UDK 34(058)

ISSN 0350-8501

УНИВЕРЗИТЕТ У НИШУ
ПРАВНИ ФАКУЛТЕТ

ЗБОРНИК РАДОВА ПРАВНОГ ФАКУЛТЕТА У НИШУ

БРОЈ 79 | ГОДИНА LVII | 2018

COLLECTION OF PAPERS FACULTY OF LAW, NIŠ

№ 79 | YEAR LVII | 2018

НИШ, 2018.

ЗБОРНИК РАДОВА ПРАВНОГ ФАКУЛТЕТА У НИШУ

Ниш, 2018.

Издавач
Правни факултет у Нишу

За издавача
Проф. др Саша Кнежевић, декан

Главни и одговорни уредник
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Штампа: Медивест Ниш, **Тираж:** 100

Зборник радова Правног факултета у Нишу
под називом Collection of papers, Faculty of Law, Nis је у пуном тексту доступан у HeinOnline бази података, EBSCO бази Legal Source, као и у бази Central and Eastern European Online Library – CEEOL.

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COLLECTION OF PAPERS, FACULTY OF LAW, NIS
NIŠ, 2018

Publisher:
Faculty of Law, University of Niš

For the Publisher:
Prof. dr Saša Knežević, Dean

Editor-in-Chief:
Prof. dr Irena Pejić

Translation: Gordana Ignjatović (English)
Proofreading: Aleksandra Gojković
Desktop publishing: Nenad Milošević
Print: Medivest Niš, **Circulation:** 100

PUBLICATION CENTRE, Faculty of Law, University of Niš
Trg kralja Aleksandra 11, Niš 18000, Serbia
Telephone: +381 18 500 201,
E-mail: zbornik@prafak.ni.ac.rs
Website: http://www.prafak.ni.ac.rs
http://www.ebscohost.com/public/legal-source
http://home.heinonline.org/titles/Law-Journal-Library/Collection-of-Papers-Faculty-ofLaw-Nis/?letter=C
Central and Eastern European Online Library – CEEOL

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III РАДОВИ СТУДЕНАТА ДОКТОРСКИХ СТУДИЈА / *PHD STUDENTS' PAPERS*

Уводна реч

Поштовани читаоци,

Научни радови садржани у редовном броју Зборника радова Правног факултета у Нишу (79/2018) покривају широку научну област права од међународног, преко компаративног права до ужих научних области које се баве појединим проблемима у националном правном поретку. У фокусу пажње редовног броја налази се Европско кривично право, а једнако можемо препоручити вашој пажњи радове аутора из региона и европских земаља који указују на различите аспекте хармонизације националног права са правом Европске уније. Уређивачка политика часописа се није променила у погледу подстицаја младих истраживача, па ћемо у овом и у следећим бројевима наставити са објављивањем радова студената докторских академских студија.

Редакција часописа жели да истакне да је индексираност Зборника радова Правног факултета у Нишу у различитим базама података, као што су Central and Eastern European Online Library – CEEOL, HeinOnline база података, EBSCO база података (Legal Source), SCIndex - српски цитатни индекс, Directory of Open Access Journals – DOAJ, допринела већој видљивости научних радова и истраживачких пројеката, као и да је то значајно повећало број прегледа, преузимања и навођења извора из нашег часописа у протеклој години.

У Нишу, новембар 2018.

Проф. др Ирена Пејић,
главни и одговорни уредник

Editor's Introductory Note

Dear Readers,

The current issue of the scientific journal Collection of Papers of the Law Faculty, University of Niš (No. 79/2018) comprises scientific papers addressing a wide range of legal issues in the areas of international law, comparative law and national law dealing with subject-specific problems in the national legal order. The focus of attention in this regular issue of the Law Faculty journal is European Criminal Law, but we can equally recommend to your attention the articles submitted by authors from different countries in the region and European countries discussing diverse aspects of harmonization of national law with the law of the European Union. In line with the established editorial policy of encouraging young researchers and providing incentives for further scientific research, this issue includes articles submitted by PhD students.

The Editorial staff would like to inform the readership that our scientific journal Collection of Papers of the Law Faculty, University of Niš, has been indexed in a number of Internet databases of scientific books and periodicals, such as: the Central and Eastern European Online Library (CEEOL), the HeinOnline database, the EBSCO (Legal Source) database, the SCIndex – the Serbian citation index, and the Directory of Open Access Journals (DOAJ). A greater visibility of individual scientific papers and research projects has largely contributed to the significant increase in the overall number of journal views, downloads and source citations in the past year, all of which ultimately adds to the credibility of our journal.

Niš, November 2018.

Prof. Irena Pejić, LL.D.

Editor-in-Chief

I ЧЛАНЦИ

У ФОКУСУ
ЕВРОПСКО КРИВИЧНО ПРАВО

ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879015B

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UDK: 341.44(4-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 23.10.2018.

*ЕВРОПСКИ НАЛОГ ЗА ХАПШЕЊЕ КАО МЕХАНИЗАМ ЕКСТРАДИЦИЈЕ У МЕЂУНАРОДНОЈ КРИВИЧНОПРАВНОЈ САРАДЊИ***

Апстракт: *Предмет рада је Европски налог за хапшење (у даљем тексту: EUN) као модел екстрадиције држава чланица Европске уније, успостављен Оквирном одлуком Већа ЕУ (2002/584/PUP) од 13. 6. 2002. о поступку предаје између држава чланица ЕУ. У уводном делу рада је дат кратак осврт на идеју уједињења Европе после II светског рата и с тим у вези усвајање EUN као супститута споре и недовољно ефикасне екстрадиције. Централни део рада садржи излагање о његовом појму, легислативном оквиру, материјалним и процесним правним условима за издавање и садржини. Европски налог за хапшење не може се издати за сва кривична дела, већ само за дела наведена у Каталогу 32. Начело двоструке кажњивости је укинуто за поједина тешка кривична дела, као и забрана изручења властитих*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World"*, held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

Рад је и резултат рада на Пројекту *Развој институционалних капацитета, стандарда и процедура за супротстављање организованом криминалу и тероризму у условима међународних интеграција*, МПНТР РС под бр. 179045.

Рад је писан у оквиру потпоре Хрватске закладе за знаност и одобреног пројекта под бр. 1949. *Multidisciplinary Research Cluster on Crime in Transition - Trafficking in Human Beings, Corruption and Economic Crime*.

држављана за нека финансијска кривична дела. У закључном делу је указано на улогу EUN у изградњи и функционисању јединственог правосудног простора ЕУ.

Кључне речи: *Европски налог за хапшење, екстрадиција, међународна кривичноправна сарадња, ЕУ.*

1. Увод

После II светског рата међународна заједница се нашла пред питањима реконструкције и изградње порушених држава, очувања мира у будућности и поновног успостављања нарушених политичких и других односа између народа. Стари континент је био посебно погођен ратом и ратним страхотама па је проблем обнове тим пре био доста сложенији у односу на остале делове света.

Први интегративни документ је била „Порука Европљанима" у којој су истакнути принципи уједињења, економске и политичке интеграције и преношења дела националног суверенитета на заједницу. Потом је 1949. године основан Савет Европе са идејом политичке сарадње, развоја парламентаризма, демократије и заштите људских права. Процес интеграција је настављен 1951. године Уговором о оснивању ЕЗ за угаљ и челик, а потом 1957. године формирањем ЕЗ за атомску енергију и ЕЕЗ (Fontaine, 1997). Даље је 1967. године потписан Уговор о обједињавању заједница и основана је ЕЗ са јединственом структуром.[1] Уследило је усвајање Јединственог европског акта 1987. године, којим је донекле ревидиран оснивачки документ и најављене су реформе Заједнице (Никач, Бећировић, Корајлић, 2013: 75-91).

Најважнији интегративни корак, после оснивачког акта, било је потписивање *Уговора о стварању ЕУ* у Мастрихту 1992. године. Документом је предвиђено да Унија има не само економску компоненту, већ заједничку спољну и безбедносну политику и сарадњу у домену правосуђа и унутрашњих послова. Установљена је организација са позната три стуба ЕУ које чине: а) економија, б) спољна политика и одбрана и ц) правосуђе и унутрашњи послови. У оквиру последњег стуба наведена су питања од заједничког интереса: азил, визе, имиграције, сузбијање тероризма, организованог криминала и илегалне трговине наркотицима на међународном нивоу (Гасми, Никач, 2013: 43-107). Даље је потписан Уговор

1 http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm, 20. 8. 2018.

из Амстердама 1997. године, који додатно афирмише заједничку спољну и безбедносну политика, као и сарадњу у области унутрашњих послова и правосуђа.[2] Следе Уговор из Нице из 2001. године, који је подстакао дебату о будућности Уније[3] и Уговор из Лисабона из 2007. године[4], којим је усвојен пакет амандмана на Римски споразум и Уговор из Мастрихта. Лисабонски уговор је реформски документ чији је циљ јачање институција и поједностављење процедура одлучивања, нарочито у погледу борбе против тероризма, организованог криминала и енергетске безбедности (Верола, 2007: 15-32).

Европски налог за хапшење и предају (енгл. *European Arrest Warrant-EAW*) јесте механизам који је уведен у оквиру новела Оснивачког уговора и промена у области слободе, безбедности и правде. У питању је механизам који је заменио традиционални и веома спори модел екстрадиције, као вида међународне кривичноправне помоћи држава (Божић, Лештанин, Никач, 2018: 155-172). EUN има за циљ олакшање и убрзање сарадње у функцији процесуирања осумњичених, оптужених или осуђених лица за конкретна кривична дела. Крајњи циљ је да ова лица не измакну руци правде и да се обезбеди фер, законит и ефикасан кривични поступак.

2. Легислативни оквир EUN

а) Простор ЕУ карактерише општа либерализација која се огледа у познатој синтагми „слободан проток људи, роба, услуга и капитала". Поред добрих страна повезивања и отворености Европе, јавиле су се и лоше стране у виду злоупотреба криминалних група и криминалаца, који су користили порозне границе и лакши транзит између држава. То је довело до експанзије и трансфера појавних облика криминалитета, група и извршилаца из неразвијених и земаља у транзицији ка развијеним државама. Јавили су се и нови појавни облици криминалитета, међу којима су посебно опасни неки видови организованог криминалитета као што су трговина људима, трговина људским органима, сексуална експлоатација деце, дечија порнографија, VTK и др.

У циљу осујећења криминалаца и организованих група да избегну одговорност за недела и побегну у друге земље, чланице ЕУ су најпре усвојиле *Конвенцију о примени Шенгенског споразума о постепеном укидању контроле на заједничким границама* (1990). Успостављен је јединствени *Шенген*

2 http://www.eurotreaties.com/amsterdamtreaty.pdf, 21. 8. 2018.

3 http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf, 21. 8. 2018.

4 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT 22. 8. 2018.

информациони систем (СИС) са базама персоналних и других података за сва лица која су оперативно и безбедносно интересантна (Никач, Симић, 2011: 87-102). Даље су усвојене *Конвенција о поједностављеном поступку изручења између држава чланица* (1995)[5] и Конвенција која се односи на изручење између држава чланица (1996),[6] али исте нису ратификоване и нису у примени.

У сусрет доношењу EUN претходили су оснивање Европола 1995. године, Европске правосудне мреже (EJN) 1998. године и Еуројуста 2002. године (Симић, Никач, 2010: 61-70). Иницирано је оснивање Канцеларије европског тужилаштва ради кривичног гоњења за преваре на штету ЕУ и извршавање налога које издају државе чланице (Palmieri, 2005: 37-43). Даље је усвојен Tampere програм (1997) о међусобној сарадњи у области правосуђа и унутрашњих послова[7], којим се укида претерани формализам у процедури изручења, убрзава поступак и узајамно признају одлуке у кривичноправним стварима.

б) Оквирна одлука о европском налогу за хапшење и процедури предаје између држава чланица 2002/584/PUP је донета на седници Савета ЕУ 13. 6. 2002. године и ступила је на правну снагу 1. 1. 2004. године.[8] У питању је најважнији легислативни оквир ЕУН чији је циљ да умањи строги правни формализам, замени традиционални систем екстрадиције моделом предаје лица и ојача међусобно поверење у одлуке правосудних органа држава.

У функцији примене овог инструмента правосудне сарадње у први план је дошло *начело узајамног признања* судских одлука. Државе чланице поштују одлуке страних судских инстанци, прихватају их и извршавају на својој територији без формализма. Начело је прихваћено најпре сходно пресуди Суда ЕУ у предмету *Cassis de Dijon*, а потом је примена проширена на правосудну сарадњу у кривичним стварима (Pradel, Cortens, Vermeulen, 2009: 607-608). Даље је разрађено путем Програма мера за примену

5 http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1995:078:FULL:EN:PDF/, 23. 8. 2018.

6 http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41996A1023(02):EN:HTML/, 23. 8. 2018.

7 http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF/, 25. 8. 2018. /Programme of measures to implement the principle of mutual recognition of decisions in criminal matters./

8 Council Framework Decision of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States, Decision 2002/584/JHA, Official Journal L 190 od 18. 7. 2002. Više: internet adresa: http://europa.eu/scadplus/leg/en/lvb/l33167.htm (25. 8. 2018). Текст Оквирне одлуке на интернет адреси: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML (25. 8. 2018).

начела узајамног признања (2000) и Хашког програма (2004). Правно је артикулисано у чл. 29 Уговора о ЕУ, којим се ствара „простор слободе, безбедости и правде" у којем не постоје границе између држава чланица, већ јединствени простор где одлуке правосудних органа слободно циркулишу (Čule, Hržina, 2013: 715-750). У том смислу успоставља се однос између (правосудних) органа држава чланица који се базира на узајамном поверењу и поштовању судских (правосудних) одлука.

Терористички напади од 11. септембра 2001. године у САД значајно су убрзали усвајање јединственог легислативног оквира са циљем ефикасне примене начела узајамног признања судских одлука, избегавања дуготрајног поступка ратификације и потенцијалних резерви држава на поједине одредбе. Као резултат актуелног стања безбедности и правних ставова држава чланица усвојена је Оквирна одлука за хапшење и процедуру предаје између држава чланица ЕУ коју су касније прихватиле новопримљене државе чланице, у складу са динамиком проширења ЕУ (2004, 2007, 2013).

в) Следећи важан правни извор у овој области је *Оквирна одлука бр. 2009/829/PUP од 23. 10. 2009. о примени начела узајамног признања на мере надзора међу државама чланица ЕУ*, као алтернативе привременом притвору. У контексту испуњавања стандарда и мерила из Поглавља бр. 24 - Правда, слобода и безбедност, поред Оквирне одлуке о EUN, донето је још неколико важних оквирних одлука којима се регулишу различити облици правосудне сарадње.[9]

9 Оквирна одлука Савета ЕУ 2003/577/PUP од 22. 7. 2003. о извршењу налога за осигурање имовине и доказа у ЕУ, Оквирна одлука Савета ЕУ 2005/214/PUP од 24. 2. 2004. о примени начела узајамног признања новчаних казни, Оквирна одлука Савета ЕУ 2006/783/PUP од 6. 10. 2006. о примени начела узајамног признања налога за одузимање, Оквирна одлука Савета ЕУ 2008/909/PUP од 27. 11. 2008. о примени начела узајамног признања пресуда у кривичним стварима којима се изричу казне затвора или мере које укључују одузимање слободе с циљем извршења у ЕУ, Оквирна одлука Савета ЕУ 2008/947/PUP од 27. 11. 2008. о примени начела узајамног признања пресуда и условних осуда с циљем надзора условних мера и алтернативних санкција, Оквирна одлука Савета ЕУ 2008/978/PUP од 18. 12. 2008. о европским налозима за прибављање предмета, документације и података за коришћење у кривичним поступцима, Оквирна одлука Савета ЕУ 2009/299/PUP од 26. 2. 2009. о изменама и допунама оквирних одлука 2002/584/PUP, 2005/214/PUP, 2006/783/PUP, 2008/909/PUP и 2008/947/PUP ради јачања процесних права особа и примене начела узајамног признања одлука донетих поводом суђења у одсуству.

3. Појам и елементи ЕУН

Сагласно чл. 1 Оквирне одлуке, ЕUN је дефинисан као *судска одлука* донета у једној држави чланици ради хапшења и предаје тражене особе од стране друге државе чланице ради кривичног прогона, извршења затворске казне, притвора или друге мере безбедности.[10] Недвосмислено је да је ЕUN *правосудна одлука* која је донета у једној држави чланици, призната од осталих чланица ЕУ и примењује се у односу на лице које се потражује.

У погледу садржине (чл. 8) потребно је да ЕUN има следеће *податке*: назив (правосудног) органа издаваоца ЕUN; изјаву о подигнутој оптужници и намери да се лицу суди; персоналне податке о лицу које се потражује; пратећу документацију; појединости о кривичном делу и санкцији, уз кратак чињенични опис; пресуду, решење или други документ у односу на лице и дело; захтев за заплену ствари које су потенцијални доказ или су имовина проистекла из кривичног дела, који нису обавезни већ су факултативни елементи ЕUN; друге информације у вези са делом које могу бити од значаја за позитиван исход и извршење налога (Гајин, 2009: 75-78).

Поред садржине стандардизована је и *форма* ЕUN ради лакше примене и уједначеног поступања држава чланица. Важан елемент чини кореспонденција и с тим у вези језик комуникације где се, поред службеног језика, налог потражиоца доставља и на језику државе извршења налога.

Спровођење ЕUN заснива се на обавези сваке државе чланице да, поштујући начело узајамног признања и одредбе Оквирне одлуке, изврши сваки прописано издати акт. Одредбама ЕUN традиционални појам „изручење" је замењен појмом „предаја", на који начин је још једном истакнут правосудни (судски) карактер акта у односу на ранију везу с извршном влашћу.

Поступак предаје траженог лица је детаљније регулисан одредбама од чл. 11 до чл. 30, што је значајно другачије у односу на Конвенцију Савета Европе о изручењу из 1957, која је поступак изручења оставила у надлежност држава.

4. Поступак имплементације ЕUN

Поступак примене ЕUN обухвата најпре издавање акта, достављање држави чланици или осталим државама, преко доношења одлуке замољене државе чланице и на крају реализацију поступка предаје лица.

10 Op. cit. u nap. 8 /European Arrest Warrant Act/.

Издавање акта је први корак у поступку и веома значајан за исход процеса у целини. Поступак издавања акта претпоставља да су испуњене материјалне и процесне претпоставке за покретање и примену акта.

а) Материјалноправне претпоставке за издавање EUN полазе од органа надлежног за издавање акта. Правосудни орган, по правилу *суд*, стварно је надлежни орган за издавање EUN и свака држава потписница обавештава Генерални секретаријат ЕУ о делегираном националном правосудном органу. У зависности од уставних решења, устројства и организације држава могу бити надлежни и други органи и тела сваке земље. У погледу територијалне важности издати EUN важи на територији свих држава чланица ЕУ.

Ситуације у којима се издаје EUN су следеће: а) истрага за извршено кривично дело, б) извршење изречене казне и в) извршење одлуке о притвору. У случају истраге лице није осуђено и у току је преткривични поступак у којем се утврђује статус осумњиченог (извршилац, саизвршилац, помагач, подстрекач или организатор). У вези извршења казне судски поступак је правоснажно окончан осуђујућом пресудом и лице се потражује јер није доступно органима државе, а најчешће се налази у бекству. У погледу извршења одлуке о притвору у питању је преткривични поступак у којем је донета одлука о задржавању у притвору, али је лице недоступно и најчешће у бекству на територији друге државе (EAW, art.1, 22 fn).

У односу на тежину и инкриминацију кривичних дела EUN се издаје у *случајевима*: а) изречене казне затвора од четири месеца или донетог решења о притвору у истом трајању, б) преступа за који је предвиђена максимална казна затвора од једне године и в) када је дело инкриминисано у обе државе. Предвиђено је да услови за издавање EUN морају бити испуњени кумулативно и без правних сметњи.

Каталог кривичних дела је решење усвојено Оквирном одлуком о EUN, у којем се наводе кривична дела која су по врсти, тежини и природи веома опасна и штетна по интересе ЕУ, држава чланица и њихове грађане. Због тога су чланице обавезне да изврше сваки конкретни EUN који се односи на кривична дела из овог корпуса, без изузетка и без потврде двоструке инкриминације дела. Додатни услов је да је запрећена минимална казна од три године затвора у држави која тражи извршење налога. Утврђена листа кривичних дела није коначна и према Оквирној одлуци постоји могућност измене и допуне, на основу извештаја ЕК и након консултација са Европским парламентом (EAW Act, art. 2. par. 3).

У актуелном Каталогу енумерисана су укупно 32 кривична дела за која се издаје EUN: учествовање у организованој криминалној групи,

тероризам, трговина људима, сексуална експлоатација деце и дечија порнографија, илегална трговина наркотицима, илегална трговина оружјем, корупција, финансијске преваре, прање новца, фалсификовање новца, дела VTK, еколошки криминал, неовлашћени улазак и боравак у држави, убиство, илегална трговина људским органима, киднаповање, расизам и ксенофобија, оружана пљачка, илегална трговина културним добрима, обмане и преваре, рекетирање и изнуде, кривотворење и пиратство производа, фалсификовање административних докумената и њихова трговина, фалсификовање средстава плаћања, незаконита трговина хормонским супстанцама, нелегална трговина нуклеарним и радиоактивним материјалима, трговина украденим возилима, силовање, пироманија, злочини у оквиру надлежности MKS, незаконита отмица авиона и бродова, и саботажа (EAW Act).

Стручну и логистичку помоћ државама чланицама може да пружи *Европска правосудна мрежа* (European Justice Network–EJN). Мрежа омогућава да чланице могу да користе капацитете телекомуникационих система EJN, Интерпола и Шенгенског информационог система (SIS) у реализацији EUN и у оптималном временском року (Ђорђевић, 2011: 6-8).

б) Процесноправне претпоставке за издавање EUN односе се на процедуру издавања, спровођење и контролу извршења акта.

Процедура за *издавање* EUN предвиђа да акт издаје надлежни *судски орган* државе потражиоца. Официјелним каналима налог се доставља држави где се претпоставља да се налази тражено лице, односно осталим чланицама по захтеву потражиоца (SIS или Интерпол) (Гајин, 2009: 30).

Замољена држава је дужна да одмах ухапси тражено лице уколико се налази на њеној територији и одреди тзв. екстрадициони притвор. У том контексту спроводи се процедура провера идентитета притвореног лица уз правне гарантије у погледу права на одбрану, обавештавања породице и DKP, медицинске помоћи и употребе матерњег језика, поред језика поступајуће државе. Органи безбедности замољене државе поступају по судском налогу друге државе на исти начин као да се ради о одлуци домаћег суда, односно надлежног органа. Потом следи *прелиминарно саслушање* на којем се притворени најпре упознаје са правима и обавезама у поступку, као и изјашњава о садржини EUN. Уколико нема довољно елемената за одлучивање и одлуку, може се затражити допуна налога од државе издаваоца у погледу формалних елемената (EAW Act, 22 fn).

Главно саслушање пред надлежним судијом обавља се у разумном временском року са циљем провере EUN за извршење, ваљаности тражене допуне и постојања правних сметњи за извршење. Замољена држава може

одбити извршење EUN ако постоје *апсолутне сметње* као што су амнестија, начело *ne bis in idem* и године старости (EAW Act, art.3). *Релативне* сметње су факултативни основ за неизвршавање EUN и у ову групу спадају: недостатак двоструке кажњивости, вођење кривичног поступка у држави извршења за исто кривично дело, правоснажна пресуда (модалитет *ne bis in idem*), законска забрана кривичног гоњења или кажњавања, правоснажна осуда за кривично дело (EAW Act, art. 4).

На крају овлашћени судија доноси *одлуку*, на коју постоји право жалбе.

Спровођење и контрола извршења су саставни елементи процеса имплементације EUN у пракси. У поступку по издатом налогу не разматрају се докази, већ пре свега елементи везани за издавање налога и постојање услова за изручење. Надлежни судски орган замољене државе цени испуњеност формалних елемената и техничке чињенице везане за изручење. Суд је дужан да донесе одлуку о (не)изручењу лица у року од 60 дана од дана хапшења.

Уколико је ухапшено лице *сагласно* са изручењем држави потражиоцу, онда је процедура значајно скраћена, па се одлука мора донети у року од 10 дана од давања сагласности. Потом суд замољене државе обавештава надлежни орган издаваоца EUN, након чега се утврђују детаљи предаје лица потражиоцу.

Трошкови поступка по издатом EUN су такође важна ставка у примени. У питању су издаци који се односе на ангажовање персоналних и техничких ресурса за спровођење налога који обухватају: операцију хапшења, смештај и чување, обезбеђење, исхрану, медицинску негу, правну помоћ, спровођење и трансфер. У пракси ЕУ прихваћено је да по правилу све трошкове сноси држава потражилац, али одређене трошкове свакако има поступајућа држава до коначне предаје лица потражиоцу (EAW Act).

Контрола извршења EUN је подробније регулисана клаузулом но. 8 Оквирне одлуке, према којој се предвиђа инхерентна надлежност судских органа. Полази се од правних стандарда развијених држава ЕУ о независности и слободи судова у одлучивању, што значи да су одлуке првостепених судова предмет контроле другостепених судских инстанци замољене државе. У том смислу судска власт је у великој мери ослобођена утицаја политичког фактора и извршење EUN је неспорно ствар правосудних органа (Palmieri, 2005: 38).

У функцији спречавања злоупотреба у пракси установљена је *клаузула о забрани дискриминације* (EAW Act, art. 12) када постоје разлози за сумњу да је EUN издат ради прогона или кажњавања лица на основу пола, расе,

религије, етничког порекла, националности, језика, политичког става или сексуалне оријентације. Посебно се указује да су услед наведених аката угрожени положај и права особе у поступку примене.

Одбијање извршења EUN може учинити замољена држава уколико постоји озбиљна бојазан да ће тражано лице бити осуђено на смртну казну, изложено тортури или нехуманим поступцима, понижавајућој казни и третману. Замољена држава може затражити додатне гарантије у погледу статуса и права лица, што је сагласно унутрашњем правном поретку и универзалним европским стандардима (Ђурђић, 2012: 24).

5. Проблеми у постуку примене EUN, осврт

Проблеми у поступку примене EUN у пракси постоје од када је донета Оквирна одлука, посебно од почетка ефективне примене и све до данас. Почетак примене везује се за 2004. годину, од када је у Шпанији ухапшен држављанин Шведске по захтеву исте државе, након чега је предат потражиоцу. У почетном периоду Оквирна одлука није правовремено имплементирана у свим државама чланицама ЕУ, да би након тога уследило издавање више хиљада EUN и по службеним проценама негде око 20% је ефекат извршења. У случајевима када тражена лица дају *пристанак за изручење* поступак је доста краћи и траје од 14 до 17 дана до предаје потражиоцу, док у случају одсуства сагласности поступак предаје лица траје од 45 до 48 дана.[11]

Почетни проблеми били су везани за документацију EUN која је у једном броју случајева била непотпуна и неуредна, па су замољене државе захтевале да се списи употпуне и уреде ради поступања. Следећи (административни) поблем представљали су трошкови поступка који по правилу падају на терет потражиоца, али и замољене државе у периоду од хапшења до предаје лица потражиоцу (исхрана, смештај, обезбеђење, лекарска помоћ). Начело економичности стога налаже ефикасно поступање, али не на уштрб законитог поступка и права ухапшеног лица. Посебан проблем у пракси представљају нетачне информације о траженим лицима, локацијама скривања, помагачима и средствима која користе, што значајно отежава оперативно поступање органа замољене државе. У пракси је било и случајева нерационалног издавања EUN због дела мање друштвене опасности и мањег значаја, што указује да је присутан известан аутоматизам у издавању EUN.

11 Report from the Commission to the European Parliament and the Council, EU Commission, Brussels, 11. 4. 2011, p. 3.

Посебан поблем представља потенцијална *политизација* случајева, односно политички мотивисано издавање EUN против непожељних лица. Међутим, смисао EUN је да као супституит екстрадиције буде у потпуности деполитизован, растерећен сваког ванправног утицаја и могућих притисака на органе у земљи потражиоцу и замољеној држави. С друге стране, могући су и случајеви политизације од стране замољене државе када без ваљаног правног разлога не поступа по уредном EUN, као што је био случај одбијања Ирске да преда потражиоцу свог држављанина који је прегазио возилом двоје деце у Мађарској (Гајин, 2009: 82-85).

Дилеме у примени EUN су се јавиле посебно у случајевима *изручења властитих држављана,* као што је био поменути случај Ирске. Неке земље су отишле корак даље па су уставни судови прогласили неуставним и незаконитим решења уграђена у национално законодавство, сходно Оквирној одлуци. У образложењима највиших судских инстанци преовлађују аргументи у којима се указује на темељна уставна начела законитости и забране изручења домаћих држављана страној држави.[12]

Поједине државе чланице ЕУ су ограничиле временско и материјално подручје примене EUN као на пр. Уједињено Краљевство и Холандија, док су друге чланице (Пољска, Белгија) проширили Каталог кривичних дела у односу на која се примјењује начело обостране кажњивости. Неке земље као на пр. Италија нису у националном законодавству укинуле примену начела обостране_кажњивости у погледу Каталога 32 кривичних дела из чл. 2 Оквирне одлуке. Тако је Данска одредила посебно тело извршне власти као надлежно за издавање и извршење EUN, што је супротно Оквирној одлуци која изричито препознаје судске органе и правосудни поступак. Малта и горе поменуте државе до сада су као разлоге за одбијање извршења EUN навеле заштиту националне безбедности, политичке разлоге, личне и породичне прилике тражених лица (Čule, Hržina, 2013: 721–724). Поједине чланице су повећале број облигаторних разлога за одбијање извршења налога и тиме ограничиле дискреционе одлуке правосудних органа. Постоје и проблеми у погледу слања и пријема издатих налога путем канала ЕУ (SIS), јер многе земље Уније још нису ушле у Шенгенски простор и користе расположиве канале Интерпола.

Поменути проблеми налажу појачане мере надзора и контроле у примени EUN свих земаља чланица ЕУ, а посебно потражиоца као издавалаца налога и замољених држава које поступају по налозима.

12 Уставни суд СР Немачке је одлуком бр. 2 BvP 2236/04 од 27. 7. 2005. г. укинуо закон којим је у национално законодавство имплементирана Оквирна одлука о EUN. Уставни суд Пољске је 27. 4. 2005. г. укинуо закон којим је Пољска у национално законодавство уградила Оквирну одлуку о EUN.

6. Закључак

Европски налог за хапшење и предају (EAW - *European Arrest Warrant*) важан је механизам међународне кривичноправне сарадње држава Уније. EUN је заменио поступак класичне екстрадиције која је била доста спора и често је доводила до изигравања правде, избегавања одговорности извршилаца и измицања руци правде. У том погледу EUN је револуционарни правни механизам који је гарантовао доступност правде једнако за све, и омогућио је убрзану процедуру изручења тражених лица и довео до значајног смањења трошкова поступка.

Позитивно дејство EUN се огледа у неколико чињеница: а) процедура је бржа, економичнија, сведена на техничке елементе и без опструкције поступка; б) смањен је ванправни политички утицај на кривичне предмете; в) успостављена је могућност изручења домаћих држављана другој држави чланици и г) обезбеђена је додатна заштита права оптужених и осуђених лица. Деполитизација поступка и отклањање ванправних понашања је изузетно важно питање за успех механизма EUN, посебно када се ради о захтеву стране државе за изручење домаћег држављанина.

Смисао EUN је да се међународна кривичноправна сарадња одвија у оквиру делотворног простора *„слободног кретања судских одлука у кривичним стварима"*[13]. Истина, државе чланице се донекле одричу дела националног суверенитета, што је у другом плану у односу на опште интересе и доступност правде једнако за све. Укинуто начело двоструке кажњивости за тешка кривична дела у енумерацији Каталога 32 (Кнежевић, 2014: 257-270), и укинута је забрана изручења домаћих држављана и лица за фискална кривична дела. У пракси EUN се издаје и спроводи директно од стране судских органа, у једноставној и истоветној правној форми. Даљи развој овог система има превасходни циљ да смањи ванправне и политичке утицаје у осетљивој области екстрадиције, односно хапшења и предаје лица другој држави.

На крају, поједине државе из састава некадашње СФРЈ већ су чланице ЕУ (Словенија, Хрватска) и примењују EUN. Од познатијих случајева наводимо чувени предмет Перковић-Мустаћ, када је РХ по уласку у ЕУ променила одредбу домаћег законодавства *(Lex Perković)*, након чега је предала двојицу својих држављана СР Немачкој као потражиоцу. Србија и остале земље из састава ex-YU су аплицирале за пријем у ЕУ и чека их процес хармонизације норми са правом ЕУ, што је посебно важно у оквиру Поглавља 23 и 24.

13 EAW Act, art. 5, 22 fn.

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EUROPEAN ARREST WARRANT AS A MECHANISM OF EXTRADITION IN INTERNATIONAL CRIMINAL JUSTICE COOPERATION[*]

Summary

The subject of the paper is the European Arrest Warrant as a Model of Extradition of EU Member States, established by the EU Council Framework Decision (2002/584/PUP) of 13 June 2002 about the surrender procedure between the EU Member States. The introductory part of the paper gave a brief overview of the idea of the unification of Europe after the II World War and in this regard the adoption of the EUW as a substitute for slow and insufficiently effective extradition.The central part of the paper contains an exposition of its concept, legislative framework, substantive and procedural legal conditions for publication and content. The EAW can not be issued for all offenses, but only for the works listed in the Catalog 32. The principle of double punishment has been abolished for some serious crimes, as well as the prohibition of the extradition of its own citizens for some financial crimes. In the concluding part pointed to the role of EAW in the construction and functioning of the EU's single judicial area.

Key words**:** *European arrest warrant, extradition, international criminal justice cooperation.*

* This research has been fully supported by the Croatian Science Foundation, under the project no 1949 *Multidisciplinary Research Cluster on Crime in Transition-Trafficking in Human Beings, Corruption and Economic Crime*

This paper is the result of the research on project *Development of institutional capacity, standards and procedures for countering organized crime and terrorism in the conditions of international integration,* Ministry of Education and Science of the RS no 179045.

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879031J

UDK: 343.53
Рад примљен: 13.05.2018.
Рад прихваћен: 18.09.2018.

СИСТЕМИ УСЛОВНЕ ОСУДЕ СА ЗАШТИТНИМ НАДЗОРОМ У ЕВРОПСКОМ КРИВИЧНОМ ПРАВУ

Апстракт: *У савременом кривичном праву казна затвора је данас основна и најзначајнија врста кривичне санкције која се изриче учиниоцима кривичних дела у циљу спречавања и сузбијања криминалитета. Но, сва кривична законодавства, поред безусловне казне затвора, познају и различите модалитете његовог изрицања или извршења. То су различити облици супститута или алтернатива у случајевима када према оцени личности учиниоца кривичног дела није неопходно његово безусловно лишење слободе. Тако се разликује потпуна или делимична суспензија казне затвора или неке друге врсте казне. У првом случају ради се о условној осуди. То је потпуно изузеће од извршења судском одлуком изречене или утврђене казне затвора (и или друге врсте и мере казне) за одређено време (време проверавања) и под одређеним условима. У случају да условно осуђени не испуни постављене опште и посебне, обавезне или факултативне услове, кривично право предвиђа обавезно или факултативно опозивање условне осуде. Но, поред условне осуде, као облика или модалитета извршења изречене казне затвора, поједина савремена кривична законодавства познају и условну осуду као посебну врсту кривичне санкције – као меру упозорења. Претпоставка за примену ових мера јесте испуњење формалних услова – у погледу врсте и висине изречене, односно издржане казне затвора и материјалних услова – те оцена суда да примена казне у конкретном случају није неопходна јер се циљеви (сврха) кажњавања могу остварити и без ефективног извршења казне затвора у целости или делимично. Управо о појму, карактеристикама, условима и начинима извршења суспензије казне затвора са заштитним надзором у европском кривичном праву са теоријског и практичног аспекта говори и овај рад.*

Кључне речи: *кривично дело, учинилац, казна затвора, условна осуда, заштитни надзор, суд, европско право.*

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1. Уводна разматрања

У савременом европском кривичном праву у систему мера друштвене реакције на криминалитет преовладавају по свом значају казне, посебно казна затвора. То је лишење слободе кретања учиниоца кривичног дела на одређено време дефинисано судском одлуком. Она је прописана за највећи број кривичних дела, самостално, алтернативно или кумулативно са неком другом казном. Изриче се за одређено законом прописано време (Јовашевић, 2011: 759). Али изречена мера казне затвора не мора у сваком конкретном случају да се ефективно и изврши у потпуности или делимично за одређено време (време проверавања) и под одређеним обавезним и факултативним условима (Grozdanić, Škorić, Martinović, 2013: 211–215). То значи да суд осуђеном лицу може да одреди да се изречена (или утврђена) казна у потпуности или делимично не издржава применом условне осуде. На тај начин се ефективно извршење утврђене или изречене казне затвора одлаже за одређено време (време пробације) и под одређеним условима.

Условна осуда (Petrović, Jovašević, Ferhatović, 2016: 218–220) у кривичноправном систему Европе се јавља у два облика: а) као самостална кривична санкција (мера упозорења или адмонитивна санкција) и б) као форма, облик, начин, модалитет извршења казне лишења слободе на слободи. У сваком случају, условна осуда (Јовашевић, 2016: 268–270) је одлагање извршења утврђене казне затвора (и или друге врсте и мере казне) одговорном учиниоцу кривичног дела за одређено време (време прокушавања, проверавања), под условом да не изврши ново кривично дело и испуни друге постављене опште и посебне обавезе и услове[1]. Ако условно осуђено лице не изврши ново кривично дело у одређеном року и испуни друге постављене обавезе, тада до извршења казне неће доћи. У противном, условна осуда се опозива, а утврђена казна се извршава у пенитенсијарним установама. То значи да је условна осуда опраштање казне (или привремено одрицање државе да изрекне казну) учиниоцу дела од стране друштва под одређеним условима, опраштање које је базирано на уверењу да ће се учинилац убудуће владати у складу са нормама правног поретка и да неће вршити кривична дела.

У правној теорији (Turković et al., 2013: 213–221) се могу наћи и схватања према којима код условне осуде држава не одустаје од реакције на кривично дело чиме се остварује праведност, те генерална и специјална превенција,

1 У савременом кривичном праву позната је и парцијална условна осуда. Тако члан 132–31 француског Кривичног законика, члан 43 аустријског Кривичног законика и члан 57 Казненог закона Хрватске предвиђају могућност условног одлагања извршења дела утврђене казне затвора. У том случају се условна осуда претвара у антиципирани условни отпуст.

али се према учиниоцу кривичног дела показује обзирност тако да се поштеђује од извршења казне (Novoselec, 2004: 379). У неким правним системима условну осуду као врсту кривичне санкције поред суда могу да изрекну и вансудски органи (нпр. председник републике).

Условна осуда може бити изречена одговорном учиниоцу кривичног дела (физичком или правном лицу). Савремено кривично законодавство познаје два система условне осуде који су настали из института „*probation*". То су (Pavišić, Grozdanić, Veić, 2007: 244–252): а) континентални и б) англоамерички систем.

Према континенталном (француско-белгијском „*sursis*" систему, који је уведен на предлог сенатора Беранжеа), суд води кривични поступак према учиниоцу кривичног дела и изриче му врсту и меру казне, али чије извршење одлаже за одређено време под одређеним условима. Учинилац се за то време не сматра осуђиваним ако испуни постављене услове. Предности овог система је што се учиниоцу кривичног дела суди и изриче казна тако да се у случају њеног опозивања приступа извршењу већ изречене казне. Пресуда се доноси на бази свежих и непосредно утврђених доказа, тако да је мала могућност да дође до грешака у прикупљању, утврђивању и судској оцени доказа (Јовашевић, Митровић, Икановић, 2017: 217–223).

Код англоамеричког система (Ђорђевић, Ђорђевић, 2016: 99) не води се кривични поступак, већ се суђење одлаже за време док се учинилац кривичног дела ставља под систем прокушавања, односно под надзор органа правосуђа под условом да он на то пристаје. Англоамерички систем прокушавања је повољнији за учиниоца кривичног дела с обзиром на то да не долази до суђења и изрицања казне (па се такво лице не сматра осуђиваним), а заштитни надзор који врше одређена лица (или органи), штити га од искушења и пружа му помоћ у савладавању свакодневних животних проблема за укључивање у друштвено-користан рад и уздржавање од кршења прописа. Недостатак овог система долази до изражаја у случају опозивања прокушавања, када накнадно долази до суђења због могућих тешкоћа око прикупљања и утврђивања доказа услед протека времена (Horvatić, 2003: 167–169).

С обзиром на бројне предности заштитног надзора над условно осуђеним лицем за време трајања пробације, који потиче из англоамеричког система, данас је у великом броју европских држава ова врста условне осуде заступљена у значајној мери, не само у нормативном већ и у практичном погледу. Стога ћемо у наставку рада указати на основне карактеристике различитих система заштитног надзора уз условну осуду у европском кривичном праву, полазећи прво од решења у праву Републике Србије.

2. Република Србија

Условна осуда у кривичном праву Републике Србије представља одлагање извршења утврђене казне учиниоцу кривичног дела под условом да за време које одреди суд не изврши ново кривично дело. То значи да је условна осуда опраштање казне (или привремено одрицање државе да изрекне казну) учиниоцу дела од стране друштва под одређеним условима, опраштање које је базирано на уверењу да ће се учинилац убудуће владати у складу са нормама правног поретка и да неће вршити кривична дела. Она се јавља као самостална кривична санкција где суд утврђује казну учиниоцу за извршено кривично дело и истовремено одређује да се она неће извршити ако осуђени за време које суд одреди у трајању од једне до пет пет година (време проверавања или кушње), не учини ново кривично дело (члан 65 Кривичног законика из 2005. године[2]). То значи да се изрицањем условне осуде учиниоцу кривичног дела утврђује казна, али се не изриче, што указује на карактер ове васпитно-прекорне и упозоравајуће санкције.

За изрицање условне осуде, било у класичном облику или са заштитним надзором, потребно је испуњење два кумулативна услова, а то су: 1) формални услов – да је учиниоцу за извршено кривично дело утврђена казна затвора до две године или новчана казна уз два ограничења: а) она се не може изрећи за кривично дело за које је прописана казна затвора од десет година или тежа казна и б) она се не може изрећи ако није протекло више од пет година од правноснажности раније осуде којом је учиниоцу изречена казна затвора за умишљајно дело; и 2) материјални услов – уверење (оцена) суда да ће се на осуђеног и без извршења утврђене казне у довољној мери утицати да више не врши кривична дела имајући у виду: а) личност учиниоца, б) ранији живот, в) понашање после извршеног кривичног дела, г) степен кривице и д) друге околности под којима је дело учињено.

2.1. Садржина заштитног надзора

Условна осуда са заштитним надзором (члан 71 КЗ) је други облик (модалитет) ове упозоравајуће санкције у Републици Србији уведен са циљем да се умање разлике између континенталног и ангоамеричког система условне осуде. Увођењем заштитног надзора као елемента пробације уз условну осуду добијен је комбинован (мешовити) облик условне осуде који даје широке могућности за остваривање специјалне превенције. Заштитни надзор обухвата законом предвиђене мере помоћи,

2 Службени гласник Републике Србије, број: 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14 и 94/16.

старања, надзора и заштите. Изрицање заштитног надзора је факултативно и зависи од нахођења суда. Наиме, када изрекне условну осуду суд може да одреди да се учинилац кривичног дела стави под заштитни надзор за одређено време у току трајања времена проверавања ако се, с обзиром на његову личност, ранији живот и држање после извршеног кривичног дела, а нарочито његов однос према жртви кривичног дела и околности извршења дела, може очекивати да ће се заштитним надзором потпуније остварити сврха условне осуде (Камбовски, 2006: 378–382). Заштитни надзор одређује суд у пресуди којом изриче условну осуду и одређује мере заштитног надзора, њихово трајање и начин њиховог испуњавања.

Садржину заштитног надзора (члан 73 КЗ) чине следеће обавезе (Мрвић Петровић, 2005: 164–166): 1) јављање органу надлежном за извршење заштитног надзора у роковима које тај орган одреди, 2) оспособљавање учиниоца за одређено занимање, 3) прихватање запослења које одговара способностима учиниоца, 4) испуњавање обавеза издржавања породице, чувања и васпитавања деце и других породичних обавеза, 5) уздржавање од посећивања одређених места, локала или приредби ако то може бити прилика или подстицај за поновно вршење кривичних дела, 6) благовремено обавештавање о промени места боравка, адресе или радног места, 7) уздржавање од употребе дроге или алкохолних пића, 8) лечење у одговарајућој здравственој установи, 9) посећивање одређених професионалних и других саветовалишта или установа и поступање по њиховим упутствима и 10) отклањање или ублажавање штете причињене кривичним делом, а нарочито измирење са жртвом учињеног кривичног дела. При избору једне или више обавеза у оквиру заштитног надзора и одређивању њиховог трајања, суд нарочито узима у обзир следеће околности (Selinšek, 2007: 219–221): а) године живота учиниоца, б) његово здравствено стање, в) склоности и навике, г) побуде из којих је извршио кривично дело, д) држање после извршеног кривичног дела, ђ) ранији живот, е) личне и породичне прилике, ж) услове за испуњење наложених обавеза и з) друге околности које се односе на личност учиниоца, а од значаја су за избор мере заштитног надзора и њихово трајање. У сваком случају, када се определи за изрицање условне осуде са заштитним надзором суд одређује и време њеног трајања које се креће у оквиру времена проверавања.

2.2. Извршење заштитног надзора

Извршење заштитног надзора уз условну осуду, односно изречених мера помоћи, заштите, старања и надзора (Petrović, Jovašević, 2006: 278–281) се спроводи у складу са Законом о извршењу ванзаводских санција и мера из

2014. године.[3] Према овим решењима суд који је одлучивао у првом степену дужан је да извршну одлуку заједно са подацима о личности осуђеног лица, а који су прибављени у току кривичног поступка, достави надлежној повереничкој канцеларији (Симовић, Јовашевић, Симовић, 2015: 238–241) у саставу Управе за извршење кривичних санкција Министарства правде, у року од три дана од дана када је одлука постала извршна (члан 34).

Повереник је дужан да одмах, по пријему судске одлуке, предузме радње за њено извршење и да по потреби успостави сарадњу са породицом осуђеног, полицијом, установама здравствене и социјалне заштите, послодавцем и другим надлежним установама, организацијама и удружењима. Он такође у року од 15 дана од дана пријема одлуке има обавезу да изради „програм извршења заштитног надзора" за свако конкретно осуђено лице у складу са његовим могућностима и потребама. Потом повереник упознаје осуђеног са утврђеним „програмом" и са последицама неизвршења обавеза (члан 35). Овај програм Повереник доставља и надлежном суду, као и одговарајућем органу, установи, организацији, односно другом послодавцу. На утврђени „програм" осуђено лице има право приговора надлежном суду у року од три дана од дана када се упознао са његовом садржином, односно са својим обавезама и начином њиховог испуњавања.

Повереник одмах обавештава суд и Повереничку службу о почетку и завршетку спровођења заштитног надзора у вези са извршењем условне осуде, односно о току и постигнутим резултатима, односно проблемима у његовој реализацији. У случају да извршење заштитног надзора не отпочне у року од 30 дана после пријема извршне одлуке или ако осуђени не прихвати извршење заштитног надзора, повереник је дужан да одмах о томе обавести суд који је одредио заштитни надзор. Ако осуђени током спровођења програма не испуњава обавезе које су му одређене, повереник о томе обавештава суд и повереничку службу, уз навођење разлога. Такође, повереник је дужан да достави суду и повереничкој служби извештај о околностима које битно утичу на спровођење програма (члан 36). На основу успеха који је остварен у извршењу мера заштитног надзора, повереник у свом извештају може да предложи суду да замени или укине поједине обавезе осуђеног. Но, ако на основу остварених позитивних резултата сматра да је у потпуности испуњена сврха примене заштитног надзора, повереник у извештају може да предложи суду да се осуђеном укине заштитни надзор и пре истека рока проверавања.

3 Службени гласник Републике Србије, број 55/14.

3. Балтичке државе

3.1. Естонија

Кривични законик Републике Естоније[4] из 2001. године са новелама до 2017. године у глави петој под називом „Ослобођење од казне" у члану 73 прописује условну осуду (која, дакле, нема карактер самосталне кривичне санкције, већ представља алтернативу казни). Суд учиниоцу кривичног дела, коме је изречена казна затвора или новчана казна, исту може одложити у целости или делимично за време проверавања (од три до пет година), ако узимајући у обзир околности извршења кривичног дела, као и особине личности учиниоца, дође до уверења да је безусловно извршење казне неоправдано и неразумно (Merusk, Pilving, 2013: 392–403).

У члану 75 КЗ прописане су обавезе које суд може изрећи осуђеном лицу у оквиру „Надзора над понашањем осуђеног" за време трајања рока пробације. Зависно од околности сваког конкретног случаја, особина личности осуђеног и стања његових потреба, суд може изрећи једну или више обавеза надзора као што су (Kerrgandberg, 2011: 276–282): 1) да борави у пребивалишту које му одреди суд, 2) да се јавља одељењу за надзор у периодима које одреди службеник за надзор, 3) да се у свом месту пребивалишта јавља службенику за надзор у одређеном времену и да му пружи информације које се односе на испуњавање постављених обавеза и коришћење средстава за живот, 4) да прибави дозволу службеника за надзор у случају напуштања места пребивалишта на територији Естоније дуже од петнаест дана, 5) да прибави дозволу службеника за надзор у случају промене пребивалишта, запослења или места студирања и 6) да прибави дозволу службеника за надзор за боравак ван територије Естоније (Lišvic, 2010: 356–364).

Такође је суд овлашћен да осуђеном лицу изрекне и неку од следећих обавеза у периоду трајања надзора над његовим понашањем (Запевалов, Манцев, 2011: 77–80): 1) да надокнади штету причињену кривичним делом у року који одреди суд, 2) да не употребљава алкохолна пића или опојне дроге, 3) да не поседује, носи или користи оружје, 4) да тражи запослење, стиче опште образовање или звање у року који одреди суд, 5) да се, уз свој пристанак, подвргне прописаној медицинској, психолошкој или сличној терапији, 6) да благовремено и квалитетно извршава обавезе на које је пристао, 7) да не борави на местима које одреди суд или да не остварује комуникацију са лицима које одреди суд, 8) да учествују у програмима

4 Karistusseadustik (Luhend Kar S), RT I 2001, 61, 364, (6. jun 2001), RT I 2017, 30, 3 (13. decembar 2017)

социјалне помоћи и 9) да се, уз свој пристанак, подвргне електронском надзору.

3.2. Латвија

Кривични законик Републике Латвије[5] из 1998. године са новелама до 2013. године у члану 55 под називом „Условна осуда" одређује појам, карактеристике, природу и услове изрицања условне осуде. Према овим законским решењима, ако суд учиниоцу кривичног дела изрекне казну затвора од три месеца до пет година, он може, имајући у виду следеће околности: а) природу учињеног кривичног дела, б) врсту и обим проузроковане последице, в) особине личности учиниоца и г) друге околности конкретног случаја, да одлучи да се извршење казне суспендује за одређено време од шест месеци до пет година (време пробације), под условом да за то време учинилац не учини ново кривично дело и да испуни друге постављене обавезе (Lukashov, Sarkisova, 2001: 143–147).

За време трајања рока проверавања суд може да условно осуђеном лицу изрекне једну или више следећих обавеза (Pettai, Ziekinka, 2003: 398–401): 1) да надокнади штету проузроковану кривичним делом у одређеном року, 2) да не мења место боравка без сагласности државног органа за пробацију, 3) да учествује у програмима које организује и спроводи Државна пробацијска служба, 4) да не посећује одређена места, 5) да борави у месту боравка у одређено време, 5) да се подвргне уз сопствену сагласност лечењу од зависности од алкохолизма, опојних дрога, психотропних или токсичних супстанци и 6) да поштује друге услове који доприносе остварењу сврхе кажњавања – спречавање поновног извршења кривичног дела.

3.3. Литванија

Кривични законик Републике Литваније[6] из 2000. године са новелама до 2015. године у одредби члана 55 прописује условну осуду, њен појам, услове за изрицање и начин извршења, односно мере заштитног надзора. Према овим решењима, суд који учиниоцу кривичног дела изрекне казну затвора од три месеца до пет година, може да је замени условном осудом узимајући у обзир: а) природу учињеног кривичног дела, б) проузроковану последицу, в) личност учиниоца и г) друге околности, те дође до уверења да се сврха кажњавања може остварити и без извршења изречене казне. У овом случају суд одређује време проверавања у трајању од шест месеци до пет година (Pettai, Ziekinka, 2003: 398–401).

5 Krimallikums, Latvias Vestnesis No. 199/200 – 1998, No. 61/4867 – 2013.

6 Criminal code, No. VIII–1968, No. XII–1649.

У ставу 6 члана 55 КЗ Летоније прописане су обавезе које суд, као мере заштитног надзора, може изрећи за време трајања рока пробације. То су следеће обавезе осуђеног лица (Pettai, Pettai, 2015: 316–320): 1) да у одређеном року надокнади штету проузроковану кривичним делом, 2) да не напушта место пребивалишта без сагласности Државне службе за пробацију, 3) да учествују у програмима у складу са упутствима Државне службе за пробацију, 4) да не посећује одређена места, 5) да борави у месту пребивалишта у одређено време и 6) да испуни друге услове које суд сматра неопходним за остварење сврхе изречене казне. Ако се пак ради о лицу које је кривично дело извршило услед зависности од употребе алкохола или опојних дрога, тада је суд овлашћен сходно ставу 7 да му уз условну осуду изрекне обавезу да се, уз његов пристанак, подвргне лечењу од алкохолизма, зависности од опојних дрога или других токсичних супстанци.

4. Источноевропске државе

4.1. Бугарска

Кривични законик Републике Бугарске[7] из 1968. године са новелама до 2017. године у глави седмој под називом „Изузеће од извршења изречене казне“ у члану 66 предвиђа условну осуду (Керчева, 1995: 233–237). Ако суд учиниоцу кривичног дела изрекне казну затвора до три године, може да одложи њено извршење за време проверавања у трајању од три до пет година под условом да он раније није био осуђиван на казну затвора за кривично дело опште природе и ако утврди да, у циљу остваривања сврхе кажњавања, а пре свега поправљања осуђеног, није нужно безусловно издржавање изречене казне. У сваком случају, осуђени је дужан да ради или студира у току трајања времена пробације, осим ако није обавезан да се подвргне медицинском лечењу.

У члану 67 КЗ прописан је заштитни надзор (иако га тако Законик не назива), који суд може изрећи уз условну осуду (Ненов, Стојнов, 1992: 313–321). Наиме, суд је овлашћен да условно осуђено лице повери одговарајућој јавној организацији или радном удружењу, уз његову сагласност, а са циљем да му пруже образовну бригу током трајања условног периода. Но, осуђени се може поверити и одређеном лицу, односно ако се ради о осуђеном малолетном лицу – одговарајућој локалној комисији, са истим циљем како би организовали његову образовну бригу.

7 State Gazette No. 26/1968, No. 85/2017.

4.2. Мађарска

Закон Ц из 2012. године о Кривичном законику Републике Мађарске у смислу одредбе члана 69 под називом „Условна осуда уз надзор" прописује мере надзора које суд може изрећи за време трајања, а то су: а) одлагање кривичног гоњења, б) условне осуде, в) условног отпуста и г) посла којим се надокнађује причињена штета извршеним кривичним делом (Molnar, 2009: 189–192).

Мере заштитног надзора (једну или више) над условно осуђеним лицем у смислу члана 71. КЗ јесу следеће (Karsai, Szomora, 2014: 278–287): 1) да не одржава контакт са одређеним лицем које је учествовало у извршењу кривичног дела, 2) да се не приближава жртви кривичног дела или њеном месту пребивалишта, радном месту или образовној институцији коју похађа, укључујући и друго место које жртва посећује, 3) да не борави на посебним јавним местима и да не присуствује одређеним јавним догађајима, 4) да не конзумира алкохолна пића у јавности, 5) да се мора пријавити на прописаном месту и у прописано време одређеном органу или лицу, 6) да се мора јавити државној агенцији за запошљавање или да се пријави локалним органима ради обављања посла за опште добро, 7) да мора похађати посебне студије, 8) да се мора, уз своју сагласност, повргнути одређеном лечењу или терапеутским и куративним третманима и 9) да мора похађати групне догађаје или друге програме које му одреди службеник за пробацију.

Поред наведених „општих" правила понашања, суд може условно осуђеном лицу (став 3) да изрекне и „посебна" правила понашања имајући у виду: а) природу кривичног дела, б) степен проузроковане последице (висину штете) и в) унапређење његове друштвене интеграције.

4.3. Пољска

Кривични законик Републике Пољске[8] из 1997. године у осмој глави под називом „Мере уз условну осуду" у члану 66 прописује условну обуставу кривичног поступка ако суд дође до уверења да ће учинилац поштовати правни поредак и да неће наставити са вршењем кривичних дела имајући у виду (Zbiorowe, 2015: 178–181): а) кривицу учиниоца кривичног дела и проузроковане друштвене последице које нису великог значаја, б) околности извршења дела, в) понашање учиниоца који није раније кажњаван за умишљајно кривично дело, г) његове личне карактеристике и д) његов дотадашњи начин живота, осим ако се ради о кривичном делу за

8 Kodeks karny 6.czerwca 1997, Dz Nr. 88. poz 553 z 1997, Nr. 240. poz 1431 z 2012.

које је прописана казна затвора дужа од три године. У случају да се оштећени помири са учиниоцем дела или учинилац надокнади проузроковану штету или се оштећени и учинилац договоре о начину надокнаде (реституције) штете, тада се условна обустава кривичног поступка може изрећи и за кривична дела за која је прописана казна затвора дужа од пет година.

У члану 69 KZ је прописана могућност изрицања условне осуде учиниоцу кривичног дела коме је суд претходно изрекао казну затвора до две године или новчану казну ако дође до уверења да се и на овај начин могу остварити циљеви кажњавања, односно да учинилац више неће вршити кривична дела. Ово уверење суда се заснивана следећим околностима као што су (Andrejew, Swida, Wolter, 2012: 312–323): а) став учиниоца, б) његове личне карактеристике, в) његов дотадашњи начин живота и г) његово понашање након извршења кривичног дела. При изрицању условне осуде, суд истовремено одређује и време проверавања у трајању: а) од две до пет година ако је изречена казна затвора, б) од једне до три године ако је изречена новчана казна и в) од три до пет година ако се ради о малолетном учиниоцу кривичног дела.

При изрицању условне осуде, Законик познаје и могућност примене „заштитног надзора" (иако га тако не назива) у члану 72. То је скуп различитих обавеза осуђеног лица као што су (Bojarski, 2007: 119–122): 1) да обавештава суд и службеника за пробацију о напретку током периода проверавања, 2) да се извини оштећеном лицу, 3) да изврши одређену радну обавезу како би обезбедио издржавање за друго лице, 4) да обавља плаћени рад, да се подвргне образовној активности или едукацији за стицање одређеног занимања, 5) да се уздржи од употребе алкохола или опојних дрога, 6) да се подвргне медицинском лечењу, а посебно програмима одвикавања од употребе опојних дрога или програмима рехабилитације, 7) да се уздржи од посећивања одређених локалних места и 8) да се укључи у другу одговарајућу активност ако се тиме може спречити даље вршење кривичних дела. Суд је такође овлашћен да осуђено лице обавеже да у одређеном року у целости или делимично надокнади штету проузроковану извршеним кривичним делом.

Сходно члану 73 KZ, при изрицању условне осуде, суд може осуђено лице да стави под надзор службеника за пробацију или другог лица од јавног поверења, удружења или локалне организације чије активности укључују образовну бригу, спречавање деморализације или пружање помоћи осуђеним лицима. Овај надзор одређених лица или установа траје све време проверавања, а обавезно се изриче малолетном учиниоцу кривичног дела (Banasik, 2013: 289–294).

4.4. Руска федерација

Кривични законик Руске федерације[9] из 1996. године са новелама до 2012. године у члану 73 одређује „Условну осуду" као самосталну кривичну санкцију. Ако је суд учиниоцу кривичног дела изрекао казне васпитног рада, ограничења у војној служби, служења у дисциплинској војној јединици или лишења слободе до осам година, онда може (осим за кривична дела против полне слободе деце узраста до четрнаест година) да одложи њено извршење ако је и без тога могућа рехабилитација осуђеног лица. При доношењу овакве одлуке суд узима у обзир (Федосова, Скуратова, 2005: 55–56): а) природу и степен друштвене опасности кривичног дела, б) особине личности учиниоца и в) олакшавајуће и отежавајуће околности. Изрицањем условне осуде суд истовремено одређује и време проверавања од шест месеци до три године, осим ако се ради о условном одлагању извршења казне затвора у трајању које је дуже од једне године, када време проверавања може да траје до пет година (Мамадович, 2010: 154–159).

Поред класичне условне осуде, у истој законској одредби је прописана могућност суда да условно осуђеном лицу за време трајања рока проверавања постави одређене обавезе у смислу заштитног надзора као што су (Papor et al., 2007: 166–169): 1) да не мења место пребивалишта, рада или студирања без обавештавања државног органа који врши надзор над његовим понашањем, 2) да не посећује одређена места, 3) да се подвргне лечењу од алкохолизма, наркоманије, токсикоманије или венеричних болести, 4) да нађе запослење према својим способностима, 5) да се школује у установи општег образовања и 6) да испуни друге обавезе које погодују његовом поправљању и рехабилитацији. Надзор над животом, радом, школовањем и понашањем условно осуђеног лица у том случају врши специјализовани државни орган надлежан за пробацију, односно ако се ради о осуђеном војном лицу – командант војне јединице или установе (Papor, 2008: 404–407).

5. Јужноевропске државе

5.1. Албанија

Кривични законик Републике Албаније[10] из 1995. године са новелама до 2015. године у глави седмој под називом „Алтернативе казни затвора" предвиђа у члану 60 условну осуду. Овде, дакле, условна осуда не

9 Уголовниј кодекс Россијској федерации, Россијскаја газетта Но.63/96.

10 Criminal code of the Republic of Albania, Law No. 7895/199, .No. 8893/2015.

представља самосталну врсту кривичне санкције, већ начин, форму замене казне затвора (Muci, 2012: 221–224).

Према овом решењу осуђени је за време трајања пробације дужан да изврши једну или више обавеза (Elezi, 1999: 178–182): 1) да изврши радну обавезу или да се стручно усавршава, 2) да троши плату, приходе или друга средства за издржавање породице, 3) да надокнади штету проузроковану кривичним делом, 4) да се уздржи од употребе моторног возила за вожњу, 5) да не обавља професионалне активности које су повезане са извршеним кривичним делом, 6) да не посећује одређена места, 7) да не посећује места на којима се служи алкохолно пиће, 8) да борави у месту становања, 9) да се не дружи са одређеним лицима (осуђеним лицима или саучесницима у извршеном кривичном делу), 10) да не поседује, носи или користи оружје, 11) да се повргне медицинском лечењу и рехабилитацији у здравственој установи и 12) да престане са коришћењем алкохолних пића или опојних дрога.

При изрицању једне или више обавеза осуђеном лицу, суд нарочито узима у обзир (Elezi, Kacupi, Haxhia: 2013: 289–291): а) његову старост, б) његово ментално стање, в) начин живота и потребе, посебно оне које су повезане са његовом породицом, образовањем или радом, г) мотиве извршења кривичног дела, д) његово понашање после извршења кривичног дела и ђ) друге околности које утичу на избор врсте и време трајања мере. У члану 60а КЗ-а прописана је изричито „обавеза престанка коришћења алкохола или опојних дрога". Ова се мера заштитног надзора изриче лицу које је кривично дело извршило у стању зависности од употребе алкохола или опојних дрога. У том случају се он подвргава медицинском третману који има за циљ лечење осуђеног лица како би се уздржао од даље употребе оваквих супстанци. Овај се третман примењује у специјализованој здравственој установи, према одлуци Министарства здравља, а на захтев пробационе службе. Такође, ова служба врши надзор над извршењем изречених мера заштитног надзора, односно даје предлог за њихову измену или окончање.

5.2. Италија

Кривични законик Републике Италије[11] из 1937. године са бројним новелама до 2016. године у другом делу под називом „Обустава и суспензија казне" у глави првој, у одредби члана 195 прописује условну осуду као облик суспензије изречене казне (а не самосталне кривичне санкције). Она се

11 Legge 10. Ottombre 1930. No. 1398. Testo coordinate ed aggiornate del Regio Decreto Legge 20. 3. 2016, No. 20 e 8. 3. 2017, No. 24.

изриче примарном учиниоцу кривичног дела који не представља опасност за друштво када се и на овај начин може у довољној мери утицати на његово понашање и поправљање ако му је изречена: новчана казна, обавезни рад или казна затвора до три године, чије се извршење затим суспендује за одређено време од две до пет година (Padovani: 2012: 241–249).

При изрицању условне осуде суд осуђеном лицу поставља одређена правила понашања (члан 202 КЗ), која се односе на (Aleo, Pica, 2012: 389–396): 1) потребу стицања одређеног стручног образовања, 2) настањивање у одређеном месту, 3) заснивање радног односа, 4) уздржавање од дружења са одређеним лицима, 5) уздржавање од употребе алкохолних пића или опојних дрога, 6) уредно давање издржавања за чланове своје породице и 7) подвргавање потребном лечењу или другој терапији. Избор ових правила суд врши на основу анализе индивидуалних потреба сваког осуђеног лица, а у складу са околностима и нивоом опасности од бекства таквог лица.

