавних финансија с циљем формулисања ставова о правној природи одлука и интерних аката Суда (извештаја и мишљења), који се налазе у функцији усмеравања и подупирања финансијског управљања у ЕМУ. Интерне одлуке Суда у садејству са фискалним правилима доприносе финансијском легитимитету и упознавању грађана са областима у којима Суд врши контролу трошења јавних прихода. У том смислу анализи су подвргнуте и стратегије путем којих Суд иницира промене у ревизији у јавном сектору утврђивањем приоритета у областима везаним за привредни раст, запошљавање и климатске промене. Нарочити акценат у истраживању јесте на сагледавању врста и обележја ревизија, фазама ревизијског процеса и методологије путем које Европски рачуноводствени суд остварује своје надлежности. У даљем тексту се посебно сагледава однос Европског рачуноводственог суда са другим комунитарним органима и националним ревизорским институцијама који, према мишљењу аутора, представља услов одговорног, транспарентног и ефикасног управљања фискалном и монетарном политиком. Делокруг рада Европског рачуноводственог суда у условима глобалне финансијске кризе добија на својој сложености и имплицира кредибилан фискални оквир унутар еврозоне.

Кључне речи: Европски рачуноводствени суд, ревизија, монетарно право, фискална одрживост, финансијски легитимитет.

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EXPORT CONTROL OF CULTURAL GOODS

Abstract: *The article reviews the existing national, international and EU rules relating to the export of cultural goods. At the national level, criminal and misdemeanor sanctions that ensue in case of violation of rules on export of cultural goods have also been analysed. Connected therewith, the qualification issue existing between criminal offenses and misdemeanors has been clarified. Following this, stipulations of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects have been summarized, focusing thereby on a state's possibility to request the return of illegally exported cultural goods. Ultimately, EU export rules have been briefly explained and commented both with regard to the unlawful removal of cultural objects within the EU and with regard to the export of some cultural objects outside the EU. In enforcing export-related provisions, inter-state cooperation seems to be of a paramount importance, whereas the rules on return of illegally exported cultural goods must be devised as to facilitate the balance between the interests of the so-called source states to preserve their cultural heritage, on the one hand, and the interests of import states to guarantee ownership rights of the good faith buyers.*

Keywords: *export, control, cultural goods, criminal and misdemeanor sanctions, return.*

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1. Introduction

Each state enjoys a sovereign right to determine which objects belong to its national cultural heritage and what export policy it will pursue with regard to them¹. National export regimes of cultural property reflect a prevailing ideological orientation of a specific country towards its cultural heritage – nationalist or internationalist. While cultural nationalists stress unbreakable ties between cultural goods belonging to one country and its national history and identity (Merryman, 1995: 14), cultural internationalists contend that national cultural property is an integral part of all mankind's inheritance (Dickson, 1987: 845). From this main distinction other features may be derived. Cultural nationalists, on the one hand, support export bans and export controls of cultural goods, and consequently favor restitution of illegally exported artworks to the countries of their origin. Cultural internationalists, on the other hand, argue that as long as cultural objects are well preserved, publicly accessible and accompanied with information on their provenance, it is irrelevant where they are displayed (Merryman, 1985: 1920, 1921). All the more, internationalists purport that dispersion of one country's cultural objects around the world facilitates better understanding of that country's history, its people, their habits and customs, owing to what unhindered circulation of cultural objects is desirable and could indeed serve as an effective leverage to suppress thriving black market in antiquities (Merryman, 1986: 848).

Comparing different national export regimes of cultural goods, certain coordinates could be identified. Firstly, there are countries that impose total embargo on all goods of cultural significance. Secondly, there are countries that apply the so-called screening system: they allow export of some or all of its cultural property, provided that a licence authorizing an export had previously been obtained. Thirdly, some countries like the United Kingdom defer granting of an export licence for a designated period of time so as to enable their buy out by national museums and galleries, failing which an export permit will be usually granted. Lastly, there are countries like the United States that allow uninhibited trade in almost all cultural objects (Nafziger, Paterson ed., 2014: 171; Schorlemer, 1992: 518-519; Bator, 1982: 286, 314). Serbia belongs to the group of countries that employ an export licencing system.

Nowadays, moderately cultural nationalist orientation seems to be prevailing. Nevertheless, not all objects considered as cultural goods are necessarily subject to the same export regime. Some countries, for instance, provide streamlined

1 Preamble of 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in its fifth recital provides that "... It is incumbent upon every State to protect the cultural property existing within its territory against ... illicit export".

solutions depending on the type of assets of cultural property. Besides, some jurisdictions provide nuanced export solutions based on significance, uniqueness, age, value and other distinctive features of a specific cultural object.

Export controls, by their nature, concern only physically movable cultural goods. Nonetheless, the mobility criterion does not in all instances coincide with the legal definition of movable things. Objects that are incorporated in immovable cultural goods, such as sculptures, stained glass and frescoes, could be torn out or detached from immovable monuments and become subject to illegal export. Moreover, some laws explicitly stipulate that, albeit their mobility, certain movable goods present an integral part of immovable cultural monument. According to Serbian law, for instance, physically movable objects of special cultural and historic importance, such as works of monumental and decorative painting, sculptures and works of applied arts which make an integral part of immovable cultural monument, are also deemed immovable.² Regardless of their legislative qualification as immovables, these objects will be covered in this paper given their susceptibility to illegal export.

Before focusing on relevant legal sources and potential sanctions, a brief distinction will be drawn between stolen and illegally exported cultural objects. Namely, if a person rightfully owns certain object, he may, under the general rules, do whatever pleases him as long as he does not intervene with ownership rights of others. However, for the sake of general interest, possession, use and transfer of ownership of certain things are subject to some restrictions (Станковић, Орлић, 2014: 61). Cultural objects, amongst others, fall under this special regime. Therefore, although someone is fully entitled to a specific cultural object, he needs to comply with numerous limitations of ownership entitlements, including those pertinent to its export. This implies that cases of illegal export involve rightfully acquired cultural goods that have been exported in violation of the state's of origin export rules, whereby, unlike in cases of stealing, the owner's entitlements have not been violated. Stealing someone's cultural property, on the other hand, implies an owner's dispossession, triggering a possibility for the owner to file *action rei vindicatio*, or, in common law terms, replevin action. While the owner's standing to file an action to recover his cultural object is indisputable in case of stealing, it is questionable who and under what conditions has standing to file an action for return of illegally exported cultural objects (Merryman, 1998: 4). In this article, analyses will be confined to the illegally exported cultural goods.

Export control mechanisms of cultural goods could be perceived from three perspectives: national, international and community. Primarily, Serbian national

² Art. 19 of the Cultural Property Act, *Official Gazette of RS*, No 71/94, 52/11 – other law, 92/11.

rules relevant for the export of cultural assets and entailing sanctions in case of their violation will be presented, after which we will be focused on the relevant international and EU instruments.

2. Serbian rules pertaining to the export of cultural goods

2.1. Rules prescribed in the Cultural Property Act of the Republic of Serbia

According to the Cultural Property Act of the Republic of Serbia, cultural goods could be defined as things and creations of tangible and spiritual culture³ which possess characteristics envisaged by the Act⁴ and which are established as cultural goods pursuant to the Act⁵, or which are regarded as cultural assets as per this Act⁶, and which enjoy special treatment and protection regardless of the type of assets. Besides cultural goods, the Serbian Cultural Property Act governs also the status of goods under prior protection. Namely, Serbian legislation provides a special regime for objects which have not yet been established as cultural, but which, upon a preliminary assessment, possess characteristics qualifying them as potential artworks, thus, deserving a provisional protection.⁷

The Serbian Cultural Property Act generally prohibits removal or export of cultural goods and goods under prior protection, unless otherwise provided by the Act.⁸ Exceptionally, cultural goods may be permanently exported, or temporarily removed abroad upon a permit issued by the ministry in charge of cultural matters (currently: the Ministry of Culture and Information). The ministry may grant the permit only provided that its issuance is justified.⁹ Nevertheless, ministry in charge of cultural matters is exclusively competent to issue a permit for the export or removal of cultural goods, whereas the temporary or permanent export of goods under prior protection, save publications, shall be authorized by the Republic Institute for Protection of Cultural Monuments¹⁰, or by a competent secretariat of Autonomous Province of Vojvodina (currently: the Provincial Secretariat for Culture, Public Information and Relations with

3 Art 2 of the Cultural Property Act

4 Art. 19-27 of the Cultural Property Act.

5 Art. 3 in conjunction with Art. 47 - 52 of the Cultural Property Act.

6 Art. 53 of the Cultural Property Act.

7 Art. 4 in conjunction with Art. 27 of the Cultural Property Act.

8 Art. 15 of the Cultural Property Act.

9 Art. 118 of the Cultural Property Act.

10 Art. 80 para. 2 of the Cultural Property Act.

Religious Communities)¹¹. Export of publications ought to be authorized by the National Library of Serbia, Matica Srpska Library in Novi Sad and the National and University Library in Priština.¹²

The latter deserves a few remarks. As already underlined, stipulations relevant to the export of goods under prior protection pertain only to movable objects which renders it unclear why authorization of their export had been entrusted to the institution which is, pursuant to this Act, competent for immovable cultural property.¹³ When it comes to publications, on the other hand, the solution proposed in the Act renders it vague which of the three libraries is competent for the issuance of an export permit in a specific case.