Члан 203 КЗ Италије прописује овлашћење суда да условно осуђено лице стави под надзор заштитника, чувара, службеника за пробацију или добротворне организације. Ова лица су дужна да буду у редовном контакту са условно осуђеним лицем, да га посећују код куће или на радном месту, да проверавају активности којима се он бави у слободно време, да му дају савете и упутства како да на најбољи начин допринесе свом поновном прилагођавању нормалном друштвеном животу и његовом преображају (Rammaci, 2007: 278–285).

Поред заштитника и службеника за пробацију (као државних или друштвених органа), условно осуђено лице се за време трајања проверавања може у смислу члана 213 КЗ ставити и под надзор добротворних организација (као и јавних или приватних установа или удружења). Ове организације (Pulitano, 2007: 321–333) су дужне да предузимају различите мере како би се условно осуђена лица лакше, брже и ефикасније укључила и прилагодила животу у заједници. У том циљу оне пружају саветодавне услуге, усмерење, моралну и материјалну помоћ условно осуђеном лицу у циљу поновног успостављања његовог нормалног живота у заједници и спречавања поновног вршења кривичних дела. Добротворне организације могу оваква лица и да запосле на одговарајућем радном месту, да му пруже помоћ у проналажењу запослења, послодавца, места становања, те да га саветују како да правилно користи своју уштеђевину или зараду, као и да му пружају све видове подршке које су неопходне за вођење „часног“ живота. У том циљу ове организације врше редован надзор над условно осуђеним лицем, али на дискретан и одговарајући начин, тако да не угрожавају процес његове рехабилитације.

5.4. Шпанија

Органски закон 10/1995 о Кривичном законику Краљевине Шпаније (Merino Blanco, 2006: 221–229) из 1995. године са новелама до 2012. године у глави трећој под називом „Замена казне затвора и условна осуда" предвиђа различите облике супституита казни затвора (Luzon Pena, Diaz, Conlledo, 2012: 189–195). Тако је у члану 80 под називом „Суспензија извршења казне затвора" предвиђено да је суд овлашћен да изречену казну затвора до две године суспендује од извршења, ако процени да не постоји криминална опасност од понављања вршења кривичног дела осуђеног лица против кога се иначе не води други кривични поступак. Тада се одређује време проверавања у трајању од две до пет година, након саслушања странака, узимајући у обзир личне околности учиниоца, карактеристике извршеног кривичног дела и дужину изречене казне затвора (Landecho Velasco, 2004: 341–353).

При изрицању суспензије изречене казне затвора, суд је овлашћен да у смислу члана 83 осуђеном лицу изрекне једну или више мера (Birgin, Baratta, 2000: 311–317): 1) забрану посећивања одређених места, 2) забрану приближавања жртви, њеним сродницима или другим лицима које одреди суд или забрану комуникације са њима, 3) забрану напуштања места пребивалишта без одобрења суда, 4) лично појављивање пред судом, односно службом пробације, 5) учешће у обуци, раду, културној или саобраћајној едукацији, тренинг програмима о сексуалној и еколошкој заштити, односно у програмима о заштити животиња и 6) испуњавање других обавеза које суд сматра погодним за друштвену интеграцију осуђеног, уз његову сагласност, а којима се не вређа његово лично достојанство.

6. Закључак

Савремена кривична законодавства Европе, укључујући и законодавство Републике Србије из 2005. године, предвиђају разуђен систем кривичних санкција за учиниоце кривичних дела. То је у складу са обимом, структуром и динамиком криминалитета, али и са захтевима криминалне политике – да се сваком учиниоцу кривичног дела индивидуализира врста и мера друштвене реакције оличене у кривичној санкцији која одговара степену друштвене опасности учиниоца дела, односно обиму и интензитету проузроковане последице и околностима под којима је кривично дело учињено, као и карактеристикама његове личности. Казне су основне и од најстаријих времена најчешће прописиване и изрицане кривичне санкције.

Но, под утицајем идеја о индивидуализацији и специјалној превенцији као основној функцији кривичног права, почетком 20. века у систем кривичних санкција се уводе нове врсте мера друштвене реакције. То су мере упозорења (опомињуће, упозоравајуће, адмонитивне кривичне санкције), међу којима се посебно истиче условна осуда. Но, поред својства самосталне кривичне санкције условна осуда се често јавља и као облик, форма модалитет суспензије изречене (или утврђене) казне затвора или друге врсте казне.

Зависно од садржине условне осуде и начина његог извршења, разликују се два система: а) континентални и б) англоамерички систем. Последњих деценија издвајајући предности сваког од њих, ствара се нови мешовити систем условне осуде – условна осуда са заштитним надзором. Овај заштитни надзор чине различите мере заштите, помоћи, старања и надзора над жиотом, радом и понашањем осуђеног лица за одређено време, чиме се превентвно делује у правцу предупређивања поновног вршења кривичних дела, а истовремено му се низом правила, захтева, упутстава и обавеза утиче на друштвену реинтеграцију у локалну заједницу како би водио уредан и „частан" живот.

На тај начин се психолошком „принудом" утиче на учиниоца кривичног дела у смислу поправљања његовог понашања, уздржавања од кршења прописа и понашања и владања на слободи под одређеним ограничењима и под претњом примене у закону прописане или у судској одлуци изречене врсте и мере казне. Такође, ове мере треба да условно осуђеном лицу: а) отклоне могуће узроке и услове за поновно вршење кривичних дела која су га раније одвела на „пут криминала", б) наметне обавезу да у целости или делимично отклони штетне последице извршеног кривичног дела или се измири са оштећеним на други начин, и в) обавеже на одређено место живљења, школовања или рада, односно лечење и рехабилитацију.

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SYSTEMS OF SUSPENDED SENTENCE WITH PROBATION SUPERVISION IN THE EUROPEAN CRIMINAL LAW

Summary

In contemporary criminal law, a prison sentence is the basic and most important type of criminal sanction imposed on criminal offenders in order to prevent and combat crime. In addition to the unconditional prison sentence, all criminal legislations also recognize different modalities of its imposition or execution. Different forms of substitute or alternative measures are awarded in cases where unconditional detention is not necessary. Thus, we can distinguish full or partial suspension of the prison sentence or some other kind of punishment. In the first case, it involves the suspended sentence. This is a complete exemption from the execution of a court-awarded prison sentences (and/or other types and forms of punishment), or determined for a specified time (probation period) and under certain conditions. In case the conditionally convicted person does not meet the set of general and special, mandatory or optional requirements, criminal law provides for mandatory or optional revokation of the suspended sentence. However, in addition to the suspended sentence as a form or modality of executing the imposed prison sentences, some modern criminal laws also recognize the suspended sentence as a special kind of criminal penalty - as a measure of warning. A prerequisite for the implementation of these measures is the fulfillment of the formal requirements, pertaining to the type of offence and prison sentence duration, or material conditions – the court assessment that the application of penalties in the particular case is not necessary because the goals (purpose) of punishment can be achieved without effective enforcement of prison sentences in whole or in part. This paper discusses the concept, characteristics, conditions and methods of implementation of these forms of prison sentence suspension, with various systems of probation supervision in the European criminal law.

Key words*: criminal act, perpetrator, prison sentence, suspended sentence, probation supervision, court, European law.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879051S

UDK: 342.4:342.7(439)
Рад примљен: 30.09.2018.
Рад прихваћен: 14.11.2018.

*RIGHTS AND FREEDOMS IN THE CONSTITUTION OF THE REPUBLIC OF POLAND***

Abstract: *Guaranteeing the fundamental rights and freedoms to citizens, as well as enabling them their proper exercising and strict observance, are one of the most important tasks of contemporary democratic states and simultaneously a real challenge. The level of the individual rights' observance undoubtedly depends upon whether a state is able to create an effective system of their protection. Not less important is indeed the catalogue of fundamental rights and freedoms contained in the Constitution which, in consequence, along with the constitutional guarantees, remains one of the most essential attributes of their protection. Given that the basic law is treated as their main and supreme source, violating such rights is considered to be the breach of the constitutional provisions. Contrary to the states with long and stable traditions of statehood and democracy, this problem seems to be especially essential and vivid in case of those states which still remain on the stage of solidifying their statehood foundations as well as seeking, striving for and testing their ways of democratic development, being rather new for them hitherto. The paper aims to provide a detailed legal analysis of the catalogue of rights, freedoms and duties envisaged in the Constitution of the Republic of Poland of 1997, presently in force, as well as to reflect on their sources and axiological basis deriving from the international standards. The paper first discusses the key concepts in the Polish constitutional law doctrine: a right, a freedom, a duty, and their*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

constitutional guarantees. Further on, it focuses on the analysis of particular rights, freedoms and duties catalogued in the Polish basic law, as well as their scope and interpretation. In the end, the paper discusses the problems related to constitutional guarantees of the fundamental rights and freedoms.

***Keywords*:** *fundamental rights and freedoms, the Constitution of the Republic of Poland, content and interpretation of basic rights, observance of human rights, effective legal instruments.*

1. Introduction

The substance of the status of individuals, including the strict observance of their rights, especially in the context of their relations with the state authorities, is an extremely essential area of contemporary democratic states' functioning (Banaszak, 1995). It gains even more importance in the states with unsolidified statehood and democratic traditions, where this substance has not been deeply rooted in the legal culture and nation's mentality. In such states, huge efforts are still necessary to create effective mechanisms ensuring the unhindered exercise of constitutionally provided legal rights and freedoms, and to establish an effective system of their guarantees and protection.

The Polish constitutional legislator has treated the regulation of the fundamental rights and freedoms in its basic law rather extensively and in great detail. This approach seems to be a result of the binding liberal doctrine, determining the supreme status of an individual in relation to the state. Moreover, it is worth noting that the Polish Constitution was created in the period of the transformation of the state's political system and in the eve of joining the EU. Hence, constructing a catalogue of citizens' fundamental human rights and freedoms contained in the basic law as well as the system of their constitutional guarantees was held under a strong influence of the standards ensuing from the output of the international and European law in the field of human rights' protection. An objective of such an approach was the state's striving to ensure its citizens an institutionalized capacity to really exercise their constitutionally guaranteed rights and freedoms and, above all, the capacity to effectively claim those rights in case of their breach, especially by the public authorities. Furthermore, meeting the conditions laid down by the EU, concerning the standards of a democratic legal state and an appropriate degree of human rights guarantees on the constitutional and systematic level, was an undoubtedly stimulating factor.

The paper aims to provide a legal analysis of the issues related to the protection of rights and freedoms of persons and citizens on the grounds of the binding

Constitution of the Republic of Poland of 2 April 1997[1]. In particular, the analysis focuses on the catalogue of freedoms, rights and duties of persons and citizens contained in the basic law, as well as on their constitutional guarantees. This research has been conducted with reference to the doctrinal concepts of freedom, right and duty, provided in the Polish constitutional law literature. The author analyzes the classification and systematics of fundamental rights and freedoms introduced in the basic law, as well as the system of constitutional guarantees. The central part of the paper has been dedicated to the analysis of the catalogue of rights and freedoms of persons and citizens, their duties on the grounds of the binding basic law, created in line with the international standards, as well as their systematics, content and scope.

2. The Concepts of Freedom, Right and Duty, and Fundamental Rights in the Polish Constitutional Law Doctrine

The concepts of freedoms and rights of persons and citizens are strictly connected with each other, both in the legal acts and in the subject literature (Matwiejuk, 2009: 89-93). Yet, it should be underlined that these concepts have different meanings, their origins vary and, as a natural consequence of the above, the technics of constructing the legal norms related to them are also diverse (Ławrynowicz-Mikłaszewicz, 2014b: 73-93). Human freedoms ensue from the natural rights, from the features which are congenital and appurtenant to man, such as an ability to speak (Ławrynowicz-Mikłaszewicz, 2014a: 100-115). Hence, a state cannot establish a freedom of speech; it can only recognize it (which is done most frequently) and it can also restrict it. Some authors, especially the representatives of the Thomist school, suppose that the natural rights originate from the Creator, i.e. they are a result of the manifested law (*ius divine*). Therefore, freedoms are not established by states; they may only be recognized, guaranteed and restricted by states.

Unlike freedoms, rights are created by states, which determine the catalogue and the scope of envisaged rights. It is similar with duties (Borski, 2016: 87-94).

The analysis of particular distinctive features underlying the notions of freedom, right and duty, as well as an attempt to compare them, lead to very interesting conclusions. First of all, a notable feature characterizing the freedom concept is the possibility to choose different behaviour according to an individual will of a person in question. Secondly, freedom is not derived from substantive law, as it is the case with a right or duty; therefore, law does not state a basis or a source from which it is derived. However, similarly to all other kinds of norms being in

1 The Constitution of the Republic of Poland, *the Official Law Gazette 'Dziennik Ustaw'* 1997, No 78, item 483 with amendments.

force within a human society, law may restrict an individual freedom. This is its great value, in fact. Thirdly, a state authority, wishing to restrict a citizen's freedom, is obliged to determine the legal basis of its activity. And fourthly, the state is obliged to undertake all appropriate actions in order to assure an individual a possibility to exercise such sphere of freedom which the law has envisaged in its substantive sense.

In characterising the concept of a right, comprehended as an objective prerogative or individual entitlement determined by a legal norm, there are several notable features. Firstly, an authorized person always has an opportunity to choose a certain kind of behaviour, meaning that he/she can either exercise it or not. Secondly, a right is always derived from a legal norm in a substantive sense, which means that there is no right without a legal norm determining it. Thirdly, in case of a conflict, it is a citizen's duty to indicate the legal basis from which the right ensues. And fourthly, it is the state's duty to undertake appropriate actions and make every effort to guarantee the citizens' exercise of their rights.

In an attempt to characterise the concept of a duty as an element of a legal norm, we may note several distinctive features. Firstly, a duty implies that a citizen has no possibility to choose a certain kind of behaviour because, as opposed to freedoms and rights, there is an explicit order or a prohibition of a definite action. Secondly, a duty is always derived from a substantive legal norm; in other words, there is no duty without a legal norm. Thirdly, in case of a conflict, it is the obligation of the state to indicate the legal basis from which the duty ensues, and the citizen is required to comply with the legal provisions. And fourthly, it is also the state's duty to assure the citizens' compliance with the envisaged obligations by guaranteeing both (general) social and other (individual) citizens' interests.

In the constitutional law doctrine, the notion of fundamental rights is one of the principal concepts in the field of rights and duties of persons and citizens. They are distinguished by using a formal criterion. Thus, a right is considered to be fundamental in case a constitutional legislator has included it into the catalogue of constitutional rights. In creating such a catalogue, the legislator is usually guided by the accepted axiological principles and values. When constructing the basic law, the constitutional legislator always chooses and makes such rights fundamental which he conventionally recognizes to be such.

3. Commonly Accepted Classifications of Freedoms, Rights and Duties

The constitutional law doctrine recognizes different criteria for classifying rights, freedoms and duties, such as: universality, restriction or non-restriction, and the manner of regulating the subject matter (substance) of rights and freedoms.

When using the criterion of universality in creating a catalogue of rights and freedoms, it is assumed that they are intended to refer and equally apply to all, which is the key requirement underlying the idea of equality. This principle allows for only few exceptions, e.g. a different regulation of the rights of minorities, children, etc.

According to another classification, rights and freedoms are divided into those which can be suspended or restricted, and those of an absolute character. The second category of rights and freedoms cannot be restricted.

There is also a classification based on the way of regulating the substance of rights and freedoms. Depending on the accepted legislation technics, constitutional norms can be applied directly or they may require concretization by way of a statute.

The substance criterion is elaborated in the UN documents, and it is most frequently and universally used by constitutional legislators in contemporary states when constructing the constitutional catalogues of human rights and freedoms. The distinctive criteria are the spheres of human life which are protected by constitutional legislators. From this viewpoint, human rights and freedoms can be divided into the following groups: personal, political, economic, social and cultural rights and freedoms.

The classification of duties and obligations is also based on the subject matter criterion. They are usually distinguished as follows: general duties towards the state, including the observance of legal regulations; duties in the field of defence, and economic duties. In addition, the contemporary constitutions more and more frequently impose the duty of protecting the natural environment.

4. Guarantees of Rights and Freedoms

In the constitutional law doctrine, the guarantees of rights and freedoms of persons and citizens are comprehended as the entirety of legal institutions, aimed at materializing constitutionally recognized freedoms and granted rights. The doctrine also defines the notion of substantive guarantees, being the entirety of economic and social results assuring the exercise of rights and freedoms. The effectiveness of substantial guarantees largely depends on a social and economic condition of a state, and is not directly determined by the constitutional law norms. Certainly, the most important guarantees for lawyers are legal guarantees (Wiśniewski, 2006).

Besides the institutional legal guarantees of the national law, another distinctive feature of a contemporary democratic state is the essential role of international and supranational guarantees. These guarantees are provided in the substantive

law norms, and contain both principles and legal institutes which are to ensure the rights and freedoms of persons and citizens. They also include some (general) principles and procedures, such as: open proceedings, public pronouncing of a sentence, the right to a fair trial, the right to defence, etc. The guarantees envisaged in the national law are (for example): independence and autonomy of courts, the Ombudsman's activity, an electoral protest, the control of constitutionality of law, and the right to file a constitutional complaint. Supplemental to the national guarantees are international and supranational institutions, including relevant principles and procedures. *Inter alia,* there are supranational and international courts, such as: the Court of Justice of the European Union, the European Court of Human Rights, the International Criminal Court, etc.

5. The Catalogue of Freedoms, Rights and Duties in the Constitution of the Republic of Poland

The constitutional legislators of contemporary democratic states usually strive to envisage a comprehensive catalogue of rights and freedoms in separate chapters of their basic laws. Yet, placing them in separate parts of the constitution does not necessarily imply that they are not to be found elsewhere; for, it is not seldom that some rights are raised to the rank of the fundamental constitutional principles by being located in separate, specially designated first chapters of basic laws. Sometimes, the provisions related to rights and freedoms may be found in other chapters of the constitutions (for example, a passive electoral right can be normed in a chapter devoted to the Parliament). This peculiarity is also characteristic for the Constitution of the Republic of Poland (Banaszak, 1997b: 56-68; Banaszak, 2012: 143-163; Chmaj, M., Chmaj, J. M., 2016; Jabłoński, 2010; Jabłoński, 2014: 15-26).

Among the provisions of the Polish basic law related to the citizens' rights, freedoms and duties, we should (first and foremost) refer to those which create the normative framework of the catalogue. In the constitutional law doctrine, such provisions are most frequently distinguished as the *universal principles* referring to the citizens' fundamental rights, freedoms and duties. The starting point in formulating these provisions is a general statement that - besides the specific explicitly prescribed rights, freedoms and duties - the constitutions also contain some general provisions pertaining to the whole catalogue of rights and freedoms. The general principles constitute the basis of the system, being simultaneously the directives for its interpretation. Initially, constitutional acts determined the citizen's status in the state mainly through such general principles. The evolution of norms in this field shows a permanent tendency of making the rights and freedoms' guarantees more and more detailed, and

steadily increasing their number and level of concretization. Presently, these norms are the greatest constitutional value in the field of human rights, and they are of principal interpretation significance for the comprehension of all the other fundamental rights.

Relying on the deep analysis of the text of the Polish basic law, it may be concluded that the constitutional legislator has treated this substance in a rather detailed way, striving to construct possibly the most extensive catalogue of the fundamental rights and freedoms guaranteed to individuals. Following the example of the contemporary constitutions of other democratic states, the Constitution of the Republic of Poland has principally regulated the question of the fundamental freedoms, rights and duties in Chapter II: *The Freedoms, Rights and Obligations of Persons and Citizens*. Some of them are also part of the constitutional principles specified in Chapter I: *The Republic* (especially in Articles 1, 2, 11 and 12) (Garlicki, 1998: 83-115; Matwiejuk, 2009: 98-102).

Chapter II (*The Freedoms, Rights and Obligations of Persons and Citizens*) contains 57 provisions (Art. 30-86); thus, the regulation of this substance occupies a substantial part of the basic law. The systematics of the provisions related to the fundamental rights and freedoms contained in the Constitution of the Republic of Poland, their catalogue, as well as their content and scope have to a large extent been determined by the norms derived from the treaties and conventions, which remain part of the Polish legal order and are often directly binding[2]. Hence, they strictly correspond to the appropriate acts of international and supranational law. A special part in this field had been played by the treaties ratified by the Polish state before the adoption of the Constitution of 2 April 1997, for instance: the International Covenants of the UN (Wieruszewski, Hliwa 2002) or the European Convention on Human Rights. Therefore, they must have had a considerable influence on the content of constitutional regulations in this area. The creators of the Polish basic law only had to go further, i.e. expand the catalogue of the rights and freedoms of the persons and citizens in relation to the obligations which have been imposed in the meantime. An essential part of this Chapter is dedicated to the general principles concerning the comprehension and interpretation of all the rights guaranteed on the grounds of the Polish basic law.

2 Some of the international treaties and conventions of considerable significance for the substance of the fundamental rights and duties of persons and citizens contained in the Constitution of the Republic of Poland, are: The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, The European Convention on Human Rights, as well as The Treaty on the European Union, The Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights. A series of other international treaties related to human rights also play an important part in the consitutional framework.

The general principles, related to the whole catalogue of the fundamental rights and duties contained in the Constitution of the Republic of Poland, are placed in a separate systematization unit titled *General Principles* (Art. 30-37) (Matwiejuk, 2009: 94-98). In fact, it comprises three general principles: *dignity*, *liberty* and *equality*, which are used in the interpretation of all other rights and duties contained in the basic law (Pułło, 2014: 121-128). The objective of such conception seems to be a wish to solidify a democratic constitutional system: by promoting, providing for and enabling the exercise of citizens' fundamental rights and freedoms along with the most important and effective constitutional guarantees of their observance, by striving to assure humanitarian living conditions, achieve the multi-dimensional development of human beings, and bestow the individuals a right to participate and influence the society's development and its living conditions; and by obliging the public authorities in power to guarantee the observance of the fundamental rights and freedoms.

Achieving such a state of affairs, where the citizens play a real part in public life and influence the society's development, would undoubtedly contribute to the implementation of the fundamental constitutional principles of Poland, provided by its basic law (Bałaban, 2011: 41-56; Bisztyga, 2011: 319-328). The most important principles guaranteed by the Constitution are: the principle of the republican form of government (Art. 1), the principle of the democratic legal state (Art. 2), the principle of the sovereignty of the people (Art. 3), the principle of the civil society (Articles 11 and 12), etc. (Garlicki, 1998: 51-82; Pieniążek, 2016: 70-71; Pułło, 2014). It goes without saying that these principles contain elements emphasizing an opportunity for the citizens to actively participate in public life and shape the directions of the state policy; such active participation empowers the citizens to be co-responsible for shaping the state policy. Yet, the foundations of the democratic system are based on the constitutional provisions related to the fundamental rights and freedoms, including both personal and political ones, which guarantee the freedom of political parties' activities, the freedom of speech, and the freedom of association.

The basic law states that *dignity* constitutes the source of all the rights and freedoms of persons and citizens (Art. 30). This general principle is derived from the natural law, and established as being inherent, inalienable and inviolable; thus, public authorities are obliged to abide by and protect this principle (Dudek, 2009: 43-65; Pieniążek, 2016: 76).

The general principle of *liberty* is protected in Article 31 of the Constitution. Every person is obliged to respect the freedoms and rights of others. No one can be compelled to do anything that is not required by law. Any limitation upon the exercise of the constitutional freedoms and rights may be imposed exclusively

by a statute, and only when necessary in a democratic state for the benefit of its security or public order, or to protect the natural environment, health and public morality, or the freedoms and rights of other people. At the same time, such restrictions cannot violate the essence of freedoms and rights.

The principle of *equality* is, on the one hand, comprehended as being equal before the law and having the right to equal treatment by public authorities; on the other hand, it implies a prohibition of being discriminated in political, social or economic life on any ground (Art. 32). Therefore, the essence of the right to an equal treatment is based on the fact that all are equal before the law and that no one, without a justified reason, can be treated differently because of his sex, age, origin, language, religion, convictions, viewpoints, state of health, disability or any other ground. The right to be treated equally also seems to refer to children, who are supposed to be handled as human beings and allowed to decide about their matters in the degree corresponding to their level of development. Sex equality constitutes an element of the equality principle and simultaneously its supplement, for both men and women have been guaranteed equal rights in family, political, social and economic life (Art. 33). Therefore, equality must be promoted in social and professional life, especially in the field of the rights to education, employment and advancement, the right to be identically remunerated for work of a similar value, the right to social security, as well as the rights to occupy positions, exercise functions and be awarded public honours and decorations. Therefore, on the one hand, equality implies a right to be treated equally and, on the other hand, it entails a prohibition of being discriminated in political, social and economic life.

Additionally, the general principles in the catalogue also include: the right to have Polish citizenship (Balicki, Banaszak, 2007: 9-21; Banaszak, 2012: 132-143; Jagielski, 1998) and the right of the Polish citizens to protection abroad provided by the Polish state authorities (Art. 34 and 36); protection of the Polish citizens belonging to national or ethnic minorities, including their freedom to maintain and develop their own language, customs, traditions and culture by way of establishing their own educational and cultural institutions, institutions designed to protect religious identity, as well as by participating in the resolution of matters connected with their cultural identity (Art. 35); protection of the stateless persons, who the basic law empowers with a possibility to exercise the rights and freedoms guaranteed in the Constitution, with the exceptions provided by law. Placing these rights among the general principles proves their high rank within the fundamental principles included in the Polish Constitution. These provisions establish a constitutional guarantee of Polish citizenship, and no Polish citizen can be deprived of or exempted from it. While the state assures special care and protection to its citizens abroad and on the territory of Poland,

this provision also applies to the national and ethnical minorities, and stateless persons residing in Poland.

The influence of the international and European law on the constitutional catalogue of rights and freedoms of persons and citizens is also prominent in the classification. The Polish Constitution has adopted a classical division of rights and freedoms based on the criterion of the subject matter (substance) which is applied in the systematics of the fundamental freedoms and rights. Thus, the Constitution recognizes three distinctive groups: personal, political, and economic, social and cultural rights and freedoms. Citizens' duties and obligations are regulated in a separate catalogue.

In the Polish Constitution, personal rights and freedoms are regulated in Chapter II (Art. 38-56), under a separate systematisation unit titled *Personal Rights and Freedoms*. This extensive and well-developed catalogue includes the following rights and freedoms: the right to life (Art. 38); prohibition of subjecting anyone to scientific experimentations, including medical ones, without the patient's voluntarily expressed consent (Art. 39); prohibition of subjecting anyone to torture and cruel, inhuman or degrading treatment and punishment, including the application of corporal punishment (Art. 40); personal liberty, security and inviolability, which implies the prohibition of any deprivation or limitation of liberty, except in cases provided by law and imposed only in accordance with principles and under the procedures specified by statutes, comprising the constitutional rights of a detained person (such as: the right to be informed, immediately and in a manner comprehensible to him, of the reasons for such detention; to immediately inform his family or a person indicated by him of the deprivation of liberty; to appeal to a court for immediate decision upon the lawfulness of such deprivation, except by a sentence of a court, and the right to compensation for unlawful deprivation of liberty) as well as the obligations towards a detained person (such as: handing the person over to a court for the consideration of his case within 48 hours from the moment of his detention; releasing him/her, unless a warrant of temporary arrest issued by a court, along with the specification of the charges laid against him, has been served within 24 hours of the time of being given over to the court's disposal; treating him in a humane manner (Art. 41) (Fules, 1996); criminal responsibility only for committing a prohibited act subject to a penalty by a statute in force at the moment of its commission, except those which nevertheless constituted an offence within the international law (Art. 42, point 1); the right to defence at all stages of criminal proceedings, including the right to choose a counsel (Art. 42, point 2); the presumption of being innocent until proven guilty by the final court judgment (Art. 42, point 3); the right to a fair trial, comprehended as a right to a just and public hearing of one's case, without undue delay, before a competent,

impartial, autonomous and independent court (Art. 45), as well as the right to appeal a decision of the court of the first instance; forfeiture of property can only be admitted in cases specified by a statute and by virtue of a final court judgment (Art. 46); the right to legal protection of one's private and family life, honour and good reputation, as well as the right to decide about one's personal life (Art. 47); freedom and privacy of communication (Art. 49); the inviolability of home, including the admissibility of any search of a home, premises or vehicles only in cases and in a manner specified by a statute (Art. 50); an extensively comprehended right to privacy, entailing the right of everyone to keep secret any information concerning him and the prohibition of imposing an obligation by virtue of a statute to disclose such information; the prohibition of acquiring, collecting and making any information on citizens, other than that which is necessary in a democratic legal state, accessible by public authorities; as well the right of everyone to have access to official documents and data collections concerning him, including the right to demand the correction or deletion of information which is untrue, incomplete or acquired by means contrary to a statute (Art. 51); the freedom of unhindered movement and the right to choose a place of residence and stay within the territory of the Republic of Poland, and to leave its territory, also containing the prohibition of expelling a Polish citizen from the country and the lack of possibility to implement any ban on return, and an opportunity to return and permanently settle in Poland in case of a person whose Polish origin has been confirmed in accordance with a statute (Art. 52); freedom of conscience and confession (Art. 53), comprising the freedom to profess or accept any religion according to one's personal choice; to manifest it, individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites or teaching; to have sanctuaries and other places of worship depending on the needs of the believers, as well as the right of individuals, wherever they may be, to benefit from religious services; the right of the parents to ensure their children moral and religious upbringing and teaching in accordance with their convictions; the right to implement the religion of a church or another legally recognized religious organization as a subject taught at schools, provided that the other peoples' freedom of conscience and religion are not infringed thereby; the freedom to publicly express religion, which may be limited only by means of a statute and only where this is necessary for the defence of state security, public order, health, morality or the freedoms and rights of other persons; prohibition to be compelled to participate or not in religious practices, including the prohibition of being obliged to disclose one's views, religious convictions or beliefs; freedom of speech (Barciak, 1997: 47-65), or more extendedly, the freedom of expression, containing the freedom to express one's opinions, as well as acquiring and disseminating information, the prohibition of implementing preventive censorship on the means of social

communication and the licensing of the press, with a possibility to introduce, by virtue of a statute, an obligation of receiving a permit for the operation of a radio or a television station (Art. 54); prohibition of extradition of a Polish citizen, especially including the cases of persons suspected of committing a crime for political reasons without the use of violence, or if the extradition would violate rights and freedoms of persons and citizens, whereas the exceptions to the prohibition to extradite Polish citizens apply to cases where extradition is granted upon a request of a foreign state or an international judicial body, if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which Poland is a member, provided that the act covered by a request for extradition has been committed outside the Polish territory and constituted an offence under the Polish law in force, or would have constituted an offence under the Polish law in force if it had been committed within its territory, both at the time of its commitment and at the time of making the request; the exclusion to these conditions applies in case of an extradition requested by an international judicial body established under an international treaty ratified by Poland, in connection with the crime of genocide, crime against humanity, war crime or the crime of aggression, covered by the jurisdiction of that international body, and the admissibility of extradition will be adjudicated exclusively by courts (Art. 55); the rights of foreigners to seek asylum in the Republic of Poland in accordance with the principles specified by a statute, including a possibility for a foreigner seeking protection from persecution to be granted the status of a refugee in accordance with the international agreements to which Poland is a party (Art. 56).

The catalogue of political rights and freedoms is envisaged in Chapter I of the Polish Constitution (Art. 11 and 12), determining the fundamental constitutional principles, as well as in Chapter II (Art. 57-63), under a separate systematisation unit titled *Political Freedoms and Rights.* The most significant rights and freedoms are contained in Articles 11 and 12. Article 11 guarantees the freedom to establish political parties and organize their activities; they are free to associate the citizens of the Republic of Poland, based on the principles of voluntariness and equality, for the purpose of influencing the creation of state policy by means of democratic methods. Article 12 guarantees the freedom to establish trade unions, associations, civil movements, foundations and other forms of citizens' social activism, and to organize their activities on the basis of law, for the purpose of safeguarding the citizens' interests and expressing their opinions. Both provisions express and determine the scope of the supreme and fundamental constitutional principle of promoting the development of the civil society on the grounds of the Polish Constitution. Instead of being placed in the chapter

dedicated to the rights and freedoms, where the universally guaranteed freedom of association is included separately, these two provisions have intentionally been placed in the chapter devoted to the basic principles of state organization because they underline the possibility of citizens' active participation in the shaping the state's policy directions. For, such an activity makes the citizens empowered to be co-responsible for shaping the state policy. Whereas Article 11 states the main goals and objectives of creating political parties, its content should not be comprehended in the way that only political parties have been granted the monopoly in the field of 'creating the state's policy'.

In addition, the catalogue of political freedoms and rights contained in Chapter II of the Constitution (Art. 57-63) includes: the freedom of assembly, comprising the freedom of organizing and participating in peaceful assemblies (Art. 57); the freedom of association (Art. 58), except for the events whose purposes or activities are contrary to the Constitution or statutes; it comprises the freedom of associating in trade unions, socio-professional organizations of farmers and employers' organizations, as well as the right of trade unions, employers and their organizations to negotiate, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements, and the right of trade unions to organize employees' strikes and other forms of protest subject to the limitations specified in a statute, which can restrict or forbid strikes organized by specified categories of employees or in specific fields for the purpose of protecting the public good, whereas the scope of the freedom of association in trade unions and employers' organizations and other freedoms related to trade unions may only be subject to such statutory limitations as are permissible in accordance with the international agreements to which Poland is a party (Art. 59); the right of access to the public service based on the principle of equality for all the Polish citizens who enjoy full public rights (Art. 60); the right to obtain information on the activities of public authorities and persons discharging public functions, including the right of access to documents and entry to the sittings of collective public organs formed by universal elections (Art. 61); the right to participate in referenda and elections (Art. 62), and the right to submit petitions, motions and complaints in the public interest, in one's own interest or in the interest of another person, with his/her consent, to the public authorities as well as to organizations and social institutions in connection with the performance of their duties prescribed within the field of public administration (Art. 63).

Economic, social and cultural rights and freedoms are envisaged in Chapter II (Articles 64-76), under a joint systematization unit titled *Economic, Social and Cultural Rights,* which contains the following catalogue: the right to ownership, other property rights and the right of succession, which are subject to equal legal

protection for everyone, whereas the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such a right (Art. 64); the freedom to choose and pursue a profession and to select one's place of work, while an obligation to work may be imposed only by a statute; the permanent employment of minors under the age of 16 is prohibited and a minimum level of remuneration for work or the manner of setting it are laid down by a statute; the public authorities are obliged to pursue policies aiming at full and productive employment by implementing programmes of combating unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention (Art. 65); the right to safe and hygienic conditions of work and annual paid holidays and leaves, as well as the right to statutorily specified days-off, and the maximum permissible number of working hours (Art. 66); the right to social security in case of being incapacitated to work due to sickness or handicap, as well as in case of having attained a retirement age, including the right to social security of the unemployed, involuntarily remaining without work and having no other means of support for their living (Art. 67); the right to health protection, equal access to health care services financed from the public funds, guaranteed to all the citizens, irrespective of their material situation, along with the duty of public authorities to ensure special health care to children, pregnant women, handicapped people and elderly persons; the obligation of public authorities to combat epidemic diseases and prevent the negative health consequences of the degradation of the natural environment, as well as their support for the development of physical culture, particularly among children and youth (Art. 68); the right of disabled persons for aid in ensuring their subsistence, adaptation to work and social communication provided by public authorities (Art. 69); the right to education, which is compulsory until the age of 18; education in public schools is free of charge, while it is allowed to introduce payments for certain services provided by public institutions of higher education; parents have the right to choose schools other than public ones for their children; citizens and institutions have the right to establish primary and secondary schools and institutions of higher education and educational development institutions, and public authorities are obliged to ensure universal and equal access to education for citizens; the Constitution also guarantees autonomy for the institutions of higher education (Art. 70); the right of families (particularly those with numerous children or single-parent families) in difficult financial and social circumstances to get special assistance from public authorities, including the right guaranteed to mothers to receive special assistance before and after bearing a child; in its social and economic policy, the state is obliged to take into account family welfare and well-being (Art. 71); the rights of children, who are under special protection of the state; everyone has the right to demand of public authorities to protect

children against violence, cruelty, exploitation and demoralization, including the right of children deprived of parental care to get care and assistance provided by public authorities; both parents and persons responsible for children, as well as public authorities, are obliged to hear and consider their opinions, and insofar as possible give priority to their views in the course of establishing their rights; moreover, the Constitution has established the Commissioner for Children's Rights for child protection purposes (Art. 72); the freedom of artistic creation, scientific research and dissemination of their results, as well as the freedom to teach and enjoy cultural goods (Art. 73); the right and obligation of public authorities to deliver the information relating to the state of environment and its protection, to pursue policies ensuring ecological security for current and future generations, as well as to support the activities of the citizens for the benefit of protection and improvement of the environment quality (Art. 74); the right of the citizens to satisfy their housing needs, including the obligation of public authorities to pursue conducive policies, and in particular to combat homelessness, to promote the development of low-income housing and support the activities aiming at the acquisition of one's own apartment by each citizen, and to protect the tenants' rights (Art. 75); the obligation of public authorities to protect the rights of consumers, customers, lessors or lessees against any activities threatening their health, privacy and safety, as well as against dishonest market practices (Art. 76).

The subsequent unit in the systematics of Chapter II of the Constitution, titled *Means of Protection of Freedoms and Rights* (Art. 77-81), regulates the constitutional guarantees for exercising the fundamental rights and freedoms, as well as the instruments of their protection (Banaszak, 2012: 162-186; Matwiejuk, 2009: 102-108). The provisions contained in this part include: the right to compensation for any harm caused by the actions of public authorities in contravention of the law; a statute cannot bar anyone a recourse to a judicial proceedings in pursuit of the claims alleging the infringement of freedoms or rights (Art. 77); the right of each party to appeal against the judgments and decisions issued in the first instance (Art. 78); the right of every person whose constitutional freedoms or rights have been infringed to submit a claim to the Constitutional Tribunal in the matter of conformity of a statute or another normative act, on the basis of which a court or a public administration authority has issued a final decision on one's freedoms and rights or obligations, with the Constitution, except for the right to asylum and granting the status of a refugee (Art. 79); the right of everyone to file a motion and apply to the Commissioner for Citizens' Rights to receive assistance in the protection of rights and freedoms infringed by public authorities (Art. 80).

The citizens' duties are envisaged in Chapter II (Art. 82-86) of the Constitution, in the systematization unit titled *Obligations* (Banaszak, 1997a; Banaszak, 2012: 186-201; Matwiejuk, 2009: 108-110). They can be systematized as follows: general obligations towards the state, and obligations in the field of defence. The general obligations towards the state include: the duty of loyalty of every Polish citizen to the Republic of Poland, as well as concern for the common good (Art. 82); the duty to observe the law of the Republic of Poland (Art. 83) and fiscal obligations, comprising compliance with responsibilities and public duties, including the payment of taxes (Art. 84). The obligations in the field of defence contain: the duty of every Polish citizen to defend the Homeland and the duty to perform a military service or substitute service, if a citizen is not able to perform military service due to his religious convictions or moral principles, if the obligation to perform such service is imposed on him by a statute (Art. 85). Following the example of other contemporary constitutions, the Polish basic law also imposes an obligation on citizens to take care of the natural environment, including the responsibility for causing its deterioration (Art. 86).

6. Conclusion

The concepts of rights and freedoms have different meanings, even though these terms are most frequently correlated and closely associated with each other. The distinctive meanings have been determined by their various origins deriving from the constitutional law doctrine. The distinctions in the essence of rights and freedoms have considerable influence not only in comprehending the contents and scopes of particular rights and freedoms but also on the way and technics of constructing the norms establishing and regulating them. The situation is similar in respect of the citizens' obligations.

The catalogue of the fundamental freedoms and rights envisaged in the Constitution of the Republic of Poland of 1997 has largely been created under the influence of the international law output, particularly stemming from the Polish obligations in the field of human rights. The Polish constitutional legislator has treated the rights and freedoms in an extensive and detailed way, dedicating much space and attention to them in the content of the basic law. A vast majority of the fundamental rights and freedoms have been placed in Chapter II of the Constitution, while some of them have been raised to the rank of the constitutional principles and located in Chapter I. The general principles of dignity, liberty and equality, which are expressly proclaimed in the Constitution, are another element of considerable importance for comprehending and interpreting particular freedoms and rights: they are the prism through which all other freedoms and rights contained in the Polish basic law ought to be assessed. In

that context, the important role of the Polish constitutional law doctrine and the output of the Constitutional Tribunal should by no means be underestimated, particularly considering the fact that the content and scope of fundamental rights and freedoms are derived from the legal doctrine and judicial interpretation of the envisaged legal provisions. Finally, constitutional guarantees are the issue of principal significance for the full and effective exercise of the envisaged freedoms and rights. Besides the institutional legal guarantees provided by the national law, the international and supranational guarantees also have an essential role in creating the basic laws of contemporary democratic states. In particular, they are a distinctive feature of constitutional laws of the states undergoing an intensive impact of integration processes. Concurrently, they constitute an additional and highly effective shield and gauge for assessing the proper operation of the state's internal mechanisms.

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ПРАВА И СЛОБОДЕ У УСТАВУ РЕПУБЛИКЕ ПОЉСКЕ

Резиме

Гарантовање основних права и слобода грађана и омогућавање њиховог правилног остваривања и строгог поштовања су један од најважнијих задатака савремених демократских држава, а истовремено и прави изазов. Ниво очувања индивидуалних права несумњиво зависи од тога да ли је држава у стању да створи ефикасан систем њихове заштите. У том погледу, изузетно важну улогу има каталог основних права и слобода садржаних у уставу, који заједно са уставним гаранцијама, остаје један од основних атрибута заштите људских права. С обзиром да је основни закон (устав) главни и врховни извор основних права и слобода, свако кршење уставних норми представља повреду уставом загаранотованих права. За разлику од држава које одликује дуга традиција државности и стабилна демократија, овај проблем је посебно актуелан у државама које су још увек у фази учвршћавања основа своје државности, и које још увек траже, настоје да успоставе и/или проверавају своје моделе развоја демократије, што за ове државе представља приличну новину.

Овај рад има за циљ да пружи детаљну правну анализу каталога права, слобода и обавеза гарантованих Уставом Републике Пољске из 1997. године, који је тренутно на снази, као и да сагледа изворе права и аксиолошку основу која потиче из међународних стандарда. У том контексту, аутор најпре разматра кључне појмове у теорији пољског уставног права који се односе на права, слободе, обавезе, и њихове уставне гаранције.. Аутор затим даје преглед одређених права, слобода и дужности садржаних у пољском Уставу, и разматра њихов обим, ограничења, начин тумачења и разумевања. На крају, аутор указује на проблеме у оквиру уставних гаранција основних права и слобода.

***Кључне речи**: Основна права и слободе, Устав Републике Пољске, садржај и тумачење основних права и слобода, поштовање људских права, делотворни правни инструменти.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879071J

UDK: 327.7(4-672EU)
339.923(4-672EU)

Рад примљен: 30.09.2018.
Рад прихваћен: 14.11.2018.

*REFORMING THE EUROPEAN UNION JUDICIAL SYSTEM: SIMPLICITY OR COMPLEXITY***

Abstract**:** *With the entry into force of the Lisbon Treaty, the judicial system of the European Union sustained significant reforms. First of all, the European Court of Justice was renamed the Court of Justice of the European Union (CJEU). Further, under the Lisbon Treaty, the CJEU is comprised of the Court of Justice (CJ) and the General Court (GC). The EU Civil Service Tribunal (CST) was a specilized court which operated within the CJE framework until 1st September 2016, when it ceased to exist.Hence, the Lisbon Treaty terminology itself is confusing. Originally set as a three-tier judicial structure, it may be said that the Court today functions as a one-layer structure with two courts. Changes have also been introduced in terms of the Court Statute, Rules of Procedure, Advocates-General, appointment of judges, the number of judges in the General Court, etc.These changes raised tensions, first between the Court of Justice and the General Court, and thenbetween the Court of Justice and the European Parliament, as well as disagreement with the Council's position.On the other hand, the General Court introduced important reforms thatled to an impressive rise inthe number of cases closed andreduced length of proceedings. This paper provides a critical review of these reforms, as it is difficult to assess the short-term and long-term implications. Inthe conclusion, several lessons and recommendations are given in order to improve the efficiency and effectiveness of the Court's work.*

Keywords: *Court of Justice of the EU, General Court, reforms, Lisbon Treaty.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

The Lisbon Treaty introduced significant changes in the EU's judicial system.[1] In 2011, the Court of Justice of the European Union (CJEU)[2] submitted its first legislative initiative and, after four years of negotiations, what was adopted at the end was somewhat similar to what was proposed at the beginning. Regulation 2015/2422 changed the judicial system from three layers into one with only two courts (European Parliament, Council, 2015). The possibility of creating specialized courts according the Lisbon Treaty was abandoned. The equality of member-states in appointing judges become crucial to the system: the process of independent nomination of judges was also abandoned. In order to achieve this, the number of judges in the General Court (GC) wasdoubled, without providing additional resources for the personnel and with possibility to be reduced. All these changes were envisaged without any analysis of the long-term implications for any of the institution involved in the legislation process.

The debate surrounding this legislation process caused tensions among EU institutions, first between the Court of Justice (CJ) and the General Court (GC) regarding the meaning of the reform and the way it was proposed by the CJ. Tensions also arose between the CJ and the European Parliament (EP),asthere were some contradictions concerning the Council's position. At first, doubting the need of any increase in the number of judges, the member-states approved the proposal when the need of increase became less obvious. The EP adopted the reform without taking into consideration some of the warnings in the legislation process, such as the impact assessment or serious analysis of the costs and benefits from the offered solutions. Nor such constitutional change drew attention of national parliaments.At the end, numerous legal uncertainties emerged. In the meantime, the GC implemented important reforms that led to a progressive increase of the number of cases closed. The backlog started to disappear in 2014 and dropped drastically in 2015, as well as the length of procedures.[3] In any case, the "urgency" recognized by the EU institutions and member-states when they approved the double number of judges in 2015 quickly disappeared the same year.

1 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *OJ C 202/1,* 07 June 2016.

2 Article 19 of the Treaty on European Union (TEU) provides that the CJEU – the Institution – includes various jurisdictions: the Court of Justice (CJ), the GeneralCourt(GC) and specialised courts.

3 The number of applications was 617 in 2012, 790 in 2013, 912 in 2014, and 831 in 2015. The number ofclosed cases was 688 in 2012, 702 in 2013, 814 in 2014, and 987 in 2015. The average length of proceedings fell from 26,9 months in 2013 to 23,4 months in 2014 and to20,6 in 2015.

It is difficult to assess the long-term implications. There is no precedent in the EU history, since there was no comparable legislation procedure in the EU's judicial system. Also, there is no precedent in member-states, as no Supreme Court was given the right to legislative initiative. Article 281 of the Treaty on Functioning of the European Union (TFEU) anticipates that the EP and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with some exceptions. They may do this either at the request of the CJ and after consultation with the European Commission (EC), or on a proposal from the EC and after consultation with the CJ. The Court had this opportunity according to Article 245 of the Treaty of Nice and Article 188 of the Treaty of Maastricht. Still, according to this procedure, the Statute could only be changed under the same rules necessary for changing the Treaties. Therefore, the EP was not included and member-states acted unanimously. After the Lisbon Treaty, the EP is included in theStatute revision as in any other legislative procedure and the Council may act only with qualified majority. Further, according to the procedure from Maastricht and Nice, all member-states could file amendments but, with the Lisbon Treaty, the CJEU and the EC have a monopoly over the right of initiative.

The Lisbon Treaty also strengthens the three-layer judicial structure of the EU. While the Treaty of Nice evoked the possibility of creating specialized chambers attached to the GC, the Lisbon Treaty anticipates the creation of specialized courts. There were many reasons for this step, as specialized courts were considered to provide greater productivity, fewer expenses, more focused system in the appointment of judges and greater coherence in jurisprudence. The only specialized court is the Civil Service Tribunal (CST), established in 2004 (Council Decision, 2004).

2. The CJEU Legislative Proposals

On 28 March 2011, the CJ submitted to the Council and the EP amendments to the Statute of the Court.[4]The amendments concerned all three courts and were aimed at modifying the rules regarding the Grand Chamber composition and establishing the office of vice-president; providing the possibility to attach temporary judges to specialized courts in order to replace those judges who may be absent for a longer period; and supplementing the GC with 12 new judges. The paper focuses on the proposal for increasingthe number of judges in the GC.

4 Interinstitutional file 2011/0901 (COD), *Reform of the Statute of the Court of Justice of the European Union,*http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017657%202011%20INIT.

The reasons for the proposal are explained in the explanatory note (Council Document, 2011).For several years the number of cases closed by the GC was lower than the cases submitted. This created increase in its backlog, as well as increase in the length of proceedings. Such development threatened the right of parties to a fair trial, thus violating Article 6, paragraph 1 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights.The increase in the GC's workload is relatedtoitsmore extensive jurisdiction after enlargements, as well as the increase in the number of EU legislative acts.

It was considered that the number of cases would increase in future. The undertaken measures and the creation of the CST did not significantly contribute to reducing the GC backlog.Therefore, it was necessary to take one of the two possible approaches offered in the Treaties: either to apply Article 257 of the TFEU and introduce a new specialized court, or to increase the number of judges in the GC according to Article 19 of the TEU. The CJ considered that the second solution was more acceptable in terms of effectiveness, flexibility and consistency.

Regarding*effectiveness*, the CJ indicated that the elimination of the GC backlog would not ease the burden of the GC, as the most complex cases may end up in front of the GC. Moreover, the GC will be required to consider the increased number of appeals against the specialized court decisions, not to mention the possibility to rule on preliminary ruling procedure in the area of intellectual property. Also, it confirmed that it would be easier to integrate new judges in the existing structure, rather than create a new one. Thus, the appointment of new judges would be a faster solution and, therefore, a more appropriate response to the urgency of the situation. Regarding *flexibility,* the CJ emphasized that it would be more difficult to dissolve a new court after it became operational than to reduce the number of judges. Regarding *consistency* of the EU law, the CJ also emphasized that every additional creation of specialized court would imply transfer of preliminary ruling procedures in front of the GC as indicated in Article 256, paragraph 3, of the TFEU.

The CJ considered that additional 12 judges to the GC are necessary. This increase would allow the Court to absorb its backlog and ease the organization of its work giving priority to complex cases and introduction of specialized chambers. The Court did not provide information on how it came to the conclusion that 12 judges were the required figure.

The EC adopted its Opinion on 30 September 2011, completely supporting the CJ's proposal (European Commission, 2011).Regarding the GC amendments, the EC considered that the increasing of number of judges at that moment was not the best solution, while the creation of a new specialized court would give results

after some period of time. The EC also added that additional amendments to the Statute are necessary, especially some form of specialization in chambers in order to avoid fragmentation; therefore, it proposed the creation of at least two specialized chambers. As the EC is the most attacked institution in front of the GC, the content of its legislative proposal in this area requires serious analysis.

Further, the EC indicated the need to determine arrangements for the nomination of 12 new judges, and emphasized the fundamental goals: to ensure that most appropriate and qualified candidates are nominated; to guarantee stability by requiring member-states to renew the mandate of efficient judges; and finally, to ensure fair representation of all national legal systems. Recognizing that the achievement of these goals is far from being easy, particularly in terms of increasing the number of judges from 28 to 40 judges and the replacement of around 20 judges every three years, the EC proposed two possible models. The first model was to secure equality and stability among member-states. The second model was aimed at finding a balance among the representation of national systems and specialization in certain issues. For this purpose, half of the judges would be appointed according to their specialization in certain area. Both proposals are quite complex.

The legislative procedure in front of the EP was divided in two parts in order to have progress in those elements which are not connected to the composition of the GC.On 5 March 2013, the EP presented its Draft Report proposing that the GC should consist of one judge per member-state, whereas 12 new judges will be designated to serve in the GC, irrespective of their nationality and exclusively on the basis of their professional and personal qualifications, provided that there are no more than two judges per member-state (European Parliament, 2013).The amendments to the Statute of the EU Court of Justice provided that all member-states may submit nominations and that judges whose mandate expires may also submit applications for nomination. It also provided that a panel, envisaged in Article 255 of the TFEU, shall evaluate candidates and a list of at least half of the judges to be appointed according to the common accord of the member-states.

On 12 December 2013, the EP adopted the amendments in its first reading. However, the *rapporteur* suggested the voting on the draft-legislation to be postponed in compliance with Rule 52, paragraph 2 of the EP Rules of Procedure,[5]which applies when the Council additionally modifies the legislation proposal.As the EP agreed, the proposal was returned to the Review Committee in charge. In the first reading, the Council and the EP did not reach an agreement; so, on 15

5 http://europam.eu/data/mechanisms/COI/COI%20Laws/European%20Commission/European%20Commission_Rules%20of%20Procedure%20for%20MPs_2013.pdf; In the latest Rules of Procedure this rule is deleted.

April 2014, the EP finally agreed on the legislative solutionproposed in the first reading of the text adopted on 12 December 2013.[6]

According to the Council document of 15 October 2012, member-states had no agreement on the number of judges to be appointed for reducingthe backlog, the duration of procedures and budgetary implications for any of the options (Council of the EU, 2012).First, the CJ statistical data confirmed that there was an increased gap between the number of new cases in front of the GC and the number of closed cases, and that the GC is not able to handlethe cases in the time-frame determined by internal timetable and deadlines. Second, the document presented calculations without identifying any reliable sources;it was intended to provide a rough assessment on the impact ofthe increase in the number of judges of the GC, their results and average duration of procedures. Third, costs were estimated for each of these hypotheses.Finally, delays due to lengthy procedures were an obstacle to undertake efficient strategic planning.

A compromise was proposed at the Council's General Affairs meeting in December 2014,involving the appointment of additional nine judges, with a designation system based on two parallel rotation systems.[7]The top six member-states would appoint four additional judges, each judge to be appointed for two consecutive mandates, while all other member-states would appoint five additional judges, each judge to be appointed for a single mandate. Yet, this proposal was not supported and the discussion continued after the adoption of the new GC Rules of Procedure in April 2015.[8]

On 13 October 2014, the CJ send a letter to the Council proposing to increase the number of judges in the GC to two per member-state, whichwould be done in stages and parallel to the increase of new cases (Court of Justice of the EU, 2011). The letter alsohighlighted the difficulties in appointing new judges to the CST, hence proposing first instance appeals against EU officials to be transferred to the GC andthe dissolution of the CST. Then, the letter set three implementation phases, of which two are completed. The first phase ended in 2015,followingthe appointment of 12 new judges; the second phase ended in 2016 with the appointment of 7 new judges, while the third phase should end in 2019 with the appointment of 9 new judges, which makes a total of 56 judges in the GC.

The letter lists the reasons in four sections. The first section explains the reforms as structural and sustainable. The second section refers to the alternative op-

6 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014AP0358&from=EN

7 Council's General Affairs Meeting in December 2014, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/genaff/134235.pdf

8 Rules of Procedure of the General Court, *OJ L 105/1*, 23 April 2015.

tion for creation of specialized courts.The third section adds that this solution eliminates the alleged issue specific to the CST concerning the need to appoint new judges on the basis of merit and not according geographical origin. The fourth section specifies the costs of the proposed reform.

The letter itself did not go without controversy. Some considered it a new proposal, others a revised proposal.Such uncertainty is difficult to accept, especially if it has constitutional consequences. Also, there were concerns in the EP that this new approach has never been submitted to national parliaments. The lack of formality of the special legislative procedure, especially if it refers to quasi-constitutional proceedings, can only be downgraded.

3. Institutional Debates

The Council document of October 2014, titled "Reform of the General Court of the European Union – Way forward",indicated the proposals of the CJ (Council of the EU, 2014). Although there was support for the proposal, further work was necessary for the legal guarantees on all three levels of the reform, for budgetary implications and the effects of the reform on the CJ.Some member-states insisted that the three phases be clearly set in legally-binding text that would also verify the mechanism for integration of the CST and that there should be no more than two judges per member-state (of the same nationality) in the CST and the GC. In fact, there was no legal coordination in the Council between the increase of judges and the dissolution of the CST, although both issues are related.

Regarding budgetary implications, the Council outlined the costs. It indicated that the proposal would allow more cases to be assigned to chambers of five judges or the Grand Chamber, as well as the appointment of some judges as Advocates General in some cases, thereby increasing the quality of judgments. All these elements were anticipated without conducting any assessment or consultation with the GC. Such justification has nothing to do with budgetary considerations and without some precise explanation, the reform started to face quite different questions from those necessary to solve the GC's backlog issue. Ironically, the first consequence of some of the proposed measures was to increase the duration of proceedings, which is completely contrary to the main goal of the reform.

Further, the possibility of reducing the cabinet's personnel during the third phase of the reform started to draw some attention, thus implying that additional administrative costs are not needed. In order to respond to the doubts of some member-states whether the suggested increase is the most effective option, the Council repeated its intention to reduce the number of legal secretaries and assistants, thus reducing the expenses by 25%. This statement reveals that the

key target of the member-states was the appointment of more judges, regardless of the costs and contrary to the GC's efficiency.

These adjustments completely risk the influence of the reform because of absence of managerial and administrative logic. Reducing the number of personnel along with increasingthe number of judges may have negative consequences on productivity, which is evidence of the fact that the GC in 2014 explicitly requested for more personnel instead of judges, as an issue of priority in handling the huge backlog.

On the third aspect, the Council pointed out that the Court would be able to handlethe increased number of appeals on short-term basis and that the Court may be invited to submit reports in 2019 in order to propose necessary appropriate measures. Doubling the number of GC judges and the dissolution of the CST inevitably leads to an increase in the number of appeals in front of the CJ. On this issue, the Council's representatives indicated that a filtering mechanism is needed, but without indicating how to do it in long-term. This is an important feature of the EU's judicial system, which can transform the appeal from an instrument that serves the applicant's interest into an instrument that serves only the Court's legal concerns (Woude, 2014: 3).

The Council stated its position in the first reading in June 2015, anticipating that the Court should publish annual reports and that assessment should be made after each phase of the reform, at the same time confirming that in any case the number of judges should remain two per member-state (Council of the EU, 2015). The draft was adopted after the first reading without additional amendments.

The debate in the EP was much more difficult than the one in the Council. The stakes were higher: additional 28 judges to the GC, and dissolution of the CST, as well as the level of resources. The constitutional influence of the reform was also essential: creating a two-layer instead of a three-layer judicial system, and abandoning the system of independent appointment of judges.

The EP analysis was presented on 17 June 2015, when the Council adopted the proposal in the first reading. According to the analysis, which was quite critical of the proposal, the productivity of the GC significantly increased in the last years, as well as the decrease of the backlog, without a single additional judge. Despite such positive results, the analysis required that the need foradditional 28 judges and the dissolution of the CST should be seriously considered. The facts showed that there was no need for urgent reform of the GC. This absence of urgency gave the legislator time and space in which it would be able to reflect on the nature and structure of the judicial system.[9]

9 Allemano, A., Laurent, P., (2015). *Where do we stand on the reform of the EU's Court System? On a reform as shortsighted as the attempts to force through its adoption*, EU Law Analysis, 23

Most of the consequences of the proposal were not completely explained. For example, the CJ emphasized that the reform is dependable on the dissolution of the CST, but details of such proposal were not submitted to the EP. The CJ indicated that its proposal would lead to restrictions on the right to appeal without providing details of what exactly it had in mind. Therefore, the Court justified its plans for transfer of jurisdiction to the GC,without providing any details. Thus, the EP was excluded from assessing the CJ proposal.

Regarding the GC's request on additional resources for addressing any encountered difficulties, the experience showed that the targeted increase of personnel (legal secretaries, registry personnel and translation service) gives better results, is cheaper and reversible, unlike the dissolution of the CST and the appointment of 28 far more expensive judges. Moreover, with the absence of every assessment of the proposal, it is difficult to understand how the doubling of the number of judges will not reduce (rather than improve) its efficiency and productivity.

In reality, the CJ was asking the EP to take a big step in the dark by adopting measures that are expensive, radical and irreversible without giving any clear direction as to the consequences. Simple declarations about the increase of the number of cases filed or delays in duration of proceedings are not substitutes for fact-supported and careful analysis. This is even more so with the appointment of new 28 judges and their cabinets, each costing 1 million Euros per year; in the absence of clear, objective justification; it is nothing more and nothing less than mismanagement of public spending.

The EP was aware of technical and budgetary advantages of specialized courts. In its Resolution from 29 April 2015 on discharge of the CJ's budget for 2013, the EPpointed out out that "in 2013, the Civil Service Tribunal completed 184 cases, as against 121 in 2012 (i.e. an increase of 52 %), thus reducing the number of pending cases by 24 (i.e. a decrease of its backlog by 11 %); believes that the elimination of the Civil Service Tribunal is an inadequate solution to face the Council's long lasting blockage" (European Parliament, 2015). Additionally, in its amendments, the EP suggested re-introducing numerous features from the process of appointing judges to the CST in the appointment process for the GC. However, the EP adopted the CJ's proposal without any amendments, thus completely going in the opposite direction, following the Council and the EC.

September 2015,https:// verfassungsblog.de/where-do-we-stand-on-the-reform-of-the-eus-court-system-on-a-reform-as-short-sighted-as-the-attempts-to-force-through-its-adoption/

3.1. Differencesbetween the CJ and the GC

Even in 2015, there was no clear vision of the extent of the backlog, since the two concerned courts (the CJ, the author of the legislative proposal, and the GC, subject of the proposal) presented different analyses. This situation is a direct consequence of the absence of serious analysis of the reasons for the backlog. In fact, four significant changes contributed to the improvement of the overall situation: introduction of a serious system for productivity control;employment of 9 legal secretaries; improvement of stability in its composition; and creation of an advisory panel for the appointment of judges according to Article 255 TFEU.

During the legislative procedure, a surprising development was the deep and growing disagreement between the CJ and the GC regarding the actual state of affairs concerning the backlog. The CJ requested that the number of judges be doubled, without taking into consideration the expressed needs of the GC. In the meantime, the GC adopted internal measures and requested to demonstrate its efficiency. Shortly, for the CJ, the situation in the GC was catastrophic, while the GC considered that it significantly improved.

This steams from the differences in the methodology of both courts. On the one hand, the CJ has taken into account all possible delays, not only those during the handling of the case by GC's judges and their cabinets. According the CJ, the deadline of two months given to the parties in which they should respond to the question set by the GC, also constitutes time taken by the GC to close the case. If parties request additional period for filing an application due to holidays, this delay is also included in the GC consideration. The GC is also responsible for the time during which the case is suspended, awaiting a judgment from the CJ in a connected case. The time necessary to review or translate a draft-judgment is also added to the time necessary for the GC to rule on the issue. However, since neither the judges nor their cabinets can do anything about this kind of backlog, the increase in the number of judges is not the adequate solution to solve these issues.

On the other hand, the reports on the GC show significant improvement in the time needed to finish cases and in the number of cases pending. Before the doubling the number of judges, the GC closed more than 1000 cases, with a decrease of 160 pending cases and with a large decrease in the number of old cases. Also, the duration of proceedings determined by judgment was reduced to 10 months.[10]Hence, all other institutions seem to have been obliged to see new reasons for justification of the proposal for doubling the number of judges

10 Compare: https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-10/qdaq16001enn.pdf, p.17 and https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf, 190.

in the GC (transfer of competences, changes in the chambers from three to five judges, changes in the appeal system), apart from the reasons for reducing the backlog and the duration of procedures.

In fact, the improvement in the GC's situation is considered to be due to several measures: reducing the size of reports from hearings, abolishing the need of translation into all EU languages, possibility to rule on intellectual property cases without hearings, etc. All these measures are not crucial for the whole reduction of the workload or the duration of proceeding. It is therefore necessary to determine the actual reasons for the improvement and eventually to increase the cabinets of GS's judges, to increase the GC's Registry personnel, to change the Rules of Procedure, although progress has been made with the changes from 2015 for simplification and acceleration of procedures through taking judgments without a hearing with the consent of the parties or a judgment delivered by an individual judge.

The doubling of resources in every system is of great challenge. Nothing makes costs bigger than increasing resources. So, the first thing that needs to be done is to assess the global resources available to the GC (judges, legal secretaries, assistants, and Registry personnel). Doubling the GC judges would make it the largest international court in the world. Although there are obvious differences, it is enough to imagine the same solution to be implemented in the EP or the EC. Comparisons can be made with some of the larger first instance national courts, although such analogy is wrong. By definition, the operation of an international court is quite different from the operation of the national court. The heterogeneity in its membership is bigger, just as the instability in its composition for several reasons. Further, in EU courts, members have two functions to perform. They must rule on cases but, doing that, they reflect their national legal orders. An unstable and decentralized court with 56 judges will require a major investment in time and energy in order to protect the coherence of its jurisprudence without prejudice to the equality of legal systems from which the judges come.

The weakness of this reform is that it creates high-level jobs, while concurrently promising decrease of the second and third echelons in the cabinets. Thus, judges are highly paid for performing tasks that can easily, and with fewer costs, be performed by less qualified personnel. Further, judges are the most unstable component in the entire system. The level of multiplication of judicial posts increases the instability of the entire system, while the increase of legal secretaries and the Registry tends to do the opposite. Finally, the creation of a single large GC concentrates all the appeals in the CJ. As a result, this raises questions concerning the workload of the CJ judges, as well as the decisions of judicial character made by administrators who are officials in the Court's Registry hierarchy.

It is wrong to believe that both courts are essentially the same. The dichotomy among them tends to increase. This is important to understand since it implies that what is good for one court does not necessarily mean it is good for the other. The CJ basically decides on matters of law. The GC decides the matters to law and facts. Hence, the proceedings in the GC are longer by nature and the cases are more complex. Judgments that describe the facts and decisions, by their nature, are longer than those in which the facts are found elsewhere or do not arise. Internal review and translation of such judgments requires more time.