This Act distinguishes permanent export from temporary removal of a specific cultural object¹⁴. Whereas publicly owned cultural objects could be only temporarily removed from Serbian territory, privately owned artworks are susceptible both to permanent and temporary export. This conclusion may be drawn from the distinctive transfer of ownership regimes of cultural goods depending on their type of assets. Namely, if a cultural object is publicly owned, it is deemed inalienable according to the Public Property Act of the Republic of Serbia¹⁵ (Midorović, Milić, 2016: 185-186). Hence, for such objects only temporary removal is conceivable for temporary exhibitions, restoration, evaluation and the like purposes. Conversely, privately owned cultural artworks are freely transferable, provided that institutions which are entitled to pre-emption right fail to exercise it within the prescribed time limit¹⁶ (Midorović, Milić, 2016:183-185). They may also be sold to foreigners. In Serbia, namely, foreign natural persons and legal entities may acquire ownership rights on movables equally as domestic persons¹⁷. This implies that there is no legal obstacle for a foreigner to acquire ownership of privately owned movable cultural object. Besides, it could happen that an owner, who is a Serbian citizen, or his heirs, want to take a cultural object abroad where they reside. Regardless of who is transferring

11 Art. 42 para. 1 point 15 of the Act on Establishing the Competences of the Autonomous Province of Vojvodina. *Official Gazette of the RS*, No. 99/2009 and 67/2012 – Decision of the Constitutional Court.

12 Art. 83 para. 3 of the Cultural Property Act.

13 Art. 75 of the Cultural Property Act.

14 Art. 118 para. 2 of the Cultural Property Act.

15 Art. 16 para. 1 and 4 of the Public Property Act. *Official Gazette of RS*, No. 72/2011, 88/2013, 105/2014.

16 Art. 119 of the Cultural Property Act.

17 Art. 82 of the Act on the Foundations of Property Law Relations. *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 6/80, 36/90, *Official Gazette of the Federal Republic of Yugoslavia*, No. 29/96 and *Official Gazette of the Republic of Serbia*, No.115/2005 - other law.

a cultural object across the border, a foreigner or a Serbian citizen, he needs to acquire an export permit from the competent ministry.

Unlike the situation in some other countries, the Serbian legislator has not stipulated streamlined solutions based on the category of a specific cultural object. Although the Serbian Cultural Property Act distinguishes three categories of cultural goods, depending on their importance: cultural goods, cultural goods of great importance, and cultural goods of extraordinary importance¹⁸, they all are subject to the same export regime. Such a solution shall be reconsidered. Besides, this Act is silent on whether an applicant who files a request for an export permit ought to prove his ownership right over a cultural object which the request refers to. Moreover, Serbian legislation does not provide different categories of licenses which, for practical reasons, are known in some other jurisdictions.¹⁹ At the end, the Act neither envisages criteria according to which justifiability of the export shall be judged nor provides procedural rules for the issuance of export permits.

Removal of a specific cultural object from the Serbian territory which is contrary to the analyzed rules raises the issue of illicit export. According to Serbian law, disregard of export regulations entails criminal misdemeanor sanctions.

2.2. Penal aspects of illegal export of cultural goods

One of the ways to prevent cultural goods from leaving their country of origin in contravention with the national rules lies in envisaging such acts as criminal offenses. Criminal law protection is based on the premise that there is something valuable worth of such protection (Stojanović, 2009: 62). Amongst other values, goods belonging to Serbian cultural heritage are considered valuable enough to deserve such protection. Moreover, by ratifying the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*,²⁰ Serbia undertook an obligation to envisage illegal export of cultural property as a criminal offense. Namely, in Article 8 of this Convention it is stipulated that "The States Parties to this

18 Art. 2 para. 3 in conjunction with Art. 5 of the Cultural Property Act.

19 For instance, in the UK there are open and individual export licenses, whereby open export licenses can be divided into open general export licenses and open individual export licenses. For more see: *Export Controls on Objects of Cultural Interest, Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export license*, Department for Culture, Media and Sport. Accessed 31.8.2016. http://www.artscouncil.org.uk/sites/default/files/download-file/Export_criteria_March_2015.pdf

20 Regulation on Ratification of Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. *Official Gazette of SFRY – International treaties and other agreements*, No. 50/73.

Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6 (b)...”, whereas in Article 6 (b) it is enshrined that „The States Parties [...] undertake to prohibit the exportation of cultural property from their territory unless accompanied by the [...] export certificate”. Accordingly, the Serbian legislator provided criminal and misdemeanor protection of cultural goods by envisaging that their export is either a criminal or misdemeanor offense, unless accompanied with an export permit.

2.2.1. Criminal law protection

The 2009 Act Amending and Supplementing the Criminal Code of the Republic of Serbia introduced a new criminal offense titled “Unauthorized Transfer of Cultural Assets to a Foreign Country”,²¹ which clearly indicates the prohibited and punishable conduct. At the outset, it stipulates that “Whoever takes or exports abroad a cultural asset or an asset subject to preliminary protection without a prior approval of the relevant authority, shall be punished by imprisonment of six months to five years.” The wording implies that this criminal offense requires a cultural good or an asset under prior protection to be taken or exported abroad. Indeed, one may not talk about an export, unless a cultural asset has crossed the border. For this criminal offense to exist, it is not necessary to prove that one takes a cultural good abroad with intention to keep it there “permanently”; the intention to take it “temporarily” suffices. If the perpetrator was discovered while trying to cross the border and prevented from taking abroad a cultural good, it constitutes an attempted criminal offence which is punishable as prescribed by the law.²² This criminal offense exists only provided that a perpetrator has committed it with premeditation. Had a person who intends to take abroad or export cultural goods previously obtained an export permit issued by the competent ministry, there is no a criminal offense.

According to statistics, this criminal offense is rarely reported. For instance, statistics reveal that in 2014 only one person was indicted and one person was convicted of committing this criminal offense in the Republic of Serbia.²³ The

21 Art. 82 of the Act Amending and Supplementing the Criminal Code of the Republic of Serbia. *Official Gazette of RS*, No. 72/2009. Currently Art. 221a of the Criminal Code, *Official Gazette of RS*, No. 85/2005, 88/2005, 107/2005.

22 Art. 30 para. 1 of the Criminal Code.

23 Пунолетни учиниоци кривичних дела у Републици Србији, 2014. - Пријаве, оптужења и осуде -, Београд, 2014. (Adult criminal offenders in the Republic of Serbia, 2014: Criminal reports, indictments and convictions).

Извор: Републички завод за статистику. Accessed 5.4.2016. http://webrzs.stat.gov.rs/WebSite/repository/documents/00/01/97/00/SB_603_Punoletni_ucinioci_KD_2014.pdf.

question remains whether this piece of data depicts a real situation or rather points to the difficulties faced by customs border controls in charge of inspecting the baggage of those leaving the country or, more likely, whether it evidences the skillfulness of those involved in a thriving business who manage to pass cultural goods across the border undetected.

According to the categorization of cultural goods based on their importance²⁴, besides the described ordinary incrimination, the Criminal Code also envisages a qualified criminal act, which will be considered committed if directed against a cultural good of extraordinary or great importance. In this case, an offender shall be punished with imprisonment of one to eight years.

Having regard that this criminal offense was introduced in the Criminal Code only in 2009, one may ask whether illegal export of cultural goods was prohibited and sanctioned beforehand. As we saw, former Yugoslavia, as a Contracting Party to the mentioned 1970 UNESCO Convention, committed itself in 1972 to prohibit the exportation of cultural property from its territory unless accompanied by the export certificate. It is, therefore, unclear what happened between 1972 and 2009. Interestingly, this criminal offense was envisaged in Article 150 of the Cultural Property Act of 1990,²⁵ which provided a similar sanction as today's Criminal Code, although with a limited scope of application. Namely, the cited Article stipulated that „Whoever exports or takes abroad cultural good without the permission of the competent authority, shall be punished with up to five years' imprisonment". However, given that it excluded goods under prior protection, the scope of this incrimination is narrower than the current provision. Nevertheless, the Cultural Property Act of 1990 prescribed that export or taking abroad of goods under prior protection constitutes a misdemeanor unless authorized by a competent authority.²⁶ Unlike nowadays, the cited Article did not make distinction based on the importance of each cultural property.

2.2.2. Misdemeanor law aspects

In addition to the criminal offense of taking abroad and exporting cultural property, the legislator envisaged misdemeanors in this field. Considering that specific misdemeanors are not envisaged in the Misdemeanor Act but in the laws regulating specific areas of social life, the misdemeanors pertaining to export and taking abroad of cultural property and goods under prior protection are stipulated in the Cultural Property Act of the Republic of Serbia (1994). This Act stipulates a fine ranging from 1,000 to 10,000 new dinars for an institution, cor-

²⁴ Art. 2 para. 3 in conjunction with Art. 5 of the Cultural Property Act.

²⁵ the Cultural Property Act, *Official Gazette of FRY*, No. 6/1990.

²⁶ Art. 158 para. 1 point 23 of Cultural Property Act. *Official Gazette of FRY*, No. 6/1990.

poration, organization and any other legal entity which takes abroad or exports good under prior protection without authorization of the competent institution.²⁷ Conspicuously, the envisaged fine is extremely low. The fine prescribed in this Act is not in compliance with the Misdemeanor Act²⁸ as the principal law in the field of misdemeanors. The Misdemeanor Act provides that a fine for a legal entity may be prescribed by way of a legislative act or regulation, and that it may range from 50,000 to 2,000,000 dinars. This discrepancy could have been resolved in 2005, when the Act Amending the Act on Stipulating Fines for Business Offenses and Misdemeanors²⁹ was enacted, or in 2011 when the Cultural Property Act was amended and supplemented.

Besides envisaging the responsibility of legal entities for illegal export of cultural assets, the Cultural Property Act (1994) also includes provisions on the liability of the property owner and the responsible person in a relevant institution or other legal entity. Namely, the Act prescribes a term of up to 60 days' imprisonment, or a pecuniary fine ranging from 100 to 1,000 new dinars for the owner of a cultural good, whereas a responsible person in a relevant institution or other legal entity will be imposed a fine ranging from 100 to 1,000 new dinars.³⁰ As previously already stressed, these provisions are not in line with the Misdemeanor Act which stipulates that a fine awarded to natural persons or responsible person in legal entities may range from 5,000 up to 150,000 dinars. We consider the alternative forms of punishment prescribed by the legislator (60 days' imprisonment or a fine ranging from 100 to 1,000 new dinars) to be unacceptable. It is worth noting that the 60 days' imprisonment is the strictest punishment envisaged in the Misdemeanor Act³¹ (Midorović, Milić, 2016: 186-189).