The *modus operandi* of the CJ is highly centralised. All cases are considered at the General Meeting and all important cases are sent to the Grand Chamber of 15 judges, which is designed in order to reduce the differences in interpretation of the EU law. In contrast, the GC is decentralized. All applications are sent to chambers of three judges and 95% remain there, while only 5% are judged by chambers of five judges. Thus, the risk of differences in interpretation of the law is higher, although the threat decreases with the right of appeal against GC judgments.

This debate was made without detailed analysis of the possibilities offered by the reform. At the beginning, the member-states were prepared to reject the CJ proposal for budgetary reasons, but they radically changed their approach when promised an additional judge. Then, they requested personnel cuts as a budgetary compensation, a consequence that has not been seriously analyzed. It was decided that the GC would get a lot of judges it had not asked for and would suffer a reduction in the less expensive personnel it was asking for. The main political parties in the EP decided to accelerate the adoption of this reform without conducting any assessment on the impact or analysis of costs and benefits in time when the urgency of the matter disappeared since the GC had control over its backlog.

Since the GC's internal reforms drastically reduced the backlog and reduced the duration of proceedings by the end of the 2015, it became clear that the undertaken measures with small increase in the resources (9 additional legal secretaries) contributed greatly to resolving the problem of backlog.[11] The small increase in the personnel required to obtain such a great result shows that major improvements could be achieved through new, more limited and targeted personnel increases. On the contrary, at the beginning of 2016, the existing uncertainty about personnel in cabinets, the appointment of new judges, the need for deep restructuring in organization and greater replacement of existing judges, gives the effect of destabilizing the GC in whole, thereby threatening the excellent results made in the past.

11 Seytre, D.,(2015). *Une insulte à l'intelligence*, Le Jeudi, 4 November 2015, http://jeudi.lu/justice-europeenne -une-insulte-a-lintelligence/.

In the existing context of budget cuts, it is of great importance for the EU and national institutions to seek productive solutions. The GC's development from 2011 to 2015 reflects the benefit of such an approach, but the legislative debate went in different direction.

4. Future Lessons BULETI

Over time various goals were set for the GC reform: reducing the backlog, reducing the duration of procedures, larger chambers, coherence in jurisprudence, new appeal regime, transfer of jurisdiction from the CJ to the GC. A clear vision of long-term goals is necessary for these crucial reforms. Any systematic initiative must begin with a reflection on the CJ. The CJ adopted different approach rather than concentrating on courts under its judicial hierarchy.

In conducting its legislative role, the CJ sometimes acted under its standards, required by an actor in the legislative procedure. Legislative procedures must respect specific limitations of the Treaties. Ultimately, all documents arising from the CJ needs to be approved by a joint CJ meeting, catalogued in separate register and made available to public.

Official documents related to any legislative procedure should be adopted by a separate division of the institution. Independent decisions of the CJ President are not in accordance with such standards. Further, the use of undated, unregistered and non-signed CJ documents in the course of the legislative procedure should be prohibited. It is not possible to justify a legislative reform of constitutional consequences based on documents which no one wants to take responsibility for. Finally, the Treaty should give authority to the institution as a whole (rather than a single court only) to present a legislative proposal.

Consultation among interested parties has become a standard characteristic of all legislative procedures. This is especially the case when proposals have a structural or even quasi-constitutional character. The CJ should apply the same principle when implementing its legislative initiatives.

Regarding the long and controversial process, a serious reference to Article 281 of the TFEU is necessary.The best solution would be simply to abolish the CJ's legislative initiative. The Court should be able to present requests for legislation amendments in limited areas in question, but the EC would be responsible for taking them and then promoting what emerged as its proposal. If this best option is not adopted in the future, the second best option would impose serious procedural limitations on all CJ's legislative initiatives. In particular, this competence must be attributed to the institution as a whole, and not to one of the courts. Further, a clear separation within the institution should be established among

judicial decisions and administrative or legislative decisions, with a possibility for proper judicial review of the latter. Otherwise, the institution can find itself in a serious mess in ruling on applications regarding legislative acts sponsored and promoted by the CJ.

5. Conclusions

The proposal to increase the GC judiciary is the first legislative initiative of the CJ under the Lisbon Treaty, which brought a major shift in the entire judicial system of the EU.

Increasing the number of judges in the GC toa total of 56 judges by 2019 is followed by the dissolution of the CST, thus bringing the three-layer EU judicial system to one or two layers. This has collateral consequences on the appointment process, the geographical basis for recruitment of judges, personnel management, as well as the appeal process.

The member-state's inability to agree on anything, except on simple multiplication of judges, made the situation worse. It made the appointment of judges in specialized courts even more difficult, thereby providing an excuse for their abolition, although they were obviously more quality oriented, more productive and more economical. It has also led to doubling the number of judges in the GC, which had much wider implications. This weakness has clearly become a source of unnecessary spending by the EU.

The reform was made without impact assessment or external consultation. There was nothing resembling the associative process which surrounds the legislative procedures in the EU, especially of quasi-constitutional nature. Also, considerations should be given to the restrictions that apply to the CJ when initiating legislative proposal.

The position of other institutions during negotiations was surprising. For example, in the first phase, the EC insisted on the need to protect the GC's stability, a point that was forgotten during the second phase. In the first phase, the Council expressed serious doubts about the need to increase the number of judges, while in the third phase when the proposal focused on additional 28 judges, these doubts paradoxically disappeared. Nor has the EP considered the proposal regarding impact assessment or the costs and benefits of the analysis.

Effective rejection of recourse to specialized courts in the EU's judicial system is a fundamental strategic choice. First, it strengthens the member-states role in appointment of judges. The choice of candidates by a committee consisting of specialist is replaced by decision-making by the member-states, a strong intergovernmental reform. Second, in a comprehensivemanner, the reform establishes

a principle of equal representation of member-states in EU courts. This will have important consequences for the recruitment of EU judges.

The reform is not only related to increasing the number of judges. It also refers to the organization of the GC. The CJ strongly advocated in the Council for some specialization inside the GC, as well as for a system of discretionaryattribution of cases to judges. The member-states and the EC also supported this. However, none of these actors consulted the GC on how the court wants to manage its internal affairs. Therefore, there is a need for further reflection regarding the protection of organizational independence of the EU courts.

Specialization in the GC raises another question in this frame. Unlike the CJ which is very much centralized, the GC functions in a decentralized manner, with chambers of three judges constituting the basic formation in decision-making processes. In such frame, the specialization of one judge may have a strong impact on the outcome of the cases. The same could be said about the discretionary attribution of cases. As the CJ and the GC are differently organized, such discretion could have strong impact on the outcome of the procedure. In addition, is such a non-transparent and opaque system for the attribution of cases in line with the ECHR regarding the right to a fair trial?

Finally, the doubling of the GC judiciaryis not in fact a reform, but an example of pure mechanic vision of public service reform. In general, the benefits of such an approach are overrated and the costs are overestimated. Neither the institutions nor the member-states or interested parties considered the functioning of the EU courts;nor did they consider the efficiency and costs of possible reforms. This brought the EU judiciary to a paradoxical situation since all parties followed different approachesin an effort to deal with the budgetary cuts and in search of higher productivity. In the future, all EU institutions must pay more attention to long-term productivity, respecting the quality of justice, recruitment of qualified personnel, productivity of judges, and giving due consideration to public funds.

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РЕФОРМА ПРАВОСУДНОГ СИСТЕМА ЕВРОПСКЕ УНИЈЕ: једноставност или сложеност?

Резиме

Ступањем на снагу Лисабонског уговора, правосудни систем Европске уније претрпео је значајне промене. Пре свега, Европски суд правде је преименован у Суд правде Европске уније (СПЕУ). Према одредбама Лисабонског уговора, Суд правде Европске уније се састоји од Суда правде и Општег суда. Службенички суд Европске уније, који је функционисао као специјализовани суд у оквиру Суда Правде, престао је да постоји 1. септембра 2016. године. До забуне долази и због саме терминологије Лисабонског уговора. Наиме, иако је првобитно осмишљен као правосудна институција која је обухватала три нивоа (судске инстанце), Суд правде ЕУ данас обухвата два суда. Остале измене односе се на Статут Суда, Пословник о раду, Генералног адвоката Суда, именовање судија, број судија Општег суда (2 судије по држави чланици од 2019. године). итд.

Ове промене су изазвале тензије, пре свега у односима између Суда правде и Општег суда, затим између Суда правде ЕУ и Европског парламента, као и неслагања са ставом Савета. С друге стране, Општи суд је спровео значајне реформе које су довеле до импресивног повећања броја решених предмета и скраћења дужине поступка. Овај рад даје критички прегледа реформе правосудног система ЕУ, јер је тешко проценити краткорочне и дугорочне импликације оваквог решења. У закључку, аутор даје неколико сугестија и препорука како би се побољшала ефикасност и ефективност рада Суда.

Кључне речи: *Суд правде, Општи суд, реформа правосуђа ЕУ, Лисабонски уговор.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879089P

UDK: 347.23:502.131.1
502.131.1

Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*THE SOCIAL FUNCTION OF PROPERTY OWNERSHIP IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT****

Abstract: *The subject matter of this paper is the constitutionalization of the right to property in the comparative constitutionalism, within the context of sustainable development, as a long-term prospective of a community existence and advancement. The first part of the paper points out to social and ecological functions of camu and considers, from the comparative perspective, the constitutional guarantees on the right to property, the forms of property ownership, and the title holders of property rights. The second part is devoted to constitutional solutions related to the regime of using the natural (developmental) resources, through the prism of the social function of property ownership, the public interest and the environment protection. The authors also discuss the legislative authority allocation in this field of proprietary relations between the various levels of authority in federal and regionally organized states. The third part of the paper provides a comparative analysis of the conditions for expropriation permissibility and limitations to property rights.*

Keywords: *the Constitution, right to property, social function of property ownership, ecological function of property ownership, limitations to property rights, sustainable development.*

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** The contribution of the co-author Nevena Petrušić is the result of her engagement in the Project no. 179046: *Protection of Human and Minority Rights in the European Legal Space,* financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

*** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

The ownership right is an integral part of the right to property which, as a fundamental human right, has been guaranteed by the International agreements and the supreme national acts on human rights. At the international level, the warranting of the (private) property rights has been accompanied by numerous difficulties and incompliance, caused by ideological and political reasons. The debate, which was conducted in the process of internationalization of human rights among the advocates of maximalist ideas on private property and those who negated every need for its existence (Sprankling, 2014: 8-19), resulted in establishing the right to property, which is guaranteed in the International agreements as a qualified right – the right which is subject to various limitations, also including the possibility of deprivation of such right under certain conditions (Čok, 2004: 346). Due to disagreement in view of the property concept and the fear of certain states that, by warranting private property, they would be too restricted in the chance to accomplish their economic, political, social and other goals by limitation on property, this right was not guaranteed by the Treaty on Civil and Political Rights (1966), nor by the basic text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950),[1] but by the first Protocol to the European Convention, adopted in 1952 (Krstić, Marinković, 2016: 238-239).

Like in the past, the contemporary law also considers the ownership right, as the widest legal authority to hold, use and dispose of items, effecting everybody and ensuring to the title holder immediate and direct legal authority over the items (Kuštrimović, Kovačević, Lazić, 2009: 59). Although the ownership right belongs to the range of permanent, absolute and time-unlimited rights (Stanković, Orlić, 1999: 56), it has been limited ever since in many different ways. However, while in the past the purpose of limitations was primarily aimed at providing conditions for undisturbed use of items, through preventing abuses, banning the exceeded emissions, regulation of neighborly relations (etc.), in the contemporary law, the limitations on property ownership have been significantly

1 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter: "the European Convention" or " the Convention "), adopted on 4th November 1950 in Rome, came into effect on 3 September 1953. Sweden and the United Kingdom were the loudest among the states which opposed introduction of the right to quiet enjoyment of property in the European Convention wording. On the other hand, Belgium, Italy, Holland and France were determined advocates of the idea on the necessity of guaranteeing this right, justifying their attitude by the fact that the property right is not the economic right only, but that it also has a political dimension, as a condition for individual independence and a basis for family stability. About the warranties of the property right contained in the European Convention, in more details: (Van Dijk, Van Hoof, 1989: 619-625; Peukert, 1981: 3238; Coban, 2004: 467; Gomien, 2000: 35-38).

expanded and they are in the function of realizing numerous economic, political, social and other public interests of the community.

This paper examines the changes in the contents of constitutional matter on ownership right, within the context of social justice principles and social function of ownership right, as well as the principle of sustainable development as a long-term prospective of a community existence and advancement. In this paper, we analyzed and elaborated on several essential factors underlying the implementation of these principles in the domain of proprietary relations, on the example of the consititution of sixteen countries, including Serbia and some countries of former SFR Yugoslavia[2], in an effort to establish contemporary trends in the constitutional standardization of contents, range and limitations on property ownership. Taking into consideration the constitutional changes at the beginning of the 20th century, related to the transformation of ownership, the right to property as a human right resulting from the constitutionalization of the social justice principle at the beginning of the 20th century, we try to establish if there is a challenge before the constitutions in the 21st century in terms of constitutionalization of the sustainable development principle, apart from the rule of law principle and the social justice principle, and how it would be reflected to property rights, at least. The encouragement for starting this research is the fact that issues relevant for the social and ecological functions of property ownership, gradually find the way in the constitutional matter and open the debate on whether to constitutionalize the sustainable development principle as a constitutional principle which is as important as the rule of law principle used to be in the 19th century and the social justice principle in the 20th century.

2. Social and ecological functions of property ownership in comparative constitutionality

The principle of social function of property ownership is an expression of an endavour to establish the balance between the interest of an individual and the community needs, which implies establishing rules on how it is used. Viewed historically, the social function of property concept was articulated by León Duguit, the advocate of the sociological theory of law, who presented it to the professional public for the first time during the lecture in Buenos Aires in 1911. According to the concept posited by Duguit, property does not have "extenal"

2 The analysis includes the constitutions of the following countries: Austria, Belgium, Bulgaria, Danmark, Italy, Macedonia, Germany, Poland, Russia , Slovenia, Serbia, France, Croatia, Montenegro, Spain and Switzerland. Constitutional provisions of foreign countries are cited according to constitutional texts, as published on the portal *Legislationline*, Retrieved 15 May 2018 from http://www.legislationline.org /documents/section/constitutions.

limits only, but also its "internal limits", immanent to its very nature. In contemporary law, the social function of property is not disputable, regardless of ideological starting points and principles of property regulation, being essentially different within national systems (Gregory, 2003: 733-776). In many states, the concept of social function of property ownership, was a justification for numerous agrarian and urban reforms (Foster, Bonilla, 2011: 101), which were the cornerstone for developing the social responsibility doctrine of the property right title holder. (Dagan, 2007: 1255-1274).

The social function of property ownership is related to the principle of social justice, which, apart from the principle of the rule of law, is warranteed by some constitutions as one of the basic principles on which the community rests. The essence of constitutional concretization of the social function of property ownership is embodied in two key rules: 1) property ownership implies obligations, and 2) using property ownership should serve the public interest.[3] The right of the title holder to freely and at own discretion use (or not use) some real estates that belong to him/her, is subject to limitation by these rules, owing to the obligation imposed on him/her to use it in the way that contributes to the public wellbeing, including both to an individual person and the community. In some constitutions the mentioned limitation refers to all forms of property,[4] in some of these consitutions it refers to public or state owned property only, economized and managed in the interest of citizens and the society,[5] and there are also constitutions prescribing this limitation for private property only.[6]

In addition to the social function of property ownership, in certain constitutions it is recognized and for the first time expressly provided that the property ownership has the ecological function.[7] The ecological function of property ownership stems from the right to a healthy living environment, which, as a fundamental human right[8] is nowadays warranted by a large number of consti-

3 Constitution of Germany (Art. 14, para.2)

4 Constitution of Germany (Art. 14, para.2), Constitution of Croatia (Art. 48, para.2), Constitution of Macedonia (Art. 30, paras.1 and 2), Constitution of Spain (Art.33, para.2 and Art. 128, para.1).

5 Constitution of Bulgaria (Art. 18, para.6).

6 Constitution of Italy (Art. 42, 2t. 2).

7 Constitution of Slovenia (Art. 61, para.1).

8 The right to sound environment is not a constituent part of the human rights corpus, guaranteed by European Convention on Human Rights. In practice of the European Court of Human Rights, its protection is achieved indirectly, by relating it to certain rights guaranteed by the Convention. The milestone in interpretation is the Decision in case *Lopez Ostra against Spain*, in which the European Court took the stand that not taking adequate measures to prevent further environment pollution and remove already made harm, represents human

tutions.[9] Shaping the very concept of ecological function of property ownership is the result of dramatic land, water and air polution levels which, in the second half of the 20th century, degraded natural ecosystems and human habitats and geopardized the biological survival and future of humankind.[10] People recognized that, in case they did not set the limits on their technical and technological development, it would be done by the nature instead. This awareness caused intensified design and mechanisms building for suppression (control) of ecologically irresponsible behaviour and environmental protection, including some process instruments for resolving ecological disputes (Petrušić, 2004: 424).

Although versatile legal instruments were developed for environmental protection, no consensus is reached on whether a human is the central value they should protect, or it is the nature, as the value in itself. The anthropocentric concept of environmental protection is still dominant, implying protection for the purpose of creating living conditions and development of human kind. However, the impacts of the ecocentric concept are more and more powerful; based on the idea of equality of the human and the nature, this concept entails that nature represents a substantive value, regardless of its importance in terms of maintenance and development of human society (Rakić, 1995: 247).[11]

For the purpose of environment protection, constitutions provide numerous rights and obligatons of legal entities, like the right of everybody to receive true, timely and full information on the environment condition,[12] the responsibility of

rights violation, justifying such attitude by the fact that «*the state failed to establish the balance between the economic interest of the City of Lorca and the right of the Petitioner to effectively enjoy the right to home and privacy and family right, as anticipated by the Art. 8. of the Convention*». Lopez-Ostra v. Spain, ECHR (1994), Series A, No. 303C. In more detail: (García San José, 2005: 12-15; Petrušić, 2005: 295-314).

9 Constitutions of Bulgaria (Art. 55, para.2), Montenegro (Art. 23, para.1), Croatia (Art. 69, para.1), Russia (Art. 62), Slovenia (Art. 72 para.1), Serbia (Art. 74, para.1), Spain (Art. 45, para.1).

10 In reports of the United Nations, it is estimated that throughout the world around 1.1 billion people have no access to drinking water, that more than five million people die per year due to diseases caused by polluted water, and *each day* six thousand children, less than five years old die due to the same reason. During one day only, six million tones of wastes are discharged into rivers, lakes and water flows. Information on the eco medium threat level in the country and the world may be found at the portal of the home eco-forum: http://www.ekoforum.rs.

11 Nowadays, the ecocentric concept is in expansion, as confirmed by increasing number of those, advocating for the idea that the legal subjectivity is to be acknowledged for animals, as well (Stojanović, 2017: 10).

12 Constitutions of Montenegro (Art.23, para.2), Poland (Art.74, para.3), Russia (Art. 42) & Serbia (Art.74, para.1).

experts for hiding facts and circumstances which may represent a risk to human life and health,[13] the obligation of everybody, particularly the public authorities to take care of, improve, reproduce and protect the environment, the live nature and its diversities, and use the natural wealth and resources[14] in a reasonable way, the responsibility to protect the environment[15] and compensate the damage made to environment,[16] the right to impact the decision making on issues significant for environment protection,[17] the right to healthy environment[18], etc.[19]

For the purpose of nature preservation, as a precondition of sustainable development, constitutional solutions on responsibility (of public authorities, in the first place) towards future generations are significant. The fundamental values in constitutional systems are as follows: space design and humanization and upgrading and respect for the environment;[20] the obligation of authorities to undertake activities in order to create permanent and measurable relation between the nature and its ability of renewal, on the one hamd, and its use by humans, on the other hand;[21] the obligation of public authorities to exercise the policy which guarantees ecological safety to present and future generations;[22] the responsibility towards future generations and obligation of the country to protect the natural wealth[23] and the environment by implementing law enforcement and other measures.

The ecological function of property ownership is the basis for constitutional regulation of the use of natural resources (water, soil, mineral resources, etc.); the usage regime also includes limitation on property rights related to these resources,[24] which is discussed in the fourth part of this paper.

13 Constitution of Russia (Art. 41, para.3).

14 Constitutions of Bulgaria (Art. 55), Montenegro (Art. 23, para.3), Croatia (Art. 69, para.2), Macedonia (Art. 43, paras.1&2), Poland (Art.74, paras.2&4 and Art.86), Russia (Art. 58), Slovenia (Art. 79, para.2), Serbia (Art.71, para.2).

15 E.g., Constitutions of Slovenia (Art. 72, para.3) and Serbia (Art. 74, para.2).

16 E.g., Constitution of Poland (Art. 86) and Constitution of Spain (Art. 45, para.3).

17 Constitution of Montenegro (Art. 23, para.2).

18 E.g., Constitution of Montenegro (Art. 23, para.2).

19 Some of these rights are the result of impelentation of *United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,* as of 1998 (Aarhus Convention). More detailed (Todić, 2002: 185-191).

20 Constitution of Macedonia (Art. 8, para.1, lines 8 and 10).

21 Constitution of Switzerland (Art. 73).

22 Constitution of Poland (Art. 74, para.1).

23 Constitution of Germany (Art. 20a).

24 Constitutions of Croatia (Art. 52), Macedonia (Art. 55, para.3) and Russia (Art. 36, para.2).

3. Constitutionalization of the property rights – general constitutional guarantees on property rights, forms of property ownership and title holders of property rights

As one of the basic (natural) rights, the inviolable right to property was guaranteed even by the end of the 18th century in the great declarations on human rights, but in the course of more than two centuries' long constitutionality development, it has been subject to significant changes in terms of its basic characteristics. Initially designed as a general standard, which guarantees the property right, the constitutional matter was expanded to numerous issues related to property and property rights. For that reason, the question we want to respond to in this paper requires the analysis of contemporary constitutional regulations on property rights.

In the comparative constitutionality, the general constitutional norm guarantees the right to property,[25] private property and other forms of property ownership, explicitly prescribed by the law.[26] Yet, the normative approach is different. In some constitutions, the ownership right is guaranteed in a separate provision, while the right of inheritance[27] or other property rights[28], that is, the right of inheritance[29] and other property rights[30] are guaranteed in another provision. Some constitutons contain just the blanket norm which guarantees the right to property, and the legislator is given freedom to regulate the right of inheritance,[31] prescribe the limits of legal and testamentary inheritance and the right of the state to inheritance,[32] or to guarantee the right of inheritance, prescribing that such right "may not be excluded or limited due to the non-fullfilment of public obligations."[33] Some constitutions include specific constitutional solutions on stimulating savings aimed at acquisition of property rights on real estates (apar-

25 Constitution of Bulgaria (Art. 17. para.1), Montenegro (Art. 58 para.1), Danmark (Art. 1 para.73), France (Art. 2) and Art. 17 of the Decaration of Human and Citizens Rights (integral part of Constitution), Croatia (Art. 48 para.1), Italy (Art. 42 para.1), Switzerlannd (Art. 90 para.1).

26 Constitution of Russia (Art. 8 para.2).

27 Constitutions of Bulgaria (Art.17 para.1), Macedonia (Art.30 para.1), Poland (Art.64 para.1), Spain (Art.33 para.1).

28 Constitutions of Gemany (Art. 42 para.1), Poland (Art. 64 para.1), Serbia (Art. 58 para.1).

29 Constitutions of Montenegro (Art. 60), Croatia (Art. 48 para.4), Serbia (Art. 59).

30 Constitution of Russia (Art. 35 para.2).

31 Constitution of Slovenia (Art. 67 para.1).

32 Constitution of Italy (Art. 42, para.4).

33 Constitution of Serbia (Art. 59).

tments and farmland)[34] and regulating property as the basis for management and decision making.[35]

Constitutions guarantee various forms of property ownership. Most constitutions guarantee the right to private and public property.[36] Public property is defined in different ways: as state-owned property[37] which includes municipality-owned property,[38] the city-owned property,[39] the property owned by an autonomous region,[40] the community-owned property,[41] socially owned property,[42] or the national property.[43] Exceptionally, some constitutions guarantee cooperative property[44] or mixed property[45] as a special form of property. Several constitutions contain some specific solutions. The Constitution of France prescribes, for example, that "any estate, every enterprise, the use of which has or gains the character of national public service or, practically, monopoly, must become the property of the community".[46] The Constitution of Germany provides that "land possession, natural wealth and production means may be transferred to social property or some other form of social economy".[47] Regulating the way and the rate of indemnification for the purpose of socialization, the Constitu-

34 Constitution of Italy, the Art. 47 prescribes that «the Republic stimulates and protects savings in all their forms, disciplines, coordinates and controls the credit operations. Through savings, it assists in population's obtaining property over apartments, immediate property of farmland and and indirect and direct shareholding investments in big production complexes in the country. «

35 Constitution of Macedonia (Art. 58).

36 Constitutions of Bulgaria (Art. 17 para.2), Italy (Art. 42 para.1), Slovenia (Art. 70 para.1), Serbia (Art. 86 para.1).

37 Constitutions of Serbia (Art. 86 para.1), Spain (Art. 132 para.3).

38 Constitution of Bulgaria (Art. 17 para.4).

39 Constitution of Russia (čl 8. para.2).

40 Constitution of Serbia (Art. 86 para.1).

41 Constitution of France (para. 9 Preamble).

42 Constitution of Germany (Art.15).

43 Constitution of Spain (Art. 132 para.3).

44 Constitution of Serbia (Art. 86 para.1).

45 Constitution of Germany (Art. 87e, para.3) prescribes that „Railway lines of a federal state shall be considered as industrial enterprises in mixed ownership. They are the property of the federal state in case the business of such enterprise includes railways building and maintenance. The sales of state shares that it, according to point 2, has got in that enterprise, is regulated by Law; most of shares shall remain the state property. More specific provisions shall be enacted by the federal law."

46 Constitution of France (para. 9 Preamble Constitutiona France).

47 Constitution of Germany (Art. 15).

tion of Spain provides that the law "regulates the state property and national property, their management, protection and preservation".[48] The Constitution of Poland provides that a family household is the basis of agricultural system of the country, as well as that such principle does not impair the right of property and inheritance, or the freedom of economy.[49]

Regarding the title holders of property, particularly in terms of ownership over real estates, the constitutional regulations refer to the status of foreign natural and legal persons as title holders of the ownership right. Constitutional solutions range betwen two extremes, starting from the universal guaranteees on property rights to foreigners over real estates, with reference to legal regulations and ratified international agreements[50], regulating the contents of the universal constitutional rule more specifically, and all the way to specifying the conditions under which foreigners acquire the ownership right,[51] especially the ownership right over land, natural wealth and resources of general interest,[52] or specifying resources over which the foreigners may acquire the ownership right[53] and the possible range of their property rights.[54]

4. Constitutionalization of natural resources: property rights, usage regime and protection

The constitutions which are subjected to this comparative analysis regulate the ownership right over the natural resources, as well as the regime of their use and special protection.

Constitutional regulations, in the domain of natural resources use and protection, are based on a widely accepted sustainable development principle aimed at meeting the needs of present generations, without endangering the ability

48 Constitution of Spain (Art. 132, para.3).

49 E.g., Constitution of Poland (Art. 23).

50 Constitution of Slovenia (Art. 68).

51 Constitutions of Montenegro (Art. 61), Croatia (Art. 48, para.3) Macedonia (Art. 31); Slovenia (Art. 68).

52 E.g. the Consitution of Bulgaria (Art. 22 para.1) prescribes that «Foreigners and foreign legal persons may not acquire the right property on land, except in case of inheritance according to the law. «

53 Constitutions of Slovenia (Art. 70, para. 3), Serbia (Art. 85, para.1).

54 Constitutions of Bulgaria (Art. 22 para.1) and Serbia (Art. 87 para.1) provide that "Foreigners may acquire concession right over the natural wealth and resources of general interest, as well as other rights, provided by law."

of future generations to meet their own needs.[55] The essence of sustainable development is environment protection,[56] which implies slowdown and eventual halting of natural resources depletion and environment degradation.[57]

Constitutional solutions in view of natural resources also differ. Some constitutions provide that these resources are the state property,[58] i.e. owned by the community,[59] or the private property; thus, they prescribe a special regime of their usage, possibility of expropriation[60] and special conditions under which foreigners may acquire the ownership right over these resources and goods.[61]

Regarding the use of natural resources,[62] constitutions establish a special regime, by prescribing principles on which the usage of such resources rests (inalie-

55 The concept of sustainable development was proclaimed for the first time by UN Commission on Environment and Development, in a well-known Report «Our Common Future». Recommendations of this Report were adopted in Rio de Janeiro Summit in 1992 and they are contained in Agenda 21, which gives recommendations for sustainable management of land, water and forest resources in 21st Century. During the last couple of years a new idea has been advocated for about, so called, „*strong sustainability*", based on the fact that some parts of nature are non-renewable, therefore they should be preserved forever. Such an attitude became visible in the Report of the Environment Protection Commission „*Environment and Human Rights*", adopted in the Parliamentary Assembly of the Council of Europe in April 2003. (*Environment and human rights*, 2003).

56 Although there is not a full agreement on the normative contents of the notion „sustainable development", the theory points out to its elements, as follows: common but divisible responsibility, intergenerational solidarity, intragenerational solidarity, justice, participation and gender equality (Baker, 2006; 26). In literature, there may also be found different interpretations of the sustainable development principle. Thus, Jonathan M. Harris includes social inequality and environment pollution reduction in the principles of sustainable development (Harris, 2001: 21).

57 The National Strategy of sustainable development of Serbia (2008-2017), as of 2008 («Official Gazette of RS», No. 57/2008) establishes the following principles of sustainable development: Intergenerational solidarity and intra- generational solidarity; Open and democratic society; Knowledge as the carrier of development; Inclusion in social processes; Integrating environmental issues in other sectors policies; Precaution; Subject causing pollution/ beneficiary pays; Sustainable production and consumption.

58 Constitutions of Bulgaria (Art. 18 para. 1), Montenegro (Art. 58 para. 3), Serbia (Art. 87 para.1).

59 Constitution of France (Art. 9 Preambule of Constitution).

60 Constitutions of Germany (Art. 15), Russia (Art. 36 para.2).

61 The Constitution of Slovenia – legal regulation of the right of foreigners to use natural wealth and resources in general use (Art. 80 para.3); the Constitution of Serbia – right of foreigners to acquire concession right over natural wealth and resources in general use (Art. 85 para.2) and the right of natural and legal persons to acquire certain rights on corresponding resources in general use, under conditions and in the way prescribed by law (Art. 87 para.2).

62 Constitution of Slovenia (Art. 70 para.1).

nability, non-obsolence and non-seizure, banning the change of their intended purpose),[63] as well as by regulating conditions under which these resources may be used,[64] or the way they may be used.[65]

There are significant differences among constitutions in view of the contents and the range of regulating natural resources, comprising air, water, land, mineral resorces, flora and fauna and the energy.

Air[66] is a natural eco-medium in view of which various constitutions regulate various issues: establishing a unique boundary emmission values for the air harmful matters,[67] air purification,[68] air cleanliness maintenance,[69] air space.[70] In a smaller number of analyzed constitutions, air is recognized and explicitely specified as a resource significant for the environment, specifically protected.

Constitutions classify water as a significant natural resource,[71] but there is a notable difference in the contents of constitutional provisions. Some constitutions, in addition to the blanket norm on water as a resource that enjoys special protection,[72] place special emhasis on coastal beach area,[73] the sea, sea-coast and islands.[74] In other constitutions, there is a principal provision missing and there are specifically listed sea-coast,[75] coasts, beaches, territorial waters and

63 Constitution of Spain (Art. 131 para.1).

64 Constitutions of Russia (Art. 36 para.2), Slovenia (Art. 70 para.2), Serbia (Art. 87 para.3), Spain (Art. 132 para.1 and para. 3).

65 Constitution of Serbia (Art. 89 para.2) provides that „Law may limit the forms of using and disposing, that is, prescribes conditions for using and disposing in order to eliminate the risk of making harm to nature or to prevent the violation of the rights of other persons' interests, based on the law."

66 Constitutions of Austria (Art. 10, para.1, point 11), Germany (Art. 74, para. 1 point 24), Croatia (Art. 52).

67 Constitution of Austria (Art. 11, para.5).

68 Constitution of Germany (Art. 74, para.1 point 24).

69 Constitution of Austria (Art. 10, para.1, point 11).

70 Constitution of Croatia (Art. 52).

71 Constitutions of Bulgaria (Art. 18, para.1), Croatia (Art. 52), Germany (Art. 74, para.1, point 17 i Art. 91 a, para.1), Spain (Art. 132, para.2 i Art. 148, para.1, point 10), Switzerland (Art. 76).

72 Constitutions of Bulgaria (Art. 18, para. 1) and Croatia (Art. 52).

73 Constitution of Bulgaria (Art. 18, para.1).

74 Constitution of Croatia (Art. 52).

75 Constitution of Germany (Art. 74, para.1, point 17 and Art. 91a, para.1).

natural springs[76], land reclaimed from the sea and swamps[77], chanels and irrigation, mineral and thermal water[78], water resources[79] and particularly the international and inter-cantonal water resources.[80] Constitutions regulate other issues as well, significant for the water regime and preservation of this natural resource, such as: construction and use of hydraulic plants,[81] careful use and protection of water sources and defense from harmful impacts of water,[82] maintenance and discovery of water sources, using waters for energy production, cooling and intake in water flow circulation,[83] enacting regulations on water protection, securing corresponding residual water, water quantities industry, securing embankmets and impact of atmospheric residues,[84] competence of regional authorities related to water sources use and possibility of introducing taxes for water sources use,[85] using water for transportation companies with tax payment for use,[86] supply of water,[87] marine waterways and river waterways of general significance,[88] etc.

In a vast majority of constitutions, the land is recognized as the primary natural resource.[89] The accent is on agricultural and arable land, particularly on the way of using this land, which is regulated in constitutions in different ways. Some constitutions put the emphasis on "rational and planned use";[90] some insist on using the land "for agricultural purposes only, with the possibility to change the intended purpose of the land in exceptional cases only, if the need for that has been proved, under the condions and in the way prescribed by

76 Constitution of Spain (Art. 132, para.2).

77 Constitution of Belgium (Art. 113).

78 Constitution of Spain (Art. 148, para.1, point 10).

79 Constitution of Switzerland (Art. 76, para.1).

80 Constitution of Switzerland (Art. 76, para.5).

81 Constitution of Spain (Art. 148, para. 1, point 10).

82 Constitution of Switzerland (Art. 76, para.1).

83 Constitution of Switzerland (Art. 76, para.2).

84 Constitution of Switzerland (Art. 76, para.3).

85 Constitution of Switzerland (Art. 76, para.4). Italy (Art. 44 i Art. 117 para.2), Germany (Art. 75, para.1 points 3,4 & 17), Poland (Art. 23), Russia (Art. 9, para.

86 Constitution of Switzerland (Art. 76, para.4).

87 Constitution of Germany (Art. 75, para.1, points 3 and 4).

88 Constitution of Germany (Art. 74, para.1, point 21).

89 Constitutions of Austria (Art. 14, st, 1, 2, 4 i 5), Belgium (Art. 113), Bulgaria (Art. 21), Croatia (Art. 52),2), Slovenia (Art. 71, paras.1 and 2), Serbia (Art. 88, para.1), Spain (Art. 47, para.1).

90 Constitution of Croatia (Art. 52).

law.[91] Some constitutions underline that usage must be "in accordance with the general interest, particularly if it is to do with the change of the land intended purpose";[92] some consitutions point out to "land design",[93] "agricultural structure improvement",[94] while some prescribe the foundation of "regional institutions for crediting agriculture and land development.[95] Some constitutions insist on agricultural and arable land protection,[96] which is especially regulated in detail in the Constitution of Switzerland.[97]

In principle, certain constitutions provide that land is "the fundamental national wealth, under special protection of the state and the society",[98] as well as that land is used and kept as "the basis of life and work of people living in a corresponding territory."[99] The Constitution of Austria contains a specific solution, regulating in detail schooling of experts in the fields of agriculture and forestry.[100]

Constitutions regulate mineral (underground) resources as a significant natural and developmental resource, but the solutions differ and the terminology varies as well. Mineral resources or mining are explicitly mentioned in several constitutions only[101] and most constitutions use general notions, the meaning of which is much broader, for example: natural wealth,[102] natural resources,[103] general interest resources,[104] natural sources,[105] natural heritage[106], etc. The norms are, in most cases, general and include all natural resources. Regulation

91 Constitution of Bulgaria (Art. 21, para.2).

92 Constitution of Spain (Art. 47, para.1).

93 Constitution of Germany (Art. 75, para.1, points 3 and 4).

94 Constitution of Germany (Art. 91a para.1 point 3).

95 Constitution of Italy (Art. 114, para.2).

96 Constitutions of Austria (Art. 14, paras.1,2,4 and 5), Bulgaria (Art. 21), Germany (Art. 74, para.1, point 17), Poland (Art.23), Slovenia (Art.71, paras.1 and 2), Serbia (Art. 88, para.1), Spain (Art. 47, para.1 & Art. 130, para.1).

97 Art. 104. Constitution of Switzerland.

98 Constitution of Bulgaria (Art. 21, para.1).

99 Constitution of Russia (Art. 9, para. 2).

100 Constitution of Austria (Art. 14, para. 1, 2, 4, i 5).

101 For example, in constitutions of Austria (Art. 10, para.1, point 10), Bulgaria (Art. 18, para.1), Croatia (Art. 52), Macedonia (Art. 56, para.1), Spain (Art. 45, para.2).

102 Constitutions of Macedonia (Art. 56, para.1), Slovenia (Art. 70, paras. 2 & 3), Serbia (Art. 85, para.2).

103 Constitution of Russia (Art. 9 para.1).

104 Constitution of Serbia (Art. 88, para.1).

105 Constitution of Spain (Art. 45, para.2).

106 Constitution of Montenegro (Art. 78).

on the use and protection of these resources in more specific details is missing, or referrence is made to legal regulation of these issues.[107] The property regime and the way of using these resources is prescribed in a number of constitutions.[108] Only some constitutions regulate the way of using these resources in more detail, with emphasis on the rational use,[109] prescribing that such resources must be used to protect and improve living conditions and protect and renew the environment,[110] that these resources may be freely disposed of, provided that it "would not harm the environment or disturb the rights and legal interests of other persons"[111].

The subject of constitutional regulations is the protection of flora and fauna as well. Constitutional solutions vary, depending on the contents and scope of constitutional regulations, as well as the resources emphasized. Some constitutions, globally prescribe special protection of flora and fauna and other parts of nature,[112] nature reserves[113] and special ecosystems.[114]

In view of flora protection, some constitutions emphasize protection of specific parts, such as forests (special regime and forest protection,[115] forests exploitation[116]) and forest land,[117] pastures,[118] parks of national interest,[119] mountain landscapes[120] (special measures for mountain areas[121]), continental shelf (special exploration, excavation, use, preservation and economizing, taking care of biological, mineral and energetic resources in such marine vastness),[122] footpaths

107 Constitutions of Slovenia (Art. 70, paras. 2 & 3), Serbia (Art. 85, para.2).

108 E.g., Constitutions of Bulgaria (Art. 22 para.1), Montenegro (Art. 58 para.3 and Art. 59), Germany (Art. 15), Russia (Art. 36 para.2), Slovenia (Art. 70, para.3), Serbia (Art. 85, paras. 1 & 2 and Art. 87 paras. 1 & 2), Spain (Art. 128 and Art. 131 para.1).

109 Constitution of Spain (Art. 45, para.2).

110 Constitution of Spain (Art. 45, para.2).

111 Constitution of Russia (Art. 36, para.2).

112 Constitutions of Croatia (Art. 52) and Macedonia (Art. 56, para. 1).

113 Constitution of Bulgaia (Art. 18, para.1).

114 Constitution of Italy (Art. 117, para.1).

115 Constitutions of Austria (Art. 10, para. 1, point 10), Bulgaria (Art. 18, para.1), Croatia (Art. 52), Germany (Art. 74, para.1, point 17), Switzerland (Art. 77).

116 Constitution of Spain (Art. 148, para. 1, point 8).

117 Constitution of Serbia (Art. 88 para. 1).

118 Constitution of Austria (Art. 10, para. 1, point 10).

119 Constitution of Bugaria (Art. 18, para.1).

120 Constitution of Spain (Art. 130, para.3).

121 Constitution of Italy (Art. 44).

122 Constitution of Bugaria (Art. 18, para.2).

and walkways.[123] Other consitutions regulate protecton of plants from diseases and pests,[124] in particular, protection of agricultural and forest plants,[125] sales of crops and plants,[126] fertilizers for plants and protection devices, as well as acceptance and recognition of crops and plants kinds[127], etc.

The subject matter of constitutional regulations is also the protection of fauna, but constitutional solutions differ. Thus, the regulated areas include: hunting and fishing activities, taking care of "preservation of abundance of fish, wild mammals and birds",[128] fishing and hunting,[129] particularly marine fishing,[130] fishing in the open sea and along the coast,[131] sales of animal food,[132] taking measures against infectious and other diseases, dangerous for the community, both for people and animals,[133] veterinary services and protection of animal food,[134] protection of animals from torture,[135] cattle breeding[136], etc.

Energy and various sources of energy, as the natural and developmental resources, are also the subject matter of constitutional regulations, with particular reference to the rational use, production, transmission and distribution of energy, safety measures and strong currency tracks, construction plans and use of hydraulic plants, etc.[137] There are specific provisions on the atomic energy

123 Constitution of Switzerland (Art. 88).

124 Constitutioni of Austria (Art. 12, para.1, point 4) and Germany (Art. 74, para.1, point 20).

125 Constitution of Germany (Art. 74, para.1, point 20).

126 Constitutioni of Austria (Art. 10, para.1, point 11) i Germany (Art. 11 a, para.1, point 20).

127 Constitution of Austria (Art. 10, para.1, point 11).

128 Constitution of Switzerland (Art. 79).

129 Constitution of Spain (Art. 130, para.1).

130 Constitution of Spain (Art. 149, para.1 point 19).

131 Constitution ofGermany (Art. 74, para.1, point 11).

132 Germany (Art. 11 a, para.1, point 20).

133 Constitution of Germany (Art. 11 a, para.1, point 19).

134 Constitution of Austria (Art. 10, para.1, point 11).

135 Constitution of Slovenia (Art. 72, para.4) and Consitution of Switzerland (Art. 80), prescribing the competence of Confederation to regulate « A. Keeping animals and caring about them; B. Animals experiments and interventions on live animals; C. Use of animals; D. Import of animals and animal products; E. Animals trade and transportation; F. Killing animals.«

136 Constitution of Spain (Art. 130, para.1 and Art. 148, para.1, point 7).

137 Constitutions of Austria (Art. 10, para.1 points 9 & 10 and Art. 12, para.1), Italy (Art. 117, para.2), Switzerland (Art. 89 and Art. 91), Spain (Art. 45 and Art. 149, para.1 point 21), Germany (Art. 74, para.1, point 11a).

as a source of energy,[138] its production and use, strict prescription of using it for peaceful purposes,[139] as well as the obligatons related to protection from risks incurred by atomic energy release or by ionized rays and removal of radioactive matters, etc. An illustrative example of detailed regulations in this field is offered by the Constitution of Switzerland.[140]

Constitutional regulations are not exhausted in identifying the most significant natural developmental resources only, but they expand to regulating fields which potentially endanger the environment. The subject matter of regulations are numerous issues related to production, sales, use and handling of matters and products that may endanger the living environment, such as: hazardous and other wastes management,[141] pharmaceutical products production and handling,[142] manufacture of radioactive products, weapons, explosive substances and matters[143] with powerful biological effect, waste disposal, air purification and noise fighting,[144] handling of medicaments and narcotic drugs, organisms, chemicals and objects that may impair health,[145] establishing unique limit emission values for matters, harmful to air and air cleanliness maintenance,[146] liquid or gaseous fuel or transportation of drive material,[147] measures for preventing dangerous loading on environment, which occur by exceeding limit emmission values,[148] regime of production, trade, keeping and using weapons and explosives,[149] production, procurement, sales, import, export and passage of military material,[150] food and control of food and provisions,[151] meteorological service,[152] special traffic regime of heavy vehicles for the purpose

138 Constitutions of Austria (Art. 10, para.1, points 10 & 11), Bulgaria (Art. 18, para.4), Germany (Art. 74, para.1 point 11 a), Switzerland (Art. 90 and 118).

139 Constitution of Germany (Art. 74, para.1 point 11 a).

140 Constitution of Switzerland (Art. 89).

141 Constitution of Austria (Art. 10, para.1, point 11).

142 Constitution of Spain (Art. 163, para.1, point 16).

143 Constitution of Bulgaria (Art. 18, para.4).

144 Constitution of Germany (Art. 74, para.1 point 24)

145 Constitution of Switzerland (Art. 118)

146 Constitution of Austria (Art. 10, para. 1 point 11 and Art. 11, para.5).

147 Constitution of Switzerland (Art. 91).

148 Constitution of Austria (Art. 10, para.1, point 11).

149 Constitution of Spain (Art. 149, para.1 point 26).

150 Constitution of Switzerland (Art. 107, para.2).

151 Constitutions of Austria (Art. 10, para.1, point 11), Italy (Art. 117, para.2), Germany (Art. 74, para.1, point 20), Switzerland (Art. 104, page 3, point c).

152 Constitution of Spain (Art. 140, para.1 point 20)

of environment protection,[153] heavy vehicles traffic tax,[154] road traffic effects related to environment and nature protection measures,[155] environment protection from harmful effects of excessive use of fertilizers, chemicals and other auxilliary materials,[156] control and supervision of regulations application, related to matters posing risk to environment[157], etc.

Apart from identifying the development related natural resources, constitutions regulate resources protection as well. The most significant question is who is obliged to protect the environment, natural resources and wealth. There are no important differences among constitutions in regulating obligations related to environment protection, natural resources and wealth. In most cases, there are blanket provisions, such as "everybody is obliged to keep, take care of, and protect the environment, natural resources and wealth",[158] simultaneously regulating the state (public authorities) obligation related to protection of the environment, natural resources and wealth.[159] This issue is more precisely regulated in the provisions of federal and regional states constitutions allocating authorization among the various levels of authority.[160]

153 Constitution of Switzerland (Art. 84) regulates heavy vehicles transit traffic over the Alpes: « 1. Confederation protects the Alpine area from transit traffic negative effects. It limits the transit traffic overload to a measure not harmful to people, animals and plants and living spaces, too. 2. Transit traffic of goods over the Alpes, from border to border, is by the railways. Federal Council enacts necessary measures. Exceptions are allowed only if they cannot be avoided. The Law must explain them in more detail. 3. Transit roads capacity in Alpine area must not be increased. This restriction excludes bypass roads, relieving settled places of transit traffic».

154 Constitution of Switzerland (Art. 85, para.1) establishes the right for introducing heavy vehicles traffic tax depending on their power and consumption.

155 Constitution of Switzerland (Art. 86, para.3 point d).

156 Constitution of Switzerland (Art. 104, para.3 point d).

157 Constitution of Austria (Art. 11 point 9) prescribes that «Federal government and some federal ministers have authorizations, as follows: 1. Authority to get insight into the acts of Provincial authorities through the Federal organs; 2. Authority to request reports on application of law and ordinances enacted on the Federal level; 3.Authority to request all the information on implementation, necessary for preparation and enactment of Federal laws and ordinances; 4. Autrofity to request information and insight into acts in some special cases, if it is necessary for applying other authorizations.»

158 E.g. Constitutions of Slovenia (Art. 73 para.1), Serbia (Art. 89 para.1).

159 E.g. Constitutions of Slovenia (Art. 73 para. 2), Serbia (Art. 89 para. 2), Spain (Art. 45, para. 2), Switzerland (Art. 74 para.2 and Art. 78)

160 E.g. Constitutions of Austria (Art. 10, 11 and 12), Italy (Art. 117), Germany (Art. 72, 74, 75, 87 c and 91 a), Spain (Art. 148 points 3, 7, 8, 9, and 10 and Art. 149 para.1 points 16, 19, 20, 21, 25 & 26 and Art. 149 para.3), Switzerland (Art. 78 to 120).

One form of protection is reflected in a type of legislation regulating the environment, natural resources and wealth protection. It is particularly visible in contries established on the federal and regional bases in which constitutions, carefully and in detail, regulate the allocation of authority among the central and non-central bodies, including both the basis and the framework of their responsibilities for the environment, natural and developmental resources protection. The most significant issues in this field are regulated by rules of the central authority bodies which have the legislative/regulatory authority.[161] The regulation enforcement activities are vested in the central authority organs,[162] or they can be reserved for non-central organs, too.[163] Only in some fields of environmental protection, there is a competitive authority in the domain of legislation.Then, the central authority rules regulate the principles, essential and the most important issues, thus setting the general regulatory framework for the natural resources protection. As for the non-central organs, they are reserved the right to regulate some concrete issues more specifically within the provided frameworks.

A specific form of environment, natural wealth and resources protection is also the constitutional regulation of property rights on these resources and the title holders of such rights, including: forms of property (state propety,[164] state monopoly,[165] public property, socially owned property, private property[166]); titleholders of property rights (state property,[167] state monopoly,[168] public property, socially owned property, private property,[169] property rights of foreign persons[170]); special regime of their use (legal regulation of the regime of using these resources,[171] concession[172] use and possibility of limiting property rights

161 Constitutions of Austria (Art. 10, 11 i 12), Italy (Art. 117), Germany (Art. 72, 74, 75, 87 c and 91 a).

162 Constitution of Austria (Art. 10, para.1, points 9, 10, 11)

163 Constitution of Austria (Art. 11, para.1, point 7 and paras.5 & 9, as well as Art. 12, para.1, point 4)

164 Constitutions of Bulgaria (Art. 18, para.1), Russia (Art. 9 para.2)

165 Constitution of Bulgaria (Art. 18, para.2)

166 Constitution of Russia (Art. 9, para.2)

167 Constitutions of Bulgaria (Art. 18, para.1), Russia (Art. 9 para.2)

168 Constitution of Bulgaria (Art. 18, para.2)

169 Constitution of Russia (Art. 9, para.2)

170 Constitution of Bulgaria (Art. 22)

171 Constitution of Croatia (Art. 52, para.2)

172 Constitution of Bulgaria (Art. 18, para.5)

on these resources,[173] cautious and rational use of certain resources[174]); special protection of these resources[175] and responsibility of the state, in the first place,[176] but all other subjects as well.[177]

5. Expropriation and limitations on the propety rights

Social and ecological functions of property ownership are the bases for expropriation and limitations on the ownership right. Generally viewed, in comparative constitutionality, there are three prevailing approaches to regulating expropriation or limitations on private property. Some constitutions regulate expropriation only,[178] other constitutions regulate expropriation and limitation on private property ownership in a uniform way,[179] and the third group of constitutions include specific provisions on expropriation and limitation on private property ownership.[180]

5.1. Expropriation – conditions under which it is possible and permissible

In comparative constitutionality, solutions related to expropriation are characterized by some common features as well as by significant differences. The common features of constitutional solutions are related to the constitutional basis for expropriation, reasons and goals of expropriation, compensation for expropriated property, as well as the way and time of compensation payment for the expropriated property. Differences are reflected in the contents and range of constitutional regulation of issues relevant for expropriation. Differences are also visible in terms of legal regulation of expropriation; some constitutions prescribe that expropriation is allowed on the basis of law only, or if

173 Constitutions of Italy (Art. 44), Russia (Art. 36, paras.2 & 3)

174 Constitution of Switzerland (Art. 89) regulates the principles on the use of energy: «sufficient, manifold, safe, economic and ecological energy generating supply», «saving and rational enegry consumption», «using domestic renewable energies», «development of energy techniques, especially for energy saving and renewable energies», etc.

175 Constitution of Macedonia (Art. 56)

176 Constitutions of Croatia (Art. 52, para.1), Italy (Art. 9, para.2)

177 Constitution of Montenegro (Art. 78)

178 E.g. Constitutions of France (Art. 17 Declaration of Human and Civil Rights which is an integral part of the Constitution of France), Italy (Art. 42), Germany (Art. 14), Poland (Art. 21), Russia (Art. 35), Spain (Art. 33)

179 E.g.Constitutions of Montenegro (Art. 58 para.2), Croatia (Art. 50 para.1), Macedonia (Art. 30 paras.3 & 4), Slovenia (Art. 69), Serbia (Art. 58), Switzerland (Art. 26).

180 E.g.Constitutions of Poland (Art. 22), Serbia (Art. 58).

it is provided by law,[181] and some constitutions separately indicate that public interest, which is the basis of expropriation,[182] must be established by law or by the way and range of expropriation.[183] On the other hand, differences exist both in terms of reasons for expropriation and conditions that must be met for the expropriation to be legal. In constitutions, there are various conditions posed: public interest,[184] state interest,[185] common good,[186] public need,[187] public benefit,[188] social interest,[189] inability to satisfying needs in other way.[190] The terms used in constitutions are general, and their meaning and contents have not been specified; so, they equally seem to refer to the interests and needs of a widest range of citizens. As a good practice in comparative constitutionality,[191] there are featured solutions ordering the legislator to operationalize and specify in detail the contents of the included terms.

One of expropriation conditions provided by national constitutions is indemnification of the property title holder. Constitutions mutually differ both in terms of principles, i.e. the criteria the indemnification is based on, and in terms of regulating the moment at which the property title holder is indemnified. One group of constitutions establish the principle of justice ("just indemnification",[192] "just compensation"[193]), as the indemnification criterion. The second group of constitutions, alongside with the principle of justice, establish the market value as a principle for specifying the expropriated property compensation amount, thus also regulating more specifically the contents of justice principle

181 Bulgaria (Art. 17), Danmark (Art. 1 para.73), Croatia (Art. 50), Italy (Art. 42), Macedonia (Art. 30), Gemany (Art. 14), Spain (Art. 33), Slovenia (Art. 69), Serbia (Art. 58 para.2).

182 Constitution of Macedonia (Art. 30 paras. 3 & 4).

183 Constitution of Germany (Art. 14 para.2).

184 Constitutions of Montenegro (Art. 58 para.2), Macedonia (Art. 30 para.3), Poland (Art. 21 para.2), Serbia (Art. 58 para.2), Slovenia (Art. 69).

185 Constitution of Croatia (Art. 50 para.1)

186 Constitution of Germany provides that expropriation should „serve the common good" (Art. 14 para.2).

187 Constitution of France provides that expropriation is allowed „when the public need requires that in a transparent way," (Art. 17 para.1 Declarations of civil freedoms and rights).

188 Constitution of Spain (Art. 33 para.3)

189 Constitution of Spain (Art. 33 para.3)

190 Constitution of Bulgaria (Art. 17, para.5).

191 E.g. Solutions in Constitutions of Germany and Macedonia.

192 Constitutions of Bulgaria (Art. 17, para.5); France (Art. 17, para.1 Declaration of freedoms and civil rights); Poland (Art. 21, para.2); Russia (Art. 35, para.3).

193 Constitution of Montenegro (Art. 58, para.2).

("just compensation that may not be lower than market value"[194]) or explicitly establishing that expropriation is possible provided the compensation is paid at market value.[195] The third group of constitutions is heterogeneous, including provisions which prescribe the payment of "corresponding compensation",[196] "full indemnification",[197] "full compensation",[198] "compensation with just estimation of community interests and the owner",[199] "compensation in kind or with indemnification.[200] Only one of the analized constitutions prescribes that "private property may be expropriated even without compensation, if it is in common interest"[201], as well as that "to the end of general benefit, law may provide that the right of possession of certain enterprises or groups of enterprises which refer to the basic public services or to the energy sources or have the monopolistic position, and the public interest[202] prevails, may be kept for the state public bodies, or community of workers or an individual beneficiary, or it may be transferred to them by expropriation without compensation". Some constitutions even regulate the time for paying compensation for the expropriated property, providing that compensation is paid before the property expropriation.[203] Only one of the analyzed constitutions specifies another expropriation condition, envisaging that it is possible only according to the decision of the court.[204]

Most constitutions contain the norm that proprietary and ownership rights enjoy equal legal protection. Exceptionally, only two of the analyzed constitutions regulate judicial protection of property right in expropriation proceedings,[205] and

194 Constitutions of Macedonia (Art. 30, paras. 3 & 4); Serbia (Art. 58, para.2).

195 Constitution of Croatia (Art. 50, para.1).

196 Constitution of Spain (Art. 33, para.3).

197 Constitution of Danmark (para.1 para.73).

198 Constitution of Switzerland (Art. 26, para.2).

199 Constitution of Germany (Art. 14, para.2) prescribes that «decision on expropriation must be enacted with just estimation of the community interests and the owner».

200 Constitution of Slovenia (Art. 69).. «

201 Constitution of Italy (Art. 42, para.3).

202 Constitution of Italy (Art. 43).

203 Constitutions of Bulgaria (Art. 17, para.5); France (Art. 17, para.1 Declaration of Freedoms and Civil Rights); Russia (Art. 35, para.3).

204 Constitution of Russia (Art. 35, para.3).

205 The Constitution of Danmark (Art. 3 para.73) prescribes that «any issue of expropriation acts legality and the indemnification amount may be brought before the Court. Proceedings of indemnification matters may be, according to the law, referred to courts, founded for that purpose»; the Constitution of Germany (Art. 14, para.3) prescribes that «in case of dispute for expropriation indemnification amount, jurisdiction of regular court shall prevai».

only one constitution provides a special proceeding, which entails adopting a law which regulates expropriation, as a special form of property right[206] protection.

5.2. Limitation on the property ownership right: conditions under which the limitation is allowed

In addition to expropriation, some constitutions regulate the possibility of imposing limitations on property ownership. Most constitutions which envisage this possibility regulate expropriation and limitation on property in the same way, particularly concerning the conditions under which expropriation and limitation on property are possible and allowed.[207] Only a smaller number of constitutions separately regulate limitation on property ownership, and conditions under which it is possible. In the comparative constitutionality, these conditions and formulations are different, such as: " ownership may be limited by law only",[208] "for the purpose of protection of the interests and security of the Republic, the nature, environment and health of people",[209] "ownership may be limited only to the extent which does not violate the essence of the ownership right",[210] "the way of property use may be limited",[211] "limitation on property ownership for the purpose of collection of tax and other levies or fines is allowed only in accordance with the law".[212]

The consitutional solutions are also different when comes to the regulation of the way of using property ownership and compensation payment for limitations the title holders are subjected to. Limitations pertain to the use of natural resources (sea, sea coast and islands, water, air space, mineral resources and other natural wealth, land, forests, flora and fauna, other parts of nature), immovable estates and objects of special cultural, economic and ecological significance, enjoying the special protection of the state.[213]

206 The Constitution of Danmark (para.2 section 73) provides that «when adopting the Draft Law on Property Expropriation, 1/3 of the National Assmbly members may, within three days from the final Draft adoption, request that the proposal should not be submitted to the King for adoption until the new elections for the National Assembly be held, and the proposal accepted once again by by the newly constituted National Assembly».

207 Constitutions of Montenegro (Art. 58, para. 2); Macedonia (Art. 33 para. 3 i 4); Slovenia (Art. 69); Switzerland (Art. 26, para.2).

208 Constitutions of Croatia (Art. 50, para.2); Poland (Art. 22, para.3); Serbia (Art. 58, para.3).

209 Constitution of Croatia (Art. 50, para.2).

210 Constitution of Poland (Art. 22, para.3).

211 Constitution of Serbia (Art. 58, para.3).

212 Constitution of Serbia (Art. 58, para.4).

213 Constitution of Croatia (Article 52)

6. Concluding Remarks

Contemporary constitutional solutions in the domain of proprietary relations are strongly impacted by the idea on the necessity to establish the balance between the individual interests of the property title holder and the community interests, but also the balance between the needs of present and future generations. Constitutional norms ensure the realization of social and ecological functions of property ownership. In the analyzed constitutions, the constitutionalization of the right to property clearly demonstrates the stance that property ownership entails obligations; therefore, it is subject to legitimate limitations, imposed to ensure not only the principles of social justice but also the principle of sustainable development, whose exercise is the cornerstone of survival and advancement of the humankind.

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СОЦИЈАЛНА ФУНКЦИЈА СВОЈИНЕ У КОНТЕКСТУ ОДРЖИВОГ РАЗВОЈА

Резиме

У раду се истражује садржај права својине као људског права, с ослонцем на компаративну уставност, међународне стандарде у овој области, праксу Европског суда за људска права и решења садржана у Уставу Републике Србије. У фокусу је контитуционализација права својине у контексту принципа социјалне правде и социјалне функције права својине, као и принципа одрживог развоја. Елаборирано је неколико кључних питања која су од значаја за остваривање ових принципа.

Размотрен је својински режим над развојним ресурсима и добрима у општој употреби, а нарочито статус страних физичких или правних лица као титулара својине, посебан режим коришћења ових добара, посебна заштита добара која чине развојне ресурсе и др. Анализирана су могућа ограничењима права својине, при чему је посебна пажња посвећена експропријацији, условима под којима је она могућа и допуштена, основима за експропријацију (јавни интерес, заштита животне средине и др.), принципи на којима почива одређивање накнаде за експроприсану својину (правична накнада, накнада на основу тржишне вредности) и начин исплате накнаде (претходна или накнадна) и посебно заштита права својине у поступку експропријације (судска заштита).

Размотрена су уставна решења у погледу начина коришћења права својине посебно режими коришћења добара која чине развојне ресурсе (пољопривредно земљиште, шуме, пашњаци, рудна богатства и др.), коришћење добара у контексту социјалне функције власништва, јавног интереса, екологије и заштите животне средине сл. Сагледана је и расподела надлежности између различитих нивоа власти у федералним и регионално уређеним државама у вези са регулисањем својинских права (регулативе, извршење, одговорност и др.), као индикатор одговорности различитих нивоа власти у домену коришћења својинских права и развојних ресурса у заједници.

Кључне речи: *Право својине, социјалне функције права својине, ограничења права својине, одрживи развој.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879115M

UDK: 336.227(4-672EU)
341.217(4-672EU)

Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*ACCESSION NEGOTIATION CHALLENGES FACING CANDIDATE COUNTRIES IN THE FIELD OF TAXATION***

Abstract:*The Copenhagen Criteriaset out the essential conditions which candidate countries must satisfy in order to become member states.The present paper aims to studytheeffects ofopening of the Taxation Chapter in EU accession negotiations for candidate countries, and to present the Bulgarian experience and achievements in this area. The role of the European Union's Instrument for Pre-Accession Assistance (IPA) will be discussed as a major contribution and support in the accession process.The knowledge and implications outlined in the present paper could help to strengthen the role of academic circles in the accession processes of Western Balkan countries in line with the priorities of the BulgarianPresidency of the Council of the EU.In addition to texts in the field of law, the present study and the analyses carried withinhave made use of information published on the Internet, quoting the exact source. The subjectmatter is complex and multifaceted, and the study makes no claims to being exhaustive.*

Keywords: *EU Tax Law, Taxation Chapter in EU accession negotiations, Bulgarian experience.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Challenges of EU accession in the area of Taxation

The objective of the EC is to establish a common market, the operation of which directly concerns interested parties in the Community[1].The internal market supposesthe abolition of obstacles to the free movement of goods, persons, services and capital between EU Member States (Article 3-6 TEU). TheEuropean Common Market creates enormous opportunitiesfor companies and individuals but raises alot ofissues related to: the EU legal framework on Taxation; fundamental freedoms and fiscal sovereignty;tax rules of the *acquis*; direct corporate and individual taxation, including the fight against corporate tax avoidance (the European Union's Anti-Tax Avoidance Directive); thefundamental VAT rules and principles such astaxable persons, taxable transactions, deductions, exemptions, supply rules and the acquisition of goods; the role of the European Court of Justice (ECJ); international taxation challenges, International tax jurisdiction, double taxation treaties, OECD Tax policy; the BEPS project.

Even in the absence of taxation issues, the negotiation process holds numerous challenges and requires the mobilisation of the intellectual and physical potential of all stakeholders, such as representatives of the legislative power, the executive power, the judiciary, academic circles, businesses, etc.

In the first place, the Copenhagen Criteria are generally considered to be the essential conditions which a candidate country must satisfy in order to become a member state. The conditions and timing of acandidate's adoption, implementation and enforcement of all current EU rules (the'*acquis*') are negotiated and the rules are divided into35 different policy fields (chapters), including Chapter 16 Taxation[2].*A candidate country has to accept the acquis before joining the EU and make EU law part of its national legislation.* Adoption and implementation of the *acquis* are the basis of the accession negotiations.[3]Member States must take all appropriate measures to ensure fulfilment of the obligations arising from the Treaty or from secondary legislation. They must facilitate the achievement of the Community's tasks and abstain from measures which could jeopardise the objectives of the Treaty: Article 10 TFEU (ex 5)[4].The biggest challenge, however, is not only the adoption of *acquis* but its subsequent proper application following

1 Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastinge* [1963]

2 A bilateral screening meeting for Chapter 16 – Taxation was held in Brussels on 5 and 6 March 2015. The delegation of the government of the Republic of Serbia was headed by Mr. Nenad Mijailović, State Secretary in the Ministry of Finance and Head of Negotiating group 16, and Ms. Tanja Miščević, Head of Negotiating Team with the EU. Retrieved on 11 June 2018 from http://www.eu-pregovori.rs/eng/negotiating-chapters/chapter-16-taxation/.

3 Candidate countries negotiation status: https://ec.europa.eu/neighbourhood-enlargement/countries/check-current-status_en. Retrieved 11 June 2018

4 Case 272/86 *Commission v Greece* [1988]

accession. Several of the issues facing our judicial practice and law enforcement are listed further below.