For a misdemeanor to exist, a cultural good or an asset under prior protection has to be exported or taken from the Republic of Serbia. If a cultural good has not crossed the state border, there will be only an attempt of a misdemeanor, which is not punishable. Namely, an attempt of a misdemeanor offense is punishable only if it is explicitly stipulated in the Misdemeanour Act³², whereas the Cultural Property Act does not sanction an attempt of committing a misdemeanor.

From the aforesaid, it seems that from the perspective of natural persons, the same behavior is simultaneously envisaged as a criminal offence and a misde-

27 Art. 130 para. 1 point 20 in conjunction with Art, 80 para. 2 and Art. 83 para. 3 of Cultural Property Act.

28 the Misdemeanor Act, *Official Gazette of RS*, No. 65/2013 и 13/2016.

29 *Official Gazette of RS*, No. 101/2005.

30 Art. 130 para. 2 of Cultural Property Law.

31 Art. 37 para. 1 of the Misdemeanor Act.

32 Art. 16 of the Misdemeanor Act.

meanor offense. This may bring forth qualification problems as it may be unclear whether a person who has committed the described acts shall be punished for a misdemeanor or for a criminal offense. This issue could be solved through a systematic interpretation of the Misdemeanor Act and the Criminal Code. Namely, according to the Criminal Code, a criminal offense will be deemed perpetrated with guilt (culpability) when an offender has committed it with premeditation, unless the Code explicitly provides that a perpetrator is guilty when acting in negligence.³³ On the other hand, under the Misdemeanor Act, the offender's negligence is sufficient for establishing liability, unless a specific provision explicitly stipulates that an offender will be punished only if he/she acted with premeditation.³⁴ Therefore, in case of misdemeanor, negligence as a form of guilt suffices, whereas premeditation is needed only if it is explicitly prescribed by the law. Conversely, if the described offense has been committed with premeditation, it will be deemed criminal offense and not a misdemeanor.

3. International rules pertaining to the export of cultural goods

3.1. Relevant provisions of the 1970 UNESCO Convention

At the international level, the most prominent document dedicated to the protection of cultural goods in times of peace is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³⁵. This Convention was ratified by 131 countries³⁶, which makes it almost universally applicable. In 1973, the Convention was ratified by the Socialist Federal Republic of Yugoslavia, and it is currently applicable in Serbia by way of notification of succession.

The 1970 UNESCO Convention provides an array of provisions relevant to the export of cultural goods. First of all, it assumes that illicit export of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property³⁷. By way of its ratification or acceptance, the signatory States Parties agreed to oppose illicit export by available means, including the adoption of laws and regulations intended to prevent such

33 Art. 22 para. 2 of the Criminal Code.

34 Art. 20 para. 1 of the Misdemeanor Act.

35 The Convention is available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> (Accessed on 11th April 2016).

36 Available at: <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (Accessed on 11 April 2016).

37 Art. 2 para. 1 of the 1970 UNESCO Convention.

practices³⁸, as well as by establishing and keeping up to date a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage³⁹. In addition, the States Parties undertook to introduce export certificates which shall accompany the export of all items of cultural property in the absence of which the export shall be deemed prohibited.⁴⁰ Moreover, the Signatories undertook to make known to the public that export of cultural assets without export certificate is prohibited⁴¹. State Parties also committed themselves to take the necessary measures to prevent museums and similar institutions within their territories from acquiring cultural property which has been illegally exported from another State Parties after entry into force of the UNESCO Convention.⁴² By way of this Convention, States further undertook to oblige antique dealers to inform purchasers of the cultural property of the export prohibition to which such property may be subject,⁴³ and to cooperate in facilitating the prompt restitution of illicitly exported cultural property to its rightful owner⁴⁴. Last but not the least, the Convention allowed States Parties to declare certain cultural property as inalienable and, thus, unexportable, and to facilitate recovery of such property in case it has been exported.⁴⁵

Although the Convention mentions recovery and restitution of illicitly exported cultural property, it is not clear whether recovery of illegally exported cultural property to the State of its origin is a duty or merely a recommendation to the States Parties. The wording “to cooperate in facilitating their recovery” suggests the latter. This can be substantiated when comparing Article 13 para. 1 (b) and (d) with Article 7 para. 1 (b), which explicitly envisages a duty of States Parties to recover “cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention”. Given that the question of recovery of illegally exported cultural objects to the countries of their origin was not clearly stipulated, there was a need to clarify this matter, which was one of the tasks of the UNIDROIT Convention.