In the second place, in terms of sources of EU law[5] in the area of taxation, the main concepts and rules apply. Legal doctrine discriminates between three main groups of acts which comprise the so-called primary law and stand foremost in the hierarchy of EU legislation. These are the treaties creating the Union, the acts which amend those treaties and the treaties of accession of new member states. These are all conventional instruments, constituting classic international treaties.

Among the valid treaties are the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU).The EC Treaty is an integral part of the legal system of the Member States and must be applied by their courts. Treaty provisions are capable of creating direct effects both vertically (between the state and individuals) and horizontally (between individuals)**.** EU law consists of the founding treaties (the TEU and the TFEU) and the legal provisions based on the legislative powers delegated to the European Union by the founding treaties. The portion of EU law provisions that may have an effect on taxes is referred to asEU Tax Law.The Charter of Fundamental Rights of the European Union was adopted after entry into force of the Lisbon Treaty on 1 December 2009, and it was decided that the Union shall accede to the ECHR[6]. Human rights play an enormous role in tax cases. The scope of the Charter[7], however, is limited to cases in which EU law is at issue according to Article 51.

The fundamental rights and the general principles of EU law are protected by the ECJ. Taxpayer rights relate to the main principles of EC law*:* proportionality; legal certainty; legitimate expectations; fair play; due care principle; protection against arbitrary laws/regulations; equal treatment; no discrimination; right to privacy; right to be taxed fairly; right to be trusted; right to move on right to equal treatment. At present, the issue of taxpayer's rights must be interpreted in light of the new trends, related to Transparency and Data Protection[8].

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5 About EU Law see: Weatherill, S. (2016) *Cases and Materials on EU Law*. Twelfth Edition. Oxford University Press, Weatherill, S. (2016) *Law and Values in the European Union*. Oxford University Press

6 With regards to ECJ case-law on human rights as a source of law, see Кръстева, З. (2015) *Разследването на престъпления съгласно ЕСПЧ*. Sofia, Sibi, 15-20.

7 See Александрова, И., Златарева, М, Панова, Ангелов, Н. (2015) *Съдебна защита на основните права в България*. Том 1 и 2, НИП; Семов, А. (2018) *Права на гражданите на ЕС*. УИ „Св. Климент Охридски"; Христев, Х. (2018) *Вътрешен пазар и основни свободи на движение в правото на Европейския съюз*. Sofia, Ciela

8 Toptchiyska, D. (2017) *The Rule of Law and EU Data Protection Legislation*. ORBIT Journal. 1, 1 (Aug. 2017). Retrieved on 13.08.2018 from https://doi.org/https://doi.org/10.29297/

The general principles of EU legislation not laid down in the Treaties should also be regarded as primary law. The Treaties expressly recognise the principle of protection of human rights (Article 6 TEU), the principle of non-discrimination (Article 18 TEU), the principles of subsidiarity (Article 5, para. 3 TEU) and proportionality (Article 5, para. 4 TEU), etc. Others, such as the principle of protection of legitimate expectations and the principle of legal certainty are inferred from the ECJ case-law. Regardless of whether laid down in the Treaties or inferred from legal practice, the general principles of EU law constitute primary sources which should not be contradicted by those standing lower in the hierarchy of sources, otherwise the latter may be repealed by the ECJ pursuant to Article 263 TFEU.

EC measures must not infringe the legitimate expectations of those concerned in the absence of overriding public interest(Legitimate expectations[9]).Measures should not exceed what is appropriate and necessary to achieve the objectives in question (Proportionality)[10].Persons in similar situations should be treated alike unless differential treatment is objectively justified(Equality)[11]. According to the principle of proportionality, thecontent and form of Union action should not exceed what is necessary to achieve the objectives of the Treaties (Article 5 TEU)[12]. Administrative action must comply with the purpose of the law and must not deprive citizens of more than is necessary to achieve this purpose. It is unlawful to apply the law 'stringently' if this will bring about results that were not originally sought by the law. The principle of proportionality fulfils two main functions: it is used as a ground for review of Community measures and as a ground for review of national measures adopting and applying the measures of Community law.

When assessing compliance with the principle of proportionality, the following questions must be considered: whether the action taken is suitable to attain the purpose,and whether the measures of the action are necessary with view of the restrictions and disadvantages that must be sustained with view of attaining the purpose. The EC must act within the limits of the powers conferred on it by

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9 Case 120/86 *Mulder v Minister van Landbouw en Visserig* [1988]

10 Case 181/84 *R. v Intervention Board for Agricultural Produce, Ex p. Man(Sugar)* [1986]

11 Case 20/71 *Sabbatini v EP* [1972]

12 In this respect, see:Case C-553/16 ECJ Judgement of the Court of 25July 2018*TTL EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika'* – Sofia. Request for a preliminary ruling under Article 267TFEU from the Varhoven administrativen sad (Bulgarian Supreme Administrative Court, Bulgaria). Retrieved on 13.08.2018 from http://curia.europa.eu/juris/document/document.jsf?text=&docid=204390&pageIndex=0&doclang =EN&mode=lst&dir=&occ=first&part=1&cid=890164

the Treaty. In areas outside the EC's exclusive competence, the EC must act in accordance with the principle of subsidiarity only if the proposed action cannot be sufficiently achieved by the Member States[13].

What is the scope of legal instruments in the area of taxation? There is NO exclusive competence (Article 3 TFEU) in the area of Taxation and NO shared competence, excluding indirect taxation (Article 4 TFEU)[14]. Article 6 TFEU (exclusively enumerated actions)applies in the context of taxation.

In general, Member States have broad sovereignty in the area of direct taxation. The *acquis* on taxation covers extensively the area of indirect taxation: value-added tax (VAT)[15] and excise duties. The European Commission has launched plans for the biggest reform of EU VAT rules in a quarter of a century[16]. In 2016, the Commission presented measures to modernise VAT in the EUto make it simpler, more fraud-proof and business-friendly[17].Currently, the EU does not use direct taxes for its own recourse collecting purposes.

The provisions of TEU and TFEU in the field of taxation are as follows: Article 4 TEU on Union loyalty (sincere cooperation); Article 18 TFEU prohibiting discrimination based on nationality; Article 21 TFEU on the right of EU citizens to freely move and reside in the European Union; Article 45 TFEU on the free movement of workers; Article 49 TFEU on the right of establishment; Article 56 TFEU on the freedom to provide services; Article 63 TFEU on the free movement of capital and payments; Article 107 TFEU prohibiting state aid; and Article 115TFEUon the authorization to issue directives(the only express measure available for the positive harmonization of direct taxes).

13 Case C-84/94 *UK v Council (The Working Time Directive)* [1996]

14 Under Art. 4(2)(a) TFEU, the Union and the Member States share competence in the area of internal market.

15 For further information on the VAT system, see: Terra, B., Kajus, J. (2018) *Guide to the European VAT Directives 2018*. IBFD; *EU VAT Compass 2018/2019*. (2018) IBFD; de la Feria, R. (2009) *The EU VAT System and the Internal Market*. IBFD; Lamensch, M. (2015) *European Value Added Tax in the Digital Era. A Critical Analysis and Proposals for Reform*. IBFD; de la Feria, R. (2013) *VAT Exemptions: Consequences and Design Alternatives,* The Hague, Kluwer Law International;

16 For more information, see: http://europa.eu/rapid/press-release_IP-17-3443_en.htm. Accessed on 11 June 2018

17 For more information on the Action plan, seet: http://europa.eu/rapid/press-release_IP-16-1022_en.htm. Accessed 11 June 2018

Information related to secondary legislation in the area of Direct Taxation[18] and Indirect Taxation[19] can be found on the website of the European Commission.

Existing directives predominantly regulate the area of VAT and excise duties. These apply to each Member State to which they are addressed, but leave to the national authorities the choice of form and methods[20]. An important element is the Sixth VAT Directive (adopted on 17 May 1977), now replaced by Council Directive2006/112/EC of 28November 2006 on the common system of value added tax (VAT Directive).

Article 114TFEU (dealing with internal market measures) and Article 352 TFEU allow the use of regulations.

Regulation is the main legal instrument in the field of customs law[21]. Regulation (EU) No952/2013 of the European Parliament and the Council laying down the Union Customs Code entered into force on 30 October 2013, but its substantive provisions apply in their entirety as of 1 May 2016, once the UCC Delegated and Implementing Acts were adopted: Regulation (EEC) 1658/87 on the customs tariff, regularly amended, and Regulation (EC) 1186/2009 setting up a Community system of reliefs from customs duty (codified version), replacing Regulation (EEC)No918/83 from 1 January 2010.

In the third place, member states face a further challenge: the fight against irregularities and fraud related to public funds from the EU budget, both in terms of revenue and expenditure. VAT is part of the own resources of the Budget of EU (Article 311 TFEU and Council Decision of 26 May 2014 on the system of own resources of the European Union):a uniform rate of 0.3% is levied on the harmonized VAT base of each member state; the taxable VAT base is capped at 50% of gross national income (GNI) for each country for the period 2014-2020[22].

In the context of the EU budget[23], Article 325 TFEU applies. What exactly is an 'irregularity' according to valid European law? The main regulation providing

18 See: https://eur-lex.europa.eu/summary/chapter/taxation/2101.html?root=2101. Accessed on 11.6. 2018. https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2018.pdf. Accessed on 11.6. 2018.

19 See: https://eur-lex.europa.eu/summary/chapter/taxation/2102.html?root=2102. Accessed on 11.6. 2018

20 See Case C-131/88 *Commission v. Germany* and Case C-49/00 *Commission v. Italy*

21 For further information on valid legislation, see: https://eur-lex.europa.eu/summary/chapter/customs.html?root_default=SUM_1_CODED=12. Accessed on 11 June 2018

22 Regarding EU Public Finance, see: http://ec.europa.eu/budget/news/article_en.cfm?id=201501061636. Accessed on 11 June 2018

23 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

legal definition of the term is Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (in Article 1, para 2).The Convention on the protection of the European Communities' financial interests[24]also applies.EU countries must introduce effective, proportionate and dissuasive criminal penalties[25] to deal with fraud affecting the EU's financial interests. The Convention differentiates between fraud in regard to expenditure and revenue. Examples of fraud in respect of revenue include any intentional act or omission such as: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal reduction of EU budget resources; non-disclosure of information in violation of a specific obligation with the same effect; or the misapplication of a legally obtained benefit (for example, the misuse of legally obtained tax payments) with the same effect. Fraud is a type of irregularity.

The main factor differentiating an 'irregularity' from 'fraud'[26] is the element of deliberate intent: *irregularity* is a situation in which implementation rules (national law or EU law) are infringed; *fraud* is a situation in which implementation rules (national law or EU law) are intentionally infringed, with the infringement having a particular purpose – the obtaining of undue advantage.

According to Regulation No.2988/95,Article 4, para, 1 provides: 'As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage'; Article 3, para1 provides: 'The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1 (1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.'; Article 3, para 4 provides: "Member States shall retain the possibility of applying a period which is longer than that provided for in paragraphs 1 and 2 respectively.'

Public interest and the desire to protect the EU budget have prompted the establishment of the European Public Prosecutor's Office (EPPO). On 8 June 2017, twenty EU Member Statesreached a political agreement on the establishment of

repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1)

24 OJ C 316, 27.11.1995, pp. 48-57

25 See: the Bulgarian Criminal Code, Section IV "Crimes Against the Monetary and Credit System", Art. 255, 255a and Art. 258

26 See: National Strategy for the Prevention and Fight against Irregularities and Fraud affecting the Financial Interests of the European Union for the 2014–2020 period, adopted by means of Protocol No 53 of the session of the Council of Ministers held on 17.12.2014, as well as the Strategy for Combating Fraud affecting the Financial Interests of the European Community, adopted by the Council of Ministers by means of Protocol No 41, item 7/13.10.2005, updated in February 2009

a new EPPO[27] under enhanced cooperation. Council Regulation (EU) 2017/1939 establishing the EPPO under enhanced cooperation was adopted by the JHA Council of 12 October 2017 and entered into force on 20 November 2017. On 14 May 2018, the Netherlands notified its intention to participate in the EPPO's enhanced cooperation. Following a build-up phase of three years, the EPPO is envisaged to take up its functions by the end of 2020. The EPPO will be an independent and decentralised prosecution office of the European Union, with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. Currently, only national authorities can investigate and prosecute fraud against the EU budget, but their powers stop at national borders. The existing EU-bodies such as Eurojust, Europol and the EU's anti-fraud office (OLAF) lack the necessary powers to carry out criminal investigations and prosecutions.

In the fourth place, with regards to direct taxation, the current challenge at global, European and national level is the prevention of tax fraud, circumvention of tax laws and the restriction of practices associated with 'aggressive tax planning', requiring designated measures to reduce loss to national budgets through improvement of tax legislation and information exchange between the tax administrations of Member States. Member States must comply with the principles of the Code of Conduct for Business Taxation[28], aimed at the elimination of harmful tax practices (Tsenova, 2017).Administrative co-operation and mutual assistance[29] between Member States is aimed at ensuring smooth functioning of the internal market as concerns taxation and provide tools to prevent intra-Community tax evasion and tax avoidance. Since its adoption, the original Directive 2011/16/EU has been amended five times, with the aim of strengthening the administrative cooperation among Member States[30]. Member States are required to transpose the amendments of the Council Directive 2011/16/EU of 15 February 2011on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC into national law, and to sign the multilateral Arbitration Convention. Bulgaria is a party to the EU Arbitration Convention (90/436/EEC) on the elimination of double taxation in connection

27 On these issues, see: Тонева, Г. (2017) *Европейската прокуратура и българското наказателно и наказателнопроцесуално право*. Sofia, Ciela; Legal Barometer: http://www.cli-bg.org/Legal%20Barometer_broi_15.pdf. Retrieved on 11 June 2018

28 For more information, see: https://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en, Accessed 11 June 2018

29 See: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en. Accessed on 11 June 2018

30 See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02011L0016-20180101&from=EN. Accessed on 11 June 2018

with the adjustment of profits of associated enterprises, which provides that where the commercial or financial relations between two associated enterprises differ from those which would apply between independent enterprises, the profits of those enterprises should each be adjusted as appropriate to reflect the arm's length position. The Convention provides for disputes with fiscal authorities to be referred to an advisory commission, subject to waiver of rights of appeal under domestic law provisions. The Arbitration Convention was first applicable with respect to the 15 original Member States. With respect to the 10 new EU Member States that acceded to the European Union on 1 May 2004, a new Accession Convention was signed on 8 December 2004 (EU Official Journal, C 160, 30 June 2005). The Convention entered into force on 1 July 2008 in relation to Bulgaria and Romania and on 1 January 2015 in relation to Croatia.

Several different initiatives have been developed and implemented in the course of the last few years which modify the elements and principles of familiar taxation systems, prompted by business globalisation, the common European market and trends in the business environment, caused by digitalisation. The first of these is the G20/OECD's Base Erosion and Profit Shifting (BEPS) Project[31]. This project provides for measures at global and European level. The BEPS project is the second major post-financial crisis effort at global cooperation relating to taxation. The first project, which was primarily inter-governmental, involved transparency[32]. The G20 and OECD recently initiated work on tax policy to achieve strong sustainable growth, which may become the next tax cooperation project. The BEPS Project will also give rise to significant reform in the field of treaties for the avoidance of double taxation (Penov, 1999). Implementation of the BEPS project will be reflected on a global scale as it will cover more than 1,100 tax treaties.

Another such initiative is the global automatic information exchange system, created mainly for the needs of the USA Foreign Account Tax Compliance Act (FATCA), and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, joined by Bulgaria. The Convention includes the Common Reporting Standard (CRS) of the Organisation for Economic Cooperation and Development (OECD).

In order to respond to the abovementioned challenges and to share knowledge, the Bulgarian branch of the International Fiscal Association and the Faculty of Law at Sofia University organized an international tax conference on the topics of BEPS and Enforcement of EU Tax Law in Member States and Legal Remedies

31 See: http://www.oecd.org/tax/beps/

32 See the OECD Report. Retrieved on 13.08.2018 from http://www.oecd.org/tax/transparency/global-forum-annual-report-2017.pdf

in EU Tax Law which was held on 18th and 19th May 2017 at Sofia University, Sofia, Bulgaria.[33] Representatives of different stakeholders attended, exchanged valuable opinions and shared important information.

With view of the above, it is no coincidence that the hottest topic among stakeholders is currently the issue of Tax Transparency. It raises a lot of questions, having in mind the different requirements at global, European and national level[34].

The table below illustrates the measures undertaken at theECJ level and the EU level, and how these measures have been transposed into the national legislation.

Table 1. *Measures taken at the ECJ and the EU level, and their trasposition into the national legislation*

OECD	EU	Transposition in national legislation
Convention on Mutual Administrative Assistance in Tax Matters	**DAC 1** Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC	Article 143 TSSPC (regarding the Convention) Article 143a – Article 143r TSSPC
CRS Common Reporting Standard	**DAC 2** Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation	Article 142a – Article 142z TSSPC

33 Presentations and information about different initiatives can be found on: http://www.ifa-conference.com/

34 EATLP Congress materials, 7-9 June 2018 in Zurich, Switzerland. Tax Transparency. Retrieved on 11 June 2018 from http://www.eatlp.org/congresses/this-years-congress/308-2018-zuerich.

BEPS Action 5 - compulsory spontaneous exchange of relevant information on taxpayer-specific rulings	**DAC 3** Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation	Article 143a – Article 143r TSSPC
BEPS Action 13 – Automatic exchange of Country-by-Country reporting	**DAC 4** Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation	Article 143t - Article 143z TSSPC
	DAC 5 Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities	Article 12 TSSPC
BEPS Action 12 - Mandatory disclosure rules for aggressive tax planning schemes Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures	**DAC 6** Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements	To be transposed

BEPS Action 14 - Making dispute resolution mechanisms more effective **BEPS Action 15** - Multilateral Instrument – Improving Dispute Resolution and Arbitration	**Dispute resolution** Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union	To be transposed
BEPS Action 2 - Neutralising the effects of hybrid mismatch arrangements **BEPS Action 3** - Designing effective controlled foreign company (CFC) rules **BEPS Action 4** - Limiting excessive interest deductions	**ATAD 1** Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market	To be transposed
BEPS Action 2 - Neutralising the effects of hybrid mismatch arrangements	**ATAD 2** Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries	To be transposed

In the fifth place, as mentioned above, a huge challenge is how EU law will be applied by the separate member states, given the direct effect of EU Law and Rights and remedies. The discussion thus far has focused on the extent to which EU Law creates rights that are enforceable by individuals in their own national courts. Rights demand remedies. This issue raises the question of state liability in the case of infringements of EU law in the area of taxation and the procedural manner of imposing such liability.

As mentioned, the main principles of EU law are the direct effect and the supremacy[35] of EU Acquis. A general principle is that Member States are liable for the infringement of European Union law[36]. The ruling of the ECJ in the *Francovich*[37] case established a remedy for damages in cases of breach of EU law.This was conceived as an EU remedy in its own right, and not simply as an option which a particular Member State might or might not choose to embrace[38].

The ruling on the*Francovich* case left open numerous issues concerning the nature of the damages remedy. Many of these were clarified in *Brasserie du Pecheur* and *Factortame*[39]. The principle of state liability in damages was held to be general in nature and to exist irrespectively of whether the EU norm which had been broken was directly effective or not. Liability could be imposed irrespective of which organ of the state was responsible for the breach: the legislature, the executive or the judiciary. The ECJ set out the criteria to determine when the state could incur liability. Thus, the ECJ ruled: Where a Member State acted in an area in which it had some measure of discretion, comparable to that of the EU institutions when implementing Union policies, the conditions for liability in damages must be same as those applying to the EU itself. The right to damages was dependent upon three conditions: the rule of law infringed must have been sufficiently serious; and there must have been a direct causal link between the breach of the obligation imposed on the state and the damage which was sustained by the injured parties[40].

Bulgaria has accumulated experience and practice in the field of state liability in cases of infringement of EU law. In Bulgaria, the procedural rules of action with the closest effect are those set out in the State Liability for Damages Act (SLDA). With view of the contradictory practice in terms of applicable proce-

35 This principle was enunciated in case 6/64 *Costa v Enel* [1964] It held: "By creating a Community of unlimited duration, having….powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and thus have created a body of law which binds both their nationals and themselves".

36 See also: Костов. С. (2018) *Извъндоговорната отговорност на ЕС и на държавите членки*. Sofia, Sibi; Корнезов, Ал. (2012) *Отговорността на държавата за нарушаване на правото на Европейския съюз*. Sofia, Ciela

37 C-6&9/90 *Francovich v Italian Republic, Bonifaci v Italian Republic* [1991] Ross, M. (1993) *Beyond Francovich* M.L.R.; Craig. P. (1993) *Francovich, Remedies and the Scope of Damages Liability, L.Q.R*

38 See: Craig, P. (2016) *Administrative Law*. Sweet&Maxwell., p.293

39 Case C-46/93 *Brasserie du Pecheur SA v Germany*, and Joined Cases C-46/93 and C-48/93 *R. v Secretary of State for Transport Ex parte Factortame Ltd* (No.3) [1996]

40 See Craig, P. (2016) *Administrative Law*. Sweet&Maxwell, p.294

dures and courts competent to review claims for damages caused by the state due to infringement of EU law, an Interpretative case No. 2/2015 of the General Meeting of Judges from the Civil and Commercial Divisions and the General Meeting of Judges from 1st and 2nd Division of the Supreme Administrative Court was initiated upon request of the Chairman of the Supreme Bar Council for the adoption of a joint interpretative decision on the following issues: 1) Which is the competent court to review claims based on Article 4, §3 TEU, which seek to enforce state liability for infringement of EU law? 2) Which is the applicable procedural rule of action for review of claims based on Article 4, §3 TEU? The proceedings under the above interpretative case were stayed by means of Decision dated 09.03.2017 until delivery of the decision of the ECJ under items 1 and 2 of case C-571/2016. The case before theECJ was initiated on the basis of a request for a preliminary ruling by Varna Administrative Court under administrative case No.560/2016. The request raises 8 questions, the first two of which relate to the handling of claims under Article 4, §3 TEU. As of present, the issue regarding the court competent to review claims under Article 4, §3 TEU and the procedure for hearing claims has not been resolved conclusively in practice and the decision under the initiated interpretative case, suspended at a later stage, is still pending.

In the sixth place, it is highly recommended that the experience of those states which acceded to the EU prior to 2004 and 2007 be used in the course of the negotiation period, including experience in the field of taxation, with view of their similar past and culture. Both positive and negative lessons must be taken into account. Work on projects financed through EU funds bring about a shift in thinking and discipline of behaviour, given the strict rules governing the preparation and implementation of such projects, while the exchange of experience and the transfer of knowledge, good practices and expert skills from other member states will serve as guarantee for quality. It is precisely through the financial instruments of cohesion policy[41]that economic, social and territorial cohesion takes place in the context of the main EU values, as laid out in Article 2 of the Treaty on European Union (TEU), as well asin the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU.

In the seventh place, a huge challenge, not only for Candidate Countries, but also for Member States is compliance with the principle of the Rule of Law[42],not only in the field of taxation. The Rule of Law is the backbone of any modern

41 On the topic of the EU Cohesion Policy, see: Goleminova, S. (2017) *Financial legal relations within the system of public funds from the European Structural and Investment Funds*, Sofia, Ciela Publishing

42 See: Belov, M. (2018) *Rule of Law at the Beginning of the Twenty-first Century*, Eleven International Publishings, Hague

constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based.

It is no accident that the European Commission came up with the idea of tying the transfer of all funds (not only those under the cohesion policy) to the rule of law in its draft proposals for the next EU budget – the Multi-Annual Financial Framework, published on 2 May 2018[43]. The mechanism includes the requirement for an independent and effective justice system that would guarantee an effective fight against corruption and abuse while using EU funds, and an effective audit system. Compliance with the rule of law could be applied to all EU policies, but all financial conditionalities would have to be precise and propositional.

Last, but not least, the processes at global, European, regional and national level (not only in the field of taxation), brought about by the new economic and social realities,are increasingly dynamic. This is the place to highlight the priorities of the Bulgarian presidency of the Council of the EU in the area of Taxation. These priorities were outlined in a note[44] to the EU Council's High Level Working Party on Tax Issues.[45]

2. Taxation in Bulgaria

The first question to pose in this context is what actually happened with the Bulgarian negotiation process in the area of Taxation? From the distance of time it should be noted that the actual start of Bulgarian negotiations for accession was15 February 2000. Bulgaria's position with regard to Chapter 10 Taxation was presented at an intergovernmental conference on the negotiations held on 30 April 2001, and the Chapter was temporarily closed on 10 June 2002. The National Revenue Agency was established towards the end of 2002.Since 1 January 2007 Bulgaria has been a Member State of the European Union. The conditions and arrangements for admission are set out in the Protocol annexed to the Treaty concerning the accession of the Republic of Bulgaria and Romania to the EU.

'With the Treaty of Accession of the Republic of Bulgaria to the European Union, ratified by an act passed by the National Assembly on 11 May 2005 (State Gazette

43 See: https://ec.europa.eu/commission/sites/beta-political/files/budget-proposals-financial-management-rule-law-may2018_en.pdf and http://ec.europa.eu/budget/mff/index_en.cfm. Accessed on 11 June 2018

44 See: http://data.consilium.europa.eu/doc/document/ST-5668-2018-INIT/en/pdf accessed on 11 June 2018

45 Priorities in the area of Economic and Financial affairs – presentation to the Committee on Economic and Monetary Affairs (ECON) of the European parliament. Retrieved on 11 June 2018 from http://www.minfin.bg/en/comments/10194

issue 40/12 May 2005, in force as of 1 January 2007), the Republic of Bulgaria acceded to the European Union. According to Article 2 of the Act Concerning the Conditions of Accession of the Republic of Bulgaria and the Adjustments to the Treaties on which the European Union is Founded, applicable pursuant to Article 2 of the Treaty of Accession of the Republic of Bulgaria to the European Union as of the date of accession, the acts adopted by the institutions prior to the accession are binding for Bulgaria and are applied under the conditions laid down in those Treaties and the Act itself. According to Article 19 of the said Act, the acts listed in Annex III thereto must be adapted as specified in that Annex. Item 4 'Taxation' of Annex III to Article 19 of the Act of Accession lists Sixth Council Directive and its various amendments. According to Article 53 of the Act of Accession, Bulgaria must put into effect the measures necessary for it to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 249of the EC Treaty unless another time limit is provided for in the Act. These measures must be communicated to the Commission at the latest by the date of accession or, where appropriate, by the time limit provided for in the Act. The Act does not set out a time limit for the transposition of Sixth Council Directive which means that this should be effected at 1 January 2007, given the text of Article 53 of the Act of Accession."[46]

The TSSC of 29 December 2005 provides general rules on tax liabilities, liable persons, tax controls, refund of overpaid or unduly paid tax amounts, related parties, methods of determining market prices, limitation periods, collection and execution, etc.

The Republic of Bulgaria adopted and to a considerable extent implemented the*acquis* in the field of taxation, and did not envisage any major problems with the entry into force of the relevant legislation nor its implementation by the date of accession.

There are however some cases where transitional periods or derogations were achieved.

In the second place, what is the current concept of Bulgarian legal doctrine? According to the generally accepted national legal doctrine tax relations (which are a type of financial legal relations) are covered by the first and fourth group of public relations which fall within the scope of regulation of financial law – those that arise from the distribution of national revenue through taxes, the inflow of

46 Interpretative Decision No 3/06.06.2008 under Interpretative Case No 2/2008 of the General Meeting of Judges from 1st and 2nd Division of the Supreme Administrative Court. Retrieved on 11 June 2018 from: http://www.sac.government.bg/TD_VAS.nsf/d038edcf49190344c2256b7600367606/fd0e2a1652305ecbc2257e500027fd5b?OpenDocument

funds to the budget and control[47] over this activity. They also relate to the correlation between the national financial system and that of the European Union.

In this respect, the National Legal Framework includes some basic articles of the Constitution of the Republic of Bulgaria (CRB).According to Article 5 (para. 1) of the CRB and Article 15 (para. 1) of the Law on Legislative Acts (LLA), a legislative act must conform to the CRB and to statutory acts of a higher rank. The CRB introduces the principle that taxes should be established by law (Penov, 2013); according to Article 60 (para. 1), 'Citizens shall pay taxes and duties established by law proportionately to their income and property'. Paragraph 2 of the same article introduces the second fundamental principle of tax law: all tax concessions or surtaxes must also be established by law. The purpose of the principle that taxes must be defined by law is to guarantee interference into the private dominion of taxpayers to the extent and in the manner required by public interest. Tax systems not created on the basis of law are anti-constitutional. By means of Decision No. 3/9 February 1996 under constitutional case No 2/1996, the Constitutional Court ruled that the principle that tax liabilities must be established by law extends to all elements determining the amount of the tax: the taxpayer, the tax base, the tax rate, etc. The provisions of Article 60 CRB clarify that the definition of a taxable person cannot be effected in an interpretative manner but solely through express statutory text."[48]

Other CRB provisions regulating taxation are: Article 84 (item 3), according to which the National Assembly is the body which establishes taxes and determines the size of state taxes – an exclusive obligation which it cannot delegate to the executive power; Article 85 (para. 1, item 4), according to which the National Assembly ratifies or denounces by law all international treaties which contain obligations for the treasury; Article 98 (item 12) – the President is the body which may cancel uncollectible debts to the State; Article 141(para.3) – the municipal council is the body which determines the size of local charges by a procedure, established by law.

Laws take the most prominent place among sources of tax law. Statutory rules related to the budget normally come into effect on 1 January of the respective year and their validity is equal to that of the budget act. The provisions of Article 16 (para. 3) of the Public Finance Act apply to tax laws and their amendments: 'No changes in taxes or compulsory insurance contributions, in terms of all

47 According to the Bulgarian National Audit Office Act § 1,p.11 AP: "Financial control" is any form of control related to management of public means and activities, carried out by specialized authorizations and procedures, including budget control, financial inspection control, tax control, customs control, etc.

48 Interpretative Decision No 3/06.06.2008 under Interpretative Case No 2/2008 of the General Meeting of Judges from 1st and 2nd Division of the Supreme Administrative Court.

their elements, shall be stipulated to enter into force before the date of entry into force of the state budget act and/or the laws regulating the budget of the National Health Insurance Fund and the public social security budget for the relevant year, or before the date of entry into force of the act amending and supplementing them.'

According to Article 14 (para. 1) LLA, the statutory act can be given retroactive effect only in cases of specific exceptions. In Decision No 9/1996 of the Constitutional Court, the Constitutional Judges share the opinion that citizens need to have advance knowledge of their obligations regarding the state. Article 14 LLA lays down the requirements and exceptions for retroactive effect with the provision that sanctions cannot have a retroactive effect unless where the new sanctions imposed are less severe than the previous ones.

To summarize, sources of material tax laws which regulate the different types of taxes are: the Corporate Income Tax Act; the Income Taxes on Natural Persons Act; the Local Taxes and Fees Act; the Value Added Tax Act; the Excises and Tax Warehouses Act; the Insurance Premium Tax Act. The main procedural act is the Tax and Social Security Procedure Code. The statutory rules of other acts which are not part of tax legislation but nevertheless comprise sources in this context are: the Administrative Violations and Sanctions Act, the Interest on Taxes, Fees and Other Similar State Receivables Act; the Customs Act; the State Aid Act; the Currency Act. As noted, the Administrative Procedure Code and the Civil Procedure Code have subsidiary effect. Individual provisions from other acts are also applied in the regulation of tax relations, such as those of the Commercial Act, the Obligations and Contracts Act, the Local Self-Government and Local Administration Act, etc. Many by-laws also serve to regulate tax relations: ministerial decrees adopting rules and ordinances; instruments issued by the minister of finance, etc. The significance of the ordinances adopted by Municipal Councils in determining the amount of local taxes pursuant to the Local Taxes and Fees Act should not be overlooked.

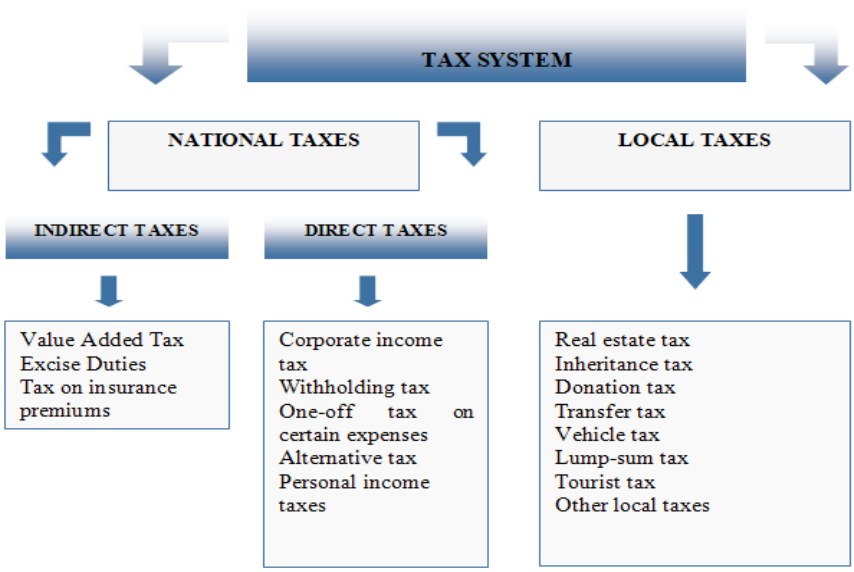
In terms of international bilateral agreements concluded by Bulgaria, another source of tax law are any Treaties for the Avoidance of Double Taxation[49]. These serve as basis for the avoidance of levying direct taxes on the income and property of taxable entities by two or more jurisdictions. Bulgaria has an extensive treaty network[50]. The treaties generally follow the OECD Model Convention even though Bulgaria is not an OECD Member country. However, some of the treaties

49 Art.135-142 TIPC sets out the procedure for application of the treaties for the avoidance of double taxation of the income and property of foreign persons

50 See the complete list of tax treaties signed by Bulgaria at the NRA website: http://www.nap.bg/en/page?id=530. Retrieved 11 June 2018

contain the definition of a permanent establishment, which follows the UN Model Convention. Treaty provisions prevail over domestic law provided that the treaty is duly ratified, entered into force and officially promulgated inthe State Gazette. According to Article 5 (para. 4) of the Constitution, International treaties which have been ratified in accordance with the constitutional procedure, have been promulgated and have come into force with respect to the Republic of Bulgaria are part of the legislation of the State. They have primacy over any conflicting provisions of the domestic legislation. This rule applies to international conventions as well.

STRUCTURE OF BULGARIAN TAX SYSTEM



Revenue authorities have certain powers laid down in the Tax and Social Security Procedure Code and substantive tax laws. Their legal capacity is expressed in their competence as a sum of powers assigned to them by law. The powers of a revenue authority and a public enforcement authority are laid down in the National Revenue Agency Act and the Tax and Social Security Procedure Code, with municipal administration officers (Article 4 of the Local Taxes and Fees Act)

51 For more information see:http://www.minfin.bg/bg/770 and http://nap.bg/page?id=428, Accessed on 11 June 2018

and customs authorities (Article 104 of the Excise Duties and Tax Warehouses Act) also being treated as revenue authorities.

3. Conclusions

Bulgaria has accumulated invaluable experience in the application of EU Tax Law in the area of Direct and Indirect Taxation. The resulting best practices can be transferred to all possible areas of cooperation: administrative; academic; judicial; business. In this respect, the European Union's Instrument for Pre-Accession Assistance (IPA)could make a major contribution and provide support in the accession process for: development of administrative capacity of tax authorities; regional partnership and exchange of best practices for the development of legal, institutional and methodological frameworks for the tax system and tax control and prevention of fraud; enhancing the competitiveness of the national economy, strengthening its ability to withstand the competitive pressures of the single market, reducing disparities; compliance with accession requirements not only in the area of taxation. We should not forget that the Western Balkans countries need a clear European perspective and connectivity among them and with other Member States. Academic circles may playa very crucial and strategic role in this process. The Bulgarian Presidency works purposefully for return of the topic of the Western Balkans on the EU agenda, and has taken responsibility and raised these issues for discussion, outlining the measures for their overcoming. The implementation of the Rule of Law in the area of tax law and taxation creates trust among the Member States.

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ИЗАЗОВИ ПРЕГОВАРА О ПРИСТУПАЊУ ЗЕМАЉА КАНДИДАТА У ОБЛАСТИ ОПОРЕЗИВАЊА

Резиме

Копенхагенски критеријуми су основни услов који држава кандидат мора испунити да би постала држава чланица Европке уније. Циљ рада је да размотри последице отварања Поглавља о опорезивању у преговорима о приступању земаља кандидата, и да представи искуство и достигнућа Бугарске у овој области. Биће представљена и важна улога Инструмента предприступне помоћи (ИПА), који представља велики допринос и подршку Европске уније земљама кандидатима у процесу придруживања. Информације и импликације наведене у овом раду могу допринети већем учешћу академских кругова у процесу придруживања земаља западног Балкана, у складу са приоритетима бугарског председавања Саветом Европске уније.

***Кључне речи**: Пореско право Европске уније, Поглавље о опорезивању, преговори о приступању земаља кандидата, Инструмент предприступне помоћи (ИПА) Европској унији, искуство Бугарске.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879141K

UDK: 343.346:341.9(4-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*THE HAGUE CONVENTION ON THE LAW APPLICABLE TO TRAFFIC ACCIDENTS AND ROME II REGULATION***

Abstract: *The Hague Convention on the Law Applicable to Traffic Accidents (hereinafter: the Convention) contains harmonised rules regarding the law applicable to non-contractual liability for damage arising from traffic accidents. According to the Convention,a traffic accident is an accident which involves one or more vehicles, and is connected with traffic on a public highway, in grounds open to the public or in private grounds to which certain persons have a right of access. The rule is adapted to the specifics of road transport, objectified according to certain facts in the particular case. The Convention introduces something new into the existing system of conflict of laws resolution based on relevant facts i.e. the application of the law of the place of vehicle registration when there is only one vehicle involved, in the accident which is registered in the country which is not the place of the accident, or when there are more vehicles involved in the accident which are registered in the same country which is not the country of the accident. The basic aim of the Convention was to facilitate the compensation of damage by means of automobile liability insurance and improvement of the position of the injured parties.In relation to determining the law applicable to non-contractual liabilities, the EU enacted the Regulation Rome II which does not provide solutions for road traffic accidents but general standards of the Regulation (article 4) are applied in such cases.*

Key words*: damage, traffic accidents, applicable law, EU law.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

In the proceedings of making a resolution on its own merits, the problem of non-contractual liability for damage caused, legally and factually involving two or more countries, creates a problem for competent authorities and opens the problem of conflict of law resolution. The changes of rules on civil liability at a national level affect the change of attitude regarding different kinds of liability and the manner of indemnification. Particularly complex issues concern non-contractual liability for damage caused by a traffic accident in situations with an international element. The adoption of several international conventions which contain substantive and conflict of law solutions has not eliminated the problem of smaller or larger differences in regulating non-contractual relations. Namely, courts usually apply the domestic law provisions, except when it comes to the provisions of private international law i.e. conflict of law rules, which may involve the application of the rules of a foreign legal system. It particularly refers to the application of convention conflict of law rules.

The efforts of the Hague Convention regarding private international law to harmonise the conflict of law issue resulted, *inter alia*, in enacting the Convention on the Law Applicable to Traffic Accidents (hereinafter: the Hague Convention). At the same time, the efforts of theory and practice of *Acquis Communautaire* towards more righteous and efficient compensation for damage arising in many cases actualised the harmonisation of non-contractual liability at the regional level, which enabled the enacting of Regulation (EC) no. 864/2007 on applicable law for non-contractual obligations (Rome II Regulation)[1]

Today the Regulation is universally applied within the EU, in relation to interior disputes as well as in relation to disputes with an international element. Thus, the European legislation abandons the double track of private international law, which includes different legal provisions on private legal disputes involvingMember States subject matterin relation to the non-member States, regarding the harmful event arising after its entry into force.

2. The Hague Convention on the Law Applicable to Traffic Accidents

The unification of the conflict of law rules at the universal level within the Hague Convention for private international law includes the Hague Convention on the Law Applicable to Traffic Accidents of 4th May 1971. The document entered into force in 1971 and it has been applied in the Republic of Serbia since 1976.[2]

1 Rome II Regulation, OJ EU 199/40 as of 31st July 2007.

2 ''Official Gazette of the Socialist Federal Republic of Yugoslavia''- International Treaties no. 26/76. The contracting parties are Belgium, Bosnia and Herzegovina, France, Croatia,

The Convention contains the harmonised rules regarding law applicable to civil non-contractual liability for damage arising from a traffic accident, whichis defined as any accident involving one or more vehicles and connected with traffic on the public highway, in grounds open to the public or in grounds to which certain persons have a right of access. Accordingly, the Convention accepts the rule on application of the law on non-contractual liability for damage arising out of traffic accidents in connection with the place of accident, i.e. it assumes a regular conflict of law rule which provides for application of the substantive law of the State where the accident occurred.[3] The rule is adjusted to the specifics of road traffic made objective according to certain facts in a particular case. The objectives of this harmonisation are: to remove the uncertainty of the general phrase ("close connection with the place of accident" which could lead to different solutions for a longer period of time), until the court practice of the signatory countries is harmonised, considering the fact that a judge decideson the merits of each case; to optimally adjust the conflict of law to the specifics of the road traffic, and to exclude the possibility of resolving the conflict of laws which would be the result of accidental circumstances.

Lex loci delicti commissi remains the basic conflict of law convention rule. It implies the applicability of the internal law of the State in which the damage was caused by a traffic accident, which excludes the use of *renvoi* (sending back and redirecting to another law). At the same time, the Convention introduces a new fact into the existing system of conflict of laws, i.e. the application of the law *of the place of registration of the vehicle*based onrelevant facts, when only one motor vehicle took part in the accident but it is registered in the State which is not the State of the accident; or when several vehicles registered in the same State, which is not the State of the accident, took part in the accident.[4] In case of

Lithuania, Latvia, Luxembourg, Macedonia, Morocco, Montenegro, the Netherlands, Ukraine, Austria, Poland, Serbia, Slovenia, Slovakia, Czech Republic, Belarus, and Switzerland. Retrivied 21 July 2018 from www.hhcch.com

3 Article 3 of the Convention.

4 Article 4 (a) (b) of the Convention. From foreign court practice: The judgement of the Court of Appeals in Paris, June 1981, in the dispute *Brandicort v Bigu* regarding a traffic accident in Morocco. In order to avoid the collision with a car registered in Morocco, Bendicot, driving a car registered in France with 5 passengers in it, turned off the road and went down the embankment. One person died in the accident and the others were injured, one of whom brought an action against the vehicle owner for compensation of damage. The first instance court applied Article 4 of the Hague Convention and ruled that the applicable law is French law, i.e. the law of the place of the registration of the vehicle. The court decided that only one vehicle with one licence plate took part in the accident. The determination of the applicable law was even more difficult considering the fact that there was no direct contact of the vehicles, but the driver of the French car avoided the collision and thus caused the accident. However, the Court of Appeals decided that the Moroccan vehicle caused the accident and that two

several people being involved in the accident, the applicable law is determined for each one of them individually. The vehicles which are registered in several countries, or are not registered at all, are subject to the law of the State of "habitual residence" which is applied instead of the law of the State of the place of registration of a motor vehicle in the function of a conflict of law solution. Applicable law includes the issues of conditions and scope of liability, reasons for release from liability, nature and kind of damage, the circle of persons who have the right to compensation of damage, burden of proof, liability of the principal for the actions of a person under their control, statute of limitations, etc. Besides, the applicable law regulates the right of the aggrieved party to initiate a proceeding against the insurer, as well as any other issues which a judge finds appropriate to apply.

The Convention does not oblige the signatory countries to introduce direct action against the insurer, but directly refers to the applicable law according to the conflict of law rules and states that the damaged parties have the right to a direct action if such action is recognised according to the law applicable for compensation of damage. The exceptions to this rule are set in favour of the aggrieved party if the applicable law does not recognise a direct action, but this right is recognised according to *lex loci delicti*, or if the right to a direct action is not recognised according to any of these two rights but it is possible according to the law of the place where the insurance contract was entered into.

The application of the law where the traffic accident occurred may be unfavourable for the aggrieved party if it provides for less indemnification that the indemnification which may be achieved according to the law of their own State. When there is a bigger difference among the regulations on liability, it usually refers to the amount of compensation for damage according to the rules of the State of the accident; for this reason, EU law stipulates that the law which is more favourable to the aggrieved party may be applied for liability for damages arising from traffic accidents. Namely, the court needs to determine, either *ex officio* or at the request of the aggrieved party, by comparing the decisions based on the law of the place of the tort with the law of place of damage, which of these laws is more favourable for the aggrieved party. Inability to determine the content of the applicable foreign law gives rise to the application of *lex fori* or the application of the law which is closest to the unknown, i.e. probably the application of applicable law.

vehicles of different places of registration took part in the accident; hence, Moroccan law needed to be applied, i.e. *lex loci delicti commissi*. Revue Critique, no 416, janvier 1982 p. 691.

2.1. More precise determination of Convention solutions

The purpose of regulating private and legal relationships with a foreign element is reflected in a uniform or approximately equal resolution of a dispute, regardless of the fact which State authority deals with it. The courts have to take into consideration the principle of the choice of law which is most closely connected to the dispute and the law the application of which was justifiably expected by the parties, as well as the balance of the solutions (Collins, 1993:5). At the universal level, the prevailing attitude is that the provisions of the convention need to be considered as autonomous international collection of legal standards which is, according to its meaning, independent from the national law of countries (Gebauer, 2000:685). According to the Vienna Convention on the Law of Treaties, the convention has to be interpreted in good faith, according to the regular meaning of expressions from agreements and taking into account the subject and purpose of the agreements.[5] The courts of the signatory countries are obligated to apply the Hague Convention rather than domestic conflict of laws rules when deciding on non-contractual liability for damage caused by a road traffic accident. However, in the Serbian court practice, domestic Act on Resolving Conflict of Laws with Regulations of Other Countries is applied more frequently, considering the fact that the area of application of Article 4(a), indent 2, regarding the phrase "liability to the victim who was a passenger" is undefined; in that regard, we may ask a question if it is a direct victim of the accident or the family of the passenger that also belong here.[6] The conflict of

5 ''Official Gazette of the Socialist Federal Republic of Yugoslavia''- International Treates, no. 30/1972, a provision of article 31, paragraph 1 of the Convention.

6 From foreign court practice: The judgement of the Supreme Court of the Republic of Croatia, 878/08-2-18. 03 2010, case *Nikolić and others vs. insurance agency*. A citizen of the Republic of Serbia died in a car with Slovenian licence plates in which car there was another passenger. The family, Serbian citizens, initiated a proceeding for damages against the Croatian insurance agency. By applying the Hague Convention, the first instance court applied Croatian law and the law of the place of the accident, in spite of the fact that the Hague Convention provides for deviation from the application of the law of the State of accident in favour of the law of the place of registration of the vehicle, in this particular case the law of Slovenia. The decision of the first instance court way confirmed by the second instance court (the judgement of the Vukovar County Court, gž-249/07 as of 23rd January 2008). However, the defendant asked for a review and contested the application of Croatian law stating, inter alia, that the court should have applied the law of the place of registration of the vehicle, i.e. the law of Slovenia. The Supreme Court rejected the objections of the defendant considering that the provision of article 4 of the Convention represents an exception from the principle from article 3 and it refers only to the persons which are expressly Stated in that provision: drivers, the owners of the vehicle, the victim who was a passenger or the victim who was in the place of the accident outside the vehicle. In this particular case the plaintiffs are none of these persons so the provision form article 3 of the Convention is applied to them. Therefore, the Supreme Court considered exclusively the text of the Convention when interpreting the application of the

law solution of the Hague Convention provides, depending on particular situation, the application of the law of the State where the accident happened or the law of the State where a vehicle is registered.[7] At the time of the enactment of the Convention, comparative law and court practice widely applied the law of the State where the accident occurred (Dutoit, 1968:20), considering the fact that the accident represents the issue of non-contractual liability for damage; thus,as the law of the State of the accident is most coincidental, we cannot talk about the application of law in the closest connection with the dispute. Although presented as an exception to *lex loci delicti,* the law of the registration of the vehicle is more frequently applied in practice than a general rule. If the vehicle is registered outside the State in which the accident occurred, the application of the law of the State of registration is conditioned by the fact that the common residence of directly aggrieved party is also outside the State in which the accident occurred. The application of the law of the place of registration of a vehicle represents derogation from the application of *lex loci delicti commissi* in favour of the application of the law which has closer and more important connection with the dispute (Kadner Graziano, 2004:38)

The Hague Convention does not contain the rule on deciding upon applicable law by the participants in the accident by mutual consent.[8]

In relation to the field of application of the applicable law, the Convention expressly provides that the permission for the family to claim damages must be judged according to the applicable law for non-contractual liability for damage.[9] This conflict of law solution must be loosely interpreted, i.e. it needs to be applied in adjudicating on the wrongdoer'sliability for damage sustained by the direct victim, a passenger, indirectly aggrieved party, the family of the passenger (Tomljenović, 200:132). In the application of the Convention, the court practice of the signatory countries starts from literal or wider interpretation of the scope of conflict of law provision (Sumampow, 1996:263). For example, the courts of France and Austria accept the method of wider interpretation of Article 4 (a),

provision of article 4. Remark by Vesna Tomljenović, *The interpretation of conflict of lawrules of international conventions – an example of the interpretation of conflict of laws provision of the HagueConvention on Traffic Accidents*, Collection of PFZ, 62, (1-2) 2012, p.101-152.

7 Articles 3-6 of the Convention.

8 In the dispute *Roho c. Coron et. al.* in relation to damages for a traffic accident in Djibouti the Court of Cassation of France applied the implied agreement of the parties that French law is applicable law considering the fact that the parties have the possibility to select the applicable law different from the law defined by the Convention conflict of law rules. The decision of the Court of Cassation of France in the case *Roho c. Caronet. al. Cour de Cassacio 19th April 1988 RCDIP (Revue Critique de droit international privé) 1989, p. 71.*

9 Article 8, point 6 of the Convention.

indent 2.The cases when the Hague Convention is not applied are listed as follows: the liability of the manufacturer, seller and servicer of the vehicle; the liability of the road owner or any other entity that is responsible for road maintenance or security of the users; the liability for the actions of another entity except for the liability of the owner of the vehicle or the ordering party; recourse demands between the responsible parties; recourse claims and subrogation referring to the insurer; claims and recourse claims by social security institutions or other similar institutions and public grant funds for damage caused by a vehicle or against which these claims are filed, as well as the cases of exclusion from liability provided by the law these institutions are part of.[10]The Convention accepts the possibility of correction in regular application of conflict of law solutions if it points to the application of foreign law which is obviously in contravention with the domestic public policy (Varadi, Bordaš, Knežević, Pavić, 2011: 146). Special problems in applying conflict of law solutions arise in cases when it points to the law of the state with a complex system and, even if the choice has been made, there is a question how to determine applicable law within such state (Živković, Stanivuković, 2004:311). The state which does not have a unified legal system is not bound to apply the Convention for the accidents which occur in its territory involving only the participation of vehicles registered in the territorial units of that state. According to the Convention, each territorial unit which makes part of the state which does not have a unified legal system is considered a state for the purpose of application of Articles 2-11 if it has its own system in the area of civil non-contractual liability arising from traffic accidents.[11]

3. Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II)

The national provisions of conflict of laws for non-contractual liability for damage influenced the development of European international tort law by the introduction of new relevant facts in the conflict of law solutions which need to contribute to the principle of the closest connection and flexibility of solutions.

The Rome II Regulation was enacted within the framework of general objectives of the EU to develop freedom, safety and legal area in which the free movement of people is allowed (Article 2, indent 4, of the Treaty on European Union). By the Regulation on the law applicable to non-contractual obligations (hereinafter: the Rome II Regulation),[12] the EU legislator has been trying to unify conflict of

10 Article 2 of the Convention.

11 See Article 12-14 of the Convention.

12 Official Journal of the European Union L 199, 31st July 2007. Trying to harmonise the European law concerning non-contractual liability for damage, the EU enacted the Council

law rules for non-contractual liability for damage within the EU, as well as to make it easier to apply the principles of mutual recognition of judgements in civil and business cases. Apart from the general conflict of law rules, the Regulation contains several separate solutions concerning certain forms of non-contractual liability for damage. Considering the fact that some of the EU members are at the same time the contracting states of the Hague Convention on traffic accidents, the Rome II Regulation gives an advantage to the solutions from the Hague Convention in application (Kunda, 2007;1269-1324). We can conclude that the courts of the member states apply conflict of law standards of the treaties in force but the courts of the member states which are not parties to such agreements apply the provisions of the Rome II Regulation.[13] Considering its legal force, the Regulation is above the Hague Convention and international treaties entered into only between two or more member states, if such international treaties regulate the relationships contained in the Regulation.[14] A contracting state of this Convention may at the same time be a member to another convention which contains provisions on non-contractual liability for damage in special area, in which case the Hague Convention does not have influence on their effect.[15] In the member states which have not ratified the Hague Convention on law applicable to traffic accidents, the applicable law concerningthe liability for damage caused by a traffic accident is determined according to the general conflict of law rule, considering the fact that the Rome II Regulation does not have a separate conflict of law solution for this kind of liability.

The enactment of the Rome II Regulation has not achieved full unification;thus, in the member states, the Convention still prevails over the Rome II Regulation. This refers to international liability of the parties, i.e. the member states, in

Directive 72/166/EEC as of 24th April 1972 regarding the harmonisation of the laws of the member states in relation to insurance from civil and legal liability regarding the use of motor vehicles and the obligation of insurance from such liability (Official Journal 1972, L 103 p. 1). From the practice of European Court: Upon a request for preliminary decision pursuant to Article 267 UFEU which was sent by the Tribunal/Court of Appeals in Guimaraes, Portugal, by the decision of 23rd June 2016 in the case*Isabel Maria Pinheiro Vieira, Rodriges de Andrande, Fausto de Silva Rodriges de Andrade v. Josea Manuela Proenqe Salvadora; Crédito Agricola Seguros; Companhiade Seguros e Ramos Reaissa; Jorgea Oliviere Pinta*, the Portuguese court applied for the interpretation of Article 3, para.1 of the Directive no.72/166. Within the dispute between the spouses *Andrade and CA Seguros* as one party and *J. O. Pinta* as the other party, the Court ordered the spouses to pay damages to J. M. P. Salvador because of the death of his wife in the accident (involving a tractor) which occurred on the farm where she was working.

13 The states which are not signatories to the Hague Convention are: Bulgaria, Estonia, Finland, Ireland, Italy, Hungary, Germany, Portugal, Romania, Sweden and Great Britain.

14 Article 28, paragraph 2 of the Regulation

15 Article 15 of the Hague Convention.

relation to the ratified convention by acceptance of obligation. The non-member states to the Convention apply the Regulation, except for Denmark where internal conflict of law rules on non-contractual liability for damage are applied. Pursuant to Article 29, paragraph 1, some member states have submitted to the Commission a list of cancellation of the conventions which contain conflict of law rules for non-contractual liability to which they were bound. The Commission has published the list in the Official Journal of the EU.[16]

The provision does not contain a special solution for road traffic accidents but general standards envisaged in Article 4 are applied, as well as Article 14 which provides for the choice of applicable law by the parties. Notably, a provision in the preamble of the Convention is clearly aimed at protecting the injured party: "*according to the international rules regarding the damages to the victims of a traffic accident in cases where the accident occurred in the state other than the state where the victim has habitual residence, the court before which the proceeding is initiated needs to consider all the relevant circumstances which refer to such victim, including real loss and expenses of subsequent care and medical help,when calculating the damages (point 33)"* (Babić, 2009:17).

Under the general conflict of law rule, the liability for the damage caused by a traffic accident is subject to the law of the state where the accident occurred -*lex loci damnum*[17], whereby it is not significant in which state the harmful event which caused the damage occurred and where the consequence resulted. In the Proposal for a Regulation, the Commission explains that the place of indirect damage is not significant for determining the applicable law. In relation to this, there is a question of applicable law for the claims submitted by an indirectly damaged party; in such a case, the doctrine refers to the law which is applicable

16 Official Journal of the EU, C-343/05 as of 17thDecember 2010.

17 Article 4 of the Regulation. In the unified case C-359/14 and C-475/14 in the dispute *Insurance S E v I F P&CInsuarance AS and Gjensidige Baltic AAS v PZU Lietura UAB DK*, the Court held that the regulations Rome I (Regulation on the Law Applicable to Contractual Obligations) and Rome II need to be interpreted so that the law which needs to be applied to recourse action of the insurer of the tow vehicle which compensated the damages to the victims of the accident, which was caused by the driver of the said vehicle in relation to the insurer of the insurer of the trailer is determined pursuant to article 7 of Rome I Regulation. Pursuant to article 4, the law applicable to such non-contractual liability is the law of the state in which the damage occurred, in which the damage was suffered directly from the accident. Pursuant to Article 15 item (a) and (b) of the same Regulation, such law regulates the conditions and the scope of liability as well as the reasons for the division of liability. Retrieved11.07.2018 from:
curia.europa.eu/juris/document/document.jsf?text=applicable%Blaw%2Bto%Btraffic%2Baccident&docid.

to the primarily damaged party.[18] Similarly to Article 8 of the Hague Convention, it is expressly determined that, according to the applicable law on the liability to a directly injured party, the circle of parties who have the right to claim damages as indirect consequence of the damage suffered by the directly damaged party has to be determined. In the context of *acquis communautaire* private international law and the application of Rome II Regulation, there is a prevailing attitude that there is no reason for the choice of applicable law to be different in cases involving indirect lyor directly damaged parties.

3.1. Freedom of choice

The regulation allows the party to choose applicable law, which was characteristic of contractual relationships with a foreign element for a long time. Pursuant to Article 14, the parties may, by mutual consent, select the law under which the issues of non-contractual liability for damage will be resolved (Dickinson 2009:13.01), by a special agreement after the event which caused damage or before the harmful event if all the parties do business activities. The choice of applicable law may be express or tacit, which arises from the circumstances of the case with reasonable certainty. Rome II Regulation provides standard measures of protection of the party autonomy by introducing compulsory regulations.[19] The conditions set in relation to the choice of applicable law by the parties

18 In the case C-350/14 of the European Court in relation to the dispute *Florin Lazar v. Allianz SpA,* the request for preliminary decision was filed by *Tribunale de Trieste* regarding the terms "the state in which the damage occurred", "damage" and "indirect consequences of an unlawful action" in the dispute of the family members of the person who died after a traffic accident. The goal of Rome II Regulation is harmonisation of the conflict of law rules in cases of non-contractual liability for the purpose of legal safety and taking into account legitimate legal interest in question. The Regulation does not aim to harmonise substantive EU law in that area. Thus, when a judge applies the terms which are differently accepted in different countries and the scope of which may vary in different legal systems, he/she may find himself/herself before a problematic task. This is particularly true if the applications of the persons who do not have habitual residence in the same country have been submitted within the same dispute. Article 4 of the Regulation in such case needs to be interpreted in a way that regarding the damage suffered by family of the deceased victim of the accident in the state they have residence they may initiate a proceeding in a member state and be included in the concept "indirect consequences". The concept "the state in which the damage occurred" must be interpreted within the meaning of the place in which the traffic accident had harmful consequences. Retrieved11.07.2018 from: curia.europa.eu/juris/document/document.jsf?text=applicable%Blaw%2Bto%Btraffic%2Baccident&docid.

19 Restrictions of article 14, paragraph 2 are the same as with Rome I Regulation so that "Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement". "If all the other elements

are formulated in such manner that they primarily strengthen the position of the weaker party. The possibility of expressing the parties' choice of the applicable law is expressly excluded by Article 6 which refers to unfair competition and acts which restrict free market competition as well as in relation to Article 8 which refers to the violation of intellectual property.

Freedom of choice is restricted in the following situations: a) when the circumstances of the case at the time when the damage occurred are located in the state other than the state whose law the parties choose as applicable (Article 14, paragraph 2); b) by their choice the parties may not derogate from *acquis communautaire* when all the circumstances of the case, at the time when the damage occurred, are located in the territory of one or more states in which the Regulation is in force (Article 14, paragraph 3); c) by the rules of direct application pursuant to Article 16 of the Regulation, although in Article 14 there is no provision of direct reference to this article.

The subjective point of reference, the freedom of choice, represents an option prescribed by the Regulation of general conflict of law rule for non-contractual liability for damage. It receives the rank of primary point of reference which, together with the rest, needs to create "a corresponding measure" of flexibility in the conflict of law rule.

4. The reform of the Serbian conflict of law for non-contractual liability for damage

By enacting the Act on Resolving Conflict of Law with the regulations of other countries,[20] the former SFRY embarked on the codification of private international law, including the codification of general conflict of law solutions for tort obligations (Dika, Knežević and Stojanović, 1991:6). For some cases, the Act provides (unless provided otherwise) that the applicable law for non-contractual liability for damage is the law of the place where the action was performed or the law of the place where the consequence occurred, depending on the fact which of these is more favourable to the damaged party. A single conflict of law solution includes all the cases of non-contractual liability for damage for which there is no special national or international conflict of law solution, which is the

relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement".

20 The Law on Resolving Conflict of Law with the regulations of other countries, ''Official Gazette of the Socialist Federal Republic of Yugoslavia'' no 43/82, 72/82 and ''Official Gazette of the Federal Republic of Yugoslavia'' no 49/96 and ''Official Gazette of the Republic of Serbia'' no 46/06.

case with the conflict of law solutions of the Hague Convention on applicable law for traffic accidents. The Convention is applied in Serbia as a member state on the basis of notification on succession. Due to the international origin of the Convention, in the domestic doctrine there is a prevailing attitude that the method of autonomous interpretation needs to be applied to the provisions of the Convention, which was confirmed by the European Court of Justice.

The opinion of the Supreme Court of Serbia is that the Convention has to be applied to civil liability arising from a traffic accident, regardless of the kind of tribunal competent to resolve it. In such case, civil liability is subject to domestic legislation of the state in whose territory the damage occurred.

Serbia is awaiting the enactment of a new codification of private international law, considering that the final Draft Code on Private International Law (hereinafter: the Draft PIL Code),[21] which contains conflict of law solutions harmonised with the law of the European Union, has already been made.

Thus, Article 165 of the Draft PIL Code stipulates that the parties may choose applicable law for non-contractual obligations after the harmful event or before the harmful event, provided that the parties do business activity. The choice must be manifestly made or undoubtedly arise from the circumstances of the event. If, at the moment of the occurrence of the harmful event, all the decisive circumstances are related to the state the law of which was not selected, such choice does not affect the application of the provisions of the law of the other state, from which it is not possible to derogate. The Draft PIL Code provides that the applicable law for non-contractual liability for damage is the law of the state in which the damage occurred, regardless of the fact in which state the harmful event occurred or in which state the indirect consequences of that event occurred, which is a different conflict of law solution in relation to the applicable Acton Resolving Conflict of Law which is still in force. If the responsible party and the damaged party have residence in the same state at the moment of the occurrence of damage, the law of that state is applicable for non-contractual liability. The new provision provides that, if it is clear from all the circumstances that the harmful event is obviously in significantly closer connection with another state, the law of that other state is applied.

Unlike the Rome II Regulation, the Serbian Draft PIL Code on Private International Law standardises the matter of road traffic accidents in Article 172,but it refers to the application of the Hague Convention in order to determine non-contractual liability arising from damage in a road traffic accident. Thus, as a

21 TheDraft Code on Private International Law of the Republic of Serbia; Retrieved 16 July 2018 from www.mpravde.rs

contracting state, it complies with the international legal system and the obligations accepted at the international level.

The domestic court practice applies the Hague Convention, i.e. the conflict of law rule from Article 3, which refers to the implementation of internal (substantive) law of the state in which the accident occurred, which is best known by domestic judges. In Serbian court practice, there are not so many decisions of this kind, and one of them was rendered in a case of an action taken by a Serbian citizen who suffered serious body injuries in a car accident which occurred in Iraq. The accident was caused by a truck with Bulgarian licence plates and a truck with Serbian licence plates registered with "Dunav" Company. The injured person was in the vehicle driven by the Serbian driver. In order to effectuate his right to damages, Lj. Stevanović sued the Association of Insurers of Yugoslavia (at the time), the "Dunav" Company and the Bulgarian insurance company "Bulstrad" from Sofia. It was the case of shared liability.

Among other things, it was disputable which law was applicable in this case: the law of Iraq *lex loci delicti* or the law of the former SFRY. According to the Hague Convention, it would be the law of Iraq as *lex loci delicti commissi*. However, when the territory where the harmful event happened does not match the state of the consequence, the localisation of the event is done by the application of the so-called theory of the state where the law which is more favourable to the damaged party is applied. The domestic law would be also applicable according to the principle of private international law which takes the domicile, citizenship and habitual residence as the point of reference, and the damages are provided in the proceeding which depends on the point of reference. In this case, the law of Serbia was applied as the consequences occurred in the SFRY, more precisely in today's Serbia.[22]

5. Conclusion

The solutions of the Hague Convention on the law applicable to road traffic accidents are deeply rooted in the national systems of private international law. In the procedure of harmonising different attitudes, there wererather complex solutions, whose application required the attention and competence of competent authorities.Years later, the endeavours of the EU regarding the standardisation of law in general and the conflict of law rules in particular have had a strong influence on all national systems of private international law. Cross-border events resulting in damage raise a series of issues which equally concern all the

22 From the domestic court practice, see: Decision of the Supreme Court Rev-105/06 as of 10th May 2006; Rev-3031/05 as of 13th April 2006; Rev/06 as of 1st February 2006. Retrieved 14.07.2018 from: www.rs/sr-lat/baza-sudske-prakse-suda

citizens, whether they are from the EU member states or the citizens of other states. The application of fundamental principles of EU law regarding freedom of movement of persons, goods and services leads to enacting new rules or amending the existing rules of the Hague Convention. In accordance with this, by enacting the Rome II Regulation, the conflict of law standards of international tort law in the EU area are unified, by the application of the rule of foreseeability and certainty in determining the applicable law for non-contractual liability for damage. Reaching a certain degree of foresee ability is the reason to accept the law of the place of the damage instead of the law of the place where the harmful event occurred, as a rule which will bring a certain measure of flexibility in the application of the conflict of law solution. The Rome II Regulation does not preclude the application of international treaties in which the EU member states are contracting states. The courts of the member states apply the conflict of law provisions of the treaties in force in their countries, and the courts of the member states which are not the parties to such treaties apply the provisions of the Rome II Regulation. This is the derogation from the desired European conflict of law harmonisation in favour of international rules, except for the treaties in which the contracting states are only the EU members.

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ХАШКА КОНВЕНЦИЈА О МЕРОДАВНОМ ПРАВУ ЗА ДРУМСКЕ САОБРАЋАЈНЕ НЕЗГОДЕ И УРЕДБА РИМ II

Резиме

Основни циљ Хашке конвенције био је олакшање накнаде штете посредством осигуравача аутоодговорности и побољшање положаја оштећених лица. Конвенција је резултат компромиса односно настојања аутора да помире различите приступе и тенденције у колизионом праву вануговорне одговорности. У складу са тим, решења полазе од примене права на које указују више тачака везивања истовремено пре опредељења за флексибилно везивање предмета спора. Примена одредаба конвенције има карактер унутрашњег извора те обухвата и меродавно право земаља које нисучланице ЕУ (без обзира на начело реципроцитета).

Уредба Рим II полази од традиционалног приступа тако што преузима решења која су постојала у међународном приватном праву држава чланица, а узима у обзир решења садржана у правима неких држава нечланица. У суштини, опште правило Уредбе потврђује примену права земље у којој се десио штетни догађај, али да би се избегла правна несигурност у случајевима када су последице штетне радње у различитим државама, ово правило је конкретизовано кроз примену права државе у којој је наступила непосредна штета. Жртве друмских саобраћајних несрећа имају могућност избора повољнијег права уколико су упознате са правом обе државе, чиме могу заштити своја права и обезбедити повољан правни третман. Иако повлашћени третман тужиоца није у складу са традиционалним европским правилима одређивања меродавног права, упућивање на основу отворене и флексибилне колизионе одредбе би требало да омогући правичност у сваком конкретном случају. Теорија заступа мишљење да се неуједначеност колизионих правила комунитарног права и Хашке конвенције у материји вануговорне одговорности за штету изазвану саобраћајном незгодом може превазићи изменама и допунама колизионих решења у изворима комунитарног права, доношењем новог акта секундарног законодавства или одступањем од обавезне примене конвенције у земљама уговорницама уколико и штетник и оштећени имају исто уобичајено боравиште.

Кључне речи*: штета, саобраћајна незгода, меродавно право, право ЕУ.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879157K

UDK: 341.231(4-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

THE PRINCIPLE OF RESPECT FOR THE MEMBER STATES' NATIONAL IDENTITY WITH REGARD TO THE RIGHTS AND OBLIGATIONS OF MIGRANT CITIZENS OF THE EUROPEAN UNION[**]

Abstract**:** *The principle of respect for the national identities of the Member States is directed principally at the Member States and defines the relationship between the Member States and the European Union. The conceptual scope of the principle itself includes two levels: ethical and institutional. The first covers such elements as history, culture, tradition, language and religion. The other is connected with the constitutional identity of a Member State.*

The principle of respect for national identity is first of all used in the context of restrictions on the effectiveness of EU law in the legal systems of the Member States. These States can invoke one of the elements shaping the national identity in order to,for example, limit the freedoms of the Internal Market. It should be emphasized that the limiting conditions include not only the ethical space, but also the institutional one, e.g.the protection of human rights or a threat to public order. Secondly, respect for national identity in the institutional space, as constitutional identity, is a basic argument in the discussion on the exclusive competences of Member States and the preservation of sovereignty by the Member States.

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[**] This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

In the context of the rights of migrant citizens of the European Union, it seems that the impact of the discussed principle is limited. The catalog of citizen rights does not refer directly to this principle. As has been shown above, the solution is to invoke the prohibition of discrimination based on origin, which can effectively protect the national language, religion or other elements shaping the national identity of the country of origin. However, this view is not entirely right. In the Avello case the Court of Justice referred to a problem that exceeded the competence of the European Union and ruled on matters falling within the exclusive competence of the Member States. The Court decided that attribution of family name to children with dual citizenship in accordance with the tradition and culture of the migrant's country of origin has higher value than division of competences.

The principle of respect for the national identity of the Member States indirectly affects the obligations of a migrant citizen to the host country. It is not possible to accept the thesis that it is a civic duty, but in certain areas it shapes indirectly the obligations of a migrant citizen to a Member State. The citizen is obligated to respect the order, security and public health of the host country. The consequence of violation of this obligation is expulsion from the host state's territory or refusal to grant the right of residence.

Key words: *the principle of respect for the national identities of the Member States, rights of migrant citizens, obligations of migrant citizens, citizenship, limitation of residence rights of migrant citizens.*

1. General remarks

The European Union is an international organization that assumes the establishment of an internal market as one of the basic objectives, including guaranteeing the free movement of EU citizens. This freedom has been shaped from the beginning of the EC's existence to the present day. Initially, it was associated with the economic activity of migrant citizens of the Member States. After the entry into force of the Maastricht Treaty and the establishment of EU citizenship, this freedom acquired a different character, and the freedom of movement became a civil right, which is implemented without the obligation to indicate the economic activity of a migrant citizen in the host country.

A separate issue is the status of a migrant citizen in the territory of the host country. The Treaties and the Charter of Fundamental Rights (CFR)established a catalogue of civil rights. It is a catalogue that can be extended by EU law-making institutions. The obligations of migrant citizens have not been established yet but the Treaties provide for this possibility.

The subject of this article is the analysis of the impact of the principle of respect forthe national identities of the Member States on the scope of rights and possibly obligations of EU citizens. It covers three elements: firstly, the political position and the content of the principle of respect forthe national identity of the Member States; secondly, the jurisprudence of the CJ in the context of respect for the national identity of migrant citizens; and thirdly, an attempt will be made to show that each migrant citizen has the obligation to respect the national identity of the host country and that in this sense it is a civic duty.

2. The principle od respect for national identity

The concept of "national identity" is generally associated with nation and its special features. The nation should be understood as a social group inhabiting a specific area, characterized by common geographical origin, religion, language, dialect, tradition, values, symbols, legal system, etc. There is the view in the literature on the subject that "national identity" is a "*set of elements - treated by the nation as common to it - that bind it*" (Mik, 2000:465). For the state, it will be "*the awareness of having national and state characteristics, identifying with them, as well as the feeling of unity with other members (entities) of this community*" (Kuchciński, 2011:37). Thus, it should be assumed that identity is treated as a set of elements that constitute a nation. These include: material culture, language and spiritual culture. However, it is worth paying attention to the broader concept of national identity, which does not limit itself to the indicated elements, but also emphasizes the "*obligation to respect the continuity of existence of the Member States as sovereign subjects, respect for national cultures, standards of family law, rules defining the State-Church relations, languages (official), the means of providing access to state social security*" (Wójtowicz, 2011: 6).

The literature on the subject indicates two dimensions of the concept of national identity: institutional and ethical. The first refers to the state system; the second refers to the structure of fundamental rights and the rule of law. Each state is based on values that can be specific to a given state and closely related to the culture of a given society(Arnold, 2009: 56 – 58). In addition, it is emphasized that national identity is a cultural unity and the will to belong to a given country. At the same time, cultural unity means a specific culture, language, customs, religion, while the second aspect refers to the basic functions of the state that determine its legal autonomy (Wójtowicz, 2010: 12).In one of the commentaries on the Treaty on European Union, one may also find a definition of this concept based on two areas. One is, among others, the specificity of culture, language, customs and religion; the other one is state autonomy and the preservation of basic state functions (Mik, Czapliński, 2005: 57).

To sum up the indicated exemplary views on the content of the term "national identity", one should recognize two dimensions: ethical (culture, language, customs, religion) and institutional, related to the basic functions of the state.

2.1. The principle of respect for the national identity in EU law

The principle of respect for national identity was introduced for the first time to the provisions of the Treaty of Maastricht. According to the Treaty on European Union of 1991, *"The Union shall respect the national identities of its Member States, whosesystems of government are founded on the principles of democracy."* Successive treaties strengthened its significance. The Treaty of Lisbon specified the content of the principle by introducing a reference to the basic political and constitutional structures of the state, including regional and local self-government (Art. 4 par. 2 Treaty on European Union).A partial reference to the scope of the concept of national identity has been emphasized in the Preamble to the Treaty on European Union. In accordance with its provisions, the Union's aim is to deepen solidarity between its nations while respecting their history, culture and traditions. Another document with a normative value equal to primary law, in which there is a partial reference to the principle of respect for the national identity of the Member States, is the Charter of Fundamental Rights (hereinafter referred to as the CFR). According to the wording of the Preamble(Para 3), "*The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.*" Moreover, "*The Union shall respect cultural, religious and linguistic diversity*"(Art. 22 CFR).The above-mentioned provisions focus primarily on the concept of national identity in the context of diversity of cultures and traditions of the peoples of Europe. They point to the European Union's reliance on individual, diverse states that have their own distinctiveness and which are characterized by their own culture and tradition. It is a kind of added property of the entire European Union.

2.2. The principle of respect for national identity in the case-law of the Court of Justice

Changes introduced by the Treaty in the context of the principle of respect for the national identity of the Member States developed under the influence of the case-law of the Court of Justice. It emphasized repeatedly that the EU "[...] *is to respect the national identities of its Member States*[...]" (C 208/09) and that it is "*... a legitimate aim respected in the Community legal order* ..."(C 473/93). It is also worth making a reference to the Opinion delivered by the Advocate General

Maduro, who emphasized that "*a Member State may, in certain cases and subject, evidently, to review by the Court, assert the protection of its national identity in order to justify a derogation from the application of the fundamental freedoms of movement*" (Opinion in case C 213/07).

The analysis of judgments of the Court of Justice shows that it has repeatedly recognized individual elements shaping the content of the concept of national identity, e.g. protection of the language of a Member State (C 379/78 *Groener*), protection of history, tradition and culture (C 154/89, C 180/89, C 198/89), protection of public morality (C 34/79, C 121/85), as the basis for restricting the freedoms of the Internal Market. It should be emphasized that the Court of Justice also referred to the second, institutional aspect of national identity. The limiting factor in this case is respect for constitutional identity (Krzysztofik, 2017: 155–170; Cloose, 2016:82–89).The main issue, being the subject of the case-law of the Court of Justice in the discussed context, was the conflict between the protection of the constitutional catalog of fundamental rights and the implementation of the freedoms of the Internal Market (C 112/00, C 36/02). In addition, the violation of constitutional identity is related to the problem of a threat to public order and security (C 36/02).

A separate issue, which is also directly connected with the principle of respect for national identity but in the institutional aspect, is the protection of exclusive competences of Member States. As an international organization, the European Union has competences that have been delegated to it by the Member States. The principle of conferral determines its scope of activities. The indicated problem has been the subject of a long-standing discussion between the Court of Justice and Constitutional Courts of the Member States (Krzysztofik 2014: 7–30; Pal, 2012: 316–318; Biernat, 2011:49– 61; Mikłasiewicz, 2005; Banaszak 2003).

3. The rights of migrant citizens of EU

Citizenship of the European Union was established in 1992 under the Maastricht Treaty. In accordance with the provisions of the Treaty, it is of a dependent nature and is derived from national citizenship (Pal, 2016: 77–78).Member States have exclusive competence in granting of their own citizenship, while the European Union and other Member States are required to recognize the legal effects of citizenship granted.(Rogers, 2005: 62–65). Citizenship of the European Union is effective for citizens of the Member States in three areas. First of all, it is a legal bond connecting the European Union and the citizens of the Member States (Wollenschläger, 2010: 3).Secondly, it is the source of citizen rights.Thirdly, having EU citizenship is the basis for exercising the freedoms of the Internal Market (Grzeszczak, 2017: 13–27).

Considerations in this part of the article will onlybe limited to the issue of the rights of migrating citizens of the European Union, that is, what they are entitled to when using the freedom of migration. These are citizen rights whose catalog has been normalized in two ways: originally in the founding Treaty (Art. 20–24 The Treaty on the Functioning of the European Union), and later in the Charter of Fundamental Rights (Art. 39 – 46).

Pursuant to the provisions of the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU) and the CFR, a citizen of the European Union enjoys the right to migrate (Art. 21), passive and active electoral rights in the territory of the receiving state in elections to local authorities (Art. 22 par. 1) and in elections to the European Parliament (Art. 22 par. 2), uses diplomatic and consular protection in the territory of a third state when his country of origin does not have a diplomatic mission (Art. 23), he has been granted the right to petition the European Parliament (Art. 24), the right to complain to the Ombudsman (Art. 24), the right of legislative initiative (Art. 24) and the right of access to documents (Art. 24). The Charter of Fundamental Rights enriches the presented catalog with the right to good administration (Art. 41). The rights indicated above do not refer to respect for the national identity of the Member States. The subject of considerationsis the rights of citizens of the European Union, which refer to their national identity, which is directly related to the national identity of the Member State of their origin. A specific reference can be found in the CFR's resolutions (Articles 10, 13, 14, 22).As emphasized above, it refers to some aspects of national identity, especially in the ethical dimension. However, it should be remembered that the CFR refers to the EU's approach to specific values, and does not protect national identity in an individual sense.

From the perspective of the implementation of the principle of respect for the national identities of the Member States with regard to therights of citizens, the importance of the prohibition of discrimination on grounds of origin should be emphasized. According to the wording of the TFEU and the CFR, all discrimination on grounds of nationality (Art. 18)as well as on grounds of *gender, race or ethnic origin, religion or belief, disability, age or sexual orientation* is forbidden. The indicated provisions, on the one hand, introduce a general prohibition of discrimination and detailed premises of prohibited differentiation. However, it should be borne in mind that the provisions of the CFR are only applied within the scope of European Union competences and bind Member States in the implementation of EU law (Art. 51);thereby, certain aspects that shape national identity are limited to the scope of the European Union competences.

An example of invoking the prohibition of discrimination in the context of the protection of certain aspects of the national identity of a migrant citizen is the

position of the Court of Justice on matters concerning the use of the official language of the country of origin before the authorities of the host country, if national law provides for the possibility of derogating from the obligation to use the language of the host country in certain circumstances. The Court of Justice emphasized that "*Although, generally speaking, criminal legislation and the rules of criminal procedure such as the national rules in issue, which govern the language of the proceedings are matters for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power in that respect. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law*"(C 274/96).

Another example is respect for the religion of a migrant citizen. The Court of Justice addressed this problem with regard to job contests in the EU institutions, stating that institutions should avoid organizing them on the dates of religious holidays celebrated by the candidates. Ultimately, however, the interested party has the obligation to submit objections to the proposed dates (C 130/75).

4. The impact of the principle of respect for the national identities of Member States on the rights of migrating citizens

In order to demonstrate the impact of the principle of respect for the national identities of the Member States on the rights of a migrant citizen, reference should be made to the judgment of the Court of Justice in the *Avello* case. The subject matter was the situation of a Spanish citizen being a migrant worker in Belgium. He requested to change the last name of his children, who received it in accordance with the rules of Belgian law. The facts of the case were extremely problematic because attribution of family names belongs to the exclusive competence of the Member States,in which the EU has no right to interfere. In its considerations on the prohibition of discrimination, the Court stated that "*It is in this regard settled case-law that the principle of non-discriminationrequires that comparable situations must not be treated differently and thatdifferent situations must not be treated in the same way [...] Such treatment may be justified only if it is based onobjective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued [...]*" (C 148/2). When making a direct reference to the fact, the Court recognized that "*Articles 12 EC and17EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a MemberState from refusing to grant an application for a change of surname made on behalf ofminor children resident in that State and having dual nationality of that State and ofanother Member State, in the case where the purpose of that*

application is to enablethose children to bear the surname to which they are entitled according to the law andtradition of the second Member State" (C 148/2). The Court of Justice found that children with dual citizenship have the right to be named in accordance with the law and traditions of the other Member State. The Court stated that respect for the law and traditions of the country of origin is a derived right of a migrant citizen.

5. Limiting the residence rights of migrant citizens due to the threat to public order and security and the obligation to respect the constitutional identity of the host country

The issue concerning the obligations of migrant citizens is more difficult. The authors of the Treaties have not established any civic obligations, although this is not excluded because the Treaties provide for such a possibility in the future. While referring tomigrant citizens, one should consider their position on the territory of the host country. By crossing the host country's borderthey enter into the legal, social and cultural order of the receiving state.The Treaties do not indicate obligations to the host country, but they define three derogation clauses: breach of public order, breach ofsecurity, and protection of public health. Their fulfilment may lead not only to the refusal to grant the right of residence but also to the expulsion of migrant citizens from the territory of the receiving state. In its rulings, the Court of Justice emphasized that the obligations imposed on Member States may also constitute rights of individuals expressed in a negative way. It seems that such a methodology can also be adopted in this situation. The provisions of Article 45 par. 2 TFEU are not only the derogatory conditions but also the obligation of a migrant citizen to respect order, safety and public health. This obligation is also strengthened by the implementation of one of the most important principles of public international law - the principle of supremacy of the nation.

The most important issue here is to define the concept of respect for public order and security, which seem to be crucial from the perspective of national identity.

According to the established case law of the Court of Justice, this concept means that "*a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security*." Therefore, it should be assumed that from the perspective of a migrant citizen there is an obligation to respect certain values and institutions that constitute the legal heritage of the host country. This refers to respect for the institutional dimension of national identity and, more precisely, constitutional identity. However, the Court of Justice also pointed to some ethical

aspects, such as public morality, culture or religion, but always in the context ofviolation of public order.

6. Conclusions

1. The principle of respect for the national identity of the Member States is addressed directly to the European Union and the Member States. In the first case, it is connected with the obligation to respect the diversity of the Member States in the process of establishing EU law.On the other hand, in the case of the Member States, it means the right to oppose the effectiveness of EU law in a situation where it violates the national identity of the Member States. At this point, the judgment in the *Omega*case should be cited as an example, where the constitutional obligation to respect human dignity was grounds for restriction of the free movement of services; protection of national heritage, culture and art –the problem of tourist guides in the cases of *the Commission vs France*, *the Commission vs Italy* or *the Commission vs Greece*; or the national language of the state - the *Groener* case - protection of the Irish language. In each of these cases, the CJ recognized the right of a Member State to restrict the freedoms of the internal market.

It should also be remembered that this principle has a second dimension which refers directly to the scope of competences conferred to the European Union. This problem has been widely commented on in the rulings of the Constitutional Courts of the EU Member States. The judgments which were made after the entry into force of the Treaty of Lisbon indicate the scope of non-transferable competences that are the exclusive competence of the Member States.

To summarise, each Member State defines the notion of national identity and its scope, which remain inseparably connected with the state's history, tradition and the achievements.

2. The principle of respect for the national identity of the Member States indirectly affects the scope of the rights of a migrant citizen. There are no grounds for accepting the thesis that respect for national identity is a civil right, although there is no doubt that it derives from EU citizenship. Every EU citizen has the right to equal treatment and any discrimination on grounds of national origin is forbidden. Thus, individual elements shaping his identity will be protected. The analysis of case law points, for example, to respect for national traditions manifested through the right to name children in accordance with the rules of the country of origin (the *Avello* case), or the right to use the language of the state of origin in the courts of the host country (the *Unker* case).

On the other hand, EU law and the Charter of Fundamental Rights form the basis for the protection of individual rights of EU citizens, not necessarily in the aspect of migration, such as the prohibition of discrimination on the basis of faith, religion or belief. However, it should be remembered that a citizen can only rely on the CFR with regard to EU competences and when Member States implement EU law.

3. The principle of respect for the national identity of the Member States indirectly affects the obligations of a migrant citizen to the host country. It is not possible to accept the thesis that it is a civic duty, but in certain areas it shapes indirectly the obligations of a migrant citizen to a Member State. The citizen is obligated to respect the order, security and public health of the host country. The consequence of violation of this obligation isexpulsion from the host state's territory or refusal to grant the right of residence. This has been confirmed in many judgments of the Court of Justice, e.g. the refusal to grant the right of residenceto people who violate public morals or public order by belonging to terrorist organizations.

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НАЧЕЛО ПОШТОВАЊА НАЦИОНАЛНИХ ИДЕНТИТЕТА ДРЖАВА ЧЛАНИЦА У ПОГЛЕДУ ПРАВА И ОБАВЕЗА МИГРАНАТА-ДРЖАВЉАНА ЕВРОПСКЕ УНИЈЕ

Резиме

Начело поштовања националних идентитета држава чланица у погледу права и обавеза мигранта-држављана Европске уније углавном је односи на државе чланице и дефинише однос између држава чланица и Европске уније. Концептуални оквир самог принципа има два нивоа: етички и институционални. Етички ниво обухвата елементе као што су: историја, култура, традиција, језик и религија. Инситуционални ниво односи се на уставни идентитет државе чланице.

Начело поштовања националног идентитета се најпре користи у контексту увођења ограничења у погледу примене права Европске уније у правним системима држава чланица. Ове државе могу се позвати на један од елемената који обликују национални идентитет како би, на примјер, ограничиле права и слободе на унутрашњем тржишту. Треба нагласити да ограничавајући услови обухватају не само етичке принципе већ и институционалне стандарде, на пример у погледу заштите људских права или угрожавања јавног реда. Друго, поштовање националног идентитета у институционалним оквирима, као важном елементу уставног идентитета, представља основни аргумент у расправи о искључивим надлежностима држава чланица и очувању суверенитета од стране држава чланица Европске уније.

У контексту права мигранта-држављана Европске уније, чини се да је утицај овог принципа ограничен. Овај принцип није експлицитно предвиђен у каталогу права грађана. Као што је већ речено, предвиђено решење је да грађанин може да се позове на забрану дискриминације на основу пореклу, којом се може ефективно заштитити национални језик, религија или други елементи који обликују национални идентитет земље порекла. Међутим, овакво решење није сасвим оправдано. У случају Авелло, Суд правде ЕУ се бавио питањем које превазилази надлежност Европске уније и донео одлуку о питањима која спадају у искључиву надлежност држава чланица. Суд је одлучио да додељивање породичног имена (презимена) код деце са двојним

држављанством у складу с традицијом и културом земље порекла мигранта има већу вриедност од поделе надлежности.

Начело поштовања националног идентитета држава чланица индиректно утиче на обавезе држављана-миграната у земљи домаћину. Није могуће прихватити тезу да ово начело представља грађанску дужност, али у одређеним областима оно индиректно обликује обавезе држављана-миграната у држави чланици Европске уније. Држављанин-мигрант је у обавези да поштује одредбе о јавном реду, безбедности и јавном здрављу државе домаћина. Последица кршења ове обавезе је протеривање са територије државе домаћина или одбијање да се одобри право боравка.

***Кључне речи**: начело поштовања националних идентитета држава чланица ЕУ, права и обавезе држављана-миграната, држављанство, ограничење права боравка држављана-миграната.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879171M

UDK: 341.24(4-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*THE RESOLUTION OF THE EUROPEAN PARLIAMENT ON THE STRATEGIC COMMUNICATIONS IN THE CONTEXT OF THE RIGHT TO FREEDOM OF EXPRESSION AND RUSSOPHOBIA***

Abstract*: In November 2016, the European Parliament passed the resolution "EU Strategic Communications to Counteract Propaganda against It by Third Parties". In this resolution, initiated by Polish deputy Anna Fotig, Russia is equated with the terrorist Islamic State, while Russian media, like RT and Sputnik, are listed in a totalitarian manner as "unacceptable". The resolution is in legal conflict with Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union, which have guaranteed freedom of expression and information on the European soil since 1953. It is also in violation of the universal international conventions, such as: the UN Charter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Therefore, it must be viewed in the context of politically motivated sanctions that the UN introduced against the Russian Federation in 2014.*

Keywords*: European Parliament, EU, freedom of expression, Russian Federation.*

1. Freedom of expression as a fundamental human right

Human rights have become one of the fundamental part of the international public law after 1945 (Kreća, Paunović, 2002: 246). In theory, it is considered that their significance sometimes surpasses agreements as sources, and that certain international human rights have become common law rules, such as the right

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

to life (Milisavljević, 2016: 98). In that context, their appearance is connected to much older sources and events, such as the American or French revolution, while the division of human rights into the so-called ''three generations'' is done according to the time of their emergence.

According to legal theory, the right to freedom of expression belongs to those human rights which protect the social and moral integrity of a person (Paunović, Krivokapić, Krstić, 2010: 201-232). It originates from the freedom of thought, as well as from the freedom of religion. If those fundamental human rights are guaranteed in a society, then the right to freedom of expression is derived from them (Hanski, Šajnin 2007: 285). The distinction is that the freedom of expression is closer to the public law than the right of the freedom of thought, as well as the freedom of religion, which is primarily connected with private law. The right to freedom of expression can have an oral or a written form. However, the right to freedom of expression is not only an individual right. According to legal theory, which is mainly based on the international codifications after 1945 and the practice of the European Court of Human Rights, the freedom of expression is guaranteed to the minority groups. They can be a minority not only in the ethnical sense but also in the political and religious sense. The freedom of expression is a contribution to the open public debate, but it also guarantees the freedom of the oppositional opinion and the work of electronic and printed media as well.

The main sources of freedom of expression are: Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, and Article 11 of Charter of Fundamental Rights of the European Union. In addition, Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe guarantees the freedom of expression referring to the Declaration of the Heads of State or Government of the member states of the Council of Europe adopted in Vienna on 9th October 1993, as well as the Declaration on the Freedom of Expression and Information of 29th April 1982 and the Declaration on Media in a Democratic Society, adopted at the Fourth European Ministerial Conference on Mass Media Policy in Prague on 7th- 8th December 1994.

All these sources guarantee the freedom of expression at the European and universal level. The freedom of expression also comprises obtaining information from various sources, which are mutually conflicting.

2. Cold-war context of adopting Article 10 of the European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention on Human Rights, the ECHR)

was adopted in 1950, and came into force in 1953. In the Cold-war context, it was undoubtedly a means in the political battle between the two world blocks. The West fiercely criticized the lack of freedom of expression in the USSR and the significance of human rights was to be expanded. At the same time, the then Russia was presented as a totalitarian country where it was not possible to hear a different opinion. Such theses were even presented by some of the most influential American Neo-Marxists such as Herbert Marcuse. The West allegedly allowed the freedom of expression even though there was a ''good'' kind of the restriction of the freedom of expression in that part of the world. Those were the restrictions behind which the ''liberal'' goals lay (Marcuse, 1983: 29, 38, 42, 46–47, 49, 157, 167, 220). Moscow, on the other hand, consciously deprived people of their freedom, whereas in the West, it was happening ''unintentionally''. In the West, the dominant ideas are the ones of the freedom of ethics and Christianity. Western civilization has "ideas", and Russian/Soviet civilization does not. Western civilization was created in search of "the truth"'. In the West, there is a consensus between the intellectuals of all kinds (from Bentham to Saint-Simon) that the actual system is the best possible. The West is dominated by idealism, and Russia is dominated by the utilitarianism of the mind. In the West, people have been diligent for generations; in Russia, they were forced to be diligent by communism (Marcuse, 1983: 12, 16, 21, 23, 26, 27, 29, 32–33, 35–36, 40, 47, 50, 54, 58, 59, 62, 68, 70–71, 86–87, 91–99, 108, 119, 138, 152, 178–179, 184, 193, 215, 217, 222, 232). In the West, the press "censures itself"'. The West is a society of happiness and neo-colonialism, and the USSR is a society of totalitarianism or ''terrorism''; (this was, by the way, stated for the country that was a founder of the UN). That is why the western society is a "rational totalitarian society"' in which there is a rational limitation of the freedom of expression.

In the Cold-war and Soviet-phobia context which symbolizes the consensus of left-wingers like Marcuse and right-wingers like the American senator McCarthy, the European Convention on Human Rights (ECHR) was adopted in 1950, including its well-known Article 10 which guarantees the freedom of expression. Article 10 ECHR states:[1]

1. "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

1 Art. 10 ECHR The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention on Human Rights, the ECHR) was adopted in 1950, and came into force in 1953

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Also, Article 17 of the Convention emphasizes that: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity of perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". So, the West is using the freedom of expression as a means in the Cold War against Moscow. The field of this battle is the European continent. The intellectuals such as Brodsky, Sakharov or Solzhenitsyn were awarded Nobel Prizes and the asylum in the West because they were deprived of human rights, primarily the right to the freedom of expression. The Conference on Security and Co-operation in Europe held in Helsinki in 1975 was another impetus for spreading human rights to the East.

3. The practice of the European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR) and the European Commission for Human Rights have developed large practice in the settlement of disputes concerning the interpretation of Article 10 of the European Convention or the interpretation of the freedom of expression. In the well-know case *Jersild v. Denmark*, the European Court of Human Rights decided that: "Freedom of expression constitutes one of the essential foundations of a democratic society; and these principles are of particular importance as far as the media are concerned... it is incumbent on the media to impart information and ideas on matters of public interest, and the public also has a right to receive them. Were it otherwise, the media would be unable to play their vital role of public watchdog".[2] The Court is of the opinion that it is neither their right, nor the right of the national courts, to impose the media their own stand which technique the media should use in their reporting, and they highlight that Article 10 also protects the form in which information and ideas are presented. So, the European Court of Human Rights concluded in the *Jersild* case in 1994 that the freedom of expression, the availability of information on the important social matters, the observance of

2 *Jersild v Denmark* (App no 15890/89) ECHR 23 September 1994, European Court Of Human Rights, http://www.hr-dp.org/files/2013/09/09/CASE_OF_JERSILD_v._DENMARK_.pdf

the overall context in which the declarations were made, and the awareness of the viewers and listeners are the primary criteria for the decision whether somebody abused the freedom of expression.

The decisions of the European Commission for Human Rights from 1994 and 1997 could be observed in the same context. For example, according to the application No. 18714/91, in their Decision of 9th May 1994 on the case *Brind et al. v. United Kingdom* (the prohibition of live broadcast of the interview or statements of persons who openly express their support to organizations connected with Sinn Féin), the Commission concluded that the prohibition of the interview is unacceptable. The same conclusion was reached in the application No 18759/91, the Decision of 9th May 1994 on the prohibition of the live television broadcasting of the interview or the statements of persons who openly express their support to organizations connected with Sinn Féin, as well as in connection with the applications No. 28979/95 and 30343/96, the Decision of 13th January 1997 in the case *G. Adams and T. Ben v. United Kingdom* concerning the prohibition expressed to the president of Sinn Féin to come to England after the invitation of some members of Parliament and journalists.

Thus, the European Court has actually enabled the court practice to be one more source that guarantees the freedom of expression on the Continent.

4. Russophobia and the borders of the freedom of expression 2014-2017

However, after the outbreak of the Ukrainian crisis in 2014, a great change happened. The line between the freedom limitation and the hate speech was erased. The Russians were depicted as barbarians and terrorists, dangerous aggressors who jeopardize the "enlightened" West and its "values" in both military and propaganda terms; they "falsify" the history for the sake of their "imperial" interests; they are led by "unbalanced" and perverted people who attack other countries, and inside Russia itself "despotism" rules.

In that ideological discourse, the influential German weekly newspaper, *The Spiegel,* in 2016, depicted Russia as "Upper Volta with nuclear projectiles".[3] The Anglo-Saxon media and elite often lack the elementary politeness when they talk about Russia. A reporter from Fox television (Bill O'Reilly) in his interview with the American President in February 2017 openly claims that the Russian

3 See: Wiegrefe K. ''NATO Efforts to Boost Force in Baltics Will Not Boost Security'', Spiegel, 12/7/2016 http://www.spiegel.de/international/world/nato-efforts-to-boost-force-in-baltics-will-not-boost-security-a-1102578.html (accessed 1/9/2017); Lucas E.''We must stand up to Putin's *gangster state*.'', The Times, 22/12/2016, https://www.thetimes.co.uk/article/we-must-stand-up-to-putins-gangster-state-lclxflz9j (accessed 1/9/2017)

president is a killer: "He's a killer, though. Putin's a killer."[4] (For British media, the Russian president is a ''paedophile").[5]

For the US ambassador in the UN, Samantha Power, Russian actions in Syria are "barbarism" (even though the Russian forces act in that area on the bases of the invitation of the legitimate leaders, unlike the Western coalition). "What Russia is sponsoring and doing is not counter-terrorism, it is barbarism."[6] British Prime Minister Theresa May in 2016 warned that the whole Europe was allegedly "at the height of the Russian aggression'' (even though British troops were stationed in the Amari base in the north of Estonia, about 130 kilometres from the Russian border), and required the unification of Europe against the "gruesome Russian aggression''.[7] Russia is an "existential threat" not only for Europe but for the whole world's order, claimed the former Chief Commander of the NATO forces in Europe, Philip Breedlove, in the magazine *Foreign Policy* in June 2016. Not only is the official Russia an enemy. The "problematic" ones are even Russian monks. As "revealed" by a British portal *Spectator* in September 2016,[8] they allegedly use Mount Athos as a spy and propaganda centre. Namely, the Russians have a "secret plan" carried out by about 70 monks (even though the British reporter "has his doubts" that there are ten times more of them) from the Russian monastery St. Panteleimon. A "non-holy alliance" was created between the monks and the Russian president (or the former KGB agent), claim the British media. The aim of that "non-holy alliance" is to undermine the NATO and the EU, as well as the "circumvention" of the Dardanelles. The "proof" for this are the satellite and television antennas situated in the Russian monastery.

4 When the spokesperson of the Russian president requested the apology, the reporter cynically replied that he would wait until 2023, ''Bill O'Reilly: Putin will have to wait for apology over 'killer' remark ''CNN, 7.2.2017. http://money.cnn.com/2017/02/07/media/bill-oreilly-putin-killer-fox-news-trump/index.html (accessed 18/8/2017)

5 See: Dearden L.'' Alexander Litvinenko accused Vladimir Putin of a paedophile four months before he was poisoned.'',Independent, 21/2/2016 http://www.independent.co.uk/news/uk/crime/alexander-litvinenko-murdered-because-he-accused-putin-of-being-a-paedophile-a6824806.html (accessed 18/8/2017) The same claims are repeated by the Washington Times a day later in the text:, Chasmar J. ''Slain ex-KGB spy accused Putin of pedophilia 4 months before poisoning'', http://www.washingtontimes.com/news/2016/jan/22/alexander-litvinenko-slain-ex-kgb-spy-accused-putin /, (accessed 18/8/2017).

6 See : 'U.S. slams Russian 'barbarism' in Syria, Moscow says peace almost impossible'', Reuters 25/ 9/ 2016 http://www.reuters.com/article/us-mideast-crisis-syria-un-us-idUSKCN11V0NN (accessed on 18/8/2017)

7 See: ''Theresa May expects full EU role until Brexit'', BBC, 21.10.2016. http://www.bbc.com/news/uk-politics-37710786 (accessed 18/8/2017).

8 See: Norman J.,''What is behind Vladimir Putin's curious interest in Mount Athos?'',Spectator, 10.9.2016. https://www.spectator.co.uk/2016/09/what-is-behind-vladimir-putins-curious-interest-in-mount-athos/ (accessed 19/8/2017)

However, the European Court has never convicted these abuses of the freedom of expression.

5. Resolution of the European Parliament "EU Strategic Communication to Counteract Propaganda against it by Third Parties" and the derogation of the freedom of expression

After 2014, Russophobia has become the dominant discourse in the Western media. (The EU also imposed economic sanctions to the RF). In that context, the European Court of Human Rights not only failed to convict the obvious inflaming of hate speech or Russophobia (mentioned in a few cases above), but they remained silent to the obvious attempt of violation of the freedom of expression and jeopardizing the public debate on the whole continent. The best-known example of derogation of the freedom of expression is the Resolution of the European Parliament on "EU Strategic Communication to Counteract Propaganda against it by Third Parties". This resolution is the first modern legal act adopted by an international subject which wrongfully restricts the freedom of expression on the European continent.

Namely, in November 2016, the European Parliament adopted the resolution "EU Strategic Communication to Counteract Propaganda against it by Third Parties". In the resolution initiated by a Polish MP Anna Fotyga, Russia is equalized with the terrorist Islamic state. Russia is allegedly waging a "hybrid war" in Ukraine, "does not share the values" of the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights (even though Russia ratified those multilateral international agreements), "twists the truth", provokes "fear", "does not want a dialogue", represents itself as the only protector of "traditional Christian values", carries out "operations" through their secret services, helps political "extremists" and "populists", "falsifies history", leads a cyber campaign against the EU.[9] At the end of the resolution, in the totalitarian manner, they even name the "unacceptable" Russian media such as RT and Sputnik.

The Resolution is obviously in legal collision with Article 10 of the European Convention on Human Rights and with Article 11 of the EU Charter of Fundamental Rights, which have guaranteed the freedom of expression and information on the European soil since 1953. It is also contradictory to the universal international

9 European Parliament resolution of 23 November 2016. on EU strategic communication to counteract propaganda against it by third parties, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0441&format=XML&language=EN (accessed 19/8/2017)

conventions such as the UN Charter, the Universal Declaration of Human Rights, and the UN International Covenant on Civil and Political Rights.

It was not surprising that the Resolution caused a lot of negative reactions, especially from the highest positions. The Russian President, commenting on such violation of the freedom of expression, remarked that the best way of communication would be an "open discussion" where "solid arguments" are presented, and not the prohibitions that are politically motivated.

On the other hand, Estonia, a EU member state, referred to the same Resolution of the European Parliament in 2017 when it prohibited the entrance of Russian journalists to this Baltic country. So, the Resolution of the European Parliament which is, in essence, a soft law or an auxiliary source of the international law (Avramov, Kreća, 2008: 68) is set above the primary sources of the international law for political reasons. Namely, a declaration (Bartoš, 1986: 56-67) is set above the international agreements (Kreća, 2012: 86), such as the European Convention of Human Rights, the Universal Declaration of Human Rights, and the UN International Covenant on Civil and Political Rights. To make the violation of legal norms even more absurd, in this way the EU also derogated their own primary right, i.e. the Charter of Fundamental rights of the EU which is legally binding for all the EU member states (Janjević, 2009: 317). Such an approach and the severe derogation of the hierarchy of the sources of the international law, as well as of the EU legislation cannot be explained by legal motives. Actually, they are not included in the Resolution of the European Parliament. The political motives were behind the adoption of the Resolution of the European Parliament. They have to be observed in the context of Russophobia which has become the dominant discourse in the western part of the European continent after 2014, as well as in the historical context. The Resolution named "EU Strategic Communication to Counteract Propaganda against it by Third Parties" is the continuation of Soviet-phobia from the period of the Cold War. The difference is that, at the time, the West tried to fight against Moscow by expanding the human rights on the continent, whereas now Western countries are restricting them for the same political goals. So, the observance and the territorial jurisdiction of the fundamental human rights, including the freedom of expression, are getting into a regressive phase at the beginning of the 21st century.

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РЕЗОЛУЦИЈА ЕВРОПСКОГ ПАРЛАМЕНТА О СТРАТЕШКИМ КОМУНИКАЦИЈАМА У КОНТЕКСТУ ПРАВА НА СЛОБОДУ ИЗРАЖАВАЊА И РУСОФОБИЈЕ

Резиме

У новембру 2016. године Европски парламент је донео резолуцију „Стратешка комуникација ЕУ у одбрани од пропаганде трећих страна". У резолуцији коју је иницирала пољска посланица Ана Фотиг, Русија се изједначава са терористичком Исламском државом и у тоталитарном маниру се набрајају ''неприхватљиви '' руски медији попут RT и Спутњика. Резолуција је у правној колизији са чланом 10 Европске конвенције о људским правима и чланом 11 Повеље о основним правима ЕУ који гарантују слободу изражавања и информисања на европском тлу још од 1953. године. Она је и у супротности са универзалним међународним конвенцијама попут Повеље УН, Универзалне декларације о људским правима, и Међународног пакта о грађанским и политичким правима УН. Зато се она мора посматрати у контексту политички мотивисаних санкција које је УН увела против Руске Федерације 2014. године

***Кључне речи**: Европски парламент, ЕУ, слобода изражавања, Руска Федерација.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879181V

UDK: 340.132(497.4:4-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 23.10.2018.

*THE PRINCIPLE OF PROPORTIONALITY IN THE APPLICATION OF SANCTIONS AND OTHER MEASURES OF STATE COERCION ACCORDING TO BULGARIAN LEGISLATION AND EUROPEAN UNION LAW***

Abstract: *Proportionality, as a basic principle for exercising the state competences, requires that acts of public authority do not affect rights and legitimate interests to a greater extent than it is necessary for the purpose for which the act is issued. In applying sanction and other state coercion measures, the principle of proportionality is a threshold for the limitation of fundamental rights. Sanctions must be effective, dissuasive and proportionate. Their imposition must not have consequences which are manifestly incompatible with the objective pursued. These other requirements, which are closely related to sanctions, must be met by state coercive measures that ensure their effectiveness. The study focuses on proportionality as an element of judicial control in the definition and control of state coercive measures in domestic law and in European Union law.*

Key words: *proportionality principle, sanction, coercive administrative measures, judicial review of proportionality.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

Criminal justice policy is, as a rule, sovereign power of states. States' social values protected by the criminal justice systems are closely linked to the very identity of societies within them. Therefore, the definition of categories of offenses and administrative offenses is a matter for the national authorities. According to Article 83 (2) of the *Treaty on the Functioning of the Union* (TFEU), European Union (EU) legislation on the definition of offenses and sanctions is limited to ‚minimum rules' (description of conduct considered to be criminal, requirements for a type of sanction or valid for EU-wide definition of what should be regarded as aggravating or mitigating circumstances), where the approximation of the laws and regulations of the Member States in the field of criminal law is indispensable in order to ensure effective implementation of a Union policy in an area which has been subject to harmonization measures. This restriction excludes full harmonization. However, any Member State legislation which protects fundamental rights by means of criminal sanctions should be based on the principle of proportionality (Article 5 (4) of the *Treaty on European Union* (TEU): the means of action chosen by the national authorities must be necessary to achieve the objectives that they pursue.

Pursuant to Article 3 (2) TEU, the Union grants its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured, together with appropriate measures with regard to the control of external borders, asylum, immigration, and prevention and fight against crime. To achieve this goal, Member States have freedom in setting sanctions, but it is not complete. The principle of loyal cooperation under Article 4 (3) TEU requires the Member States to take all measures which are appropriate to ensure the scope and effective operation of European Union law, and to that end, while retaining their discretion as to the choice of such measures, they must ensure that they in all cases give the penalty an effective, proportionate and dissuasive character.[1,2] National legislation must not obstruct the exercise of rights and obligations under European Union (EU) law by directly or indirectly making them difficult or impossible to enforce through domestic remedies. Restrictions on the rights and freedoms recognized by the Charter of Fundamental Rights of the European Union (the Charter) may only be imposed if they are necessary and meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. According to Article 49 (3) of the Charter, the severity of the punishable offenses should not be disproportionate to the offense. The introduction of excessively severe sanctions can be interpreted as a disguised restriction on the freedoms recognized by

1 Case C-382/09 *S. M. S.,* ECLI:EU:C:2010:596.

2 Case C-201/10 *Urbán,* EU:C:2012:64, т. 23.

EU law.[3] In a comment on „internal order", the Court of Justice of the European Union (CJEU) points out that, when regulating the internal order, the measures cannot be exceeded in the light of Union Legal, to what extent this guarantees the free movement of goods, people, services and capital.[4] In that connection and in the judgment of the General Court of 17 March 2016 in Case T-817/14 (paragraph 50), it is recalled that ,the principle of proportionality, which is part of the general principles of European Union law and reproduced in Article 5 (4) TEU, requires that the acts of the Union institutions should not go beyond what is appropriate and necessary to achieve the legitimate aims pursued by the legislation in question, bearing in mind that, where there is a choice between several appropriate measures, it is appropriate to resort to the measure which creates the fewest constraints, and the inconveniences caused by it must not be disproportionate to these objectives".[5]

Similar is the understanding of the content of the principle of proportionality and the practice of the European Court of Human Rights (ECtHR). Although the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) does not use the term „proportionality", the principle is particularly clear in the provisions guaranteeing the right to private and family life, housing and correspondence (Article 8), freedom of religion (Article 9), freedom of expression (Article 10), and freedom of association (Article 11). States have a margin of appreciation of the necessary restrictions on fundamental rights (with the exception of absolute rights[6]) to protect the public interest, but the interference or limitation of the right must be „necessary in a democratic society". The frameworks of State intervention are determined by the criteria set out in the Convention, consistently maintained in a number of decisions of the ECHR: the measures provided for by the law to be necessary in a democratic society in the interests of national and public security or the economic well-being of the country, to prevent disorder or crime, to protect health and morals, or the rights and freedoms of others, to pursue a legitimate aim and to achieve

3 Case C-255/14 *Chmielewski*, EU:C:2015:475.

4 Case C-273/97 *Sirdar (Angela Maria) v The Army Board and Secretary of State for Defence* [1999], ECR I-7403.

5 Case C-343/09 *Afton Chemical,* EU:C:2010:419; Joined Cases C-581/10 and C-629/10 *Emeka Nelson and Others v Deutsche Lufthansa AG,* EU:C:2012:657; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk,* EU:C:2013:28; Case C-101/12 *Herbert Schaible*, EU:C:2013:661.

6 As a rule, the ECHR is consistent that the state can not restrict absolute rights and does not investigate the proportionality of such interference (Case *Gäfgen v. Germany*, App no 22978/05 (ECtHR 1 June 2010); Case *Siliadin v France***,** App no 73316/01 (ECtHR 26 July 2005).

a reasonable balance between the means used and the objective, whitch achievement is sought.[7]

In the Bulgarian legal system, proportionality is a constitutional principle, provided in the second paragraph of the Preamble of the Constitution of the Republic of Bulgaria (CRB) as one of the „universal values". The rule of law under Article 4 paragraph 1 of the CRB requires the proportionality of the legal restrictions imposed on individual rights and freedoms protected by the CRB. They must be appropriate, possibly „the smoothest" and at the same time effective enough means to achieve the constitutionally justified objective.[8] The proportionality requirement is applied as the decisive criterion for the type and size of legal restrictions and for the determination of specific limits on the exercise of fundamental rights (Drumeva, 2008). In terms and content, the established constitutional criteria for the admissibility of interference are identical to those established in the ECHR and the Charter and those adopted in the practice of the ECHR and the CJEU human rights standards.

2. Proportionality as an element of judicial control

Proportionality is an element of judicial control in the determination and control of state coercive measures (irrespective of the division of state coercive measures of sanction as the legal consequence of an offense, [9] the implementation of which leads to the sanctioning (most often punishment) of the perpetrator in criminal law, administrative sanctions and impact measures, including coercive administrative measures,[10] as substantive law institutes in the various legal sciences to which our attention is directed), which includes

7 Case *Sidabras and Others v. Lithuani*a, App no 50421/08 (ECtHR 23 June 2015.); Case *Oleksandr Volkov v. Ukraine*, App no 21722/11 (ECtHR 9 Jan 2013); Case *Riener v. Bulgaria,* App no 46343/99 (ECtHR 23 May 2006).

8 Decision No 14 of 4 November 2014 of the Constitutional Court of the Republic of Bulgaria on Constitutional Case No 12/2014

9 According to the commonly accepted definition, the offense constitutes guilty unlawful act or omission (aggregated by the term "act") with a socially or socially detrimental effect, the execution of which is usually accompanied by a legal sanction or other legal consequences for the perpetrator (Boichev, 2003; Ganev,1990).

10 In Article 22 of the Administrative Violations and Penalties Act, the purpose of the compulsory administrative measures is defined as a legal means of Sanctions Act of the Republic of Bulgaria preventing and abolishing the administrative violations as well as for preventing and remedying the harmful consequences thereof. The compulsory administrative measure protects a particular rule of law by aligning its disposition with the conduct of a particular legal entity which is immediately threatened with diversion, deviation or deviation from the prescribed (Decision No 10 of 29 May 2018 of the Constitutional Court Constitutional Court of the Republic of Bulgaria on Constitutional Case No. 4/2017).

several steps: legitimacy - legality (in detail, Stoynov, 1999), suitability, necessity and proportionality in a narrow sense. Illegitimacy is generally ruled out for a state sanction. At constitutional level, the CRB explicitly proclaims the *nullum crimen sine lege* principle, but not the principle *nulla poena sine lege,*[11] although the proclamation of the first necessarily implies the protection of the latter (Dolapchiev, 1994, Girginov, 1999). A number of authors draw it out of the norm of Article 4 paragraph 1 of the CRB (Nenov, 1992), according to which Bulgaria is a rule of law and its element is precisely the principle of proportionality of the crime and the punishment, as well as the norm of Article 5 paragraph 3 of the CRB (Stoynov, 1999), which contains the classic principle „No one can be convicted of an act or omission, which was not declared by the law for a crime at the moment of its execution". In the Bulgarian legal system, the measures of state coercion are formally defined and can be regulated only in a normative act having the rank of a law (Article 5 paragraph 3 of the CRB). The rationale for applying the state coercion, the subjects and the objects of coercion, the measures of impact in which it is expressed, and the order for their implementation are normative.

From the point of view of legitimacy, state intervention should be „prescribed by law", but national legislation should also provide sufficient safeguards against arbitrary interference with fundamental rights. State enforcement (criminal law, administrative law) should also be a means of pursuing the intended purpose of its implementation and, moreover, be an appropriate means of achieving that objective - the public interest which calls for the implementation of State interference. Given the broad discretion enjoyed by the legislature in the regulation of State coercive measures, the purpose of the control is to prevent the application of inappropriate measures to achieve a specific legitimate aim, such as the manifestly inappropriate nature of the measure; in light of the objective which the legislature intends to achieve, its application may affect its legality. The question is not whether the measures adopted by the legislator are the only or the best possible but whether they are appropriate and necessary in relation to the objective pursued. In that regard, according to the CJEU, where European Union law does not contain more precise rules on the fixing of national penalties since it does not explicitly provide for criteria to assess the proportionality of such sanctions, ,sanctioning measures under national law must not exceed the limits of is appropriate and necessary to attain the objectives legitimately pursued by that legislation, given that, where there is a choice between several appropriate measures, the least binding and recourse must be had to the facilities

11 The principle is proclaimed in Article 2, paragraph 1 of the Criminal Code of the Republic of Bulgaria and in Article 3, paragraph 1 of the Administrative Violations and Sanctions Act of the Republic of Bulgaria.

should not be disproportionate to the aims pursued."[12] In this context, the CJEC considers that the severity of sanctions should be in line with the severity of the offenses punished by them, including by ensuring a genuine deterrent effect, while respecting the fundamental principle of proportionality.[13]

Proportionality in the strict sense in the field of state coercion is a test of whether the objective can be achieved by alternative measures that lessen the freedom or interests of others (disqualification by giving notice of minor offenses where the punishment that may be impose a disproportionate burden on the perpetrator). Judicial control of proportionality implies the appropriateness and necessity of the measure but, within this framework, the objective and the measure are compared to resolve the conflict between the public interest in protection against offenses and the opposite private interest of the offenders affected by the state intervention.

In the field of enforcement of state coercive measures (penalties for offense and administrative offense and administrative coercive measures - coercive administrative measures) the judicial control of proportionality does not rest exclusively on subjective perceptions. According to the case-law of the CJEU, the principle of proportionality is binding on the Member States, which are obliged ‚not only to lay down rules on the gravity of fines but also to assess the factors which may be taken into account in setting the fine.'[14] Penalties and measures of administrative coercion should adequately reflect the nature, gravity and consequences of the offense, and judicial review should reasonably assess all the facts. Assessing which measures are effective, proportionate and dissuasive on a case-by-case basis should reflect the objective pursued by the chosen measure - restoring compliance or sanctioning unlawful behavior (or both). Due to the different procedural order and the different nature of the activity of imposing sanctions (criminal and administrative), which may be imposed by the order of the Criminal Procedure Code (CPC) of the Republic of Bulgaria, by a sentence and by the order of the Administrative Violations and Sanctions Act (AVSA) of the Republic of Bulgaria on the application of administrative enforcement measures (compulsory administrative measures), the Administrative Procedure Code (APC) of the Republic of Bulgaria envisages the issuance of an individual administrative act by means of which the legislator may establish different criteria for proportionality control and envisage the judicial control by the Court.

12 Case C-210/10 *Urbán*, EU:C:2012:64, т. 24 и 53.

13 Case C-565/12 *LCL Le Crédit Lyonnais,* EU:C:2014:190, т. 45.

14 Case C-210/10 *Urbán*, EU:C:2012:64, т. 54.

2.1. Proportionality in imposing penalties

The specific criminal procedure manifestation of the principle of proportionality is the provision of Article 31 paragraph 4 of the CRB, according to which „There are no restrictions on the rights of the accused beyond what is necessary for the implementation of justice". Although the provision refers only to prisoners, there can be no doubt that the requirement is applicable to other penalties. Both the offense and any other punishment and the exercise of administrative coercion in the enforcement of coercive administrative measures cannot be aimed at causing physical suffering or humiliation of human dignity (Article 36 (2) of the Criminal Code (CC) of the Republic of Bulgaria.

The basic rule for determining the punishment under Article 54 paragraph 1 of the CC and under Article 27 paragraph 1 of the AVSC obliges the court and the administrative authority to determine the penalty within the limits provided by the law for the committed crime or administrative violation. The type and amount of the punishment are specified in the sanction of the relevant norm in the Special Part of the CC or in a special law in whose disposition the administrative violation (legal status) is outlined.

Outside of the law, the punishment should be the offense and the administrative offense (Article 35 (1) of the CC and Article 27 (1) of the AVSC), respectively. The type and severity of the offense, defined in principle on the basis of the general and abstract characteristic of the act, outlines the varying degree of interference (the type of punishment), while the severity of the punishment is more case-oriented with all its peculiarities. An effective, proportionate and dissuasive response to an infringement depends on the circumstances of the case. The proportionality of the penalty is reflected in the mandatory requirement of the law to determine the degree of public danger of the act (nature, severity and duration of the offense) and that of the perpetrator, the form of guilt (intent or negligence), the inducement to commit the act and any other mitigating and aggravating circumstances (damage suffered, the co-operation of the offender to limit the consequences of the offense or offense for the person concerned or persons related to the previous damages, directly or indirectly realized financial benefits, etc. - Article 54 paragraph 1 of the CC and Article 27 paragraph 2 of the AVSC) except for those which are taken into account by law in determining the offense or administrative offense. Determining the punishment according to the aggravating and attenuating circumstances is a matter of discretion, inasmuch as the law does not state exhaustively the aggravating and mitigating circumstances - as defined, objective and predetermined signs of the act, the perpetrator or the reality. However, this discretion has its limits - the limits of the penalty at the minimum and maximum set. In all cases, the court and the

administrative prosecuting authority cannot impose a penalty heavier than the maximum prescribed. According to Article 7 item 1 of the ECHR, to which Bulgaria is a party, one shall not receive a more severe punishment than the one provided for the respective offense at the moment when it was committed. They cannot impose a penalty for an administrative offense committed and under the minimum stipulated (Article 27 (5) of the AVSC), but for a criminal offense where the legislator has envisaged the possibility for the court to impose a lighter punishment under certain hypotheses (Article 55 and Article 58 of the CC). The criteria introduced by the legislator for the proportionality of the punishment are cumulative, and through them the law allows for the specific punishment to be determined taking into account all individual peculiarities of the committed crime or administrative violation. The punishment should adequately reflect the nature, gravity and consequences of the offense or violation. It should be commensurate with the severity and achieve individual and general prevention.

2.2. Proportionality in the application of administrative enforcement measures

In the exercise of administrative coercion by enforcement of coercive administrative measures (hereinafter referred to as „coercive measures" or „measures"), the administrative body is bound by the requirements for the legality of the individual administrative acts laid down in the provision of Article 146 of the APC as grounds for challenge, one of which is the conformity of the act with the purpose of the law: the coercive administrative measure can only be applied in the absence of any other means of achieving its outcome and only for the purpose the legislator had in mind exercising state coercion. Within the framework of the requirement for compliance of the measure for the implementation of the measure with the purpose of the law, the judicial control of its proportionality shall also be exercised.

The judicial review of the lawfulness of the administrative act is complete and requires the court's discretion as to the conformity of the act with the purpose of the law (and in the absence of a complaint on that ground);[15] the coercion should only be directed to the immediate purpose of the measure, to ensuring the positive actions of the entity in the legal relationship and to abstain from the legally forbidden. Criteria for this assessment are legally established by the provision of Article 6 of the APC. Proportionality (also known as the principle of proportionality) in the exercise of powers to issue administrative

15 The obligation for the court is legally assigned by the provision of Article 168 (1) APC, according to which the court is not limited only to discussing the grounds stated by the challenger, but is obliged, on the basis of the evidence presented by the parties, to verify the lawfulness of the contested administrative act on all grounds under Article 146 APC.

acts by the administrative bodies is a basic principle in the administrative process explicitly proclaimed in the provision of Article 6 of the APC, which is characterized by three aspects of the judicial control: a) suitability - the measure is appropriate to achieve the objective; b) necessity - there should be no less restrictive means to achieve the same objective, and c) proportionality in the strict sense - balance the benefit of achieving the target against the burden on the addressee of the measure. The choice of the lightest coercive measure is not a matter of administrative discretion. The Authority is obliged to apply the lightest measure and to achieve the purpose of the law. The extent to which the restrictive measure taken is proportionate to the interest protected is a question of the lawfulness of the implementing measure because the limitation of subjective rights will be in line with the requirements of law if it has the effect of achieving the legal objective. This verification is possible only through the assessment of compliance with the criteria under Article 6 of the APC. Their violation may serve as a ground for revoking the enforcement measure only on this basis - Article 146, item 5 of the APC.

3. Legal consequences of breach of the principle of proportionality

The question of the proportionality of the penalty and the coercive administrative measure can arise, on the one hand, as a question of the necessity of their normative establishment and, on the other, as a question of the lawfulness of their application (the lawfulness of issuing and enforcing the acts with which the penalties measures are taken). The different procedures for the issuance of punishments and the enforcement of coercive administrative measures also determine a different legal remedy against these acts.

The Bulgarian legislator has raised the disproportionality of the punishment as a ground for challenging court acts (court acts and acts of courts with powers to impose administrative penalties (punitive decrees)), the so-called „obvious injustices“ of the punishment imposed. The verdict and the court decision on administrative sanction are subject to amendment by cassation order (Article 348, paragraph 1, item 3 and paragraph 5, item 1 of the CCP) only for obvious injustice of the punishment, when it obviously does not correspond to the public danger of the act and the perpetrator, the mitigating and aggravating circumstances, as well as the purposes of Article 36 of the CC and Article 12 of the AVSC. It is the court which is to monitor compliance with the proportionality requirements and may amend the sanction imposed by reason of disproportionality or cancel the act of imposing it by replacing it with other impact measures. In the application of administrative enforcement measures with the issuance of an individual administrative act, the person concerned may

challenge the act only on grounds of the non-pro-rata nature of the measure, as the jurisdiction of the court is to cancel it as part of the control of compliance of the act with the law (Article 146 item 5 of the APC). More complex is the question of the proportionality of the legal provision itself, which provides for the imposition of criminal or administrative measures on state coercion - whether the restrictive measure will directly achieve and will guarantee the protection of the public interest compared to the intended value in whose defense it is accepted. This assessment is not only a question of the constitutionality of the law, which is the exclusive competence of the Constitutional Court of the Republic of Bulgaria, but also a question of compliance of the Bulgarian law with the principles of EU law, which may arise before the national court. This issue is particularly acute when it comes to cumulation of various measures of state coercion towards a person. Due to the fact that the coercive administrative measures are not sanctions under Bulgarian law, it is possible to cumulate them with administrative or capital punishment in cases where the grounds for applying a coercive measure are an offense (administrative offense or crime). Defined in Article 22 of the AVSC, the purpose of compulsory administrative measures opens the possibility for the legislator to freely extend the hypotheses in which the use of coercive measures is envisaged as a means of achieving the fulfillment of the administrative obligations or for achieving the objectives of the administrative punishment. The trend is a growing number of normative acts which provide for the enforcement of coercive measures along with the punishment of certain unlawful behavior. This trend also raises the necessity of controlling the proportionality of the normative act itself: whether the legislative objective that determined the adoption of the disputed provisions is legitimate from the point of view of the basic law of the country and whether the introduced restriction is a necessary, appropriate and proportionate legal instrument of the lawful result in the conditions of a democratic society, which has to protect in a balanced way the rights and freedoms of all its members. The violation of the principle of proportionality in the issuing of the relevant instruments for the enforcement of state coercive measures results in the unlawfulness of the specific interventions as unconstitutional. However, insofar as Bulgarian law does not provide for any special procedural means of responding to the constitutional appeal (*Verfassungsbeschwerde)* in German law, the breach of the principle of proportionality is invoked by ordinary procedural means - an appeal to the court, which is constitutionally settled and validated in separate provisions of a law. In such a complaint, the Supreme Court of Cassation of Bulgaria or the Supreme Administrative Court of Bulgaria (Article 150, para. 1 of the CRB) may refer the matter to the Constitutional Court of the Republic of Bulgaria to declare unconstitutionality in cases where the law can lead to an unjustified restriction of fundamental rights, or the national court may refuse

to apply the national law affecting the fundamental rights by referring to the ECHR whose norms have primacy over the rules of domestic law that contradict them (Article 5, para. 4 CRB).

However, proportionality as a matter of the need for the statutory establishment of state coercion measures for an offense has another dimension since the judgment of the Court of Justice of 16 July 2015 in the *Chmielewski* case (C-255/14) whereby the CJEU has established binding rules on the assessment of a penalty as „proportionate" where this penalty applies to a breach of European law. The preliminary ruling has a direct practical significance for enforcement by national courts since in the future the national judge is faced with the challenge of complying with both European and national legislation in defining a criminal offense having a cross-border dimension or a direct negative impact on the effective implementation of policy of the Union in an area which is subject to harmonization measures. The CJEU takes note of the lack of harmonization in the field of sanctions, which empowers Member States to choose the appropriate sanctions but recalls that, according to the settled case-law of the Court,[16] they are required to exercise their competence in compliance with European Union law and its general principles and, consequently, with the principle of proportionality. In this context, the CJEU stated that the severity of the sanctions must be in line with the gravity of the infringements inflicted with them, including by ensuring a genuine deterrent effect while respecting the fundamental principle of proportionality.[17] Therefore, in the light of the C-255/14 judgment, national law must be interpreted in such a way as to ensure that the objective of ‚proportionate punishment' is attained, including in the event of a disproportionate national provision providing for the penalty in question, should reject its application, referring to the principle of primacy of EU law over the domestic law of the Member States (Article 249 (2) of the Treaty Establishing the European Community (TEC)).[18] The CJEU expressly stated that the national court „... must, as far as possible, interpret the internal legal framework which it is to apply in accordance with the requirements of European Union law... Where the result achieved by European Union law cannot be attained by interpretation of domestic law, in accordance with European Union law, national courts are required, in particular, to ensure that the provisions of European Union law are fully effective and, where necessary, on their own initiative, disapply any

16 Case C-430/05 *Ntionik and Pikoulas*, EU:C:2007:410, т.53; Case C-210/10 *Urbánq* EU:C:2012:64, т.23.

17 Case C-81/12 *Asociația Accept*, EU:C:2013:275, т. 63; Case C-565/12 LCL *Le Crédit Lyonnais* EU:C:2014:190, т. 45.

18 Case 6/64 *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, in which the CJEU treats this principle as applicable not only to regulations but to EU law as a whole.

national provision intraperitoneal law that contradict them."[19] ‚Within its jurisdiction, each court or tribunal has the duty to apply Community law in its entirety and to protect the rights which it confers on individuals, leaving aside any provisions of domestic law which conflict with it, whether or not they precede or follow the Community legal norm".[20] Furthermore, ‚the national court entrusted, in the exercise of its competence, with the application of the rules of European Union law, is required to ensure the full effectiveness of those rules by deciding, if necessary, to disapply a national provision which is contrary to them ... and it is not necessary to require or to await the abolition of this provision by legislative or other constitutional order. In fact, any provision of a national legal system, including constitutional status, and any legislative, administrative or judicial practice that may reduce the effectiveness of European Union law because it refuses competent to apply that law court power at the very moment of application to does everything necessary to exclude the application of national legal provisions which may constitute an obstacle to the full effect of Union rules is incompatible with the requirements arising from loneliness the nature of European Union law'.[21]

4. Conclusion

State coercive measures can have a significant restrictive impact on citizens' rights. In criminal law, the general principle of proportionality (Article 5 (4) TEU) requires Member States to use them as the last instrument (Article 49 (3) of the Charter). The national legislator should consider what measures and criminal, administrative or civil sanctions would be necessary and sufficient to achieve the legitimate aims pursued by European Union law. Member States are obliged not to allow in their national legislation rules which would conflict with European Union law. Failure to comply with this commitment is of particular importance to the role of the national court. The court respects and enforces the law as it is, but the principle of primacy of European Union law over national law obliges the court, in case of collision, to protect the rights that individuals derive from European Union law. This paper has focused on the proportionality as an element of judicial control and control of state coercive measures, and particularly on identifying the challenges arising from the obligations imposed by European Union law.