38 Art. 2 para. 2 in conjunction with Art. 5 para. 1 indent (a) of the 1970 UNESCO Convention.

39 Art. 5 para. 1 (b) of the 1970 UNESCO Convention.

40 See Art. 6 para. 1 (a) and (b) of the 1970 UNESCO Convention.

41 See Art. 6 para. 1 (c) of the 1970 UNESCO Convention.

42 See Art. 7 para. 1 (a) of the 1970 UNESCO Convention.

43 Art. 10 para. 1 (a) of the 1970 UNESCO Convention.

44 Art. 13 para. 1 (b) of the 1970 UNESCO Convention.

45 Art. 13 para. 1 (d) of the 1970 UNESCO Convention

3.2. Relevant provisions of the 1995 UNIDROIT Convention

In order to upgrade and mitigate deficiencies of the 1970 UNESCO Convention, the UNIDROIT drafted the Convention on Stolen or Illegally Exported Cultural Objects, which was adopted at the conference in Rome in 1995.⁴⁶ Its precise obligations diverted many states from becoming its parties, which explains why this Convention is not that widely spread as the UNESCO Convention. Although Serbia has not become Party to the UNIDROIT Convention yet, its key provisions on the illegally exported cultural objects will be briefly discussed.

Unlike the UNESCO Convention, the UNIDROIT Convention provides separate legal regimes for stolen and illicitly exported cultural objects, underlying thereby already discussed differences between them. Hereupon, the Convention defines illegally exported cultural objects as those that had been removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects,⁴⁷ along with those that have been temporarily exported under a permit and which were not returned in accordance with the terms of that permit to the State Party of their origin.⁴⁸

The main question is what consequences entail from illegal export, or, more precisely, whether a State Party can request a return of an illegally exported cultural object. According to the generally accepted view, in the absence of any international commitment on that point, states are not obliged to enforce export provisions of other states. This further implies that illegally exported cultural object, unless provided otherwise, can be rightfully acquired in the import state according to its national rules on good faith acquisition or prescription. To prevent that, the UNIDROIT Convention introduced, though on a selective basis, a duty of a State on whose territory the cultural object was illicitly imported to return it to the State of its origin. In order to prevent a mere retentionist policy of some states (Merryman, 1996: 15-16), the Convention prescribes that a requested State shall order return of an illegally exported cultural object only provided that specified conditions are met in each case. Namely, a request needs to be filed by a Contracting State, and not by a private party⁴⁹; a request ought to pertain to the object which can be qualified as a cultural one according to the Convention⁵⁰ unless it was exported during the lifetime of its creator or within

46 The Convention is available at: <http://www.unidroit.org/instruments/cultural-property/1995-convention> 31.8.2016.

47 Art. 1 para. 1 (b) of the 1995 UNIDROIT Convention.

48 Art. 5 (2) of the 1995 UNIDROIT Convention.

49 Compare Art. 5 (1) with Art. 3 (3) of the 1995 UNIDROIT Convention.

50 Art. 1 in conjunction with Annex to the 1995 UNIDROIT Convention.

a period of fifty years following his death⁵¹; an object in question ought to have been illegally exported after the Convention entered into force in both requesting and requested State⁵² provided that such export is still deemed illegal at the time when the return is requested⁵³; a request ought to be timely filed⁵⁴, and a requesting State ought to prove that a removal of the requested cultural object from its territory significantly impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State⁵⁵.

As it can be anticipated, it will not be an easy task for a state to succeed with a return request of illegally exported cultural object under the UNIDROIT Convention. Moreover, the drafters of the Convention initially intended to set even stricter rules for a return of illegally exported cultural goods in order to prevent the so-called “naked retentionism”. (Merryman, 1996: 15-16)

4. European union rules pertaining to export of cultural goods

Having regard to the fact that Serbia has commenced opening the chapters in EU accession negotiations, it is just a matter of time when chapter 26 on education and culture will be opened. Bearing that in mind, key EU provisions on this subject matter will be discussed. A special treatment of cultural objects being classified or defined by Member States as national treasures possessing artistic, historic or archeological value within the internal market is envisaged in Article 36 of the Treaty on the Functioning of the European Union (hereinafter referred to as: the TFEU). Justified on the grounds of protection of national treasures, cultural objects classified as such are excluded from prohibitions or restrictions on imports, exports or goods in transit. These prohibitions and restrictions, nonetheless, cannot easily be enforced on the market without internal frontiers within which a cultural object of one Member State can easily reach the territory

51 Art. 7 para. (1) (b) of the 1995 UNIDROIT Convention.

52 Art. 10 (2) of the 1995 UNIDROIT Convention.

53 Art. 7 para (1) (a) of the 1995 UNIDROIT Convention.

54 According to Art. 5 (5) of the 1995 UNIDROIT Convention: *Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit.*

55 Art. 5 (3) of the 1995 UNIDROIT Convention.

of another Member State infringing thereby national protective measures. In order to ensure the functioning of the internal market and concurrently preserve a special status of national treasures, the Union adopted certain provisions which can be currently found in the *Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State*⁵⁶.