19 Case C-487/12 *Vueling Airlines SA*, ECLI:EU:C:2014:2232.

20 Case C-70/77 *Simmenthal,* ECLI**:**EU**:**C**:**1978:139 **[**1978**].**

21 Case C-5/14 Kernkraftwerke Lippe-Ems, ECLI:EU:C:2015:354.

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ПРИНЦИП ПРОПОРЦИОНАЛНОСТИ У ПРИМЕНИ САНКЦИЈА И ДРУГИХ МЕРА ДРЖАВНЕ ПРИНУДЕ У БУГАРСКОМ ЗАКОНОДАВСТВУ И У ПРАВУ ЕВРОПСКЕ УНИЈЕ

Резиме

Пропорционалност као основни принцип захтева да акти јавних власти не утичу на права и легитимне интересе у већој мери него што то налаже сврха издавања одређеног акта. Приликом примене санкција и других мера државне принуде, принцип пропорционалности представља праг ограничења основних права. Санкције морају бити ефикасне, одвраћајуће и пропорционалне. Њихова примена не сме проузроковати последице које су очигледно неусаглашене са предвиђеним циљем. Мере државне принуде, које обезбеђују ефикасну примену санкција, морају да испуне и друге услове, који су блиско повезани са санкцијама. Предмет овог рада је пропорционалност као елемент судске контроле у дефинисању и контроли мера државне принуде у домаћем праву и у праву Европске уније.

***Кључне речи*:** *пропорционалност, санкција, принудне административне мере, судска контрола пропорционалности.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879197Y

UDK: 347.7(560)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*CAPITAL COMPANIES' OBLIGATION TO SET UP A WEBSITE: AN INSTRUMENT FOR TRANSPARENCY AND CORPORATE GOVERNANCE IN TURKISH COMPANY LAW***

Abstract**:** *One of the most noteworthy innovations in the new Turkish Code of Commerce,[1] published in 2011, was the capital companies' obligation to set up a website. It was aimed to institutionalize the companies, ensure that local and foreign investors have the right to get information about the company, and ensure transparency of corporate governance in view of meeting the requirements of harmonization of Turkish Law with European Union Law. Before the Code entered into force on the 1st July 2012, the legislator had shifted on the scope and sanctions of this obligation, especially in response to the reactions from small-scale capital companies. While all capital companies were initially obliged to set up a website, o the last amendments envisaged thatthis obligation applies only to capital companies which are subject to independent audit. The obligation of capital companies to set up a website is regulated in Article 1524 of the Turkish Code of Commerce, which prescribes that only the capital companies which are subject to independent audit are obliged to set up a company website. Companies must fulfill their obligations by opening a website within three months from the date of trade company registration, publishing a certain portion of the site and posting company announcements and notices, as prescribed by the law. In case a company fails to comply with these obligations, administrative and penal sanctions will be applied.*

Key words: *private limited companies, Turkish company law, Turkish commercial law, website obligation, Turkish Code of Commerce.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World"*, held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1 Turkish Code of Commerce,*Official Gazette* No. 27846 dated 14.02.2011.

1. Introduction

The topic of this paper is the capital companies' obligation to set up a website in Turkish Company Law. The topic was chosen with the aim to address the Conference subtopic: "Modern Technologies and Law: application, protection and liability".The Turkish Code of Commerce (hereinafter: TCC) was enacted in 2011 and came into force in 2012. This Code had significant effects on the institutions related to commercial law and company law in particular. One of the targeted effects was to supply the legal regime with transparency and corporate governance. The webpage obligation of capital companies was just one of the instruments to achieve the legislator's purpose. However, after introducing the amendments -as a result of the legislator's populist approach,the TCC moved away from the starting point in terms of the "*ratio legis*" of the codification.

2. Regulation of the Web Page Obligation as a Reform in the TCC

2.1. The Process of Regulating theObligation

The Turkish Commercial Code (TCC) No. 6102 entered into force in 01.07.2012 as a result of 12 years' legislativeeffort in this area.The Code was just one of more than ten significant codification reforms which were prepared and came into force with enthusiasm and motivation, as the request generated by the start of accession negotiations in 2005 between Turkey and the European Union (Bilgili, Demirkapı, 2013:8). As stated in the Preamble, the TCC was aimed to reach a commercial and company law level which was compatible with the European Union regulations, in compliance with the investment and competition climate. For this reason, the corporate governance principle envisaged in the TCC was intended to be the governing principle in the regulation of companies, and especially in terms of capital companies. Transparency, accountability, independent auditing and supervision by the state were accepted as the key concepts and institutions of the TCC and, in particular, the legal regime related to corporate and company law (Kendigelen, 2016: 596).

An important innovation in the legal regime brought by the TCC was the requirement or obligation for capital companiesto set up a website (Yıldız, 2007: 51). As a matter of fact, in the Final Provisions, under the heading "Electronic Transactions and Information Society Services", Article 1524 of the TCC regulates an obligation of each capital company to set up a website (Pulaşlı, 2014: 740). In addition, the provisions on this obligation aredispersed and located in various other articles, thus lacking systematics (Kendigelen, 2016: 597). However, in accordance with Article 1524 para.4 of the TCC, the Ministry of Customs and Trade has been given the authority and duty to issue regulation in order to

clarify the implementation of the website obligation. Accordingly, the Ministry published "the Regulation on Websites to be Set up by Capital Companies" in the *Official Gazette* on 31 May 2013.

2.2. The Essentials of Website Obligation

2.2.1. Criteria of the Time to Fulfil the Obligation

According to Article 1524 (para.1) of the TCC, all capital companies are obliged to set up a website within three months following the registration of the company in the trade registry. It is also obligatory to allocate a certain part of the website for the publication of the company announcements, which must be made by the legal personality of the company as required by the law (Moroğlu, 2012: 399). The company's website shall be registered in the trade registry but the registration does not have a founding effect; it only has explanatory effect (Pulaşlı, 2014: 563).

The contents to be published on the website shall be posted on the website within five days as the latest, unless another exceptional period is specified in the TCC. The five-day period start from the date of the transaction or the event which are the basis for posting the website contents. In case of registration or announcement, the five-day period shall be processed from the date of registration in trade registry or announcement on the Turkish Trade Registry Gazette(TTRG) website. The content that should be published in the period from the establishment of the company to the opening of the website is also put on the page at the time when thewebsiteis activated. The sanction for non-compliance with this obligation is the cancellation of the decisions of the company's General Assembly, which is the basis for posting the content on thewebsite. In addition, the requirement for the annulment of the company's General Assembly decisionshas to be observed (Moroğlu, 2012: 399, 400).

2.3. Obligatory Website Content

The legal personality of the company is obliged to include information about the company's Board of Directors and auditors, the amount of the company's promised and paid capital, the financial statements, merger agreements, and reports in case of division and merger. In addition, it is also compulsory that the decisions regarding the dissolution of the company and the cancellation of the General Assembly resolutions, the decrease in the number of the shareholders of the company and any changes in the company agreements are published on the company's web site (Kendigelen, 2016: 597).

Information on all other issues referred to in Article 6 of the Regulation on Websites to be set up by Capital Companies (2013)[2]shall also be posted on the website.Hence, it is necessary to examine the provisions of the Regulation related to the content of the capital companies' website. The list of required information which companies are obliged to post on the website is specified in Article 6 of the Regulation, as follows:

- The company's MERSIS number, trade name, registered centre, the amount of promised and paid capital, the chairman and members of the Board of Directors in joint stock companies, and the directors in limited liability companies;
- In case a legal entity is elected as a member of the Board of Directors in a joint stock company or as a director in a limited liability company, in addition to the information of legal personality, the posted information shall include the name and surname of the natural person who is selected on behalf of the legal personality, the information that the natural person representative is also registered and announced, the MERSIS code of the selected legal personality as director, trade name and registered office of the legal personality;
- The name, surname, title, place of residence/registered office and,in casethere is a branch office, the registration information of the branch.

In case of any changes in the aforementioned contents, the new version shall be published on the website at the date of the change (Art. 6.2 Regulation). In addition, Article 6.3 of the Regulation contains a long list of the elements related to the website obligation.[3]

Unless a longer period is stipulated in the TCC and other applicable administrative regulations, such as the Ministry Regulation (2013), the content posted on the company's website shall remain on the website for a period of at least six months from the date on which it was placed. Otherwise, it is assumed that the content is not placed and that the website obligation has not been fulfilled (Article 1524 para. 5 TCC).

2.4. The Respondent of the Website Obligation

It is the responsibility of the company directors and the members of the company's Board of Directors to place the content on the website within the required period, which is specified according to different circumstances in the Regulation

2 Regulationon Websites to be Set up by Capital Companies, *Official Gazette,* No.28663, 31 May 2013.

3 For more detail, see the specific provisions on the content of the list regulated in Article 6. 3 of the Regulation.

(2013).Failure of the company directors and members of the Board of Directors to comply with the prescribed obligations leads to their liability for violation of the law (Article 1524 para. 2 TCC)

According to Article 1524 para.3 TCC, the section of the website dedicated to information society services must be accessible to all, even though there is not a specific benefit. The right of access cannot be limited to the use of any records, or be bound by any conditions, such as being relevant or of interest. If the right of access is removed or limited by the decision of the company management or its General Assembly, everyone can file a lawsuit to remove this obstacle (Bahtiyar, 2017: 164).In addition, the claimant can file a compensation claim against the respondents of the obligation (Üçışık, Çelik, 2013: 509).

Another consequence of the failure of company directors and members of the Board of Directors to comply with the envisaged website obligation is criminal responsibility (Article 1524 para. 2 TCC) because these violations are described as offences which result in criminal sanctions(Bilgili, Demirkapı, 2013: 605). According to Article 562 para.12 TCC (criminal liability), the members of the company managing body who do not setup the websitewithin the prescribed period shall be punished with a judicial fine for a period ranging from one hundred to three hundred days (Bahtiyar, 2017: 386). Under the same article, members of the executive body who do not duly post the content on the website shall be punished with a judicial fine of up to one hundred days. Prosecutors are both authorized and obliged to initiate criminal investigation or proceedings with or without any notice. The prosecution for these criminal offences is not subject to a complaint (Kayar, 2015: 414).

In Turkish Law, the judicial fine is regulated in Article 52 of the Turkish Criminal Code,[4]No. 5237.Under this Article, the judicial fine may not be awarded for less than five days and no more than seven hundred and thirty days in cases not otherwise specified in the Code. The amount of the judicial fine shall be determined by taking into account the personal and economic characteristics of the convict, the determination of which shall be at least twenty and at most one hundred Turkish Liras. The amount, calculated by multiplying the number of full days determined by the court by the amount that is established for one day, shall be paid to the State treasury. The exact number of days taken as a basis for determining the judicial fine and the amount recognized as a day equivalent are shown separately in the court decision. According to the aforementioned provisions, the upper limit of the judicial fine that can be issued for a violation of the website obligation is 30.000 TL.

4 Turkish CriminalCode, No. 5237, *Official Gazette*, 26.09.2004 No: 25611.

3. Regulations in Comparative Law

In the UK company law, the obligation of the companies to setup a website is considered as one of the most important requirements of the corporate governance principle. According to the related provisions of Companies Act 2006 (CA), the company website is considered as a condition that must be fulfilled for the establishment of a company (Hannigan, 2009: 22, 23). In addition, the company has to fulfil the requirements related to auditing and calling the general assembly meetings by publishing the information on the company's website (Kershaw, 2009: 97). Moreover, the company's general assembly decisions must be published on the website to ensure their binding character for all shareholders (Girvin, Frisby, Alastair, 2010: 469). For this reason, in the UK legal system, companies are obliged to open the website in order to complete the establishment of the company; they are also obliged to actively use the website and make announcements on the company management, supervision and decisions (Hannigan, 2009: 374). These obligations are accepted as a requirement of the corporate governance principle. In addition, the website obligation has been specifically addressed in the relevant CA articles as a reflection of the principles of both accountability and liability. Another significant characteristic of this obligation in the UK company law is that all types of companies subject to the CA are obliged to fulfil the requirements related to website provisions without any discrimination. Thus, the UK legislator aims to ensure the main principles of modern company law and the validity of company law codifications (Girvin, Frisby, Alastair, 2010: 494, 495).

In German company law, the companies' obligations to setup a website are regulated in the disaggregated provisions of the Stock Corporation Act (Aktiengesetz –AktG) (Pöpken, Richter, 2012: 72). The company websiteobligation concerns the right to obtain information and copies of the contracts made after the establishment. Accordingly, it is not possible for the partners to request a copy of these contracts from the company if a copy of a contract has been made after the establishment on the company's web page. Invitations from the company's general assembly meetings should include information on the company's web site too (Goette, Habersack, Kalls, 2018: Rn.1-15). In fact, posting the announcement of the general assembly meetings on the company's website is a precondition for the call to be legally valid. The web page of the announcements to be made by the company has gained special importance in case of a joint stock company operating in the capital market. Article 124a) AktG includes a special provision regarding the announcement on the company's webpage (Goette, Habersack, Kalls, 2018: 1-15). The company's webpage plays an active role in implementing the proposals for the decisions taken by the shareholders at the general

assembly and their subordination to the Corporate Governance Code (Pöpken, Richter, 2012: 79-83).

In Serbian company law, the Company Act envisages the obligation of limited liability companies and joint stock companies to publish on its website or on the website of registered economic entities a notice on the taken legal action or completed legal transaction, with relevant facts and description of the business activity, within a period of 15 days from the conclusion of the legal transaction (Article 66 para. 9 CA).[5] The announcements posted on the company website have a special significance; they are a prerequisite that ensures the validity of the corporate governance principles. Thus, it is imperative that the guidelines for corporate governance areposted on the company's website (Art 335 CA on general assembly meetings, Article 356 CA on publishing the general assembly decisions).All documents, decision and reports should be made public and accessible to the shareholders (Article 465 CA).

4. The Legislator's Expectations about the Website Obligation, and assessment on whether the expectations have been met to date

One of the innovations that can be described as a reform in the Turkish Commercial Code (TCC) is the obligation of capital companies to setup a website. The legislator aimed to establish a law of competitiveness which is suitable for the European Union investment climate and to ensure validity of the legal regime for the capital companies in compliance with the principles of transparency and accountability. When the Code was enacted in the Turkish Grand National Assembly (TGNA) and published in the *Official Gazette*, the purpose-oriented provisions were validated. One of these provisions is the capital company's internet page obligation. Transparency will be ensured at the highest level through the introduction of the website obligation in company law. In this way, the information related to the company, the company's statements, calls, explanations, announcements, prepared documents, reports, financial statements and answers to questions will be made easily accessible to everyone.

For these reasons, in the original version of the Turkish Commercial Code,enacted and published in the Official Gazette in 2011,all the capital companies were obliged to setup a website. All joint stock companies, limited liability companies and cooperative companies with shares were also obliged to establish a website without any distinction in terms of the size or scales of business. On the other hand, only two days before the Code came into force on 01.07.2012, radical

5 The Company Act, *Official Gazette* of RS no. 36/2011, 99/1011, 83/2014, 5/2015 and 44/2018

amendments were made to the TCC by enacting the Code No. 6335[6]. One of the enacted amendments was related to the scope of the capital companies subject to the obligation to set up a website.

According to the last version of the Code, after introducing the significant last minute amendments in 2012, all capital companies were not subject to the obligation to set up a website, but only the capital companies which are subject to independent auditing. As a matter of fact, the companies subject to independent audit are only joint stock companies,under the criteria determined by the Council of Ministers, and the number of joint-stock companies which meet these criteria does not exceed 5.000 for the year 2018. According to the TCC and the legislative decree on Public Oversight, after the updated criteria for 2018, a capital company has to meet at least two of the following criteria in order to be subject to independent auditing and, hence, the obligation of opening a website(Şener, 2017: 434):

1. Total assets of 40 million TL and more.
2. Annual net sales revenue of 80 million TL and more.
3. Number of employees: two hundred and more.

In the Turkish trade practice, the number of capital companies that can meet the criteria underlined above does not exceed 5.000 companies for the year 2018. In line with the objectives of the Code specified in the Preamble of the first original version of the Turkish Commercial Code, all capital companies, including a total of about 850.000 public limited and private limited companies, were subject to the website obligation.

The main reason for introducing amendments that changed the scope of companies subject to the website obligation was the objections coming from the actors in Turkish commercial life. In particular, the Union of Chambers and Commodity Exchanges of Turkey tried to manipulate the codification and Turkish Company Law reform. Despite the fact that the Turkish Commercial Law doctrine stated that the original version of the Code should have been kept, the Turkish legislator resorted to a populist approach. Unfortunately, due to the populist approach, the Turkish Code of Commerce (TCC) has been amended 17 times in the past six years, since 2012 to date. By all these amendments, the TCC moved away from the starting pointenvisaged in the original version of the TCC. For this reason, it is considered that the legislative efforts to codify the commercial law matter have ended with failure and disappointment. In terms of the normative framework related to the obligation of capital companies to set up a web page, we need to return to the original first version of the Code. Thus, as envisaged

6 Code No. 6335, Official Gazette, 30.06.2012 No: 28339.

in the original version of the Code, all capital companies need to be subject to the website obligation without exception and discrimination.

5. Conclusion

As in all modern company law regulations, the obligation of capital companies to set up a website is regulated as one of the key principles of corporate governance, envisaged in the European Union regulations. In the effort to harmonize its legislation with EU law, Turkeyadopted the 2011 Turkish Code of Commerce (TCC), which prescribed the obligation to all capital companies to set up a website andmake the information on legal transactions accessible to shareholders and general public. The content of the obligation and the scope of the respondents were originally taken from the comparative law resources. However, after amending the TCC by the Code No. 6335,the scope of the companies which were subject to this obligation was narrowed. In spite of the legislator's original intention to subject at least 850.000 capital companies to this obligation, after all these amendments,the scope of companies that are obliged to set up a website has been reduced only to public limited companies which are subject to independent audit.In conclusion, the codification efforts have resulted in aprofound disappointment, especially for company lawyers.

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ОБАВЕЗА ДРУШТВА КАПИТАЛА ДА ПОСТАВИ ИНТЕРНЕТ СТРАНИЦУ, КАО ИНСТРУМЕНТ ЗА ПОСТИЗАЊЕ ТРАНСПАРЕНТНОСТИ КОРПОРАТИВНОГ УПРАВЉАЊА У ТУРСКОМ КОМПАНИЈСКОМ ПРАВУ

Резиме

Једна од најзначајнијих новина у новом турском Закону о трговини, објављеном у Службеном гласнику 2011. године, је обавеза сваког друштва капитала да креира и постави званичну интернет страницу (веб-сајт). Ова одредба имала је за циљ институционализацију предузећа, обезбеђивање права домаћим и страним инвеститорима да добију адекватне информације о компанији, као и обезбеђивање веће транспарентност у контексту испуњавања преузете обавезе усклађивања турског законодавства са правом Европске уније. Пре него што је Закон о трговини ступио на снагу 1. јула 2012. године, законодавац је променио оквир и санкције за кршење ове обавезе, као одговор на реакције мањих компанија. Иако су иницијално сва друштва капитала имала обавезу да поставе инетернет странице, према последњим изменама овог закона та обавеза је прописана само за друштва капитала која подлежу независној (екстерној) ревизији. Обавеза ових компанија да креирају и поставе интернет странице регулисана је чланом 1524. Закона о трговини Републике Турске, који прописује да су друштва капитала која подлежу независној ревизији дужна да израде и поставе интернет страницу. Ове компаније морају испунити своје обавезе отварањем интернет странице у року од три месеца од дана регистрације трговинског друштва и одређивањем дела вебсајта за постављање обавештења и најаву складу за законом. Уколико компанија не испуни прописане обавезе, примењују се административне и кривичне санкције.

Кључне речи: *Турски Закон о трговини, друштаво капитала, обавеза постављања интернет странице, приступ информацијама, транспарентност, административне и кривичне санкције.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879209K

UDK: 331.1(497.17:4-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 14.11.2018.

*PROTECTION OF EMPLOYEES' RIGHTS IN THE EVENT OF COLLECTIVE REDUNDANCIES AND TRANSFER OF UNDERTAKINGS: Key Aspects of Harmonization between the EU and Macedonian Labour Law***

Abstract**:** *Taking into account the obligations arising from the Stabilization and Association Agreement of 2001 (concluded between European Communities and their Member-States and Republic of Macedonia), the country is conducting a continuous harmonization of its legal order with the EU law, including the legal regulations of the so-called "social" Acquis communautaire. In this regard, the authors of the paper shall analyze the key aspects of the implementation of Directive 98/59/EC on collective redundancies and Directive 2001/23/EC on safeguarding of employees' rights in the event of transfers of undertakings, businesses, parts of undertakings or businesses within the labour legislation of Republic of Macedonia, with a particular*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

This paper is part of the broader scientific project *'IMPULSE - Restructuring of Companies and the EU Law'* supported by the Austrian Agency for International Cooperation in Education and Research – OeAD. Participants in this project were professors from the following universities: WU Vienna University of Economics and Business, University of Belgrade and 'Ss. Cyril and Methodius' University in Skopje.

focus on the protection of individual employees' rights in the events of collective redundancies and transfer of undertakings/change of employers.

Key words: *collective redundancies, transfer of undertakings, businesses, parts of undertakings or businesses, change of employers.*

1. Introduction

In the contemporary labour law system of the Republic of Macedonia, *the issue of collective redundancies* is regulated by the Labour Relations Act of 2005[1] (which is still in force). The term 'collective redundancies' itself, has been introduced for the first time by the amendments to the Labour Relations Act of 2010.[2] The frequent changes to the legal provisions regulating the issue of collective redundancies are the result of certain 'internal' and 'external' reasons (Мръчков, Средкова, Василев, 2016: 414). The internal reasons stem from the need to mitigate the negative consequences of collective redundancies on workers. Such consequences have been affecting Macedonian workers since the independence of the country (in 1991), while they had their strongest impact in the so-called phase of 'transition' and 'privatization of the social capital' in the 1990s.The external reasons for continuous changes in the regulation of collective redundancies are a reflection of the need for harmonization of the Macedonian labour legislation, both with the international labour standards[3] and the EU labour law (particularly with Council Directive 98/59/EC on collective redundancies)[4].Hence, in thispaper, the authors will focus on the more 'problematic' issues arising from the system of regulation and implementation of collective redundancies in the country. In this regard, particular emphasis will be put on those segments of the collective redundancies regime which are not harmonized, are not properly harmonized, are not clear enough, and create confusions in their implementation.

1 The title of the legal provision regulating the issue of collective redundancies within the Original text of the Labour Relations Act of 2005 states: *„Notification obligations in case of termination of employment of larger number of workers due to business reasons"*. For more information, see: Law on Labour Relations, *Official Gazette of the Republic of Macedonia*, no.62/05, Article 95.

2 The current title of the legal provision regulating the issue of collective redundancies pursuant to the Act amending and supplementing theLabour Relations Act, Official Gazette of the Republic of Macedonia, no.124/10, states: *„information and consultation about collective redundancies due to business reasons"*.

3 In this context, particular focus should be given to the ILO Convention on Termination of Employment, 1982(No.156)and the ILO Recommendation on Termination of Employment, 1963 (No.119), which are ratified by the Parliament of the Republic of Macedonia.

4 See:Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, Official Journal L 225, 12/08/1998 P. 0016 – 0021.

In the modern businessenivronments, labour relations become increasingly dynamic and, as a consequence, there are more frequent changes on the side of the employer as a contractual party in the employment relationship. Usually, such changes are related to changes in the organization of the business and/or in the ownership of assets with which the business is being performed and which are directed towards a greater competitiveness and more efficient fulfilment of the employers' business objectives. The change of the employer can lead to a transfer of the employment contracts of the employees and safeguarding of their employment relationships only as a consequence of a so called '*transfer of an undertaking, part of an undertaking, business or part of a business*' from the employer-predecessor (transferor) to the employer-successor (transferee). The second substantial issue which will be treated in this paper is the analysis of the compliance of the Macedonian labour legislation with the EU labour law (and in particular with the Directive 2001/23/EC *on safeguarding of employees' rights in the event of transfers of undertakings, businesses, parts of undertakings or businesses)*, concerning the legal regime for regulating the transfer of undertakings and the protection of employees' individual rights.[5]

2. Collective Redundancies

2.1. Forms (ways) of terminating employment contracts within the frame of collective redundancies – Definition and Scope

The Labour Relations Act defines the collective redundancies by taking into consideration their quantitative and temporal aspects, or the aspects referring to the number of employees encompassed in the collective redundancy and to the period of time over which the collective redundancy is supposed to be carried out. In this regard, Macedonian labour legislation is aligned with the EU Directive 98/59/EC on collective redundancies, since it provides that collective redundancies should cover at least 20 employees for a period of 90 days.[6]

The biggest gap between Macedonian labour legislation and the EU labour law can be found in the scope of the 'collective redundancies' and particularly in the forms (ways) of terminating of employment contracts of employees that can be equated to redundancies.

5 See: Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, Official Journal L 082 , 22/03/2001 P. 0016 – 0020.

6 Закон за работните односи, член 95, став 1.

On the basis of the definition of collective redundancies as regulated by the Labour Relations Act, we come out with two different interpretations regarding the scope of collective redundancies. Such interpretations are: the *broader (sensu latu) or grammatical interpretation,* and the *narrower (strictu sensu) interpretation.*

The broader (*sensu latu)* interpretation of the scope of collective redundancies, implicitly entails *all the forms* of termination of employment contracts. If all the forms of termination of employment contracts are calculated in the number of redundancies, then this would mean that even terminations which are inherent to the individual worker concerned shall be considered as redundancies as well (e.g.: termination due to the employee's death; dismissals due to capacity or conduct reasons on the side of the employee, etc.).Such an interpretation is inadequate and contrary to the provisions and the spirit of the Directive 98/59/EC on collective redundancies.

Unlike the broader (*sensu latu*) interpretation of the scope of collective redundancies which refers to 'any termination of the employment relationship', the narrower (*sensu strictu*) interpretation limits the scope of collective redundancies at precisely defined ways (cases) of termination of employment relationships. On the basis of this interpretation, the Labour Relations Actrefers to the *'decision on termination of employment due to business reasons'*[7] *asthe only way to terminate the validity of the employment contract that could be subsumed under the collective redundancy. The occurrence of the 'dismissal due to business reasons' as a single way of termination that can be equated to redundancy is contrary to the provisions and the spirit of the Council Directive 98/59/EC, which takes a broader (more extensive) approach. This means that the EU labour law establishes a Community concept of collective dismissals which is autonomous and uniform, and it cannot be derogated by the different national legislations of the EU member-states(Blanpain, 2012: 744). According to this concept, collective redundancies cannot be restricted only to redundancies for structural, technological or cyclical reasons and they have to comprise the dismissals for any reason not related to individual workers concerned. In fact, collective redundancies should comprise any termination of contract of employment not sought by the worker* and therefore *without his consent*, but at the same time, *it is not necessary that the underlying reasons should reflect the will of the employer.*[8]

7 Ibidem.

8 Such an interpretation derives from the Judgment of the European Court of Justice in the case *'European Commission v Republic of Portugal' (C-55/02, Judgment dated 12.10.2004, Rec. 32)*, where the Court extends the scope of the collective redundancies to other cases (ways) of termination of employment based on specific 'external' circumstances, which are independent from the will or the initiative of the employer. Such other cases are those due to:

De lege ferenda, under 'collective redundancy', Macedonian labour legislation should envisage all the ways of termination of employment contracts that are not related to the individual workers concerned and that are initiated by the employer, including the termination of the fixed-term employment contracts where such a termination takes place prior to the date of expiry or the completion of such contracts. It should also be borne in mind that there should be at least 5 employees of the total number of 'surplus' workers whose contracts of employment should be terminated on the basis of dismissal due to business reasons. The termination of the employment relationships of the remaining workers (necessary for meeting the statutory minimum in order to achieve the quantitative presumptions of the collective redundancy) may be established both on additional decisions on termination of employment due to business reasons as well as on consensual cancellations of the employment contracts(Crnčič, Cvetanovič, Gotovac, Gašpar Lukič, Milkovič, Tadič, Zuber, Žic, 2010: 178)

2.2. Workers' participation in the event of collective redundancies

Workers' participation in the event of collective redundancies entails the workers' rights to information and consultation, with its ultimate goal to prevent (mitigate) the consequences arising from the termination of the employment contracts of the 'redundant' (surplus) workers encompassed by the collective redundancy.

While Macedonian labour legislation is characterized by a proper harmonization with the EU labour law in terms of the 'temporal aspects' which determine the moments of initiation and completion of the information and consultation procedure, this conclusion cannot be brought in respect *to the subjects who are involved in that procedure***.** Namely, workers' participation (information and consultation), both according to the Council Directive 98/59/EC as well as to the Labour Relations Act is indirect, with the involvement of *workers' representatives.* However, in Macedonian labour legislation there is neither substantial definition nor a procedure for the election of workers' representatives in regards to rights to participation. In such circumstances, the following question may be asked: *Who are the subjects responsible for conducting the information and consultation procedure prior to the commencement of the collective redundancy?* In practice, it is considered that trade unions (trade union representatives) can act in the capacity of workers' representatives, *but what if there is no trade union organization at the employer*? Yet, regardless of the fact whether workers are represented by the trade unions or by workers' representatives, they have

employer's insolvency, expropriation, fire or other cases of force majeure, as well as the cases of termination of undertakings' activities due to the death of the employer-natural person.

an inalienable right to be informed and consulted, while employers have an obligation to involve the workers in the process of participation prior to the commencement of the collective redundancy. Such a position is aligned with the stance of the European Court of Justice taken in the *European Commission v United Kingdom case*, where the Court states that *it is no longer possible that there are no workers' representatives in the event where a Member State would not have an overall system of workers' representation*.[9]

2.2.1. The informing of workers' representatives in the event of collective redundancies

There is a misalignment between the Macedonian labour legislation and the EU Directive 98/59/EC in relation to the contents that make the information and then the consultation of the employees, since the Labour Relations Act does not impose obligation to the employer to inform the workers' representatives on a very important issue such as *the issue of the criteria for the selection of the workers to be made redundant***.** The determination of the selection criteria aims to objectify the process of selection of workers whose employment contracts shall be terminated or safeguarded. For the largest part of its validity, the current Labour Relations Act of 2005 has not 'touched' upon the issues related to selection of employees in the events of dismissals due to business reasons, including the cases of collective redundancies.[10] The legal void has been settled in practice by the competent courts. Referring to the international labour standards (the ILO Convention on Termination of Employment No.158, and especially the ILO Recommendation on Termination of Employment No.166), in the event of dismissal due to business reasons, the Courts oblige the employer to determine certain criteria in advance (prior to the dismissal) for the selection of employees whose employment relationship shall be terminated.[11] In the event that collective agreements which provide for criteria for selection of the employees are not applicable to the employer, he/she is obliged to determine, prior to the commencement of the procedure for termination of the employment contracts due to business reasons, certain criteria and measures with an internal Act, as well as to apply such criteria and measures (Томановиќ Т, Томановиќ В, 2010: 111).

9 See: Case *European Commission v. United Kingdom(C-382/92)*.

10 The latest Act ammending and supplementing the LRA of 29.06.2018 (Official Gazette of the Republic of Macedonia, no.120/2018) introduces a new provision that sets certain selection criteria (Art.7). In any case, we note that the provision is vague and unclear from a terminological point of view.

11 See: Decision of the Basic Court in Tetovo, РО. бр. 42/2013 from 03.07.2013 год.

The latest Act amending and supplementing the Labour Relations Act of 29th July 2018 stipulates the following selection criteria in terms of dismissal due to business reasons: the criteria arising from the needs for efficient functioning of the employers' work, vocational training and qualification of the employee, work experience, work performance, the type and significance of the employe's working position, length of service and other criteria determined in the collective agreement, including the criteria for protection of disabled persons, single parents and parents of children with special needs whose employment is terminated due to the same reasons.[12]In practice, there are several collective agreements (primarily concluded at a branch level, that is, department level) which stipulate criteria and measures for the selection of employees with the priority of retaining their working position. In most of them, the prevalent criteria are: vocational training and qualification, length of service, type and value of the working position, work results, age and similar criteria.[13] There are also collective agreements which provide for certain social criteria (such as, health condition or economic and social position of the employee), but although these are stipulated in the agreements, such criteria are given less value compared to the other criteria mentioned above.[14]

2.2.2. Consultation of the workers' representatives in the event of collective redundancies

The consultations begin only after informing the workers' representatives, but at least one month prior to *the commencement of the collective redundancies.[15] The purpose of the consultations is the 'reaching of an agreement' between the employer and the workers' representatives* with regards to *the ways and means for avoiding*

12 See: Act ammending and suplementing the Labour Relations Act of 29.06.2018, Art.7.

13 Collective Agreements that envisage such criteria are: Collective Agreement for the Employees in the Food Industry *(Колективен Договор за вработените од земјоделство и прехрамбена индустрија)*; Collective Agreement for the Textile Industry *(Колективен Договор за текстилна индустрија на Република Македонија)*; Collective Agreement for the public facilities for children in the field of care and education of children *(Колективен Договор за јавните установи за деца во дејноста згрижување и воспитание на децата и во дејноста одмор и рекреација на децата)*, etc.

14 Collective Agreements that envisage such criteria are: Collective Agreement of companies of other monetary intermediation and the activity of intermediation in operations with securities and commodity contracts (*Колективен Договор на друштвата од друго монетарно посредување и дејноста на посредување во работењето во хартии од вредност и стокови договори)*; Collective Agreement for Culture (*Колективен Договор за култура*); Collective Agreement for the Elementary Education (*Колективен Договор за основното образование во Република Македонија*), etc.

15 Закон за работните односи, член 95, став 2.

collective dismissals, reducing the number of dismissed workers, or mitigating the effects of the collective redundancies.[16]The Labour Relations Actdetermines the general time frame during which the consultations between the employer and the workers' representatives should be conducted, but it does not provide for any specific details regarding: the way of conducting the consultations(written or oral) and the extent to which the parties are involved in the consultation procedure.

Usually, in practice, consultations start with the submission by the employer of a so-called '*draft program for fostering the redundant employees'*. Workers' representatives are entitled to submit their opinions and proposals on the basis of the Draft Program. However, the Macedonian labour legislation does not determine the existence of such a 'program' as an act of the employer for fostering the redundant employees, nor does it determine its contents.

Concerning the extent to which the parties are involved in the consultation procedure, it remains unclear whether the consultations will be reduced to a simple exchange of opinions or will include a more in-depth form of dialogue between the parties which will resemble acollective bargaining. In our view, the employer will need to demonstrate goodwill, readiness and determination to finding a mutually acceptable solution even if at the end no agreement is reached.

2.3. Notifying the public authorities for the planned collective redundancy

The legal regime of collective redundancy in the Macedonian legal system is completed with the obligation of employers to notify the public authorities about the planned collective redundancy. Through the notification procedure, collective redundancies and their consequences are taken 'outside of the company boarders' because they have a wider social impact, tangling a wider range of subjects (Мрчков, 2012:644).In this process, the role of the public authority (which in the case of Macedonia is the Service responsible for employment intermediation, i.e.the Employment Service Agency of the Republic of Macedonia) is set to three broader competencies and activities,such as: the competence of being informed by the employerabout the planned collective redundancies,the competence of determining the time period for which the duration of the decisions for termination of the employment of the workers covered by the collective redundancies will not have a legal effect,and the activity of searchingfor solutions to the problems and consequences arising from the planned collective redundancies (Blanpain,2012:751). Through these three groups of competencies and activities, we analyze the compliance of the Macedonian labour legislation with the Council Directive 98/59/EC.

16 Закон за работните односи, член 95, став 3.

The Labour Relations Act determines an *obligation for the employer after the completion of the consultations with the workers' representative to notify in writing the service responsible for employment intermediation*.... In the same provision, the law determines that the *notification contains all relevant information regarding the planned collective redundancies and consultations with the workers' representatives.*[17]In this part, the Macedonian labour legislation is complementary with the contentsand with the spirit of the Council Directive 98/59/EC, which first presumes the completion of the consultation procedure, and then the adoption of decisions on the termination of the employment relationship of workers covered by the collective redundancy. Such interpretation arises from the *Junk v Kühnel (C-188/03)*case,where the ECJ statesthat '*the notification of public authorities must follow the completion of the consultation procedure, while the dismissals can be made only after the completion of the notification procedure to public authorities*'. Therefore, '*the purpose of the notification is not to prevent an employer from adoption of a decision for collective redundancy, but only the prevention of the unemployment of the employees covered by it*'.[18]

While the initial part of the notification procedure of the public authorities is in line with the relevant provisions of the Council Directive 98/59/EC, it cannot be ascertained for the rest of it.The Council Directive 98/59/EC delegates the authority to the competent public administrative body to determine the time period for which the planned collective redundancies will not have a legal effect. In this regard, the earliest period in which collective redundancies can have a legal effect *is 30 days from the moment of notification to the body of the public authority*,[19] and if this body estimates that the problems arising from collective redundancy cannot be resolved within the initial deadline, *it has the right to extend this deadline to 60 days*.[20] Of course, the time period for notification of the public administrative body to the planned dismissals until their implementation should be used to seek solutions to problems arising from collective redundancies in relation to the workers. The Macedonian labour legislation 'makes an attempt' to align with this part of the notification procedure. However, it seems that the legislator did not understand the essence of the deadlines for the 'suspension' of carrying out the collective redundancy, i.e. the temporary prolongation of the individual dismissals of the workers encompassed by the collective redundancy.

17 See Закон за работните односи, член 95, став 6.

18 See: Opinion of the Attorney General, in the caseECJ27 Jan. 2005, *Case C Irmtraud Junk v Wolfgang Kühnel* - 188/03 ECR 2005.

19 See: Council Directive 98/59/EC, Article 4, paragraph 1.

20 See: Council Directive 98/59/EC, Article 4, paragraph 3.

The purpose of determining the deadlines for 'temporary suspension' of the legal consequences of the collective redundancy decision is implicitly regulated in the Labour RelationsAct. In fact, for the duration of these deadlines, the Service responsible for employment intermediation requires an opportunity to *provide assistance and services for labour mediation of workers* covered by the collective redundancy, *in accordance with the law* (in particular, the Act on Employment and Insurance in case of Unemployment).[21]

3. Transfer of undertakings

3.1. Legal reasons for transfer of an undertaking (cases of change of the employer)

According to the EU Transfer of Undertakings Directive 2001/23/EC, the transfer of an undertaking/part of the undertaking/business/part of business can be a result of a *legal transfer* or *merger*.[22]The legal basis for the transfer of an undertaking should reflect a 'contractual relationship' between the transferor and the transferee. Directive 2001/23/EC and its rules concerning the preservation of employment and safeguarding the employees' acquired rights shall be applied in all the cases that will result in an agreed change of the employer (legal entity or natural person).It means that every legal act on the basis of which there is a transfer of the employer's function may be subsumed under Directive 2001/23/EC and covered by its rules.

The Labour RelationsAct of Macedonia regulates this issue by taking the respective provision from the Directive 'word for word'. Being willing to 'harmonize' with the Directive, the Act determines the legal reasons for transfers of undertakings, but it does that in a way which does not correspond with the legal terminology that is subject to regulation of the *Acton Trade Companies*[23], and then with other regulations in the field of the broader contract law. The Labour Relations Act envisages the *'status changes'*[24]*, as 'cases' on the basis of which a change of employer may occur on the one hand, as well as the 'legal transfers*' or '*mergers*'[25] on the otherhand. From the point of view of the Macedonian legal system, it seems that the notion 'legal transfer' is too general and can include different ways of transfer of undertakings, i.e. different cases of a change of an

21 See: Закон за вработување и осигурување во случај на невработеност, *Сл. весник* на Република Македонија no.37/1997

22 Council Directive 2001/23/EC, paragraph 1 (a).

23 Закон за трговските друштва, Сл.весник на Република Македонија, бр.28/04.

24 See: Закон за работните односи, Чл. 68, став 1.

25 See: Закон за работните однос,Чл. 68-а.

employer, while the notion 'merger' is one of the possible types of status changes that are present in the Macedonian company law.

3.2. Determining the subject of transfer and retaining the identity of the undertaking

If a comparison is made between the 'subject of transfer' regulated with the Directive 2001/23/EC (which is the *undertaking/part of the undertaking, business/ part of the business*)[26] and the notion 'subject of transfer' according to the Labour Relations Act (which is *a trade company or parts of a trade company*),[27] we will face an obvious terminological and crucial non-compliance between these two acts. The 'trade company' is and can only be a subject to law, and not an object, that is to be put in a legal circulation and to be subject of transfer (Беличанец, Миладинова, 2011: 78). Such an object (subject) could only be the 'undertaking', defined as a collection of rights, assets and factual relations that have a property value and that belong to the trade business of the merchant, which is an entire and independent legal entity that can be put in circulation.[28] In short, the undertaking is a unity of property and people, connection of capital and labour, under a sole management directed towards achieving the economic objectives that have been set.

The transfer of the employment contracts of the employees is dialectically related to the fulfilment of another cumulative condition and that is the condition of the 'transferred undertaking to retain its identity' (i.e. the economic wholeness). In this regard, the Directive 2001/23/EC stipulates that a transfer of undertaking/ part of an undertaking/business/part of a business is considered to be a transfer of an '*economic entity which retains its identity*, *meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*'.[29] The transferred undertaking will retain its identity if the new employer continues or resumes to carry out the business that was previously performed by the old employer (Blanpain, 2012: 759). The existence of other circumstances should be taken into consideration too, without prejudice to their 'relative weight' and impact on the qualification of one transfer as 'a transfer of undertaking that retained its identity'.[30]In any

26 See: Council Directive 2001/23/EC, Article 1, paragraph 1.

27 See: Закон за работните односи, чл.68-а.

28 Закон за трговските друштва, Чл. 3, став 1, точка 40.

29 See: Council Directive 2001/EC, paragraph 1, (b)

30 Such circumstances may be: *the type of undertaking or business; the fact whether or not the tangible assets of the business (such as: buildings or movable property) were transferred; the value of the tangible assets at the time of the transfer; whether or not the majority of the*

case, the basic prerequisite for having continuity in the employment is to have continuity in the performance of the business activities that fall in the 'hands' of the new, changed employer (Pitt, 1997: 242).

The Macedonian labour legislation follows the model of the Directive 2001/23/EC and, at least, is formally harmonized with the legal assumption of the Directive that the transfer of the employment contracts of the employees as a result of the transfer of the undertaking depends *inter alia* on the retaining of the identity of the transferred undertaking. The Labour RelationsActstipulates that the transfer of the trade company or part of the trade company means a transfer of an economic entity '*which retains its identity*, *meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*'.[31]

A crucial question in terms of the transfer of the undertakings and maintenance of their identity is solving the dilemmas coming from the ever expanding business practice of 'contracting out' of services (or outsourcing) in the EU member states.[32]From the point of view of the EU labour law, the main problem of this business practice is the application or non-application of the regulations governing transfer of undertakings and their consequences for the employees in the event of a 'transfer of service activities which may take place without any transfer of tangible or intangible assets from the transferor to the transferee' (Laulom, 2001: 153). Evidently, this type of 'outsourcing' refers to the contracting out of labour-intensive service activities. In short, a primary criterion for the application of the transfer of undertakings regulations is the existence of a transfer of tangible or intangible assets (property) from the employer-transferor to the employer-transferee. If in the specific case there is no such transfer (as in cases of transferring labour intensive activities), the employment contracts of the employees will be nevertheless transferred to the new employer if he takes over a 'substantial' part of the workforce of his predecessor. This will particu-

employees were taken over by the new employer; whether or not the customers were transferred and the degree of similarity between the activities carried on before or after the transfer and the period, if any, for which those activities were suspended (See: Case 24/85, 18.03.1986, Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV**,** ECR 1119).

31 See: Закон за работните односи, Чл. 68-а, став 2.

32 At the time when the Directive 2001/23/EC was adopted, the business practice of a 'transfer of the performance of certain service-providing activities to external contractors' (for example: cleaning, catering, security, etc.) or so called 'contracting out' was not present to a large extent in the business and production activities of the European companies. However, at the end of the eighties from the last century, it started to take more significant place in the strategies of 'vertical disintegration' of companies as a consequence of their interest in reducing the costs and increasing the hiring and firing flexibility.

larly apply to those economic sectors that encompass such economic activities which are not composed of specific operating resources (for example: catering, maintenance and cleaning, security), and the takeover of the workforce will be a sufficient criterion that will lead to a transfer. In other words, in the labour intensive sectors, the takeover of the employees is a decisive criterion for the existence of a transfer.

The business practices of 'contracting out' and their legal consequences in relation to the employees are not an 'open subject for discussion' only on the level of the European Communities. They are insolvable enigmas in the Macedonian labour and legal system, even though 'at first sight' the Labour Relations Act seems to give certain directions in favour of them being solved. So, the Act stipulates that in the event of the '*transfer of activities of a trade company or parts of a trade company or in case of transfer of tasks or part of them from the employer-transferor to another employer-transferee, the rights and obligations deriving from employment shall be completely transferred to the employer-transferee to whom the transfer is made.The transfer of the rights and obligations deriving from the employment relationship takes place regardless of the legal reason and regardless of the fact whether the ownership rights are transferred to the transferee or not. The employer-transferee, as an employer, is authorized to continue to perform the tasks or activities of the previous employer or to perform similar tasks and activities. The tasks and activities related to production or services provision or similar activities offered by the legal entity or natural person on their behalf and on their responsibility in the facilities or premises determined for their performance shall be considered as tasks or activities of the employer*'.[33] With this provision, the Labour Relations Act (consciously or unconsciously) makes a clear distinction between the notion '*undertaking/part of the undertaking/business/part of the business*' that refers to the performance of the central or ancillary activity of the employer, and the notion '*activity/task*' that refers to the performance of certain stable and regular production or service-providing activities that are not central, nor ancillary activities of the employer and that can be 'outsourced'. But, on the other hand, the consequences from the transfer of the 'activity/task' in relation to the employees are identical to the consequences from the transfer of the 'undertaking/ part of the undertaking/ business/ part of the business'. Both the first and the second case cause (or are supposed to cause) transfer of the employment contracts of the employees and safeguarding of their acquired rights. However, in practice, the legal consequences in relation to the employees that occur after the transfer of the activity/task has been realized are diametrically opposite to those stipulated in the Act. Usually, in the event when the employer decides to 'outsource' a certain activity or task to an external contractor (regardless of

33 See: Закон за работните односи, Чл. 68-а, став 4.

whether the activity is capital-intensive or labour-intensive), the employment contracts of the employees who have been previously employed by the employer that organized the performance of the activity or task in question are *terminated*, or are *taken over by the new employer, but under different (deteriorated) conditions* than the conditions the employees previously had.

3.3. Safeguarding the employment and preserving the conditions of the employment relationship

The principle of safeguarding the employment relationships of employees and preserving their terms and conditions of employment in the event of a change of the employer is inspired by the idea of'legal succession' that has been known in the civil and commercial law for centuries, and has been later transmitted to the labour law (Мръчков, 2015: 311). The basic rule inspired from the Directive 2001/23/EC is that the '*transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee'.*[34] *This rule does not have an identical transposition within the Macedonian labour legislation but, from several provisions of the Labour Relations Act, a conclusion can be drawn that the new employer (transferee) takes over all the rights and obligations deriving from the transferred employment contracts in an unchanged form and scope.*[35] It is considered that the contracting parties (employees employed at the employer-predecessor and the new employer) should not conclude new employment contracts because those are not 'new' contracts, but it is a transfer of their 'old' contracts of employment which are automatically transferred to the new employer-successor. The rights and obligations of the employees before and after the transfer of their employment contracts should be seen as a whole. Thus, the rights arising from the continuity of the employees' employment relationship (i.e. the years of service) with both employers (the former one and his successor), such as the rights to a severance pay and a period of notice, are particularly important. Additionally, the principle of 'safeguarding the employment of the employees and the preservation of their employment conditions' entails all other rights that the employee had with the previous employer, including the rights to identical salary, salary structure and other material compensations that derive from the employment relationship (Blanpain, 2012: 783).

The criticisms that can be put forward to the Macedonian legislator in the regulation of this part of the legal provisions regarding the transfer of undertakings is that the Labour Relations Act did not determine the '*moment*' when it comes

34 See Council Directive 2001/23/EC, Article 3, para 1.

35 See Закон за работните односи, Чл 68, став 1; Чл. 68, став 2.

to the transfer of the employment contracts of the employees. It only provides that '*all the rights, obligations and responsibilities under the employment contract and the employment relationship shall be transferred to the new employer*…'[36] From the point of view of the Macedonian law, the date (day) of the transfer of the undertaking can be considered the date (day) when the legal consequences of such a transfer occurred in accordance with the regulations governing the legal reason on the basis of which the transfer was carried out (for example, *in the event of status changes the date of the transfer can be considered the date of the publication of the entry of the status change in the trade registry*) (Недков, Беличанец, 2008: 374)

3.3.1. Consent of the employee for the transfer of the employment contract

The key question in the event of a transfer of an undertaking, i.e. change of the employer is the following: *whether the replacement of one employer with another causes an automatic (ex lege) transfer of the employment contracts of the employees, or, the employees have the free disposition to 'block' the transfer of their employment contracts to the new employer*? In its contents, Directive 2001/23/EC does not give an explicit solution to this dilemma, so 'part' of the answer to this question can be sought in the approach of the European Court of Justice. Compared to the decisions of some older cases (as for example of the '*Daddy's Dance Hall*' case[37] or the *'Berg'* case[38]) in which the European Court of Justice has explicitly accepted the rule for automatic transfer of the employment contracts regardless of the will of the employees, in the **'***Katsikas'* case[39]the Court alleviates its stance in the favour of the discretion right of the employees to 'object' to the transfer of their employment contracts. In this case, the European Court of Justice states that the rules for transfer '*must not oblige the employee to continue the employment relationship with the transferee*'[40]... '*because such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen*'.[41]

36 See Закон за работните односи, Чл. 68, став 1.

37 In this case, the ECJ had the stance that '*the transfer of the employment contracts does not depend on the willingness of the contracting parties since it is subject to the interest of the public policy*' See: Case 324/86, 10.02.1988, Daddy's Dance Hall A/S ECR 739.

38 In this case, the ECJ ascertains that '*the change of employer brings an automatic transfer of the obligations of the employer, from the transferor to the transferee*', See: Joined Cases 144 and 145/87, 5.05.1988, Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen**,** ECR 2559.

39 See: Joined cases C-132/91, C-138/91 and C-139/91, Grigorios Katsikas**,** IRLR 179.

40 Case *Katsikas* v *Konstantidis*, paragraph (31).

41 Case *Katsikas* v *Konstantidis*, paragraph (32).

Apart from this stance (which is to a greater extent expected and acceptable), the Court does not solve the essential dilemma 'whether the employment contract or the employment relationship of the employee who has voluntarily refused the transfer of his employment contract to the transferee will continue to be applied with the original employer (transferor) or not'.

The Macedonian labour law system guarantees the principles of 'voluntarity' and 'consensuality' in the employment relationships (Старова, 2008: 342). In that regard, in the event of a transfer, the refusal of employees to continue the employment relationship with a new employer is complementary with the principle of freedom of work and employment guaranteed by the Constitutionof the Republic of Macedonia.[42] However, the Labour Relations Actdoes not stipulate a single concrete provision for resolving the dilemmas arising from the 'automatic' (ex-lege) transfer of the employment contract of the employees. It does not sets forth the obligation of the transferor to give *written notice* to the employees entailed with the 'transfer' for the forthcoming transfer of their employment contracts to the transferee, nor does it prescribe a *term* within which all these employees would be able to give their consent for the transfer. In such circumstances, it is fully unclear what the outcome will be if the employees 'explicitly' or 'tacitly' refuse the transfer of their employment contracts to the new employer.

3.4. Prohibition of dismissals

In most cases, the transfers of the undertakings are followed by dismissals of employees entailed in such transfers (Laulom, 2001: 174). Hence, the provisions that govern the safeguarding of the employment of employees in the event of transfers inevitably envisage and regulate this situation. The legal framework with which the transfers are regulated refers to both the 'prohibited' and 'allowed' cases of termination of the employment contracts of the employees in question. In that regard, Directive 2001/23/EC *'prohibits'* the dismissals of employees on the grounds of the transfer of the undertaking itself, but *'allows'* the dismissals due to economic, technical or organizational reasons entailing changes in the workforce.[43] The prohibition of dismissal of the employees exists in all the events in which a 'causal' link can be shown between the dismissal and the transfer of the undertaking (Pitt, 1997: 794). This prohibition is binding for both the transferor (referring to the dismissals before the transfer date) and the transferee (referring to the dismissals after the date of the transfer of the undertaking). This means that if the employee was dismissed because of the 'fact' that the undertaking has been transferred, this dismissal would be deemed illegal, regardless whether the dismissal was given to the employee

42 Устав на Република Македонија, Сл.весник на Република Македонија, бр.52/92.

43 See Council Directive 2001/23, Article 4, paragraph 1.

by the employer-predecessor or the employer-successor(Frntič, Govič Pentič, Hanzelak, Milkovič, Novakovič Rožman, 2017:794).

The Macedonian labour legislation regulates the issue of 'termination of the employment contracts in the event of transfer of undertakings' following the model of the Directive 2001/23/EC. In analogy to the European labour legislation, the Macedonian labour legislation 'prohibits' the dismissals conducted with the sole reason being the transfer of the undertaking, but 'allows' the dismissals based on business grounds on the initiative of the employer (predecessor or successor). Employees have the right to protection in the event of dismissals or in the case of deterioration of their acquired rights due to reasons which are connected to the transfer of the undertaking, while the employers are responsible to indemnify for infringing the rights of the employees in such cases.

Apart from the general prohibition on dismissing employees due to the transfer, in practice there are examples of abuse of this prohibition. First and foremost, it concerns cases in which one company ceases to exist (by *closure of the undertaking*) but, at the same time (or in a very short period of time), it founds another company (*newly established company*) that continues to perform the same or similar business activities. The closure of the undertaking causes termination of the employment relationship of the employees (whose employment contracts most often formally and legally are terminated on the basis of '*consensual termination*' which requires a consent of the employees concerned), while the newly established company becomes a new employer of the same employees who *sign new employment contracts, but this time with less favorable conditions*. If the employees give their consent to the 'consensual termination of their employment contracts', it seems that they would be in a 'stalemate' position, while the transfer of their employment contracts with all the acquired rights would be equal to a '*mission impossible*'. In this case, the following dilemma arises: 'whether and how the rights of the employees may be protected from this type of obvious abuses of their continuity in the employment and their acquired rights'? In our view, *de lege ferenda*, safeguarding of employees' rights would be enabled only if the legislator (in future changes and amendments to the labour legislation) enacts a new provision by which the 'malevolent' avoidance of the employers to fulfil their obligations regarding the employees in the event of a change of the employer would be explicitly sanctioned.[44]A provision with such contents would enable the employee (who, after the consensual termination of the employment

44 For example, in the labour legislation of the Republic of Croatia, there is a provision with which the 'abuse' of employees' rights in the event of a transfer of undertakings is regulated in the following manner: *the person who, with the transfer of an undertaking, part of undertaking, business or part of business or in any other way, malevolently, avoids to fulfill his/her obligations regarding the employee, upon the request of the employee, the competent*

relationship with the employer-predecessor, has concluded a new employment contract with the employer-successor on less favorable terms) to file a lawsuit for exercising the rights from the employment contract against the 'new' employer who has not 'formally' taken over the undertaking and, as a consequence, has 'malevolently' avoided the fulfillment of his obligations towards the employee, guaranteeing the acquired rights that the employee had with the previous employer (Frntič et al. 2017: 799).

4. Conclusion

Collective redundancies form an essential part of the legal regulations of the Republic of Macedonia that cover the termination of employment contracts by dismissals. In terms of changing economic circumstances and increased flexibility and deregulation of the labour markets, the dismissal protection of employees due to the ceasure of the need to perform some work(i.e. redundancy for business reasons) is faced by major challenges. The initial impressions after the comparative analyses between Council Directive 98/59/EC and the legal regime of collective redundancies in Macedonian labour legislation are 'in favor' of a successful and comprehensive harmonization of Macedonian labour law with the EU law. Yet, if an in-depth observation of the legal provisions in the Labour Relations Act is conducted and if a more profound cross-section of Macedonian labour law system is carried out, one can conclude that the legal regime of collective redundancies is far from a clear and coherent whole which entirely corresponds to the contents and meaning of the EU regulations on collective redundancies and their consequences in relation to the workers.

The basic aims of the legal regime for regulating the consequences in relation to employees of the transfer of the undertakings, both in terms of EU labour law and in terms of the Macedonian labour legislation, are: safeguarding the security and stability of the employment relationships of the employees; prohibition of dismissals due to the fact that there is a change of the employer, i.e. transfer of undertaking and preservation of the acquired employment conditions and rights that had existed before the change of the employer, i.e. transfer of the undertaking has taken place. In our opinion, considering the approach of the Macedonian legislator in the regulation of this legal matter, the current legal framework for safeguarding the employees' rights in the events of transfer of undertakings is partially harmonized with the Directive 2001/23/EC. In the absence of adequate national court practice through which it will be possible to examine and assess the court's position on all 'problematic' aspects of the legal provisions governing the transfer of undertakings, we consider that this paper

court will oblige this person to fulfill the obligations even in the event when the employment contract is not concluded with him/her.(Labor Law, Article 129)

can serve as a useful guide for the correct interpretation of the legal framework for the safeguarding of employees' individual rights in the event of a transfer of undertakings in the Republic of Macedonia.

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ЗАШТИТА ПРАВА РАДНИКА У СЛУЧАЈЕВИМА КОЛЕКТИВНОГ ОТПУШТАЊА И ПРОМЕНЕ ПОСЛОДАВЦА: КЉУЧНИ АСПЕКТИ УСКЛАЂИВАЊА ПРАВА ЕУ И МАКЕДОНСКОГ РАДНОГ ПРАВА

Резиме

У складу да обавезама које проистичу из Споразума о стабилизацији и придруживању из 2001. године, који је закључен између држава чланица Европске уније и Републике Македоније, држава спроводи континуирану хармонизацију свог правног поретка са правом ЕУ, која обухвата и законске прописе из такозваног “социјалног” acquis cotmunautaire. С тим у вези, аутори овог рада анализирају кључне аспекте Директиве 98/59/ЕУ о колективном отпуштању и Директиве 2001/23/ЕУ о заштити права запослених у случају промене послодавца, преносу предузећа или дела предузећа, и њихове имплементације у радно законодавство Републике Македоније, са посебним осврtом на заштиту индивидуалних права запослених у случају колективног отпуштања и промене промене послодаваца.

***Кључне речи**: Колективно отпуштање; пренос предузећа или дела предузећа; промена послодавца.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni187923S

UDK: 341.43
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*EUROPEAN QUALIFICATIONS PASSPORT FOR REFUGEES***

Abstract*: Asylum seekers and refugees usually face problems with qualifications recognition that obstructs their access to the host country labour market. The Council of Europe/UNESCO Lisbon Recognition Convention regulates "procedures designed to assess fairly and expeditiously whether refugees, displaced persons and persons in a refugee-like situation fulfil the relevant requirements for access to higher education". Recently, the Council of Europe embarked on development of the European Qualifications Passport for Refugees. The idea was to introduce a document providing an assessment of the higher education qualifications based on available documentation and a structured interview. This document would present information on the applicant's work experience, language proficiency and provide reliable information for integration and progression towards employment and admission to further studies. The European Qualifications Passport would enable faster and smoother integration, particularly for those categories of internationally protected persons who cannot fully document their qualifications. This paper examines the legal basis on the European Qualifications Passport, institutional framework and possible implications for all host countries. The qualitative research provides an in-depth analysis of legal and regulatory framework applicable to qualification recognition. The paper may contribute to ongoing discussion on integration of asylum seekers and refugees.*

Keywords*: refugees, asylum seekers, qualifications, integration.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

Recognition of foreign qualifications has been regulated since the 1950s by international and regional legal instruments. In addition, countries concluded bilateral agreements and recognizing foreign diplomas and certificates through their own national procedures. The main precondition for recognition of foreign qualifications was the existing formal proof of qualification obtained in the country of origin and existence of national legal framework. While recognition of diplomas and certificates was never an issue for foreign students, researchers or workers who were always able to present their official supporting documents, the area of recognition of qualifications for refugees was far more difficult, partly due to unwillingness of some host countries to integrate refugees into the labour market, fearing this might lead to permanent settlement, and partly due to the fact that refugees very often could not present formal documents to certify their qualifications. The Lisbon Recognition Convention in 1997 set the ambitious goal that Convention Parties should undertake steps to develop procedures designed to assess fairly and expeditiously whether refugees, displaced persons and persons in a refugee-like situation fulfill the relevant requirements for access to higher education, to further higher education programs or to employment activities, even in cases in which the qualifications obtained in one of the Parties cannot be proven through documentary evidence. Despite this goal, in the period between the adoption of the Convention in 1999 and 2017, very little was done in the area of recognition of qualifications held by refugees, displaced persons and persons in refugee-like situations. This prompted the Council of Europe to undertake new initiative and to introduce the European Qualification Passport to bypass the issue of recognition of inadequately documented qualifications.

2. Legal basis on the European Qualifications Passport

Legal regulation of recognition of qualifications for refugees commenced with the Convention relating to the Status of Refugees (further: Refugee Convention) adopted in 1951. In Article 22.2, the Convention regulates that "the Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships."[1]

1 1951 Convention Relating to the Status of Refugees, available at: http://www.unhcr.org/3b66c2aa10 accessed on 10 September 2018.

At the time of its adoption, the Refugee Convention regulated the recognition of foreign diplomas and school certificates in connection with the admission to schools of higher learning and universities, not regarding the exercise of professions.[2] This was a traditional manner of regulating recognition of diplomas, with the assumption that persons seeking and obtaining international protection will be able to benefit only from recognition linked to continuation of education in the host country. Secondly, the Convention assumed that refugees would be able to present formal documents certifying their previously obtained qualifications from their country of origin. In practice, these assumptions proved challenging because refugees were interested to get qualifications recognized to seek employment in the host country, and they were frequently unable to present formal documents due to volatility of circumstances in the country of origin which were the reason for fleeing without their certificates and diplomas.

The Refugee Convention also used legal standards from the Council of Europe European Convention on the Academic Recognition of University Qualifications of 14 December 1959, ratified by only three State Parties. Other important legal documents of the Council of Europe are: the European Convention on the Equivalence of Periods of University Study of 15 December 1956 (ETS No 021), later replaced by the European Convention on the General Equivalence of Periods of University Study from 1990,[3] and the European Convention on the Equivalence of Diplomas leading to Admission to Universities from 1954 (ETS No 015), with only three ratifications each. The Convention on the Recognition of Qualifications concerning Higher Education in the European Region (The Lisbon Recognition Convention) Treaty No 165, adopted in 1997,[4] also had a remarkably small number of ratifications (only five), demonstrating a very low interest of the Council of Europe State Parties in matters related to the recognition of diplomas for foreign nationals. Inter alia, in Section VII, this Convention envisages the recognition of qualifications held by refugees, displaced persons and persons in a refugee-like situation:

2 UNHCR, The Refugee Convention, 1951 The Travaux Preparatoires Analysed with a commentary by Dr Paul Weis; Available at: www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html?query=recognition of diplomas, accessed on 15 September 2018.

3 European Convention on the General Equivalence of Periods of University Study, Rome, 6.XI.1990, available at. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b3d2 accessed on 10 September 2018.

4 Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/015 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/021 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/165 accessed on 10 Sept.2018.

"Each Party shall take all feasible and reasonable steps within the framework of its education system and in conformity with its constitutional, legal, and regulatory provisions to develop procedures designed to assess fairly and expeditiously whether refugees, displaced persons and persons in a refugee-like situation fulfil the relevant requirements for access to higher education, to further higher education programmes or to employment activities, even in cases in which the qualifications obtained in one of the Parties cannot be proven through documentary evidence."

In 2010, the Lisbon Recognition Convention Committee adopted the Recommendation on Criteria and Procedures for the Assessment of Foreign Qualifications. If a refugee, displaced person or person in a refugee-like situation has formal documents certifying level of education, qualifications should be assessed in accordance with the Lisbon Recognition Convention and its Recommendation from 2010.

In addition to the legal regulation of recognition of qualifications within the relevant regulatory framework of the Council of Europe and under the Refugee Convention, the matter of recognition of diplomas was further regulated in the International Labour Organization (ILO) Convention No 143 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers). In Article 14, this Convention states that "a Member may ... (b) after appropriate consultation with the representatives organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas". The same provision is contained in Paragraph 6 of ILO Recommendation No. 151.[5]

Finally, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications establishes rules related to the recognition of professional qualifications with regards to access to regulated professions.

5 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Entry into force: 09 Dec 1978), adoption: Geneva, 60th ILC session (24 June 1975), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143 accessed on 10 September 2018.
Migrant Workers Recommendation, 1975 (No. 151), Recommendation concerning Migrant Workers, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312489 accessed on 10 September 2018.

3. European Qualification Passport

In 2017, the Council of Europe established the European Qualifications Passport as a multinational framework of a fast-track procedure to evaluate refugees' educational and training background in the absence of formal documents in order to ensure their mobility around Europe.[6] The European Qualifications Passport for Refugees is a document providing an assessment of the higher education qualifications based on available documentation and a structured interview. It also presents information on the applicant's work experience and language proficiency. The document provides reliable information for integration and progression towards employment and admission to further studies.

The Council of Europe and the UNESCO jointly introduced the European Qualifications Passport by the adoption of the Recommendation on Recognition of Qualifications Held by Refugees, Displaced Persons and Persons in a Refugee-like Situation.[7]

The Recommendation emphasises that refugees, displaced persons and persons in a refugee-like situation should be entitled to assessment for access to higher education, including when their qualifications or periods of study cannot be adequately documented. In order to achieve this, persons under international protection who cannot adequately document the qualifications or periods of study they claim are entitled to assessment of their qualifications or periods of study when applying for admission to a study programme or for the purpose of seeking employment. Competent recognition authorities should take adequate measures in this respect within the limits of each Party´s constitutional, legal and regulatory provisions.[8]

The Recommendation also puts forward proposal for assessment procedure free of charge or at reasonable cost, as costs should not be a barrier in acquiring recognition of qualifications. The Recommendation also suggests reasonable time in which assessment should be made.[9]

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6 Source: https://fruitfame.com/category/miracle-fruit/european-qualifications-passport-for-refugees accessed on 17 September 2018.

7 Recommendation on Recognition of Qualifications Held by Refugees, Displaced Persons and Persons in a Refugee-like Situation; Council of Europe, UNESCO, DGII/EDU/HE (2017) Paris/Strasbourg, 14 November 2017, Adopted by the Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region on 14 November 2017, at its extraordinary session in Strasbourg. Available at: https://rm.coe.int/recommendation-on-recognition-of-qualifications-held-by-refugees-displ/16807688a8 , accessed on 17 September 2018.

8 Paragraph 9 of the Recommendation

9 Paragraph 10 of the Recommendation

The European Qualifications Passport for Refugees is a standardized statement, with a purpose to map, summarize and present available information about the refugee's educational level containing information that describes the highest achieved qualification(s), subject field, other relevant qualifications of the individual, job experience and language proficiency.

3.1. Procedure for assessment of qualification

The methodology of obtaining the European Qualification Passport is a combination of document analysis and the use of a structured interview by qualified and experienced credentials' evaluators with the aim to provide credible and reliable information relevant in connection with applications for employment, internships, qualification courses and admission to studies.[10]

The assessment of inadequately documented qualifications has a goal to establish whether applicants are likely to hold the qualifications they claim. It may further aim to establish the value of those qualifications within the education system of the host country. Where formal rights are attached to a certain qualification in the home country, the qualification should be assessed with a view to giving the holder comparable rights in the host country.[11]

The assessment of inadequately documented qualifications should be based on information collected from reliable public sources as well as the person applying for recognition of their qualifications and supplemented by interviews with the applicant, examinations and any other appropriate assessment methods. The competent recognition authority should make use of any available and reliable information about the institutions and programmes in which the qualifications have been earned as well as information obtained through previous assessments of similar qualifications and as far as possible refer to the level, quality, learning outcomes, profile and workload of the qualification.[12]

New qualification recognition procedure has initially been tested in Norway, and after successful pilot phase in November, currently testing centres in Armenia, Canada, France, Germany, Greece, Italy, the Netherlands, Norway and the UK are working to provide documents detailing refugees' education qualifications, work experience and language proficiency.[13]

10 Explanatory Memorandum to the Recommendation, p. 14

11 Paragraph 10 of the Recommendation

12 Paragraph 17 of the Recommendation

13 Source: https://thepienews.com/news/european-refugee-passport-scheme-expands/, accessed on 17 September 2018.

The qualifications passport is valid for three years, and is intended to provide guidance for the first years that refugees enter the labour market or pursue more education.

4. Possible implications for all host countries

The Recommendation on Recognition of Qualifications Held by Refugees, Displaced Persons and Persons in a Refugee-like Situation requires from Parties to the Lisbon Recognition Convention to review and, as required, amend their legal framework and regulations to ensure that national legislation does not impede the implementation of Article VII of the Convention and the provisions of the Recommendation. To this effect, Parties are encouraged to take any required action to simplify and speed up the recognition process in a coordinated way.

In order to establish recognition of inadequately documented qualifications for refugees and persons in all refugee-like situations, host countries would need to change their national legislation in part regulating obligation to base recognition procedure on formal supporting documents like diplomas and certificates. For example, the Croatian Act on Recognition of Foreign Educational Qualifications (Official Gazette No 158/03, 198/03, 138/06, 45/11) regulates in Article 4 that recognition procedure is based on documents, and lists all documents that are required for the qualification recognition. In the long term, adoption of European Qualification Passport methodology can save costs for host countries by facilitating and accelerating the process of recognition of undocumented or non-verifiable foreign qualifications across borders in Europe.[14]

5. Conclusion

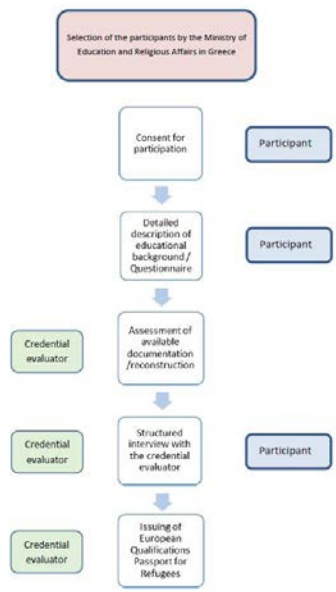
Introduction of the European Qualification Passport is a significant innovative solution to long-lasting legal limbo which refugees and all persons in similar situations encountered if they could not prove their qualifications and previous study periods by official documents. Unrecognized qualifications of persons under international protection resulted in their inability to get employment, de-skilling, losing their professional competences in case of longer-lasting displacement and reliance on social welfare in the host country. In order to achieve higher and faster integration of refugees on the national labour market, there was a necessity to introduce new method of assessment of qualifications, based on background check, self-assessment and structured interview with competent experts. Having seen positive results of initial pilot phase of such recognition

14 Source: https://fruitfame.com/category/miracle-fruit/european-qualifications-passport-for-refugees, accessed on 17 September 2018.

of inadequately documented qualifications, and considering current success in nine European countries implementing the European Qualifications Passport scheme, we can expect that the proposal will have larger impact and possibly get endorsed by the European Commission in a form of more compulsory legal norm than it is currently the case with Council of Europe and the UNESCO Lisbon Convention and its Recommendation.

Annex I

Figure 1. Assessment Procedure for obtaining the European Qualification Passport



Source: *https://www.coe.int/documents/21202288/24146803/process_qualifications_passport_refugees_EN.jpg/5809dac7-9375-4a5f-9cda-42174cd0f88b?t=1489661330000*

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Migrant Workers Recommendation, 1975 (No. 151), Recommendation concerning Migrant Workers, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312489, accessed on 10 September 2018. Source: https://fruitfame.com/category/miracle-fruit/european-qualifications-passport-for-refugees, accessed on 17 September 2018.

Recommendation on Recognition of Qualifications Held by Refugees, Displaced Persons and Persons in a Refugee-like Situation; Council of Europe, UNESCO, DGII/EDU/HE (2017) Paris/Strasbourg, 14 November 2017, Adopted by the Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region on 14 November 2017, at its extraordinary session in Strasbourg. Available at: https://rm.coe.int/recommendation-on-recognition-of-qualifications-held-by-refugees-displ/16807688a8, accessed on 17 September 2018.

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ЕУРОПСКА КВАЛИФИКАЦИЈСКА ПУТОВНИЦА ЗА ИЗБЈЕГЛИЦЕ

Резиме

Тражитељи азила и избјеглице се често сусрећу с проблемом признавања стручних квалификација што им онемогућава приступ тржишту рада у земљи домаћину. Лисабонска Конвенција о признавању квалификација Вијећа Европе и УНЕСКО-а прописала је "поступке којима је циљ поштена и брза процјена испуњавају ли избјеглице, расељене особе и особе у свим ситуацијама које су сличне избјеглиштву релевантне увјете за приступ високом образовању"

Недавно је Вијеће Европе започело с развојем Европске квалификацијске путовнице за избјеглице. Идеја је била да се уведе документ који ће осигурати процјену ступња образовања и евентуалних високообразовних квалификација која би се темељила да доступној документацији и структурираном разговору. Овај документ би представљао информације о радном искуству кандидата, његовом/њеном ступњу знања страних језика и пружао би поуздане информације потребне за интеграцију тј. запошљавање и/или наставак образовања кроз омогућавање уписа у адекватне образовне институције. Европска квалификацијска путовница за избјеглице би омогућила бржу и једноставнију интеграцију, посебице за категорије особа под међународном заштитом које из објективних разлога, не могу доказати своје квалификације потребним службеним исправама.

Рад би се фокусирао на правну основу развоја Европске квалификацијске путовнице за избјеглице, институционални оквир и могуће импликације за државе домаћине. Истраживање би било квалитативно са подробном анализом правних и регулаторних оквира који се односе на признавање квалификација. Рад би могао допринијети тренутној расправи о интеграцији тражитеља азила и избјеглица.

Кључне ријечи*: Избјеглице, тражитељи азила, квалификације, интеграција.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879241P

UDK: 614.25(497.13)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*OBJECTIVE LIABILITY FOR DAMAGES IN MEDICINE AND PREVENTION OF VIOLATION OF HEALTHCARE RULES (MEDICAL ERRORS)***

Abstract: *In legal theory and jurisprudence in the Republic of Croatia, the prevailing view is that compensation for damage in healthcare should be judged according to the principle of quilt. In relation to damage caused by dangerous goods or hazardous activities in medicine, the most prominent tendency is the application of objective liability for damage. In this respect, the decision of the Constitutional Court of the Republic of Croatia is of particular importance, as the basis for changing the practice of regular courts when it comes to liability for damage caused to a patient due to dangerous goods or hazardous activity. The model which is applied around the world, primarily in the Scandinavian countries, New Zealand and the United States, is the principle of compensating the damage sustained by the patient, the so-called "no fault-no guilt"model or "no fault compensation scheme" (compensatory pattern without guilt). This model entails administrative and not civil procedure. In all no-fault systems, medical errors need to be registered in order to avoid similar situations in the future. These models provide for high transparency of the healthcare system and they aim to provide quick and just financial compensation without long-standing court proceedings and high costs.*

Keywords: *Damages, medicine, liability for damage, medical error, no-fault.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

The general rules on liability for damage under the provisions of the Obligation Relations Act apply to damage incurred to a patient during the provision of health services (Klarić, 2004: 112).[1]Regarding the rules on liability for damage, we differentiate between the types of liability for damage that come into consideration for the application of damages in medicine. Thus, we can talk about the rules of contractual and extra-contractual liability, subjective and objective liability, as well as responsibility for another (Klarić, 2004: 113).Each type of liability for damage has its own special assumptions and its scope of application. When the damage arises, the first question is according to which rules on liability for damage it will be judged (Klarić and Vedriš, 2006: 604).In the Republic of Croatia,the prevalent view in legal theory and jurisprudence is that liability for damage in healthcare should be judged on the basis of the principle of quilt (Crnić, 2008: 135).

2. Features of the Liability for Damage System

2.1.The Subjective Liability System

The importance of choice between subjective or objective liability is expressed as to whether, besides unlawfulness, in an objective sense, as a prerequisite of responsibility, guilt should also be claimed as a subjective element of unlawfulness (Klarić, 2003: 390).In the Croatian legal system, as a rule, the offender's subjective liability is presupposed. In that case, the injured party must prove the harmful act, damage, and the causal link, while the offender's quilt is presupposed. However, the lowest degree of guilt is presupposed, which is a common negligence. Any higher degree of guilt, such as intention and extreme negligence, must be proven by the injured party (Klarić and Vedriš, 2006: 610). Furthermore, the ORA[2]stipulates that a participant in obligation relations is obliged to fulfil the obligations relation to his/her professional activity with increased care in accordance with the professional rules and practice (to exercise due care of a good expert) (Crnić, 2006: 8).Therefore, for healthcare professionals, this provision establishes that a standard of their professional care is determined on the basis of two criteria: according to persons in their professional circle, and the specific circumstances of medical intervention (Klarić, 2003: 401).In this regard, it is necessary to take as a criterion the duty of care of an experienced and competent healthcare professional of the same category and rank as the

1 Obligation Relations Act, *Official Gazette,* no.35/05, 41/08, 125/11, 78/15, hereinafter referred to as the ORA.

2 Art. 10. para. 2. ORA.

one whose behaviour is being evaluated: a general practitioner, a specialist (Klarić, 2003: 401).

Subjective liability for damage, especially in the area of liability for damage in medicine, may also be subject to certain objections. Thus, it is emphasized that in case of subjective responsibility, physician's quilt has to be proven. The patient's position is particularly difficult since, as a non-expert, a patient has to prove the violation of the rules of highly specialized activity and the existence of a causal link[3] between a medical error[4] and sustained damage. This is particularly problematic given the fact that experts in these cases are physicians whose impartiality can for obvious reasons be questioned (Klarić, 2003: 392). The subjective liability for damage system does not show signs of a reduction in the number of court proceedings resulting from medical errors. On the contrary, the number of proceedings before the courts is steadily increasing, entailing an increase in health care costs (Kessler, 2004: 3).

2.2. The Objective Liability System

Because of the aforementioned, there is a growing tendency to introduce a system of objective liability for damage in medicine. In the system of objective or causal liability, quilt of the offender is not required for damage liability to occur. Hence, the liability for damage arises when the following assumptions are fulfilled: harmful action, damage, illegality of harmful actions, and a causal link between the harmful actions and the incurred damage. However, in case of damage caused by dangerous objects or hazardous activity, the injured party does not need to prove the causal link, which is presupposed (Klarić, 2006: 613). It is precisely with regard to damage caused by hazardous goods or activities in medicine where we see the most intense tendencies for the application of objective liability for damage. This is based on the reasons for the increasingly frequent use of certain devices and the introduction of technology in medicine that did not exist until recently (laser, robotic surgery, radiation, etc.).In this

3 Causal link or*causal nexus*is a connection that must exist between harmful actions and damage, indicating that the damage occured as a result of a harmful action. In the nature of things, damage is the result of a multitude of causes. From this multitude, one has to be chosen as legally decisive. In this respect, the position on adequacy causality is applied in the Republic of Croatia, i.e., from many circumstances surrounding the damage, the cause is considered to be only the consequence which in the ordinary course of things (which is common in life) leads to such consequences. The injured party must prove the existence of such a causal link (Crnić, 2006: 705).

4 Different terms are used in medical and legal terminology: medical error, expert error, adverse event. The term *medical error* was determined by pathologist Rudolf Virchow as a "violation of general rules of treatment because of lack of attention or caution" (Klarić, 2008: 31).

respect, even in countries that apply the rules of subjective liability, there is more frequent insistence on the introduction of objective liability for damage caused by medical devices (Klarić, 2003: 395).[5]However, in the Republic of Croatia, court practice consistently applies a system of subjective liability to damage incurred in medicine. The legal basis for the application of objective liability for damage to a physician is contained in the ORA, on the basis of which damage caused by goods or actions which have a higher level of inherent danger for the environment are subject to liability regardless of quilt.[6] Thus, in Croatian claims law there is a legal basis for the application of objective liability. It is necessary for the court to determine in each individual case whether a particular good or action which entails an increased risk of damage to the environment was the cause of the particular damage. In that case, the court must apply the rules of objective liability (Klarić, 2004: 119).[7]The court cannot ascertain that damage stems from a dangerous object or action and determine damage according to the rules on subjective liability (Klarić, 2003: 395).Our case law considers that medical treatments involving the use of procedures that by their very nature constitute a dangerous good or action have a certain risk for the patient's health, but if such a medical risk is accepted as usual, regardless of the possibility of occurrence of damage, healthcare professionals and institutions are liable on the basis of the principles of subjective responsibility. It is considered that the patient himself/herself bears the risk of damage resulting from the use of dangerous objects if the rules of the medical profession require the use of that dangerous object to eliminate the risk of the disease (Jelčić, 2007: 23).

2.3. Review of the Existing Solutions

Legal considerations on the recognition of patients' right to compensation for damage by applying the principle of objective liability are beginning to appear in our legal theory and jurisprudence. Thus, it is emphasized that medical devices are the basic means used by hospitalsin performing their medical activities and generating revenues. A position arguing for the application of objective liability is that it is fair that the one who benefits from performing a particular activity

5 About the reasons and benefits of the system of objective liability, for more information see *infra.*

6 Art. 1045. para. 3. ORA.

7 Judicial practice and legal theory determine the concept of hazardous goods as those which by their intended use, characteristics, position, location and mode of use, or otherwise constitute an increased risk of harm to the environment; therefore, they should be monitored with increased attention. Dangerous activity is an activity which in its normal course, due to its technical nature and mode of operation itself, can endanger lives and health of people or property; therefore, such threatment requires increased attention of the persons performing the activity as well as the persons who come into contact with it. (Klarić, 2006: 615).

which, due to its dangers carries an increased risk of harm to other persons, compensates for damage caused by that activity (Klarić, 2003: 394).There is also an opinion that, when determining liability, it is important to determine whether the incurred consequences are common with regard to the type of medical intervention and methods. If these consequences exceed the normal risk limit, there is objective liability (Jelčić, 2007: 24).

In this respect, the decisions of the Constitutional Court of the Republic of Croatia U-III-1062/2005 of 15 November 2007is of particular importance. In the aforementioned decision, the Constitutional Court confirmed the view of the municipal and the county court that the apparatus for conducting physical therapy with galvanic current by its properties, purpose and position is a dangerous object, and that the therapeutic procedure of using galvanic current is a dangerous activity; therefore, the person performing that activity is liable for damage sustained from that activity(Constitutional Court U-III-1062/2005). The municipal and the county court obliged the sued hospital to compensate the patient for damage (third degree burns) sustained during the galvanic current therapy. The courts referred to Article 174 paragraph 1 of the Obligation Relations Act[8], which corresponds to the ORA provision that stipulates that the owner of a dangerous object shall be liable for damage resulting from the dangerous object and the person involved in the dangerous activity shall be liable for damage resulting thereof.[9] This decision of the Constitutional Court of the Republic of Croatia is the basis for changing the court practice of regular courts when it comes to liability for damage caused to a patient by a dangerous object or a dangerous activity (Jelčić, 2007: 25).

3. Tendencies and Reasons for Application of Objective Liabilityfor Damage

More recently, there is a tendency, even in countries that consistently apply the rules of subjective liability for damage to medicine, for accepting objective liability for damage, and not just for damage caused by medical devices (Klarić, 2008: 45).

The human factor can be attributed to 60-80% of all medical errors, which are relatively common. The fact is that medical errors have not been registered for years. In recent years, medical errors have become a topic more openly discussed (Ćepulić, 2008: 112),and there has been extraordinary expansion of court procedures based on medical errors. On the other hand, certain medical

8 Obligation Relations Act (ORA), *Official Gazette no*.53/91, 73/91, 111/93, 3/94, 7/96, 91/96, 112/99 and 88/01.

9 Ar. 1063 and 1064 ORA.

studies conducted at Harvard indicate that most of the 30,000 hospitalization cases that resulted in lawsuits did not include a mistake by a physician. However, it is emphasized that even if physicians won the lawsuit, it was a losing position. At best, they were presented as unprofessional (Bernstein, 2013: 715). For this reason, a new principle for compensating patients was introduced around the world, primarily in Scandinavian countries, New Zealand and the United States; it is the so-called "*no fault - no guilt*" model or "*no fault compensation scheme*".

In Sweden, mandatory *no-fault* insurance was introduced in 1975. Insurance payers are public healthcare providers and they pay the insurance premium. The patient is compensated for damage based on physical or mental injury, along with the need to prove the causal link between the medical services and injuries. The compensation includes both pecuniary and nonpecuniary damages. An injury report is usually submitted by a medical staff, but the patient can also contact the insurer directly. If the patient is dissatisfied with the amount of remuneration that he/she has been entitled to, he/shecan file a claim to the court; however, if the patient loses the lawsuit, he/she is exposed to risk of paying costs of legal proceedings. This system also ensured physicians against consequences of their professional liability in a form of annual payments to a special fund. The system is not based on the subjective liability of a physician for damage that involves the determination of the perpetrator's guilt. This is an administrative dispute and not civil lawsuit (Proso, 2009: 364). Other Scandinavian countries also have very similar models of patient compensation systems. In Finland, this system was introduced in 1970, first as a voluntary system, while the mandatory model was introduced in 1980. Norway adopted a similar legal regulation in 2003 (Ćepulić, 2008: 130).The Swedish patient insurance model was used as the foundation for drafting similar legislation in Denmark (Proso, 2009: 365).

The United States has reached an unprecedented level of healthcare costs and without signs of slowing growth rates, which leads to the practice of "defensive medicine" (Kessler, 2004: 3), i.e. the application of those treatment options that are not necessarily in the best interest of the patient but have the purpose of protecting the physician from potential court proceedings. That is why there is a need for a reform that would reduce healthcare costs and provide patients with compensation for sustained damage as an alternative to the existing common-lawcompensation liability system. One of the alternatives[10] is a *no-fault* system

10 In addition*to the non-fault*model in the United States, Medical Responsibility System, a series of*guidelines-based systems*and*binding alternative dispute resolution* are considered.The g*uidelines-based system*is based onwrittenguidelines that determine the besttreatment of certain illnesses. If physicians and hospitals harmonize their actions with clinical practices from the guidelines, it would be presumed that they are not liable for damage. *Binding alternative dispute resolution*is an agreement between the healthcare provider and the patient

accepted in Florida and Virginia, in a limited scope- for certain neurological injuries related to childbirth. The system compensates the plaintiff with medical expenses and reasonable attorney fees. The system represents an administrative mechanism instead of court compensation, regardless of negligence or medical error. The Virginia system also allows for compensation for lost earnings for people aged 18-65 in the amount of 50% of the average wage (Kessler, 2004: 19-21).

3.1. Medical Error Registration

A common feature of all no-fault systems is that medical errors need to be registered. This is because the evidence of the medical error and the consequences it has caused is aimed at avoiding similar situation in the future. This also provides for high transparency of the health system (Proso, 2009: 369), which is a comparative advantage over other compensation liability models. Such an arrangement is based on the idea that medical errors are unintentional in a vast majority of cases. The system requires the registration of any medical errors and reporting on any technical defect in order to prevent their reoccurrence. By introducing computerization, the code of conduct for diagnostic and therapeutic procedures, and error registration systems, it is possible to analyse and take measures to ensure medical errors are not repeated.[11]No-fault systems have the purpose of reporting any harmful event during medical procedures, without seeking thequilt (fault) of healthcare professionals, except in case of intent or extreme neglect. These compensation systems have the potential to prevent future mismanagement and provide quick and fair financial compensation without long-standing court proceedings and high costs (Ćepulić, 2008: 130).

4. Concluding Considerations

Applied in any form, the objective liability system relieves physicians and other healthcare professionals of the inconvenience of being subjected to determination of quilt (fault) as a subjective element of liability for damage (Crnić, 2008: 140).

to submit their disputes relating to the damage from medical errors to a third party instead of a court.This system compensates the injured party faster and at a lower cost (Kessler, 2004: 13 – 17).

11 Registering and analysing errors and taking measures preventing the possibility of error has shown exceptional results in the United States. Surgical infections decreased by introducing perioperative antibiotic protocols; the number of incorrect drug prescriptions was reduced by introducing computer programs into medical practice; the number of pneumonia cases was reduced by introducing ventilation control protocols etc. (Ćepulić, 2008:128).

In the Republic of Croatia, the applicable law for damage incurred to a patient in the provision of health services are the general rules on liability for damage envisaged in the Obligation Relations Act (ORA). The prevailing view in the Croatian legal theory and jurisprudence is that liability for damage in healthcare should be judged on the basis of principle of fault (subjective liability). Subjective liability for damage, especially in the area of liability for damage in medicine, can receive certain objections, especially concerning the particularly difficult position of a patient who, as a non-expert, must prove the violation of the rules of a highly specialized profession and the existence of a causal link between the medical error and the damage sustained. This is particularly problematic since experts in these cases are doctors, whose impartiality, for obvious reasons, may be questioned.

In that sense, there are increasing tendencies to introduce a system of objective liability for damage in medicine. In the system of objective or causal liability, in order to determine liability for damage, the court does not have to establish the perpetrator's guilt. In case of damage caused by dangerous goods or hazardous activities, the injured party does not need to prove the causative relationship since that relationship is presupposed. It is precisely in regard to damage caused by hazardous goods or activities in medicine where we see the most intense tendencies for the application of objective liability for damage. This is based on the reasons for the increasingly frequent use of certain devices and the introduction of technology in medicine that did not exist until recently (laser, robotic surgery, radiation, etc.).In such situations, it is necessary for the court to determine in each individual case whether a particular dangerous object or activity which entails an increased risk of damage to the environment was the cause of the particular damage. In that case, the court must apply the rules of objective liability. Legal considerations on the recognition of patients' right to compensation for damage by applying the principle of objective liability are beginning to appear in our legal theory and jurisprudence.

In this respect, the decisions of the Constitutional Court of the Republic of Croatia U-III-1062/2005 of 15 November 2007 is of particular importance. The Constitutional Court confirmed the view of the municipal and the county court that the apparatus for conducting physical therapy with galvanic current by its properties, purpose and position is a dangerous object, and that the therapeutic procedure of using galvanic current is a dangerous activity, which makes the person performing that activity liable for damage resulting from that activity. This decision of the Constitutional Court of the Republic of Croatia is the basis for changing the practice of regular courts when it comes to liability for damage incurred to patients by a hazardous onject or activity.

Around the world, primarily in Scandinavian countries, New Zealand and the United States, a new principle for compensating patients was introduced, the so-called "*no fault - no guilt*" model or "*no fault compensation scheme*".

In Sweden, mandatory *no-fault* insurance was introduced in 1975. Insurance payers are public healthcare providers and they pay the insurance premium. The patient is compensated for damage based on physical or mental injury, along with the need to prove the causal link between medical services and injuries. The compensation covers both non-pecuniary and pecuniary damage. Other Scandinavian countries also have very similar models of patient compensation systems. In Finland, this system was introduced in 1970, first as a voluntary one, and the mandatory model was introduced in 1980. Norway adopted similar legislation in 2003. The Swedish patient insurance model was used as the foundation for drafting similar law in Denmark. In the USA, there is a need for a reform that would reduce healthcare costs and provide patients with compensation for sustained damage as an alternative to the existing common-law compensation liability system. One of the alternatives is a no-fault system accepted in Florida and Virginia in a limited scope - for certain neurological injuries related to childbirth.

A common feature of all no-fault systems is that medical errors need to be registered. This is because the evidence of the medical error and the consequences it has caused is aimed at avoiding similar situation in the future. This also provides for a high transparency of the health system, which is a comparative advantage over other compensation liability models. No-fault systems have the purpose of reporting any harmful event during medical procedures, without seeking the quilt of healthcare professionals, except in case of intent or extreme neglect. These compensation systems have the potential to prevent future mismanagement and ensure quick and fair financial compensation without long-standing court proceedings and high costs. Applied in any form, the objective liability system relieves physicians and other healthcare professionals of the inconvenience of being subjected to determination of quilt as a subjective element of liability for damage.

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ОБЈЕКТИВНА ОДГОВОРНОСТ ЗА ШТЕТЕ У МЕДИЦИНИ И ПРЕВЕНЦИЈА ПОВРЕДЕ ПРАВИЛА ЗДРАВСТВЕНЕ СТРУКЕ (ЛИЈЕЧНИЧКЕ ГРЕШКЕ)

Резиме

У правној теорији и судској пракси, у Републици Хрватској, превладава стајалиште да се одштетна одговорност у здравственој дјелатности треба просуђивати према начелу кривње. У односу на штете које у медицини настану у вези с опасном ствари или опасном дјелатности најинтензивније су тенденције за примјену објективне одговорности за штету. У том смислу, од посебног значаја је одлука Уставног суда Републике Хрватске која представља основу за промјену судске праксе редовних судова када се ради о одговорности за штету проузрочену пацијенту опасном ствари или опасном дјелатности. У свијету се, прије свега скандинавским земљама, Новом Зеланду и Сједињеним Америчким Државама, почео примјењивати принцип накнађивања штете пацијентима који се назива „no fault – no guilt" модел („нема грешке – нема кривње") или „no fault compensation scheme" (компензацијска схема без тражења кривње). Ради се о административном, а не грађанскоправном поступку. Свим no-fault суставима заједничко је да се медицинске грешке морају регистрирати како би се сличне ситуације избјегле у будућности. Ови модели остварују високу транспарентност здравственог система и имају за циљ брзу и праведну финанцијску накнаду без дуготрајног судског поступка и високих трошкова.

Кључне ријечи*: штета, медицина, одговорност за штету, лијечничка грешка, no-fault.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879253M

UDK: 340:159.9.019.4
Рад примљен: 24.09.2018.
Рад прихваћен: 16.10.2018.

КОГНИТИВНЕ ПРИСТРАСНОСТИ У ПРАВНОЈ ОБЛАСТИ: МЕСТО СУСРЕТА ПРАВНЕ И БИХЕВИОРИСТИЧКЕ НАУКЕ[**]

Апстракт: *У раду се приказују типичне когнитивне пристрасности представника правних професија и учесника судских и других поступака (судија, арбитара, медијатора, адвоката, странака): усидравање, уоквиравање, накнадни увид, репрезентативност и егоцентричност. Циљ је размотрити њихове импликације на процес доношења правних и других одлука, као и значај који имају у правној области. Полазна претпоставка јесте да доношење правних одлука није детерминисано само правним нормама, већ и бројним факторима који имају ванправни карактер, од којих се когнитивни фактори издвајају по својој важности. Полазећи од тога, у раду се приказују бројна истраживања когнитивних пристрасности оних који одлучују у правној области, а која припадају области бихевиористичке науке. Сва она јасно доказују постојање бројних систематских грешака у размишљању учесника судских и других поступака. На основу тих истраживања, аутори разматрају импликације ових грешака у размишљању на доношење правних и других одлука, као и технике за њихово ублажавање или елиминисање, чиме постављају концептуални оквир за будућа истраживања у овој области, када је реч о домаћем правном систему.*

Кључне речи*: когнитивне пристрасности, правна област, ефекат усидравања, ефекат уоквиравања, пристрасност накнадног увида, репрезентативност, егоцентричност.*

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[**] Рад је резултат истраживања на пројекту: „Усклађивање права Србије са правом Европске уније“, који финансира Правни факултет Универзитета у Нишу у периоду 2013–2018. године.

1. Увод

Уобичајено се сматра да *когнитивне пристрасности (cognitive biases)* представљају систематске грешке у размишљању, у смислу да наше процене одступају од онога што би се сматрало пожељним из перспективе општеприхваћених норми или тачним у смислу формалне логике (Samson, 2018: 125). Једноставније речено, когнитивне пристрасности представљају систематске обрасце одступања од *норме рационалности* у расуђивању. Рационалност, схваћена као понашање којим се доследно максимизује корист или минимизују трошкови, кључна је претпоставка модела рационалног актера (*homo economicus*) у неокласичној економској теорији. Но, ово схватање рационалности значајно се мења појавом и развојем научних дисциплина бихевиористичке економије и бихевиористичког права и економије.[1] Припадници ових дисциплина емпиријски потврђују да се *стварни људи* разликују од *замишљеног рационалног актера* из економских модела. То не значи, према мишљењу психолога Канемана (Kaneman, 2015: 386), иначе добитника Нобелове награде за економију 2002. године, да људи систематски доносе *ирационалне одлуке*, *већ само да модел рационалног актера људе не описује добро*. Једноставно речено, пристрасност интуиције, као једног дела нашег когнитивног апарата (*тзв. систем 1*), и спора контрола његовог другог, промишљеног, рационалног дела (*тзв. систем 2*), чине да наше *стварне одлуке* нису онакве какве их доноси рационални актер у економским моделима. „Поделивши" наш когнитивни апарат на два дела, Канеман је когнитивне пристрасности повезао са пристрасностима *интуиције*, при чему су оне карактеристика не само обичних људи, већ и *стручњака*. О пристрасностима стручњака убедљиво је писао свестрани научник Херберт Сајмон (Simon, 1992), који је интуицију свео ни мање ни више него на препознавање (*recognition*) познатих елемената у новој ситуацији, што је последица учења на бази претходног искуства.

Когнитивне пристрасности настају због тога што се појединци ослањају на *менталне пречице* или *правила процесуирања информација* приликом доношења одлука. Ове менталне пречице називају се хеуристикама, које су углавном корисне, али понекад доводе до озбиљних и систематских грешака у одлучивању (Tversky, Kahneman, 1974: 1124). Пошто су когнитивне пристрасности последица хеуристичких правила, развијен је посебан приступ у оквиру бихевиористичких наука: *приступ хеуристикама* и *пристрасностима*.

1 За развој ових дисциплина, видети: (Jolls, Sunstein, Thaler, 1998).

До сада је идентификовано *186* когнитивних пристрасности у општој популацији,[2] а које се разврставају на: пристрасности при доношењу одлука, веровању и понашању; друштвене пристрасности; меморијске грешке и пристрасности.[3] Пошто су когнитивне пристрасности општи спецификум устројства нашег когнитивног апарата, логично је претпоставити да важе подједнако и за бројне доносиоце одлука у специфичним сферама друштвеног живота. Полазећи управо од тога, у овом раду се приказују типичне когнитивне пристрасности доносилаца одлука у *правној области*, са циљем испитивања њиховог значаја приликом доношења *правних одлука*.

2. Когнитивне пристрасности судија и арбитара

Бројна истраживања показују да су *судије*, такође, подложне когнитивним пристрасностима. Она бацају другачије светло на понашање судија, указујући на то да ни судије не могу да избегну замке свога ума. Давно је речено, из угла правног реализма, да се морамо суочити са чињеницом да су *судије само људска бића* (цитирано у: Guthrie, Rachlinski, Wictrich, 2001: 784). Полазећи управо од те премисе, једно познато емпиријско истраживање (Guthrie, Rachlinski, Wictrich, 2001) документује постојање следећих когнитивних пристрасности судија приликом расуђивања и доношења одлука: 1. усидравање, 2. ефекат уоквиравања, 3. пристрасност накнадног увида, 4. хеуристика репрезентативности, и 5. склоност ка егоцентризму.

Ни припадници других правних професија нису поштеђени ових когнитивних пристрасности. Једно ново истраживање (Franck, Aaken, Freda, Guthrie, Rachinski, 2017) потврђује постојање когнитивних пристрасности и грешака при доношењу одлука *(међународних) арбитара*, и то: 1. усидравања, 2. ефекта уоквиравања, 3. хеуристике репрезентативности, и 4. склоности ка егоцентризму. Следи да су и арбитри, попут судија, људска бића склона (брзом) интуитивном промишљању и систематским грешкама које из тога произилазе. Управо ово истраживање показује колико је битно да они који утичу на карактер система решавања спорова

2 Интересантно је и то да су утврђене и неке пристрасности код животиња, на пример, мајмуна или пацова. Рецимо, у једном релативно новом раду (Alexsander, Brown, 2010) развијен је модел *хиперболичког дисконтовања* (као посебне врсте когнитивне пристрасности) који се односи и на животиње. Иначе, под хиперболичким дисконтовањем подразумева се људска тенденција да се садашње награде, или оне које су временски гледано ближе, оцењују као вредније у односу на будуће награде (Frederick, Loewenstein, O'Donoghue, 2002).

3 Видети листу когнитивних пристрасности: https://en.wikipedia.org/wiki/List_of_cognitive_biases

обрате више пажње на структуралне карактеристике и процедуралне механизме заштите који ће повећати вероватноћу да судије, арбитри и други доносиоци одлука правично одлучују, односно доносе одлуке које су, колико-толико, лишене грешака и пристрасности. Из тог разлога, у наставку објашњавамо све горенаведене когнитивне пристрасности судија, арбитара и других доносилаца одлука у правној области.

3. Ефекат усидравања

Под *ефектом усидравања* подразумева се људска тенденција да се приликом доношења одлука несвесно ослањамо на делић неке информације (тзв. сидро), макар он био и безначајан. Најчешће се јавља када људи врше нумеричке процене (рецимо, процену тржишне вредности непокретности) у ком случају и *безначајан број* може утицати на коначну процену. Тако су Тверски и Канеман (Tversky, Kahneman, 1974: 1128) у једном експерименту питали учеснике, подељене у две групе, да процене проценат афричких земаља у Уједињеним нацијама. Но, претходно су замољени да окрену точак среће на коме су могла да се падну *само* два броја (10 или 65), при чему учесници то нису знали. Показало се да је број са точка среће утицао на коначну процену. Наиме, медијана процене процента афричких земаља оне групе која је добила *мањи број (10) износила* је *25*, док је медијана процене друге групе која је добила *већи број (65)* износила *45*. Очит је утицај сидра на коначну процену у овом експерименту, а он није смањен ни давањем финансијских подстицаја учесницима ради повећања тачности одговора.

У правној области преговарачи су мање-више склони прихватању коначне понуде за склапање поравнања у зависности од тога каква је била *почетна (иницијална) понуда друге стране*. Очито је то да та прва, почетна, понуда обликује очекивања преговарача и њихове преференције у преговорима (Korobkin, Guthrie, 1994).[4] Осим тога, симулационе студије (Chapman, Born-

4 Ово истраживање је показало да је *нижа* вероватноћа да ће тужиоци прихватити коначну понуду за склапање поравнања ако је њој претходила *разумна почетна понуда* него када јој је претходила *екстремна почетна понуда* или *није било почетне понуде*. Будући да модел рационалног актера није могао да објасни овај налаз, аутори су понудили два могућа објашњења ослањајући се на налазе когнитивне и социјалне психологије. У питању је *ефекат усидравања*, с једне стране, али и *избегавање когнитивне дисонанце*, с друге стране. У контексту преговарања, ово друго значи да су преговарачи у већој мери склони неприхватању коначне понуде за склапање поравнања, ако су је *претходно одбили*, у односу на оне преговараче који *уопште нису* добили претходну понуду, и то из разлога како би *избегли непријатност (у виду негативног нагонског стања)* која се приликом (коначног) избора између поравнања и суђења ствара. Према томе, избегавање когнитивне дисонанце служи преговарачу да не прихвати оне услове у преговорима које је претходно одбио. Видети: (Korobkin, Guthrie, 1994: 16–21).

stein, 1996; Malouff, Schutte, 1989) откривају да су *учесници у улози поротника* и те како подложни усидравању приликом одређивања вредности накнаде штете, чиме се потврђује теза да што је виши износ тужбеног захтева, то се добија већи износ накнаде штете у парници.[5] У већ споменутој студији (Guthrie, Rachinski, Wictrich, 2001: 787–794) *судије* су биле подложне ефекту усидравања приликом одређивања вредности накнаде штете у хипотетичком случају телесне повреде.[6] Осим судија, утицају сидара подложни су и *међународни арбитри*, како потврђују експериментална истраживања (Franck et al. 2017: 1140–1151).

Да утицај сидара може бити значајан, и по својим импликацијама на реално доношење правних одлука помало забрињавајући, показује и једно истраживање (Englich, Mussweiler, Strack, 2006) које укључује четири студије на популацији судија у кривичноправној материји са циљем испитивања утицаја ирелевантних сидара на одлуку о висини казне. Показало се да тај утицај заиста постоји. Наиме, у првој студији на нормативној основи потпуно ирелевантно сидро (то је био телефонски позив новинара у којем је сугерисао висину казне) утицало је на одлуку о висини казне судија-кривичара. У преостале три студије захтев тужиоца за одређивањем висине казне био је у већој мери ирелевантан, али је утицао на одлуку судија о висини казне.[7] Штавише, овај утицај није зависио од искуства и стручности судија-кривичара, односно и искусне и стручне

5 Рецимо, када је тужбени захтев гласио на *100.000$*, поротници су додељивали накнаду штете у износу нешто већем од *90.000$*. Али када је у скоро истом случају тужбени захтев гласио на *500.000$*, порота је додељивала накнаду штете у износу од скоро *300.000$*. Видети: (Malouff, Schutte, 1989: 495).

6 Шездесет и шест судија, у условима у којима *није било сидра*, просечно је доделило накнаду штете у износу од *1.249.000$*, док је 50 судија у условима *постојања сидра* (*75.000$*), просечно доделило компензацију у износу од *882.000$*. Разлика између две групе била је статистички значајна (*p = 0,031*), чиме је јасно потврђен утицај сидра на одлучивање судија.

7 Како би били потпуно свесни ирелевантности сидара, у другој студији учесницима је јасно *речено* да је захтев тужиоца *случајно* одређен, док су у трећој и четвртој студији, учесници *бацали коцке* како би сами одредили захтеве тужиоца. Упркос знању о ирелевантности сидара, судије су и даље биле под њиховим утицајем, а величина тог утицаја није се разликовала у зависности од тога да ли је захтев за висином казне дошао од стране тужиоца, или су судије, бацањем коцки, саме одредиле те захтеве. Коначно, четврта студија је показала да је код учесника био активиран *механизам селективне доступности*. Наиме, разматрање високих ирелевантних сидара (високих казни) селективно је покренуло инкриминишуће аргументе у уму судија. Будући да је коначна одлука о висини казне под снажним утицајем управо тих инкриминишућих аргумента који лако падају на ум, то је за последицу имало *одлуке о већој казни* од стране судија-кривичара.

судије из кривичноправне материје биле су подједнако, и скоро на исти начин, подложне ирелевантним сидрима као и судије из других области права и без великог искуства у кривичној материји. Ови налази да, нормативно гледано, ирелевантна сидра (као што је телефонски позив) или случајна сидра (бројеви) могу утицати на одлуку о висини казне, имају значајне импликације на терену права у области доношења одлука, јер сугеришу да је то раширени феномен. Аутори овог истраживања закључују интригантном мишљу Алберта Ајнштајна *да се Бог можда не коцка са универзумом, али се судије могу ненамерно коцкати са кривичним санкцијама*.

4. Ефекат уоквиравања

Под *ефектом уоквиравања*, који чини срж *теорије изгледа* (Kahneman, Tversky, 1979) и њене нове верзије – *кумулативне теорије изгледа* (Tversky, Kahneman, 1992), подразумева се склоност људи да доносе различите одлуке (ризичне или мање ризичне) у зависности од *оквира* (позитивног или негативног) у коме то чине. У позитивном оквиру испољава се *аверзија према ризику*, а у негативном оквиру *склоност ка ризику*. Рецимо, људи преферирају 1.000 динара *сигурног добитка* у односу на 50% шансе да *добију* 2.000 динара, док преферирају 50% шансе да *изгубе* 2.000 динара у односу на 1.000 динара *сигурног губитка*. Иако су ово, економски гледано, идентични избори,[8] одлуке су другачије због (позитивног или негативног) оквира у коме се доносе. Ово је последица тога што људи најчешће не размишљају о релативно малим исходима у смислу стања укупног богатства, него у смислу добитака, губитака, или неутралних исхода, као што је *очување тренутног стања*.[9] Полазећи од тога, губици се *негативније* процењују у односу на добитке, са одређене референтне тачке,[10] што је у теорији означено као *аверзија према губицима* (Kahneman, Tversky, 1984: 342).[11]

8 1.000 динара добитка (губитка) исто је што и очекиваних 1.000 динара добитка или губитка (50% x 2.000 динара = 1.000 динара).

9 У теорији се тенденција за очувањем тренутног стања означава као *пристрасност ка постојећем стању (status quo bias)*. Она је, у ствари, импликација аверзије према губицима, јер се мане напуштања тренутног стања процењују као значајније у односу на предности од напуштања. Ова пристрасност је доказана у низу истраживања. Више о томе: (Kahneman, Knetsch, Thaler, 1991: 197–199).

10 Видети више о улози референтне тачке (и усидравања) у доношењу одлука и импликацијама на процес преговарања у: (Kahneman, 1992).

11 Канеман и Тверски су аверзију према губицима представили преко *функције вредности* у облику слова *S*, која је *конкавна* у сфери добитака и *конвексна* у сфери губитака и *стрмија* у домену губитака него у домену добитака. Стрмост ове криве у сфери губитака указује на то да људи испољавају већу аверзију према губицима у

Ефекат уоквиравања има значајне импликације у парничном поступку када парничне странке бирају између суђења и поравнања, при чему треба правити разлику између *средње и високоризичних парница*, с једне стране, и *нискоризичних парница*, с друге стране. Наиме, у овим првима (а то су типичне парнице), *тужиоци* се често суочавају са избором да прихвате поравнање, чиме би се поступак окончао, или да наставе са поступком, надајући се већем добитку по основу судске пресуде. С друге стране, *тужени* треба да одлуче да ли да прихвате да плате поравнање, или да то не учине, очекујући мањи износ по основу судске пресуде. Очито је то да је оквир у којем одлучују тужиоци *позитиван*, те су они су склони мање ризичним одлукама, односно томе да прихвате поравнање, за разлику од оквира тужених који је *негативан*, те су они више склони ризику, односно наставку поступка. Овај значајан налаз (*да тужиоци преферирају поравнање, а тужени суђење у средње или високоризичним парницама*) последица је тога што парница, у ствари, представља *природни оквир за парничне странке* (Rachlinski, 1996: 129). Но, други значајан налаз јесте да се преференције странака према ризику мењају у *нискоризичним парницама* (Guthrie, 2000). Наиме, у нискоризичним парницама, које су типичан пример парница малих вредности (*frivolous litigation*),[12] тужиоци бирају између *нискоризичних добитака*, а тужени између *нискоризичних губитака*. У овом случају, *тужиоци више преферирају суђење, а тужени поравнање*. Суштина је у томе да, када је *мала шанса* да се нешто добије, већа је склоност ризику, а када је мала шанса да се нешто изгуби, већа је аверзија према ризику. Насупрот томе, када је *велика шанса* да се нешто добије, односно изгуби, исказује се одбојност, односно склоност ка ризику.

Ове налазе најбоље је представио Канеман у тзв. *четвороструком обрасцу преференција према ризику* (Слика 1) и објаснио их помоћу два фактора (Kaneman, 2015: 295–299). Први је *опадајућа осетљивост на губитак*, а други је *процењивање важности самих вероватноћа*.[13] Тако у случају *нискоризичних*

односу на атрактивност добитака. Управо из тог разлога људи нерадо инвестирају када имају *идентичне изгледе* да истовремено нешто добију и изгубе (Kahneman, Tversky, 1984: 342).

12 Крис Гатри (*Guthrie*) операционализује парнице малих вредности преко нискоризичних парница, односно преко парница у којима обе стране (тужилац и тужени) унапред знају да су *мале шансе* да ће тужилац на крају однети победу. Дакле, нискоризичне парнице јесу парнице са малом вероватноћом добитака, односно губитака. Видети: (Guthrie, 2000: 185–187).

13 Ако је мала вероватноћа добитка, рецимо, *1%*, онда је *важност одлуке* која прати ту вероватноћу значајно већа (*5,5*). Супротно, ако је велика вероватноћа добитка, рецимо, *90%*, онда је важност одлуке која прати ту високу вероватноћу доста нижа (*71,2*). То указује да су људи склони да *прецењују* мале вероватноће добитка *(ефекат*

парница, *прецењивање* важности малих вероватноћа потискује први фактор (опадајућу осетљивост на губитак) и производи образац ризиковања у случају добитака и опреза у случају губитака. Рецимо, када тужилац разматра нискоризичне добитке, више је склон ризику (суђењу), због наде у велики добитак (доњи леви правоугаоник).[14] У случају *високоризичних парница*, први фактор (пад осетљивости на губитак) заједно са другим фактором (*потцењивање* важности великих вероватноћа) генерише другачији образац понашања: ризиковање у случају губитака и опрез у случају добитака. Рецимо, када тужени разматра сигуран губитак по основу поравнања и ризик још већег губитка по основу пресуде, због опадајуће осетљивости на губитак, осећаће већу одбојност према сигурном губитку (поравнању). Истовремено, услед потцењивања велике вероватноће губитка по основу пресуде, смањује се одбојност према ризиковању (горњи десни правоугаоник).[15] Овим факторима објашњава се и понашање тужиоца у случају високоризичних добитака. Управо је постојање овог ефекта уоквиравања потврђено и емпиријским налазима међу парничним странкама у стварним парницама (Rachlinski, 1996: 150–160).[16]

могућности) и *потцењују* велике вероватноће добитка *(ефекат извесности)*. Исто важи и за губитке. Више о томе: (Kaneman, 2015: 293–295).

14 На сличан начин објашњава се понашање људи који играју лутрију.

15 Ово је кључни налаз Канемана и Тверског и срж *теорије изгледа*. Овим налазом могу се објаснити многи феномени, као што је, рецимо, тенденција компанија да узалудно троше ресурсе у трци са својим конкурентима јер је прихватање пораза веома болно. У парничном поступку, тужени, због аверзије према губитку и склоности ризику (одласку на суђење), може имати бољу преговарачку позицију у односу на тужиоца, што за последицу може имати да тужилац прихвати неповољније поравнање (у односу на оно што би остварио на суду).

16 Ово истраживање показује да су у скоро четвртини случајева (23%) *тужени* платили високу цену јер су наставили са парницом. Одбијање да се поравнају коштало је тужене у просеку 66.106$ по случају, плус парнични трошкови. С друге стране, и *тужиоци* су платили високу цену због аверзије према ризику и одбијања да наставе са поступком (23% оних који су наставили са поступком добило је огромну одштету од 354.949$ по случају, минус парнични трошкови). У суштини, ово истраживање потврђује предвиђања теорије изгледа о различитим преференцијама тужених (склоности ка ризику) и тужилаца (одбојности ка ризику). Видети: (Rachlinski, 1996: 159).

Слика 1. Четвороструки образац

	ДОБИЦИ	ГУБИЦИ
ВИСОКА ВЕРОВАТНОЋА (*ефекат извесности*)	Страх од разочарања АВЕРЗИЈА ПРЕМА РИЗИКУ	Нада у избегавање губитка СКЛОНОСТ РИЗИКУ
НИСКА ВЕРОВАТНОЋА (*ефекат могућности*)	Нада у велики добитак СКЛОНОСТ РИЗИКУ	Страх од великог губитка АВЕРЗИЈА ПРЕМА РИЗИКУ

Осим парничних странака, ефекту уоквиравања склоне су и *судије* (Guthrie, Rachinski, Wictrich, 2001: 796–799). У овој студији испољила се статистички значајна разлика у процени судија да ли треба прихватити поравнање из перспективе тужиоца, односно туженог.[17] Следи да су, под утицајем *оквира*, судије различито процењивале, чиме се потврђује да су и оне подложне ефекту уоквиравања. Будући да се судије често налазе у улози *медијатора*,[18] овај налаз има значајне импликације. Наиме, циљ медијације јесте склапање поравнања, а судија (медијатор) требало би свој утицај у већој мери да усмери на *туженог*, јер он показује већи отпор ка склапању поравнања (због гореописане аверзије према губитку). Но, налаз ове студије сугерише да судије (медијатори) неће то чинити, или ће пропустити то да учине. С тим у вези, ако судије (медијатори) не подстичу тужене да прихвате поравнање, односно ако подстичу тужиоце да прихвате ниже износе поравнања, последице су те да тужиоци неће у довољној мери задовољити своје тужбене захтеве, док тужени неће бити у довољној мери одвраћени од чињења будућих штетних радњи, чиме ће оптимална превенција бити нарушена (Guthrie, Rachinski, Wictrich, 2001: 798). У овој студији се закључује да странке приликом преговарања у поступку медијације треба да оправдају своје понуде за склапање поравнања не само у смислу економске рационалности, већ и у погледу *правичности*

17 Скоро *40%* судија, *из перспективе тужиоца*, сматрало је да тужилац треба да прихвати понуђено поравнање од *60.000$*, док је само *25%* судија, *из перспективе туженог*, сматрало да тужени треба да плати поравнање у износу од *140.000$*, предложено од друге стране.

18 У америчкој судској пракси то су тзв. конференције за склапање поравнања. И у нашој пракси судије су често медијатори, при чему могу обављати посредовање само ван радног времена и без накнаде. Вид. чл. 33, ст. 6 Закона о посредовању у решавању спорова, *Сл. гласник РС*, 55/14.

(Guthrie, Rachinski, Wictrich, 2001: 799).[19] Коначно, како експериментална истраживања показују (Franck et al. 2017: 1153–1159), ефекту уоквиравања подложни су, иако не у већој мери у односу на судије, и *међународни арбитри*.

5. Пристрасност накнадног увида

Пристрасност накнадног увида (или „све време сам знао/ла" ефекат) је људска тенденција да се прошли догађаји накнадно оцењују као предвидиви у време када су се заиста и десили (Kaneman, 2015: 190). У психолошкој литератури (Roese, Vohs, 2012: 412–413) наглашавају се три аспекта ове пристрасности: *дисторзија меморије*, односно садашње погрешно присећање ранијих процена неког исхода („рекао сам да ће се то десити");[20] *неизбежност* („морало је то да се деси")[21] и *предвидивост* („знао сам да ће се то десити")[22]. Ова пристрасност последица је трију инпута (Roese, Vohs, 2012: 413–416): *когнитивних*, који се односе на меморијске процесе *сећања*, *ажурирања нових информација у постојећи систем знања*, и *давања смисла, објашњења или нарације* (најчешће у форми приче)[23] прошлим догађајима; *метакогнитивних*,[24] који се односе на субјективни осећај лакоће са којом се доносе закључци о одређеном исходу, поготово када је реч о предвидивости тог исхода (што је та лакоћа већа, јача је ова

19 Неочекиван резултат ове студије био је да је већина судија (67,5%) сматрала да странке не треба да се поравнају упркос томе што је очекивана вредност поравнања била већа од очекиване вредности суђења. Аутори су овај феномен објаснили психолошким фактором. Наиме, поравнати се значило је и пристати да значајан део вредности спора (70%) припадне супротној страни. Будући да су странке имале једнако право на имовину која је предмет спора, судије су сматрале да је чак и *подела на једнаке делове* прикладнија. Да би оправдали овај налаз, аутори су се позвали на друга истраживања (Camerer, Thaler, 1995) која јасно показују да учесници, суочени са поделом унапред фиксираног дела имовине (фиксног колача), све осим поделе на једнаке делове сматрају *неправичним*.

20 Дисторзија меморије везује се за, рецимо, процену исхода политичких (или било којих других) избора, у ком случају она одражава степен одступања тих процена *пре и после избора*.

21 Неизбежност је последица виших когнитивних процеса *давања смисла догађајима и стварима*, а који носе *уверење о њиховој каузалности*.

22 Предвидивост је субјективна категорија и односи се на *уверење о сопственом знању и способности.*

23 Насим Талеб овај феномен означава као *наративну заблуду* (Талеб, 2016: 61–83).

24 Метакогниције јесу мисли о нашим мислима, и оне, као доминантно субјективне процене, испољавају, по природи ствари, највише свој утицај на нивоу *предвидивости прошлих догађаја*.

пристрасност);[25] и *мотивационих*, који се односе на људску потребу да се свет види у форми реда и предвидивости, као и да се сачува и ојача позитивна слика о себи. Најчешће последице ове когнитивне пристрасности јесу (Roese, Vohs, 2012: 416–417): *погрешна каузалност*, у смислу приписивања погрешног узрока стварима или претеривања у давању значаја стварном узроку,[26] и *претерано поуздање у властите способности* анализирања ситуација, што може довести до занемаривања другачијих перспектива и доношења будућих ризичнијих одлука.[27]

Пристрасност накнадног увида, као и наведене последице ове пристрасности, могу имати значајне импликације у правној области, пре свега, судској пракси, што потврђују одређене студије (Kamin, Rachlinski, 1995) када је реч о установљавању одговорности за накнаду штете услед непажње.[28] Забринутост због постојања ове пристрасности, када је реч о *судијама*, изразио је судија и један од утемељивача Економске анализе права Ричард Познер (преузето из: Guthrie, Rachinski, Wictrich, 2001: 810, фун. 116). И други аутори (Hoch, Loewenstein 1989) истичу свеприсутност и робустност овог феномена, али истовремено указују да, поред несумњиво штетних ефеката, накнадни увид (фидбек) пружа информације које могу бити корисне у другим проценама, као што је, рецимо, процена основне стопе популације.

25 Овде је реч о томе да се ова лакоћа погрешно приписује „сигурности" наступања неког исхода. Ако је тешко објаснити шта се стварно десило, онда се предвидивост неког догађаја *умањује* а, ако је тешко објаснити како би наступио алтернативни исход, онда се предвидивост актуелног исхода *повећава* (Sanna, Schwarz, 2003).

26 Људи који су склони да објашњавају ствари *првим узроком* до кога дођу, без упуштања у темељну анализу, у теорији се означавају као „когнитивне шкртице" (Shaklee, Fischhoff, 1982).

27 Познато је да се коцкари у већој мери ослањају на сопствене процене него на објективне статистичке анализе. Већ је речено да се и *парничари* могу понашати на сличан начин.

28 Штавише, ова студија експлицитно демонстрира да су људи склони да *накнадно* доносиоце одлука сматрају правно одговорним за догађаје *које нису ни могли да предвиде*. Због тога неки аутори (Rachlinski, 1998: 596-600) сматрају да присуство ове пристрасности фактички претвара стандард одговорности за непажњу у *стандард објективне одговрности* са свим пратећим последицама, а које се огледају у искривљеним подстицајима у погледу пажње (тј. у предузимању прекомерне пажње) и повећаним трошковима обављања економских активности.

6. Хеуристика репрезентативности

Хеуристика репрезентативности обрађена је у бројним радовима Канемана и Тверског (Tversky, Kahneman, 1971;[29] Kahneman, Tversky, 1972;[30] Kahneman, Tversky, 1973;[31] Tversky, Kahneman, 1974; Tversky, Kahneman, 1982;[32] Tversky, Kahneman, 1983[33]). Под *репрезентативношћу* подразумева се процена вероватноће неког неизвесног догађаја (или узорка) на основу степена у коме је он сличан, у својим основним карактеристикама, популацији којој припада и рефлектује истакнуте особине процеса који га је генерисао (Kahneman, Tversky, 1972: 431). Једноставније речено, ако је догађај 1 *репрезентативнији* од догађаја 2, онда је догађај 1 *вероватнији* од догађаја 2, и то је суштина ове хеуристике. У многим ситуацијама, стереотипи који леже у основи репрезентативности, јесу тачни, те су тачне и вероватноће које из тога произилазе, али постоје и ситуације када због ове хеуристике људи исказују *прекомерну спремност да предвиђају вероватноће мало вероватних догађаја, тј. догађаја са ниском основном стопом* (тзв. *занемаривање основних статистичких стопа*), као и да *занемаре квалитет података на основу којих предвиђају* (по принципу „постоји само оно што се види"). Канеман ово зове *греховима репрезентативности* (Kaneman, 2015: 141–144). Један од разлога занемаривања основних стопа лежи у томе што је процена вероватноће на основу „репрезентативних доказа" живописнија и очигледнија у односу на апстрактно статистичко резоновање, мада се у теорији (Gigerenzer, Goldstein, 1996) истиче и да је то ефикаснији (*бржи и*

29 У овом раду аутори објашњавају људску тенденцију (укључујући и стручњаке) претеривања у процени случајно изабраних узорака из одређене популације високо репрезентативним. Консеквентно, људи очекују да су два случајно изабрана узорка из одређене популације много сличнија један другоме и популацији којој припадају него што би пробабилистичка теорија предвидела, бар је када је реч о *малим узорцима*.

30 У овом раду аутори су први пут дефинисали хеуристику репрезентативности, о којој ће бити речи у наставку, посебно када је реч о правној области.

31 У овом раду аутори су проширили своје раније схватање хеуристике репрезентативности, повезујући је са интуитивним предвиђањем, односно склоношћу људи да предвиђају исходе на основу репрезентативности, а не на основу доступних података или претходних вероватноћа исхода, а што је у супротности са стандардном логиком статистичког предвиђања.

32 Рад представља синтезу ранијих радова о репрезентативности.

33 У овом раду аутори су објаснили *заблуду на основу конјукције (спајања)*, као манифестацију хеуристике репрезентативности, када је у непосредном поређењу конјукција два догађаја вероватнија него један од њих. Ова заблуда позната је и као „Линда проблем" (детаљније у: Kaneman, 2015: 146–155).

економичнији) начин одлучивања услед честе недоступности статистичких података.[34]

У кривичноправој области ова хеуристика долази до изражаја. Рецимо, вероватноћа да ли је неко кривично одговоран или не (категоријско оцењивање), оцењује се на основу репрезентативности доказног материјала (нпр. оптужени је нервозан, вероватно је одговоран). И у грађанскоправној материји дешава се да се вероватноћа неке хипотезе на основу датих доказа изједначава са вероватноћом доказа на бази дате хипотезе (тзв. *инверзна заблуда*).[35] Рецимо, вероватноћа да је тужени крив јер је тужилац претрпео штету, изједначава се са вероватноћом да би тужилац *био* оштећен ако *би* тужени био крив (преузето из: Guthrie, Rachinski, Wictrich, 2001: 807). Да су и *судије* склоне инверзној заблуди, при чему је та склоност *ипак* мања у односу на друге експерте, показује већ споменуто истраживање (Guthrie, Rachinski, Wictrich, 2001: 808–811). Тверски и Канеман указују да због ове хеуристике судије често дају предност *сведочењу* као доказном средству у односу на *статистичке доказе* (Tversky, Kahneman, 1982: 156–158). Коначно, овој врсти интуитивног резоновања склони су и *међународни арбитри*, али, како истраживање показује (Franck et al. 2017: 1159–1162), процентуално гледано, у мањој мери него судије или друге групе испитаника (доктори или студенти права).

7. Егоцентрична склоност

Под овом пристрасношћу подразумева се склоност ка *прецењивању сопствених способности*.[36] Она настаје у бројним сферама живота (од професионалних вештина, преко здравља, вештине управљања возилом,

34 Ови аутори су развили посебан модел ограничене рационалности базиран на брзом и економичном закључивању насупрот стандарном рационалном закључивању, предлажући интеграцију психолошких и рационалних механизама закључивања. Према њиховом мишљењу, тачност и једноставност (брзина, економичност) у закључивању не морају нужно бити у колизији.

35 У домену вероватноће, ова заблуда (*inverse fallacy*) исказује се у претпоставци да је вероватноћа да ће догађај А наступити на основу тога што је догађај Б већ наступио, идентична вероватноћи догађаја Б да је догађај А наступио.

36 Упркос сличности и честој конфузији, треба правити разлику између егоцентричне склоности и склоности ка приписивању заслуга себи у случају успеха, и окривљавања других (људи или околности), у случају неуспеха (*self-serving bias*). Ова друга склоност може се означити *као фаворизовање себе и сопственог интереса*. Вид. (Forsyth, 2007: 429). Такође, директна последица егоцентричне склоности јесте и ефекат лажног консенсуса (*false-consensus effect*). У питању је тенденција по којој људи верују да су њихова уверења или поступци у много већој мери *заједничка* него што заиста јесу. Вид. (Ross, Greene, House, 1977).

доприноса заједничким активностима,[37] до успешности брака[38]) из различитих разлога: потреба за самопромоцијом; потрага за доказима који потврђују оно у шта људи желе да верују; људи памте боље сопствене радње и доприносе у односу на радње и доприносе других људи; људи различито дефинишу успех најчешће према сопственим мерилима (Guthrie, Rachinski, Wictrich, 2001: 810–812, са пописом литературе).

Разумно је претпоставити да су овој пристрасности склоне и странке у парничном поступку, као и њихови адвокати, у погледу сопствених способности, квалитета заступања и релативне вредности њиховог предмета, што може значајно да подрије процес склапања поравнања (Babcock, Loewenstein, 1997).[39] И друге студије (Loewenstein, Issacharoff, Camerer, Babcock, 1993) показују да егоцентрична склоност странака води ка снижењу вероватноће склапања поравнања и непотребном парничењу.[40] Истраживање из 2001. године (Guthrie, Rachinski, Wictrich, 2001: 813–816) јасно потврђује постојање ове пристрасности код *судија* и то у погледу стопе укидања пресуда пред вишим судом – *87,7%* судија рекло је да макар половина њихових колега има *вишу* стопу укидања пресуда пред вишим судом. Друга студија (Eisenberg, 1994) доказује постојање ове пристрасности код *судија и адвоката у стечајном поступку*. Истраживање из 2017. године (Franck et al. 2017: 1163–1166) утврђује постојање егоцентричне склоности и код *међународних арбитара*. Коначно, поједини психолози (Taylor, Brown,

37 Видети, на пример, студију у којој се тестира егоцентрична склоност у заједничким активностима (Ross, Sicoly, 1979).

38 Студије (Baker, Emery, 1993) показују да млади брачни парови малтене једногласно очекују да ће њихов брак бити успешан, упркос сазнању висине стопе развода и стопе незадовољства браком. С тим у вези, Гилберт и Вилсон (Gilbert, Wilson, 2009) одлуку о ступању у брак објашњавају *грешком афективног предвиђања*, односно предвиђањем на основу *емоција*.

39 У овој студији аутори су испитивали утицај склоности ка фаворизовању себе (*self-serving bias*), као посебне форме егоцентричне склоности, на преговарање и склапање поравнања. Интересанто је то, како ова студија показује (Babcock, Loewenstein, 1997: 120), да чим је у експеримент укључена одређена *асиметрија* између преговарача, рецимо, суптилна разлика у улогама или разлика у трошковима несклапања договора, долази до промене схватања правичног поравнања у правцу *личног интереса сваког од преговарача*, уз веровање да је њихов лични концепт схватања правичности непристрасан. С друге стране, пре увођења асиметрије, преговарачи су сматрали да је подела колача на пола *правична*.

40 У овом експерименту, странке су у зависности од улоге (тужилац/тужени) различито процењивале шта сматрају правичним износом поравнања. Наиме, тужиоци су увек тражили *већи износ* поравнања у односу на тужене, чиме се потврђује да су различито (*пристрасно, односно у сопственом интересу*) интерпретирале чињенице презентованог случаја.

1988) указују на то да ова пристрасност може бити корисна ради очувања моралне позиције и менталног здравља и благостања.[41] Додајмо томе и социјални фактор, који се огледа у томе да људи очекују да се судије (као и други стручњаци, рецимо лекари[42] или арбитри) понашају на такав, егоцентричан (резолутан, строг, самоуверен) начин (Guthrie, Rachinski, Wictrich, 2001: 815–816).