4.1.1. Directive 2014/60/EU on Return of Cultural Objects Unlawfully Removed from the Territory of a Member State

As its title suggests, the main objective of this Directive is to enable the return of cultural objects classified as national treasures which have been unlawfully removed from the territory of Member States⁵⁷. Besides, the Directive stipulates circumstances under which return shall be ordered and governs the return procedure⁵⁸. Under the Directive, a return will be ordered provided that it was requested from a Member State which can prove that the specific cultural object is classified as a national treasure in the light of Art. 36 TFEU⁵⁹, that it was unlawfully removed from its territory⁶⁰ on or after 1 January 1993,⁶¹ that a removal is still deemed unlawful at the time when return proceedings have been initiated⁶² and, last but not least, if the request was filed within the prescribed time limits⁶³.

This Directive is relatively novel in the community legal space. Compared to its predecessor,⁶⁴ it introduced significant changes, the major ones being the extension of its scope and the time limits for initiating the return proceedings. Yet is to be seen whether all limitations of its predecessor have been eliminated and whether the recast Directive will yield more returns.

Besides preserving national cultural patrimonies of all Member States, the Union strives to protect common cultural heritage by preventing some of the most valuable cultural objects from being exported out of the Union without an export

56 *Official Journal of the European Union*, L 159/1 from 28.5.2014.

57 Indent 20 of the Preamble of the Directive 2014/60/EU.

58 Art. 3 of the Directive 2014/60/EU.

59 Art. 1 of the Directive 2014/60/EU.

60 Art. 2 para 1 (2) of the Directive 2014/60/EU.

61 Art. 14 of the Directive 2014/60/EU.

62 Art. 8 para 2 of the Directive 2014/60/EU.

63 Art. 8 of the Directive 2014/60/EU.

64 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. *Official Journal L 074*, 27/03/1993 P. 0074 – 0079.

licence. This objective was tackled in the *Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods*⁶⁵.

4.1.2. Regulation (EC) No. 116/2009 of 18 December 2008 on the Export of Cultural Goods

This Regulation introduced uniform export controls at the Community's external borders. The system is based on the presentation of an export license which shall be valid throughout the Community.⁶⁶ The export control, however, does not pertain to all goods qualified as national treasures by Member States, but merely to categories of cultural goods specified in Annex, provided that they meet financial and age thresholds.⁶⁷ In case a good is not deemed as a cultural one according to the Regulation, but is classified as a national treasure in the requested Member State, it may refuse to issue export license.⁶⁸ Such goods remain subject to the national law of the Member State of export.⁶⁹

Accordingly, it could be inferred that the uniform export control system outside the Union is rather complex. It does not cover all goods defined as national treasures by the Member States. Most problematic appear to be *de minimis* criteria, especially those of financial nature which do not always adequately depict national importance of a specific cultural object.

5. Conclusion

The regulation on export control of cultural goods is multi-layered and can be viewed from national, international and EU standpoint. In Serbia, the basic rules on export control of cultural goods are stipulated in the 1994 Cultural Property Act. To grasp this subject matter, the Cultural Property Act ought to be read in conjunction with the Act on Establishing the Competences of the Autonomous Province of Vojvodina and the Public Property Act. In Serbia, cultural goods are only exceptionally exportable, provided that a permit has been issued by the ministry in charge of cultural matters. Besides cultural property, goods under prior protection are also subject to export permits which are issued either by the Republic Institute for Protection of Cultural Monuments or by the provincial secretariat in charge of cultural matters, save in case of publications whose

65 *Official Journal of the European Union*, L 39/1 from 10.2.2009.

66 Indent 2 and 4 of the Preamble in conjunction with Art 2 point 1 and Art. 2 point 3 of the Regulation (EC) No. 116/2009.

67 Annex 1 of the Regulation (EC) No. 116/2009.

68 Art. 2 point 2 para. 3 of the Regulation (EC) No. 116/2009.

69 Art 2 point 4 of the Regulation (EC) No. 116/2009.

export shall be authorized by libraries (National Library of Serbia, Matica Srpska Library in Novi Sad, and the National and University Library in Priština). All cultural goods belonging to Serbian national patrimony, regardless of their importance, are subject to the same export rules, whereby publicly owned cultural property may be only temporarily exported. Unlike some foreign laws, the Cultural Property Act of Serbia does not envisage several types of export licenses, nor does it set out criteria to determine justifiability of export, nor does it lay down procedural rules for issuance of export permits.

The Serbian Criminal Code and the Cultural Property Act stipulate sanctions in case of violation of export rules that pertain to cultural assets. In case of illegal export of cultural property, the Criminal Code prescribes the punishment of imprisonment. Misdemeanours are envisaged in the Cultural Property Act which prescribes a fine and imprisonment alternatively, whereby fine spans are not in line with the Serbian Misdemeanour Act. An attempt of the criminal offense designated as "Unauthorised transfer of cultural assets to a foreign country" is punishable, unlike an attempt to commit a misdemeanour. The type of guilt (culpability) shall be the crucial element in qualifying an illegal act of transferring abroad of cultural property as a criminal offense or a misdemeanour. If the criminal act has been committed with premeditation, it shall be considered a criminal offence. Conversely, if it has been committed in negligence, the act shall be considered and punished as a misdemeanour.

At the international level, two instruments are material for illegal export of cultural objects. Whereas the 1970 UNESCO Convention merely calls State Parties to cooperate in facilitating restitution of illicitly exported cultural property, the 1995 UNIDROIT Convention clearly establishes a duty of a State Party to recover illegally exported cultural object of another State Party provided that certain conditions are met. In order to recover illegally exported cultural object, a State Party to the UNIDROIT Convention ought to file a request within the prescribed time limit and to prove that a removal of the requested object from its territory significantly impairs one of the stated interests. Therefore, at this stage, Serbia only needs to cooperate in returning illegally exported cultural object.

Lastly, EU rules provide a special treatment of objects qualified or defined as national treasures possessing artistic, historic or archeological value within the internal market. Namely, these objects may be subject to export bans and restrictions as long as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. To achieve free circulation of goods and concurrently enable Member States to preserve integrity of their national patrimonies, the EU adopted rules on the return of cultural objects unlawfully removed from the territory of a member state, which

are contained in the Directive 2014/60. With recently introduced novelties, the Directive is expected to increase the number of returns of unlawfully removed cultural objects within the EU. On the other hand, Regulation 116/2009 introduced a complex uniform control of export of some cultural objects meeting financial and age thresholds at the Union's external borders. The Regulation itself does not provide penalties in case of violation of the rules enshrined therein but only obliges Member States to lay down effective, proportionate and dissuasive penalties in case of the Regulation infringements.

The problem of illegal export of cultural goods has been and will surely remain topical as long as cultural objects exist. It seems that no legal rules can divert people fond of artworks and easy profit from indulging into illegal practices aimed at transferring cultural property from one state to another. Nevertheless, it is up to the states, international and regional organizations to endeavor to raise awareness of this phenomenon and to try to cooperate in returning the unlawfully exported cultural property. Without inter-state cooperation, export-related rules may not subsist. Nonetheless, as the UNIDROIT Convention suggests, the return of illegally exported cultural objects shall follow only provided that vital cultural interests of the state of their origin have been threatened. The rules on return of illegally exported cultural goods must be devised so as to facilitate the balance between the interests of an export state to preserve its cultural heritage, on the one hand, and the interests of an import state to guarantee ownership rights to the good faith buyers. Besides, national criminal and misdemeanor sanctions should discourage potential offenders from committing such acts. However, whatever the rules are, their capacity depends on their enforcement. If it falls short, all the previous work has been done in vain.

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КОНТРОЛА ИЗВОЗА КУЛТУРНИХ ДОБАРА

Резиме

Свака држава има суверено право да одреди допуштеност и услове за извоз добара која се сматрају делом њеног националног културног наслеђа. Највећи број земаља има правила која им омогућују да одређена културна добра задрже на својим територијама, или, пак, да контролишу њихов извоз. Контрола извоза се постиже увођењем система одобрења сагласно коме извоз одређеног културног добра мора да буде праћен одговарајућом дозволом за извоз. Извоз културних добара који није праћен одговарајућом дозволом државе његовог порекла повлачи изрицање одговарајућих прекршајних, кривичних и грађанскоправних санкција. Незаконити извоз одређеног културног добра по природи ствари подразумева и његов увоз у другу земљу. Овде се, пак, поставља питање да ли су државе дужне да на својим територијама спроводе правила о извозној контроли друге државе. С обзиром на то да се национална извозна правила углавном квалификују као јавноправна правила, стране државе махом одбијају да их спроведу на својим територијама. Описано стање истакло је потребу за међународном реакцијом што је довело до усвајања два међународна инструмента, UN-ESCO Конвенције о мерама за забрану и спречавање незаконитог извоза, увоза и преноса својине на културним добрима из 1970. године и UNIDROIT Конвенције о украденим и незаконито извезеним културним објектима из 1995. године, при чему оба извора обавезују државе потписнице да, у одређеној мери, на својим територијама спроводе прописе о извозној политици других држава потписница. Поред националних и међународних правила, у области извоза културних добара релевантна су и два комунитарна инструмента.

Директива (ЕУ) 2014/60 о повраћају културних предмета незаконито изнрних са територије државе чланице има за циљ очување интегритета културног блага свих држава чланица ЕУ, док Уредба (ЕЗ) бр. 116/2009 о извозу културних добара, са друге стране, допринеси очувању комунитарног културног наслеђа увођењем јединствене контроле при извозу добра из Европске уније. У датом контексту, у раду су анализирани механизми контроле извоза културних добара из угла националног, међународног и комунитарног права, као и прекршајне, кривичне и грађанскоправне санкције које се изричу у случају непоштовања утврђених правила.

Кључне речи: извоз, контрола, културна добра, кривичне и прекршајне санкције, повраћај.

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