8. Закључак

Као што наведена истраживања показују, систематским грешкама у размишљању склони су не само лаици, већ и стручњаци из различитих области права. Логично питање се намеће: да ли се ове пристрасности, а које могу значајно да наруше квалитет донетих одлука у судском или другом поступку, могу елиминисати или бар ублажити? Одговор би био да је неке од њих лакше, а неке теже, или скоро немогуће елиминисати. Рецимо, показује се да је пристрасност накнадног увида изузетно „тврдокорна" когнитивна грешка, која опстаје упркос предузетим мерама за њено елиминисање (Rachlinski, 1998: 586–588). С тим у вези, у теорији (Guthrie, Rachinski, Wictrich, 2001: 822–826) се наводе, бар када је реч о грешкама *судија*, следеће мере:

Усвајање различитих перспектива у разматрању случаја. Ова мера може бити корисна, рецимо, ради ублажавања ефекта уоквиравања коме су парничне странке склоне. У том случају, судије, а нарочито *медијатори*, налазе се у јединственој позицији да преобликују страначку перцепцију позитивних и негативних исхода. Та позиција произилази из тога што судије (медијатори) могу да чују обе стране, сагледају случај из њихове перспективе, и пажљиво (водећи рачуна да и саме не подлегну овом ефекту, у чему њихово *искуство* треба да буде од значаја) преобликују њихову перцепцију исхода, и тиме учине закључење поравнања вероватнијим. У пракси, ова мера своди се на то да судије (медијатори) треба да утичу на тужену страну да плаћање поравнања не перципира као губитак. Ако успеју у томе, значајни ресурси могу бити уштеђени, чиме се повећава ефикасност парничног поступка. Додајмо овоме да се у сврху ублажавања пристрасности накнадног увида, у америчкој судској пракси, предлажу посебне технике и за *поротнике*, као што је, рецимо, *замишљање алтернативних исхода* (Wexler, Schopp,

41 Ова студија јасно показује позитиван утицај *позитивних илузија* (рецимо, нереалистичне позитивне самопроцене, или нереалистичног оптимизма) на наше ментално здравље.

42 Једна студија (Croskerry, Norman, 2008) показује да је много више на цени од стране пацијената самопоузданост лекара него њихова несигурност и њено показивање, које често наилази на осуду.

1989). Све ове и друге мере могу бити предмет посебне обуке за судије (или поротнике).

Ограничавање употребе хеуристика на прикладне околности. Под овом мером подразумева се то да судије треба да се ослоне на корисна сидра, као и да избегавају безначајна сидра. Рецимо, уместо ослањања на висину тужбеног захтева, судије се, приликом одређивања накнаде штете, могу ослонити на висину накнаде штете у сличним случајевима. Такође, искуство судија у разматрању доказног материјала требало би да утиче на смањење употребе хеуристике репрезентативности, односно прављења сличности између доказа и хипотезе која их наводно подржава. Такво искуство може и треба да се пренесе и на млађе и мање искусне судије.

Смањење ослањања на лоше процене. Овом мером могу се ублажити две најизразитије пристрасности судија: егоцентрична склоност и накнадни увид. Ова прва може се ублажити пажљивијом проценом сигурности донетих одлука, и евентуално тражењем других независних извора процене (то могу бити друга правила). У другом случају, уместо на накнадно оцењивање да ли су се странке разумно понашале и могле да предвиде штетне последице, судије се могу ослонити на *ex ante* стандарде њиховог понашања (ако их има), односно на процену да ли су своје понашање уподобиле тим стандардима.

Специјализација судија. Под овим се подразумева да се неке судије могу специјализовати као судеће судије, а друге као оне које управљају предметима, што може у већој мери довести до развоја њихових специфичних вештина и техника ради ублажавања различитих когнитивних пристрасности.

Коначно, постоје и бројна *материјална и процесна правила* која могу минимизовати утицај когнитивних пристрасности судија. Рецимо, сваки савремени законодавац прописује општа правила о одмеравању казне, како би смањио или спречио утицај безначајних сидара на одмеравање казне.[43] Такође, у случајевима несавесног лечења, понашање лекара радије се оцењује према медицинским стандардима, односно да ли је испоштовао уобичајену медицинску процедуру приликом наводног чињења деликта, него накнадном проценом „разумности понашања" (Rachlinski, 1998: 612). У вези са овим правилима, додајмо и то да су странке у арбитражном поступку у позицији да *саме* креирају правила која могу минимизовати утицај пристрасности арбитара, рецимо, одређивањем додатних

43 Вид. чл. 54 Кривичног законика, *Сл. гласник РС*, 85/2005, 88/2005 – испр., 107/2005 – испр., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 и 94/2016.

правила која ће осигурати да висина накнаде штете не буде под утицајем безначајних сидара.

Све у свему, бројна истраживања, рађена *махом* у англосаксонском правном систему, потврђују да су кључни доносиоци одлука у правној области и те како подложни когнитивним пристрасностима, јер су и они само људска бића. На срећу, пажљивим мерама, или одабиром адекватних правила, њихово дејство може се минимизовати. Наша претпоставка јесте да су ови налази подједнако валидни и када је реч о доносиоцима одлука у *домаћем* правном систему, што остаје да се потврди или оповргне у будућим емпиријским истраживањима.

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COGNITIVE BIASES IN THE LEGAL FIELD: A MEETING PLACE OF LEGAL AND BEHAVIORAL SCIENCE

Summary

The paper presents typical cognitive biases of representatives of different legal professions and participants in court and other proceedings (judges, arbitrators, mediators, lawyers, parties), including: the anchoring, the framing effect, the hindsight bias, the representativeness heuristic, and the egocentric bias. The goal of this paper is to examine their implications on the legal and other decision-making processes, as well as the importance they have in the legal field. The starting assumption is that the making of legal decisions is not solely determined by legal norms, but also by a number of factors that have a nonlegal character, whose cognitive factors are distinguished by their importance. On these grounds, the paper presents numerous studies of cognitive biases of those participants who decide in the legal field which belong to the domain of behavioral science. All of them clearly prove the existence of numerous systematic thinking mistakes of participants in court and other proceedings. Based on this research, the authors discuss the implications of these mistakes in making legal and other decisions, as well as techniques for their alleviation or elimination (the so-called debiasing techniques), thus setting the conceptual framework for future research in this field, particularly related to the domestic legal system.

Key words: *Cognitive biases, legal field, anchoring, framing effect, hindsight bias, representativeness heuristic, egocentric bias.*

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879275B

UDK: 502:061.1EU
Рад примљен: 30.09.2018.
Рад прихваћен: 14.11.2018.

*EUROPEAN UNION LAW AND THE CHALLENGES OF CLIMATE CHANGES***

Abstract**:** *The European Union is the party of key international documents dealing with the issue of climate changes: the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. Moreover, the European Union has designed a rich legislative framework dedicated to the prevention of climate changes and the suppression of their negative consequences, including numerous decisions, directives, thematic strategies and action programmes. Their main purpose is to minimise and control the emissions of greenhouse gases, in order to contribute to the minimisation of pollution, increase of energy efficiency and the mitigation of negative consequences of climate changes. The reports on the implementation of the aforementioned documents confirm that the application of the measures prescribed by various sources of acquis in this field has given positive results in the European Union countries. However, they also show that climate changes still represent a serious challenge for the legislators as well as for all the other entities whose activities can contribute to this environmental phenomenon. Having in mind the fact that the Republic of Serbia is anticipating the opening of the Negotiation Chapter 27, dedicated to environment and climate changes, the author of this paper analyses relevant international documents of universal character signed by the European Union, sources of the European Union law that are significant for*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

The paper represents the result of author's engagement in the Project No. 47011, titled "*Crime in Serbia: phenomenology, risks and the possibilities of social intervention"* of the Institute of Criminological and Sociological Research, financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

facing climate change as well as the reports on achieved results when it comes to combating climate change at the European Union level. The author also discusses international obligations of the Republic of Serbia in this area, its current progress in this field as well as the steps that our country has to take in the future in order to fulfil these obligations.

Key words**:** *European Union, climate changes, environment, ecology, environmental law.*

1. Introduction

Rapid changes of climate caused by anthropogenic factors started with industrialisation in the middle of the 18th century, leading to the emergence of extreme droughts, floods, storms, heat waves, changes in the water circle regime, increased ice and snow melting on high mountains and poles (Ostojić, 2016: 45). The United Nations Framework Convention on Climate Change, adopted in 1992, defines *climate change* as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods"[1]. In its Fifth Report, published in 2013[2], the International Panel for Climate Change (IPCC) confirmed that the climate system is warming as the consequence of anthropogenic emissions of green house gases (Doljak, Petrović, 2015: 15). Fast increase in the concentration of these gases in the atmosphere caused by human activities in the past decades is exactly what led to the imbalance of the atmosphere and its warming on a global scale (Popović, Radulović, Jovanović, 2005).

The negative consequences of climate changes, including the continuous rising of temperature and ozone layer depletion, put at risk the survival of ecosystems, animal and plant species, human lives and health. It is estimated that natural disasters and diseases generated by climate change cause the death of 315,000 people every year (Pajić, 2009). It is also assessed that global economy loses around 125 billion of dollars per year due to climate change, which is more than the amount of financial help that wealthy countries provide to the poor ones (Pajić, 2009). Southern and Central Europe and the Mediterranean are more

1 Article 1, the United Nations Framework Convention on Climate Change, United Nations, 1992, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf, and Act on the Ratification of United Nations Framework Convention on Climate Change, with Annexes, *Official Gazette of the Republic of Serbia-International Agreements,* No. 2/1997, accessed 10.01.2018.

2 Abbreviated Fifth Report of the International Panel for Climate Change, http://www.hidmet.gov.rs/podaci/ipcc/Skraceni_peti_izvestaj_IPCC.pdf , 10.01.2018.

frequently facing heat waves, forest fires and droughts, whereas the increase in humidity and floods during the winter period have been noticed in the North. Urban areas, inhabited by four out of five citizens of the European countries, are exposed to heat waves, floods and the rising of the sea level.[3]

Having in mind the devastating consequences of climate change as well as the fact that they are predominantly caused by anthropogenic factors, the European Union is dedicating a significant amount of attention to the establishment and improvement of legislative framework that regulates and controls human activities directly or indirectly contributing to climate change. Moreover, as an international organisation, the European Union has become member of the most important universally applicable international documents dedicated to combating climate change: the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, which will be discussed in details further in this paper.

Nowadays, the European Union is considered an international organisation with ambition to become the leader in combating climate changes on the global level. This may have a certain impact on the Republic of Serbia as well, as a country attempting to become its member (Todić, 2014:100-115). Since our country is to open the Negotiation Chapter 27, dedicated to environment protection and climate change[4], this issue is of special importance, particularly because the Report of the European Commission on the progress of the Republic of Serbia in 2016 emphasises that our country has made certain progress when it comes to further harmonisation of policies and legislation with the *acquis* in the field of waste, nature protection and climate change, but that the implementation of relevant legal provisions in these areas is still at the early stage.[5]

3 European Commission, Climate Action, Climate Change Consequences, https://ec.europa.eu/clima/change/consequences_en, 10.01.2018.

4 Negotiation team for the negotiations about the accession of the Republic of Serbia to the European Union, Chapter 27: Environment, http://www.eu-pregovori.rs/srl/pregovaracka-poglavlja/poglavlje-27-zivotna-sredina/, 10.01.2018.

5 Commission Staff Working Document, Serbia 2016 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016, Communication on EU Enlargement Policy {COM(2016) 715 final}, Brussels, 9.11.2016., SWD(2016) 361 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf, 26.03.2018.

2. International Conventions Relevant to Combating Climate Change ratified by the European Union

2.1. The United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change was adopted in Rio de Janeiro on 5 May 1992. It came into force on 21 March 1994 and has been ratified by 197 states.[6] The European Economic Community ratified the Convention on 21 December 1993.[7]

As pointed out in Article 2, the main purpose of the Convention includes the stabilisation of the concentration of greenhouse gases on the level that would prevent negative anthropogenic impacts on the climate system. It is also emphasised that this level should be reached within the time framework that is sufficient to facilitate natural adjustment of ecosystems to climate change, that does not endanger food production and that provides sustainable development. In Article 3, the duty of the parties to the Convention to protect the climate system for the well-being of present and future generations in accordance with their circumstances and possibilities is highlighted as one of its fundamental principles. In that context, it is underlined that the responsibilities of the parties to the Convention are not the same, as well as that developed countries should take the leading role in combating negative impacts of climate change. On the other hand, the Convention gives full consideration to the needs and circumstances of developing countries, so that they would not have to bear a disproportional or abnormal burden under the Convention.

Article 4 of the Convention prescribes the parties' obligations, such as those regarding the national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, obligations regarding national and regional programmes containing measures for climate change mitigation, obligations related to cooperation when it comes to technologies, methods and processes for limitation, minimisation or prevention of anthropogenic emissions of green house gases not controlled by the Montreal Protocol including the energy, transport, industry, agriculture, forestry and waste management sectors.

6 First steps to a safer future: Introducing the United Nations Framework Convention on Climate Change, United Nations Climate Change, http://unfccc.int/essential_background/convention/items/6036.php, 11.01.2018.

7 Status of Ratification of the United Nations Framework Convention on Climate Change, United Nations Climate Change, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php, 11.01.2018.

The same Article obliges the parties to the Convention to contribute to a rational use of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems. The parties are also required: to take into consideration climate change, whenever it is possible, when implementing their relevant social, economic and environmental policies and actions; to support each other and cooperate in scientific, technological, technical, socio-economic research, systematic observations and the establishment of a database on climate system; to cooperate in the area of information exchange, education and training regarding the climate change issues, etc. Industrialised countries, listed in Annex I to the Convention, are expected to contribute most when it comes to minimizing emissions. These countries, also known as "Annex I countries" have, among others, the obligation to submit regular reports on their policies and measures in the area of climate change, as well as to submit their national inventories on greenhouse gases emissions.

The European community is also placed in Annex I to the Convention, which means that it is also subject to the aforementioned obligations. Furthermore, the majority of the European Union member states (apart from Malta, Cyprus, Croatia, and Slovenia) belong to the Annex I countries and are also obliged to abide by these obligations.

2.2. The Kyoto Protocol

The Kyoto Protocol[8] was adopted on 11 December 1997, and came into force on 16 February 2005. It obliges industrialised countries, listed in Annex I of the United Nations Framework Convention on Climate Change, to stabilise the emissions of greenhouse gases in accordance with the principles of the Convention. The Protocol sets even stricter obligations and responsibilities regarding the minimisation of the greenhouse gases emissions[9] In order to encourage sustainable development, Article 2 of the Kyoto Protocol obliges each party included in Annex I to implement and further develop the policies aimed to increase energy efficiency, enhance sustainable agriculture, facilitate research and development of innovative and renewable forms of energy and modern technologies that do not harm the environment, gradually minimise or eliminate market and economic factors responsible for greenhouse gases emissions, enhance reforms in

8 The Kyoto Protocol to the United Nations Framework Convention on Climate Change http://unfccc.int/resource/docs/convkp/kpeng.pdf, and Act on Ratification of Kyoto Protocol to the United Nations Framework Convention on Climate Change, *Official Gazette of the Republic of Serbia-International Agreements,* No. br. 88/2007 and 38/2009; accessed 11.01.2018

9 The Kyoto Protocol, United Nations Climate Change, http://unfccc.int/kyoto_protocol/items/2830.php, 11.01.2018.

relevant sectors, limit or diminish the emissions of methane (via recycling, for example), promote cooperation, etc.

According to the Kyoto Protocol, 37 industrialized countries and the European Community committed to reduce GHG emissions to an average of 5% against 1990 levels during the first commitment period, i.e. between 2008 and 2012. The second commitment period was initiated on 8 December 2012, when the Doha Amendment[10] was signed. In accordance with this Amendment, which has not yet entered into force, the parties committed to reduce GHG emissions by at least 18% below 1990 levels in the eight-year period from 2013 to 2020. The European Union ratified the Doha Amendment on 12 June 2015.[11]

2.3. The Paris Agreement

The Paris Agreement[12] was adopted on 12 December 2015 and entered into force on 4 November 2016[13]. The European Union ratified the Paris Agreement on 5 October 2016. As highlighted in Article 2, in enhancing the implementation of the Convention, including its objective, the Agreement aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty. This aim is accomplished by: 1) limiting the increase in the global average temperature to the level "significantly below 2° Celsius", i.e. continuing the efforts to limit the temperature increase to 1.5° Celsius as compared to the pre-industrial level; 2) strengthening the capacities to adapt to the negative impacts of climate change, strengthening climate resilience and development based upon low emission of greenhouse gases in a manner that does not endanger food production; and 3) providing appropriate financial resources in accordance with low greenhouse gas emission models and climate adaptable development (Todić, 2016: 53).

10 The Doha Amendment to the Kyoto Protocol, http://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf, 26.03.2018.

11 Council Decision on the conclusion, on behalf of the European Union, of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, Brussels, 12 June 2015, Interinstitutional File: 2013/0376 (NLE), 10400/5/14 REV 5, http://data.consilium.europa.eu/doc/document/ST-10400-2014-REV-5/en/pdf, 11.01.2018.

12 The Paris Agreement, United Nations, 2015, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf,. and Act on Ratification of the Paris Agreement, *Official Gazette of the Republic of Serbia-International Agreements*, No. 4/2017; accessed 11.01.2018

13 Reference: C.N.735.2016.TREATIES-XXVII.7.d (Depositary Notification), Paris Agreement, Paris, 12 Dec. 2015, Entry into Force, https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf, 11.01.2018.

Article 4 of the Paris Agreement confirms that developed countries should maintain the leading role in minimizing greenhouse gas emissions at the total economy level. However, it also calls upon the developing countries to maximise their efforts in the field of climate change mitigation in accordance with their national circumstances and with the support they are provided. Paragraph 6 recognises the importance of facilitating an integrated, comprehensive and balanced access (which is not market-oriented) as assistance to providing nationally determined contribution of individual states. The aim of this is to: promote the measures of mitigation and adjustment, to strengthen the participation of public and private sector in the fulfilment of national contributions, as well as to facilitate the coordination of instruments and relevant institutional arrangements. Under Article 7, the adjustment to climate change is recognised as a global challenge the response to which should include the strengthening of adaptive capacities in order to protect humans, living resources and ecosystems. In that sense, Article 9 prescribes that developed countries should provide financial resources to help developing countries to apply measures for mitigation and adjustment within their current obligations under the Convention.

Article 8 states that Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage. Therefore, the parties are encouraged to improve understanding, acting and support, *inter alia*, through the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. Having in mind the importance of technology for the implementation of mitigation and adjustment activities, Article 10 of the Agreement encourages the Parties to persist in their efforts to accelerate, enhance and facilitate innovations for providing an efficient, long-term global response to climate change and promoting economic growth and sustainable development. Article 12 of the Agreement supports the cooperation between the Parties when it comes to the application of measures in order to improve education, raising awareness and informing the public in the field of climate change. Finally, the Agreement (Articles 14-19) provides bodies and mechanisms that enable and facilitate its implementation.

3. Sources of the European Union Law relevant to Combating Climate Change

3.1. The Seventh EU Environment Action Programme

The Seventh Environment Action Programme[14] is the most important strategic document in the area of environment protection policy at the EU level and, as such, is relevant to the climate change issues. It introduces the following key goals: 1) to protect, preserve and improve the natural capital of the Union, 2) to develop the economy within the European Union, which is based upon an efficient use of resources, minimisation of carbon-dioxide emissions and green economy and 3) to protect the citizens of the European Union from the pressures of environment pollution and risks for health and wellbeing.

These goals can be achieved through: 1) better implementation of legislation; 2) better dissemination of information via advanced database; 3) more intensive and rational investing in the development of environment protection and climate change policies; and 4) total integration of requirements and questions related to environment protection into other policies. The Programme proclaims two additional horizontal priority goals: 1) to make the cities in the European Union more sustainable; and 2) to help the European Union face international challenges in the area of environment protection and climate change in a more effective manner. The Programme entered into force at the beginning of 2014, and relevant institutions of the European Union as well as its member states are determined to fulfil its priority goals by 2020.[15]

3.2. Thematic Strategies relevant to Combating Climate Change

There are three European Union thematic strategies relevant to the prevention and control of the activities that contribute to the emergence of climate change: 1) the strategy on air pollution, 2) the strategy on soil pollution, and 3) the strategy on the prevention and recycling of waste. These strategies prescribe basic guidelines for the activities aimed at minimizing pollution caused by the emission of various harmful substances, including the ones that are responsible for the emergence of greenhouse gases' effects.

14 Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet", Official Journal of the European Union L 354/171, 28.12.2013., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN, 11.01.2018.

15 Environment Action Programme to 2020, http://ec.europa.eu/environment/action-programme/, 11.01.2018.

The European Union Thematic Strategy on Air Pollution[16] was adopted as an addition to current legislation with the purpose to facilitate the reaching of the air quality level that does not allow the increase of negative impact on and risks for human health and environment. The Strategy sets goals in the area of air pollution and suggests measures necessary for their fulfilment by 2020. It focuses on the most harmful pollutants and sets long-term goals regarding their minimisation. The Strategy insists on the simplification of the EU legislation in the area of air quality as well as on the revision of the legislation regulating national emissions ceilings. Besides, it aims to achieve the integration of the air quality issues into other related sectors such as agriculture, energy and traffic.

The European Union Thematic Strategy on Soil Protection[17] sets frameworks for the activities aimed at achieving a high level of soil protection and introduces measures that should be taken with that purpose. For example, the Strategy considers sustainable use of soil and preventive measures, whereas its measures for discovering problems include: identifying the areas under the risk of erosion, decrease of organic substances, salinisation, landslide, etc. Finally, operational measures entail adopting (by the member states) appropriate programmes for areas under risk, salinisation restriction measures and strategies for the remediation of contaminated areas. The main goal of the Strategy is to prevent further soil degradation and preserve its functions as well as to return the degraded soils to the level of functionality that is compatible with their use. The Strategy is expected to contribute to the integration of the soil protection issue into other sectoral policies such as: spatial planning, traffic, energy, agriculture, rural development, forestry, tourism, trade, industry and climate change.

The EU Thematic Strategy of the European Union on the prevention and recycling of waste[18] aims to promote recycling, prevention of waste and its disposal on

16 Communication from the Commission to the Council and the European Parliament, Thematic Strategy on air pollution {SEC(2005) 1132} {SEC(2005) 1133}, Brussels, 21.9.2005. COM(2005) 446 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0446&from=EN, 11.01.2017.

17 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Thematic Strategy for Soil Protection [SEC(2006)620] [SEC(2006)1165], Brussels, Brussels, 22.9.2006. COM(2006)231 final , http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0231&from=EN, 11.01.2017.

18 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and The Committee of the Regions-Taking sustainable use of resources forward - A Thematic Strategy on the prevention and recycling of waste {SEC(2005) 1681} {SEC(2005) 1682}, Brussels, 21.12.2005. COM(2005) 666 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0666&from=EN, 11.01.2017.

landfills as well as the use of waste as a resource. The most important measures for achieving the Strategy goals are as follows: full implementation, simplification and modernisation of current legislation; introduction of the life cycle principle to the waste management policy; promotion of more ambitious policies of waste prevention; advancement of knowledge and information; the development of common minimal recycling standards in all member states, and further improvement of the European Union recycling policy.

3.3. The Climate and Energy Package 2020

3.3.1. Introductory Remarks

The Climate and Energy Package 2020 is a collection of the sources of the European Union legislation that are relevant to achieving its goals in the area of climate and energy by the year 2020. This collection of legal provisions sets three core targets of the European Union in this area: 1) 20% cut in greenhouse gas emissions (in comparison to 1990 levels); 2) 20% of EU energy from renewable sources and 3) 20% improvement in energy efficiency. These ambitious targets were set in 2007 and officially incorporated into the European Union legislation in 2009. They also represent the key objectives of *the European Union Strategy for Smart, Sustainable and Inclusive Growth*[19] adopted in 2010. They are fulfilled through: emissions trading system, national goals regarding the minimisation emissions, national goals in the area of renewable sources of energy, investing in increasing energy efficiency and financing the development of the technologies that contribute to the minimisation of carbon-dioxide emissions.[20]

3.3.2. The European Union Emissions Trading System

The EU Emissions Trading System is the main mechanism for combating climate change and its key method for reducing the greenhouse gas emissions from heavy energy-using installations (such as power stations and industrial plants) and airlines. This system is applied in 31 countries (all 28 EU member states, plus Iceland, Lichtenstein and Norway), facilitating the limitation of emissions from more than 11,000 large industrial installations and covering around 45% of greenhouse gas emissions in the European Union[21].

19 Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010. COM(2010) 2020, http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf, 12.01.2018.

20 Climate Action, 2020 climate and energy package, https://ec.europa.eu/clima/policies/strategies/2020_en, 12.01.2018.

21 The EU Emissions Trading System (EU ETS) Factsheet, https://ec.europa.eu/clima/sites/clima/files/factsheet_ets_en.pdf, 12.01.2018.

This system functions in accordance with the "*cap and trade*" principle. The *"cap"* represents the entire quantity of greenhouse gases that can be emitted by installations covered by the system. Within the value of the *"cap"*, companies are given emission allowances, which they can trade with one another if necessary. The companies can also buy limited amounts of international credits from emission-saving projects all over the world. The limit on the total number of allowances that are available to the companies ensures that they have a value; the reduction of the value of the *"cap"* contributes to the reduction of emissions. At the end of the year, each company has to deliver a sufficient amount of allowances to cover all its emissions. If a company fails to do so, it is punished by a fine.[22] On the other hand, if a company manages to reduce its emissions, it can either keep the extra allowances to cover its future needs or sell them to another company.[23]

The Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community was adopted in 2003[24]. The functioning of the emission trading system has had several phases. The first phase, named "the pilot period" lasted from 2005 until 2007. The second phase, also known as "the Kyoto period", lasted from 2008 until 2012. The third phase, envisaged for the period from 2013 to 2020, significantly differs from the first two phases. Instead of national caps, a single European Union cap on emissions is applied; free allocation of caps is replaced by auctioning as the default method, and more sectors and gases are included.[25] Since the founding of this system, several Directives have been adopted for the purpose of facilitating its alterations and improvements.[26] Thanks to the establishment of this system, the issue of climate

22 Srbija i klimatske promene, EU sistem trgovine emisijama (Serbia and Climate Changes, EU ETS), http://www.klimatskepromene.rs/obaveze-prema-eu/eu-sistem-trgovine-emisijama/, 12.01.2018.

23 EU Emissions Trading System (EU ETS), European Commission, https://ec.europa.eu/clima/policies/ets_en, 27.03.2018.

24 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, Official Journal of the European Union, L 275/32, 25.10.2003., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0087&from=EN, 12.01.2018.

25 Climate Action, The EU Emissions Trading System, https://ec.europa.eu/clima/policies/ets_en#Main_legislation, 12.01.2018.

26 Directive 2004/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, Official Journal of the European Union, L 338/18, 13.11.2004., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0101&from=EN; Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the

change is being included in financial plans of many companies and contributed to the promotion of investing in cleaner technologies with low carbon-dioxide emissions.[27]

3.3.3. National Emission Reduction Targets

National emission reduction targets cover the sectors that are not included in the emissions trading system and comprise around 55% of the total greenhouse gas emissions in the European Union coming from the sources such as households, agriculture and waste. On the basis of the Effort Sharing Decision[28] adopted in 2009, the European Union member states have agreed to respect annual greenhouse gas emissions targets until 2020. National targets depend on national wealth and vary from a 20% cut for the richest countries to a maximum 20% increase for the least wealthy ones that are still expected to make efforts to limit their emissions. The Commission supervises the progress of national targets' achievement and each country is obliged to submit annual reports about this issue.[29] The following Directives are also important for the reduction of national greenhouse gases' emission: 1) Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants[30], and 2) Directive 2010/75/EU of the European

scheme for greenhouse gas emission allowance trading within the Community, Official Journal of the European Union, L 8/3, 13.1.2009., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0101&from=EN; Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, Official Journal of the European Union, L 140/63, 5.6.2009., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0029&from=EN;
Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, Official Journal of the European Union, 275, 25.10.2003., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003L0087-20140430&from=EN, accessed 12.01.2018.

27 Srbija i klimatske promene, EU sistem trgovine emisijama (Serbia and Climate Changes, EU ETS), http://www.klimatskepromene.rs/obaveze-prema-eu/eu-sistem-trgovine-emisijama/, 12.01.2018.

28 Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, Official Journal of the European Union, L 140/136, 5.6.2009., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009D0406&from=EN, 12.01.2018.

29 Climate Action, 2020 climate and energy package, https://ec.europa.eu/clima/policies/strategies/2020_en, 12.01.2018.

30 Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, Official Journal of

Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)[31].

3.3.4. National Renewable Energy Sources Targets

Mandatory national targets for the European Union member states regarding the increase in the total share of renewable energy sources in total energy use until 2020 are set by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC[32]. These targets vary from one country to another, depending on their initial positions in the field of renewable energy sources production and their capacities to expand them further. For example, the increase prescribed for Sweden is 49%, whereas it is only 10% for Malta.[33]

3.3.5. Energy Efficiency

A set of binding measures designed to facilitate the European Union to reach its goals in the field of energy efficiency increase until 2020 is prescribed by Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency[34]. In accordance with this document, all European Union member states are obliged to use the sources of energy in a more efficient manner in all phases, starting from its production until its final use. In order to achieve the 20% increase in energy efficiency, member states have had to set their national targets which, depending on each country's preferences, can be

the European Communities, L 309/22, 27.11.2001, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0081&from=EN, 12.01.2018.

31 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), Official Journal of the European Union, L 334/17, 17.12.2010., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0075&from=EN, 12.01.2018.

32 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, Official Journal of the European Union, L 140/16, 5.6.2009., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=EN, 12.01.2018.

33 Climate Action, 2020 climate and energy package, https://ec.europa.eu/clima/policies/strategies/2020_en, 12.01.2018.

34 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, Official Journal of the European Union, L 315/1, 14.11.2012., http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0027&from=EN, 12.01.2018.

based on primary or final energy use, primary or final energy saving or energy intensity. At the end of 2016, the Commission suggested alterations of the Energy Efficiency Directive, including the introduction of a new target - a 30% increase in the use of renewable energy sources.[35]

3.4. Climate and Energy Package 2030

The climate-energy package that refers to the period until 2030 was adopted in 2014[36] and sets the following goals for the European Union: 1) at least 40% reduction in greenhouse gas emissions (as compared to 1990 levels); 2) at least 27% share for renewable energy sources; and 3) at least 27% improvement in energy efficiency. A shared approach in the period until 2030 is expected to provide safety to the investors and coordinated efforts of the EU member states in this field. Such an approach should contribute to the progress in the area of low-carbon economy. It should develop an energy system that ensures affordable energy for all consumers, increases the security of the European Union's energy supplies, reduces the dependence on energy imports, creates new jobs, and brings environmental and health benefits.[37]

4. Conclusion

The European Union is on its way to achieve the goals regarding greenhouse gases reduction, increase the share of renewable energy sources and enhance energy efficiency until 2020. The latest reports confirm that the EU greenhouse gas emissions were reduced in the period from 1990 to 2016, when it was estimated to be 23% below the 1990 level, whereas the economic growth in the same period was 53%. It was also estimated that the total EU emissions fell by 0.7 % from 2015 to 2016, while the overall GDP increased by 1.9 %[38].

35 The European Commission, Energy, Energy Efficiency, https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficiency-directive, 12.01.2018.

36 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a policy framework for climate and energy in the period from 2020 to 2030, Brussels, 22.1.2014 COM(2014) 15 final, {SWD(2014) 15 final} {SWD(2014) 16 final}, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0015&from=EN, 12.01.2018.

37 Climate Action: 2030 climate and energy framework, https://ec.europa.eu/clima/policies/strategies/2030_en, 12.01.2018.

38 Report from the Commission to the European Parliament and the Council "Two years after Paris – Progress towards meeting the EU's climate commitments" COM(2017) 646 final {SWD(2017) 357 final}, Brussels, 07.11.2017., https://ec.europa.eu/clima/sites/clima/files/strategies/progress/docs/swd_2017_xxx_en.pdf, 12.01.2018., str. 37.

The targets of the European Union regarding combating climate change and the measures that the EU member states are required to apply in order to achieve these targets are important for the Republic of Serbia as well, particularly considering the anticipated opening of the Negotiation Chapter 27, dedicated to environment and climate change. According to the United Nations Framework Convention on Climate Change, Serbia is a non-Annex I country, which means that it is not considered a highly-industrialised country whose activities might have a significant impact on climate change. Therefore, the Republic of Serbia does not have the same obligations as some of the most developed EU member states. However, our country is still required to harmonise its national legislation with the provisions of the *acquis* relevant to this issue.

In that context, it should be noted that, in its Report on the progress of the Republic of Serbia in 2016, the European Commission described the progress of our country in the area of climate change as rather modest and emphasized that additional efforts should be made in that field. The Republic of Serbia is expected to adopt the Act on Climate Change and a series of administrative acts that are necessary for its practical implementation, as well as to integrate the laws, strategies and targets relevant to climate change into other sectors such as energy, traffic, agriculture and waste management.

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ПРАВО ЕВРОПСКЕ УНИЈЕ И ИЗАЗОВИ КЛИМАТСКИХ ПРОМЕНА

Резиме

Последњих неколико деценија, Европска унија чини значајне напоре на плану борбе против климатских промена. Као међународна организација, Европска унија је до сада ратификовала низ кључних међународних докумената који се баве проблематиком климатских промена укључујући: Оквирну конвенцију Уједињених нација о промени климе, Кјото протокол и Париски споразум. Поред тога, Европска унија је изградила богат правни оквир од значаја за превенцију климатских промена и сузбијање њихових негативних последица, који укључује бројне одлуке, директиве, тематске стратегије и акционе програме. Главни циљ свих ових правних аката јесте смањење и контролисање емисија гасова са ефектом стаклене баште, како би се допринело смањењу загађења, повећању енергетске ефикасности и ублажавању негативних последица климатских промена. Извештаји о примени наведених извора права Европске уније у њеним државама чланицама потврђују да је примена мера предвиђених различитим изворима ацquис-а из ове области у тим земљама дала позитивне резултате. Међутим, релевантни извештаји такође показују да климатске промене и даље представљају озбиљан изазов како за законодавце тако и за све друге субјекте који својим делатностима могу допринети овом феномену. Имајући у виду да Републици Србији предстоји отварање преговарачког поглавља 27, које је управо посвећено животној средини и климатским променама, аутор у овом раду анализира: релевантне међународне документе универзалног поља примене чија је чланица и Европска унија, изворе ацquис-а од значаја за суочавање са климатским променама, као и извештаје о постигнутим резултатима у борби против климатских промена како на нивоу Европске уније, тако и у њеним државама чланицама. Такође, аутор разматра и међународне обавезе Републике Србије у овој области, њен досадашњи напредак на овом плану и кораке које ће наша земља морати у да предузме будућности како би те обавезе испунила, нарочито у контексту предстојећег отварања преговарачког поглавља 27, посвећеног животној средини и климатским променама.

Кључе речи*: Европска унија, климатске промене, животна средина, екологија, еколошко право.*

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doi:10.5937/zrpfni1879297S

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UDK: 343.352(497:114-672EU)
Рад примљен: 30.09.2018.
Рад прихваћен: 23.10.2018.

THE IMPACT OF CORRUPTION ON NATIONAL COMPETITIVENESS[**]

Abstract: *Corruption is a global phenomenon that can be identified in all countries. Although visible everywhere, corruption usually affects poorer countries, limiting the progress of the national economy and taking away the resources needed for education, health care and other public goods and services. However, the private sector also faces this global problem that jeopardizes corporate identity, distorts trust among business partners, and ruins the reputation of companies. The paper primarily provides a theoretical overview of corruption, with a special emphasis on the role of corruption in achieving macroeconomic stability of a country. Changes in the level of corruption in the Republic of Serbia are being analyzed in comparison with the European Union countries in the period from 2009 to 2016, based on the Corruption Perception Index (CPI). The paper also analyses the impact of corruption on national competitiveness in order to assess the degree of their interdependence. The research in this paper may be useful for policy makers in the context of the future development of anti-corruption policy and strategy.*

Key words: *corruption, competitiveness, corruption perception index.*

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

The paper is a result of research within the projects 179066 and 179046, funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia

Introduction

Corruption is not a phenomenon of a recent date. The first cases of corruption were recorded in the distant past, in ancient Greece and Rome. Nowadays, corruption is characterized by its actuality, high degree of social danger and new forms that have found favourable conditions in many areas, both in the public and the private sector.

Corruption is a global threat and a serious impediment to the economic development of countries, since it redirects limited resources to inadequate use. There is no country that is completely immune to corruption. Even countries with the most successful and longest market tradition face illegal economic and political exploitation. Corruption increases inequality and promotes injustice, endangering macroeconomic stability, especially in underdeveloped countries and parts of the world.

Corruption disrupts the fundamental values of social relations of every democratic and civil society. It jeopardizes the rule of law, trust in public institutions and legal state, justice, equality and security of citizens. Corruption increases and sharpens social differences, encourages efforts to live above opportunities thanks to dishonest work, and to get rich by downplaying the value of honest work. It hampers the development of entrepreneurial climate and political culture, and other basic social values. Among other factors, the economic development of a country depends on the ability to prevent the risk of corruption. Creating and encouraging the will of citizens and determination of the authorities are crucial in combating corruption. Therefore, apart from legal responsibility, everyone in the public and the private sector has the responsibility in performing jobs.

Taking into consideration the importance that corruption has for national competitiveness, this paper analyzes the interdependence between corruption and national competitiveness in order to evaluate their relationship. In addition, corruption in the Republic of Serbia in the period from 2009 to 2016 is analysed based on the Corruption Perception Index (CPI). Given the Serbia's intention to access the European Union, Serbia is benchmarked against the EU countries according to the CPI.

The paper is organized into two sections, with several subsections. In the first part of this paper, the authors provide a theoretical overview of corruption in the public and private sector and the role that corruption plays in its macroeconomic environment. In the second part, which refers to research results, an analysis of corruption in Serbia and its position compared to the EU countries is provided, including an analysis of the impact that corruption has on national competitiveness.

1. Theoretical background

1.1 The conceptual basis of corruption

Corruption is defined as a relationship based on abuse of authority in the public or private sector in order to gain personal benefit or benefit for others.[1] It occurs where there is a possibility and interest. Corruption can be: petty, small or survival corruption, or large, sporadic or systemic; simple or complex; it can also be a corruption at the lowest, street level, contracting or corruption in public administration, political, commercial and judicial corruption.[2]

Corruption, as abuse of public authority to gain personal benefits, exists if there is a deliberate violation of the impartiality principle in the decision-making process in order to gain some advantages. Corruption occurs when the official illegally places an individual interest over the interests of people and ideals he/she should serve. Corruption can be defined in a broad and narrow sense.[3]

Since the very beginning of human society and the formation of the first states, corruption in a *wider sense* represents a socially negative phenomenon which has developed and gained its manifestations depending on the historical, social, economic, political and other conditions causing harmful consequences to society. Corruption in a wider sense entails the early forms of abuse of social position and reputation in performing certain public functions (deputies, leaders of certain political parties, leaders of charities or associations, etc.) that do not have the character of purely state functions, such as: doing a favor based on the friendship, giving gifts, creating certain relationships contrary to the basic moral, customary and other accepted codes, giving the so-called tips in the form of petty bribes to state and public officers, misuse of funds for advertising and economic propaganda, fake fees for fictitious experts, etc. Corruption in the *narrow sense* includes the abuse of an official position, receiving and giving bribes, illegal mediation, fraud at work, forgery of official documents, unconscientious work, etc.[4]

Corruption is present in both developed and poor countries, which implies that poverty and transition are not the main causes of corruption. Above all, corruption depends on the state system and morality of the nation. Of course, it

1 Konstantinović-Vilić, S, Nikolić-Ristanović, V, Kostić, M, *Kriminologija,* Law Faculty, Niš, 2009, p. 179.

2 Morris, S. D., *Forms of Corruption,* CESifo DICE Report 2/2011, Middle Tennessee State University, 2011, pp. 10-14.

3 Jelačić, M., *Korupcija,* Ministry of Interior of the Republic of Serbia, Belgrade, 1996, pp. 42-43.

4 Petrović, Z., *Krivično delo zloupotrebe službenog položaja,* Privredni kriminal i korupcija, Institute of Criminological and Sociological Research, Belgrade, 2001, p. 205.

does not depend on one factor, but usually occurs when there is a wider range of factors, such as economic, social, cultural, historical, political, legal, and others.[5]

Corruption particularly comes to the fore in unstable systems, at the time of social turbulence accompanied by the impoverishment of public officials, but also the weakening of the legal and economic control mechanisms of the state and society as a whole. Corruption is not easy to stabilize at a certain low level, especially when it begins to attack and conquer those parts of society that should be the barrier against corruption, such as the judiciary and the police.

1.2 Different approaches to the concept of corruption

In defining the concept of corruption, we may observe several components:[6]

- *Economic component* - Corruption destroys the pillars of the economic system of a society. It is the cause of many disruptions since it disrupts the functioning of the basic segments of the economic system: production, consumption, distribution and exchange. On the other hand, it is a consequence of deeper socioeconomic contradictions and the functioning of certain economic laws in the economic system of society and in the field of international economic relations, such as: laws of supply and demand, value law, crisis of hyperproduction, inflation, competition law at the domestic and the global market, and others. Contrary to the universal principle of free trade, corruption can quickly and efficiently help acquire better market position in terms of placing various goods on domestic and foreign markets.[7] Behind powerful companies, such as transnational ones, are their governments with special organizations that give full support to this way of achieving economic, political and military domination.
- *Legal component* – Among all norms that regulate relationships between people (economic, cultural, etc.), legal norms have the most important role in regulating a whole range of relationships in a state or society. They prescribe what is allowed and what is not. Therefore, their observance is ensured through criminal and other sanctions, but always in the interest of the state or the ruling class.[8] Corruption can also be defined as a special type of unfounded wealth which is forbidden or immoral. This is the case where the property of one (corrupted) person increases without any legal

5 Milošević, Z. *Političke stranke i korupcija,* Political Review, no. 1, Belgrade, 2007, p. 23-38.

6 Jelačić, M., *op.cit.*, pp. 12-40.

7 Fitzsimons, V., *Economic Models of Corruption,* Corruption and Development, The Anti-Corruption Campaigns, 2007, pp. 8-11.

8 Kaufmann, D., Vicente, P.C., *Legal Corruption,* World Bank Institute, 2005, pp. 3-5.

reason, and the property of another person (e.g., the bribe provider) simultaneously decreases.

- *Criminological component* - Corruption is part of economic crime and, according to the degree of social danger, it represents its most difficult aspect as it affects the basic state foundations and its economic system.[9] Criminology defines corruption as a set of all punishable actions undertaken by the public officer who, abusing its position and the institution in which it works, damages the public interest to such an extent and in such a way as to undermine the trust of citizens and the general public in state and society.
- *Moral component* - Corruption erodes the morale of a society through endangering or destruction of its social, economic, political and legal institutions. It breaks down basic human values, such as: freedom, dignity, the human rights of the citizen, and his/her need to create and apply new knowledge and products (material and spiritual).[10] Corruption is contrary to the basic morally correct principles that individuals, more or less knowingly and implicitly, know.
- *Social component* - Like all other deviations, corruption has origins in the social basis of society. Namely, the sharp social crisis increasingly threatens the foundation of society, i.e. state, economic, cultural and other institutions. Corruption is connected and conditioned by the appearance of bureaucracy and technocracy, and manifests itself in the unlawful behavior of some officials and other persons who are entrusted by the law to perform state or other public duties in public institutions.[11]
- *Historical component* - As a socially harmful phenomenon, corruption in a certain sense has its origin in ancient days, endangering the well-known empires (Roman, Turkish, Austro-Hungarian, British, Russian, etc.). It is an indisputable fact that there were always people who wanted to gain some benefits or privilege, which they did not have rights to under the existing moral and legal norms. In order to obtain unlawful benefits, those people skillfully used corruption as a method of achieving their goals; so, they gave

9 Benson, M.L. and T.D. Madensen (2007). Situational Crime Prevention and White-Collar Crime, in: Pontell, H.N. and G. Geis, *International Handbook on White-Collar and Corporate Crime*, New York: Springer, pp. 609- 626.

10 Kreikebaum, H., Corruption as a moral issue, *Social Responsibility Journal*, Vol. 4 Issue: 1/2, 2008, pp. 82-88.

11 Granovetter, M., *The Social Construction of Corruption,* The Norms, Beliefs and Institutions of 21st Century Capitalism: Celebrating the 100th Anniversary of Max Weber's The Protestant Ethic and the Spirit of Capitalism, Cornell University, 2004, p. 4.

gifts (in goods or money), extended various favors (material, etc.) or other benefits to those people who the realization of this benefit depended on.[12]

1.3. The role of corruption in the macroeconomic stability of a country as one of the important determinants of national competitiveness

Although the macroeconomic environment is considered as the factor which cannot accelerate economic growth by itself, it is a necessary condition for improving the competitiveness of a country.

The institutional environment is the essential component of the macroeconomic and, therefore, business environment. Its role is reflected in ensuring the institutional security of citizens in order to be engaged in economic activities. Citizens would only invest if they believe in benefits from a particular business or investment, without unnecessary waste of time and money in the protection of property and controlling the obligation fulfillment of all contracting parties. This primarily depends on the level of trust in society, but formally it depends on institutional capacity to provide the basic level of security and protection of property rights. The institutional role in improving the level of competitiveness is achieved through the provision of sufficient transparency and efficiency level of the public sector.

One of the fundamental roles of the state is to provide security to its citizens, which is a minimum requirement for the performance of economic activities. Corruption, violence, racketeering, organized crime, terrorism (etc.) have a significant negative impact on private investment and economic transactions.

The quality of a business environment is significantly influenced by the degree of corruption. As the abuse of public power for private purposes, corruption affects competitiveness in the following ways: it reduces a desire for investment since economic actors consider corruption as a special type of tax; corruption leads to inadequate allocation of human capital as it is primarily engaged in rent-seeking activities, not in productive work; corruption leads to irrational public spending as public representatives allocate funds less to the improvement of public welfare but more to the opportunities that lead to their personal wealth; corruption reduces the quality of existing infrastructure and public services through inadequate public procurement contracts.[13]

12 MacDonald, R., Tariq Majeed, M., *Causes of Corruption in European Countries: History, Law, and Political Stability,* Europe's Post-Crisis Stability – An Interdisciplinary Approach, Berlin, Germany, 2011, pp. 10-11.

13 WEF (2016-2017). *Global Competitiveness Report.* Geneva: World Economic Forum, p. 46.

Economically, corruption leads to a reduction in national wealth. It is often responsible for directing scarce public resources to non-economic high-profile projects, such as dams, power plants, refineries and pipelines, to the detriment of less spectacular but basic infrastructure projects, such as schools, hospitals and roads, or supplying rural areas with electricity and water. In addition, it prevents the development of the market structure, distorts competition, and thus discourages investment.[14]

The public sector efficiency also has a significant impact on the business environment and is reflected above all through the efficiency of administrative services. Administrative efficiency is significantly reflected in business demographics, as bulky and corrupt bureaucracy demotivates investments and reduces the efficiency of companies' operations (paying various types of taxes, complicated judicial system, (non)compliance with regulations, obtaining all necessary permits, etc.). Corporate ethics can also encourage companies, investors and society to be engaged in economic activities. Both formal and informal business norms play a crucial role in the business environment where high ethical standards among business partners contribute to building confidence.[15]

Bureaucratic corruption leads to the wrong allocation of public resources. Once corruption enters bureaucracy, public officials can create artificial bottlenecks as a means of extorting money, which further leads to a decrease in productivity and quality of services.[16]

The risk of corruption increases with the number and duration of transactions, number of people involved, and the simplicity and standardization of procedures. The most noticeable signs of the negative impact of corruption are the so-called "white elephants", projects that completely ignore public demand or fall shortly after completion. In addition to preferring wrong companies and projects, corruption reduces productivity as a result of reduced bureaucracy efforts and reduced quality of public investment.

The argument that corruption can be limited by minimizing the public sector reflects the faith of economists in the market and their lack of trust in politicians. Research shows that the size of the state budget relative to the national product decreases as the level of corruption grows. Privatization is highlighted as a means of simultaneously reducing corruption and increasing efficiency. However, although privatization can have clear economic advantages, its impact on corruption is still not clear. Corruption may only thus be shifted from the

14 Retrieved from: http://www.transparency.org, access: 10.04.2018.

15 WEF (2016-2017). *Global Competitiveness Report.* Geneva: World Economic Forum, p. 46.

16 Bose, G. (2010). *Aspects of bureaucratic corruption.* School of Economics University of New South Wales, p. 5.

public to private sector. Bribes formerly taken by public officials could be moved to employees in private companies. Many transitional economies have recorded massive corruption in the privatization programs themselves.[17] This may be one of the reasons why cuts in the public sector do not reduce corruption, at least during the transition period.

Corruption can also distort the activities of the private sector, leading to an increase of the grey economy. This type of reaction at the same time disturbs the private sector and reduces the efficiency of the government. Some companies, especially from relatively uncorrupted countries, lack the skills required to conduct corrupt transactions; so, they lose market share or prefer to operate in countries with low levels of corruption. Similarly, aid providers and investors take into account the level of corruption in assessing where to invest their funds.

It is also believed that there is a close connection between corruption and poverty in the country. An increase in the Corruption Perception Index (CPI) by one index point (out of a total of ten, with a higher index indicating a lower corruption) is associated with an increase in productivity, an increase in capital inflows of 0.8% of GDP of a particular country, and an increase in per capita income of nearly 4%. According to the World Bank estimation, corruption causes a "loss" of around billions of dollars each year.[18]

1.4. Methodology and research questions

The aim of this paper is to demonstrate the level of corruption in Serbia, as well as to examine the interdependence between the level of corruption measured by the Corruption Perception Index (CPI) and the level of national competitiveness measured by the Global Competitiveness Index (GCI).

Methods used in this paper are: analysis method, comparative analysis method, descriptive statistics, and correlation analysis. The analysis method is reflected in the elaboration of the phenomenon of corruption, in a narrow and wider sense, as well as the consideration of all its components. A special emphasis is given to the role of corruption in the macroeconomic stability of a country as one of the important determinants of national competitiveness. The comparative analysis method finds its application in a comparative analysis of the statistics from the Transparency International and World Economic Forum (WEF) database. The correlation analysis finds its application in assessing the strength of the link between corruption and national competitiveness. The statistical data analysis

17 Bjorvatn, K., Soreide, T. (2005). *Corruption and Privatization*. European Journal of Political Economy: Vol. 21, No. 4, pp. 903-914.

18 Retrieved from : http://www.worldbank.org/, accessed: 12.04.2018.

was performed using the statistical program SPSS 23.0. The analysis includes Serbia and the European Union countries (28) in the period from 2009 to 2016.

To achieve the set objective, the paper is based on the following research questions:

1. Is the level of corruption in Serbia decreasing in the analysed period from 2009 to 2016?
2. Does Serbia have a similar level of corruption as the European Union countries?
3. Is there a relationship between corruption and national competitiveness in Serbia?

2. Results and discussion

The results of the research are grouped into three categories:

a) The analysis of corruption in Serbia;

b) Benchmarking analysis of Serbia and the EU countries, according to the CPI;

c) Correlation analysis of corruption and national competitiveness in Serbia.

a) The analysis of corruption in Serbia

By its nature, corruption is hidden and difficult to prove. Despite the large number of studies about its distribution, insufficient knowledge about corruption remains as a problem in a majority of countries. Corruption is a complex

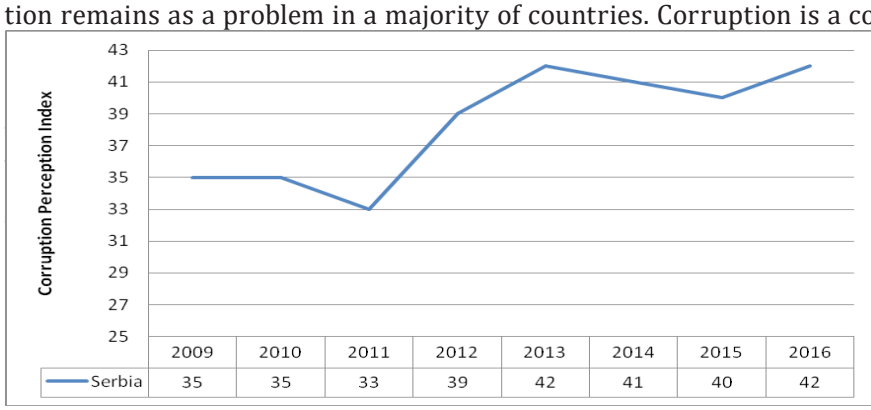

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Figure 1. *The level of corruption in Serbia according to the Corruption Perception Index, 2009-2016*

Source: Transparency International

19 www.transparency.org

Based on the figure above, corruption in Serbia in the period from 2009 to 2016 shows a decreasing trend (with some slight fluctuations). The lowest CPI and the highest corruption rate were recorded in 2011. On the other hand, the lowest corruption and the highest CPI of 42 were recorded in 2013 and 2016.

b) Benchmarking analysis of Serbia and the EU countries, according to the Corruption Perception Index (CPI)

Table 1 illustrates the Corruption Perception Index(CPI) in the 28 EU countries and Serbia for the period from 2009 to 2016. As a new EU member at the time, Croatia is also included in the analysis for the whole period.

Table 1. Corruption Perception Index (CPI) in the EU countries and Serbia, 2009-2016

EU 28	2009	2010	2011	2012	2013	2014	2015	2016
United Kingdom	77	76	78	74	76	78	81	81
Sweden	92	92	93	88	89	87	89	88
Netherlands	89	88	89	84	83	83	84	83
Finland	89	92	94	90	89	89	90	89
Denmark	93	93	94	90	91	92	91	90
Luxembourg	82	85	85	80	80	82	85	81
Ireland	80	80	75	69	72	74	75	73
Germany	80	79	80	79	78	79	81	81
Austria	79	79	78	69	69	72	76	75
France	69	68	70	71	71	69	70	69
Belgium	71	71	75	75	75	76	77	77
Estonia	66	65	64	64	68	69	70	70
Malta	52	56	56	57	56	55	60	55
Czech Republic	49	46	44	49	48	51	56	55
Spain	61	61	62	65	59	60	58	58
Slovenia	66	64	59	61	57	58	60	61
Cyprus	66	63	63	66	63	63	61	55
Italy	43	39	39	42	43	43	44	47
Portugal	58	60	61	63	62	63	64	62
Latvia	45	43	42	49	53	55	56	57
Hungary	51	47	46	55	54	54	51	48
Slovakia	45	43	40	46	47	50	51	51
Lithuania	49	50	48	54	57	58	59	59
Bulgaria	38	36	33	41	41	43	41	41
Poland	50	53	55	58	60	61	63	62
Greece	38	35	34	36	40	43	46	44

Figure 3. Benchmarking between Serbia, EU 28 average and EU countries with the lowest CPI

Based on Figure 3, it can be seen that Serbia in the whole analysed period lags behind even in comparison to the most corrupted EU countries and EU 28 average. With an average CPI value of 38.4, Serbia lags behind in comparison to Bulgaria as the EU country with the lowest CPI in the analysed period (average 39.3), Greece (average 39.5), Romania (average 41.9) and Croatia (average 45.5).

c) Correlation analysis of corruption and national competitiveness

Table 2 illustrates the correlation analysis between the Corruption Perception Index (CPI) and Global Competitiveness Index (GCI) in Serbia from 2009 to 2016.[20]

The Global competitiveness index has its values range from 1 to 7, where 1 represents the lowest and 7 the largest competitiveness. It was calculated for 133 to 148 countries worldwide. The GCI, published in the Global Competitiveness Report by the World Economic Forum, includes a weighted average of 114 indicators, each reflecting some aspect of competitiveness. These indicators are grouped in 12 different pillars.[21]

Table 2. Correlation coefficients between CPI and GCI in Serbia (2009-2016)

		CPI	GCI
CPI	Pearson Correlation	1	0.297
	Sig. (2-tailed)		0.474
	N	8	8
GCI	Pearson Correlation	0.297	1
	Sig. (2-tailed)	0.474	
	N	8	8

Source: Author's calculations (SPSS Statistics 23)

The correlation analysis revealed that there is a positive correlation between corruption and national competitiveness, indicating that the changes occur in the same direction although the degree of consistency between them is low.[22] Therefore, the higher the CPI (which implies lower corruption), the higher the national competitiveness measured by the GCI.

Conclusion

Corruption is a social phenomenon of an international character. It is manifested in various forms, destroying human values and goods, hindering further social development and bringing a psychosis of insecurity, impotence, demoralization and general disorganization into the society.

Corruption is the subject of study of legal, political, international, security and social theory, as well as legal practices and criminal policies. All these activities should lead to a unified and comprehensive activity of social subjects at all le-

20 WEF (2009-2017). *Global Competitiveness Report.* Geneva: World Economic Forum

21 *Ibid.*

22 Soldić-Aleksić, J. (2011). *Primenjena analiza podataka*, Centar za izdavačku delatnost, Ekonomski fakultet u Beogradu, p. 180.

vels, including the international community, aimed at to reducing, eradicating, preventing or suppressing corruption, or at least minimizing its harmful consequences at today's level of development. Due to the difficult consequences it produces, society should be organized in the fight for its prevention and suppression, both nationally and internationally. Prevention of corruption is one of the leading challenges of modern democratic change.

Even the most developed and stable societies are not immune to corrupt scandals. For this reason, it is not surprising that in contemporary societies characterized by inequality of human rights, obligations and property, the first sign of instability is the appearance of various forms of corruption. Therefore, as evidenced in the case of Serbia, a positive correlation between corruption and national competitiveness is expected. Based on the Corruption Perception Index, Serbia has decreased the level of corruption in the analysed period from 2009 to 2016. Besides, Serbia lags behind in comparison to the most and least corrupted EU countries.

Corruption is not acceptable in any modern society. It must be unavoidably eliminated at all levels and by all available means. The most important thing is to increase citizens' awareness, and to enable them to participate in the fight against corruption as the most important participant. Recognition of corruption as a problem that undermines the well-being of a society is the most important issue in the fight against corruption. It is necessary to raise citizens' awareness about its harmfulness and negative effects on the whole society in order to prevent its further spread and to take relevant action aimed at its eradication.

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УТИЦАЈ КОРУПЦИЈЕ НА НАЦИОНАЛНУ КОНКУРЕНТНОСТ

Резиме

Корупција је глобални феномен кога је могуће идентификовати у свим земљама. Иако свуда заступљена, корупција у већој мери погађа сиромашније земље, ограничавајући напредовање националне привреде и одузимајући средства потребна за образовање, здравство и друга јавна добра и услуге. Међутим, приватни сектор се такође суочава са овим глобалним проблемом који угрожава корпоративни идентитет, нарушава поверење између пословних партнера и који може уништити репутацију компанија. У раду се пре свега сагледавају теоријски аспекти корупције, како у јавном тако и у приватном сектору, са посебним освртом на улогу корупције у остваривању макроекономске стабилности земље. На основу Индекса перцепције корупције истражују се промене у нивоу корупције заступљене у Републици Србији у поређењу са земљама Европске уније у периоду од 2009. до 2016. године. Такође, анализира се утицај корупције на националну конкурентност како би се сагледао степен њихове међузависности. Истраживање у овом раду корисно је за креаторе јавних политика у сврху будућег усмеравања развојне политике и стратегије за борбу против корупције.

Кључне речи: *корупција, конкурентност, индекс перцепције корупције*.

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ОРИГИНАЛНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879313M

UDK: 339.187.44(497.11)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

TERMINATION OF A FRANCHISING AGREEMENT IN THE LIGHT OF THE POSITIVE LEGISLATION OF THE REPUBLIC OF SERBIA[**]

Abstract: *The needs of capital for new markets through the minimum of investment can be achieved through franchising, as a specific investment method of contracting business. Using the methods of successful operations, reduced investment risks and autonomy in operations are among the decisive reasons for joining the franchise network by the potential franchisee. In line with the absence of legal regulation in the Republic of Serbia, the Law on Contracts and Torts is being applied on a franchise agreement. The provisions of the Law on Contracts and Torts regulating the termination of a contract of commercial agency and the contract on license can be applied to the termination of a franchise agreement in an analogous manner.*

Key words: *franchising agreement, franchise, franchisor, franchisee, ordinary notice, extraordinary cancellation, serious reasons, Law on Contracts and Torts.*

1. Introduction

Contemporary market movements and the need of capital to conquer new markets through minimum investments undoubtedly significantly affect development of contemporary autonomous business operations of commercial law. One in the series of business operations that are the product of movements on the market of goods and capital is a business franchise and, consequently, the agreement as an instrument of implementation thereof. Franchising is a specific

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[**] This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

investment method of contractual business operations. The reasons that affect the expansion of business franchises are as follows: a) need for successful business operations growth, and b) capability to achieve such a growth by liaising with others that own capital and labour force for such a thing (Mendelsohn, 2004:1).

Franchising, enables the receiver of franchise to expand their business with minimum investments and minimum investment risks at the target market. The significance of franchising lies in enabling the franchisee to access a developed franchising network. Having accessed a franchising network, the franchisee uses all the advantages of the developed and tested-in-practice business operations system.[1]

2. Law on Contracts and Torts (TLC) and Franchising Agreement

The franchising agreement is characterized by continuous contractual relationship, therefore, the provisions regulating the termination of permanent obligations may be applied to it (Миљковић, 2014:355). In line with the absence of legal regulation in the Republic of Serbia, the Law on Contracts and Torts (*hereinafter:* LCT) is being applied on a franchise agreement.[2]

The provisions of the Law on Contracts and Torts - LCT regulating the termination of a contract on commercial agency and the contract on license can be applied to the termination of a franchise agreement in an analogous manner (Tomić, 1986:95). However, as there is no domestic (R. Serbia) positive legal regulations on franchising agreements, the court would have to take into account the possibility of analogous application of the provisions in each concrete case, as follows: a) on the termination of a commercial agency, or b) a licensing agreement, as general provisions on permanent obligations (Миљковић, 2014:355). One of possible solutions in such cases, to prevent occurring of an impossible situation because of the specificities of a franchising agreement, is to oblige the court to take into consideration the expert literature, which deals with this matter using the comparative method, when solving the termination of a franchising agreement (Париводић, 2004:289).

1 The receiver of franchise - *Franchisee* uses a developed business operations method and the know-how developed by the grantor of franchise - *Franchisor*, and also specific forms of intellectual property.

2 Law on Contracts and Torts (*hereinafter: LCT)*, „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

A franchising agreement, as all civil law and autonomous commercial law contracts, may be terminated, as follows: 1) with the regular passage of the term for which it is concluded, [3] and 2) cancellation. [4]

3. Termination of Agreement with the Passage of Term it is Concluded for

The termination of a franchising agreement with the passage of the term it was concluded for, represents a common way of termination of a contractual relationship. This mode of termination of an agreement is in compliance with all the generally accepted principles of contract law. With the expiration of the term to which it was concluded for, the franchising agreement ceases automatically. When the agreement terminates with the passage of the term it was concluded for, weather the reasons for the termination of the agreement, are serious or justified are not taken consideration.[5]

For the contracting parties, and particularly for the franchisee, it is important to set: a) minimum fixed time limit for the term and b) clause on renewal of the agreement.

3.1. Is the contractual provision for a minimum fixed term agreement necessary?

A franchising agreement, as well as all other contracts regardless whether they belong to classic law contracts or modern autonomous commercial contracts law, is concluded for a specific time period. The term of duration is implicated by an economic *causa* that represents the foundation for concluding a franchising agreement. The economic *causa* or the size of funds invested (of the franchisor and the franchisee) represents the starting foundation that is taken into consideration when the duration of a franchising agreement is established. When concluding a franchising agreement, and on the basis of the conducted economic analysis franchisee, wants to: a) realise depreciation of invested funds within

3 „ a permanent debit relationship within a specified period shall come to an end on the expiration of the relevant time limit ...“ – Art. 357, LCT, „*Official Gazette of the SFR of Yugoslavia*“, 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*“, 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*“, 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

4 Cancellation represents a forced termination of agreement when the contractual provisions are violated.

5 The same effect occurs if the agreement became invalid through an agreement of the contracting parties.

a specified time period; and b) start realising the specified profit (Миљковић, 2014:353). The depreciation period and the commencement of the realisation of profit is not the same with all manifesting forms of franchising agreements. [6] These two basic economic criteria represent the benchmarks for the franchisee when establishing the term of an agreement.

In regard to the duration of an agreement, the British Franchise Association – BFA[7] lays down that the duration of the franchising agreement should be that the minimum term for a franchise contract should be the period necessary to amortize those of a franchisee's initial investment which are specific to the franchise. Although the aforementioned ethical principle is contained in the BFA Code of Ethics, it generates certain unclearness. The BFA has clarified it in details by integrating the Extension and Interpretation to the Code of Ethics,[8] which lays down in the following: 1) that for a minority of the largest franchise opportunities, amortizing initial investments may not be a primary objective for the franchisee. In such cases, the objective should be to adopt a contract period which reasonably balances the interests of the parties to the contract and 2) that this section could be subject to national laws concerning the restraint of trade and may need to be met through renewal clauses.[9]

Following the tendencies of contemporary legislative solutions, the Working Document Civil Code[10] provide that with a franchising agreement concluded for a fixed term period, the duration of the agreement should be long enough to allow the franchisee to make a return on their invested funds.[11] Although the possibility for a contract to be concluded for a fixed term is stipulated in the aforementioned solution of the provisions of the Working Document Civil Code, and in the circumstances when franchising business is not sufficiently developed

6 Depending on the form of appearance of the concerned franchise agreement, a minimum fixed term ranges from one to five years, while the maximum one depends on the contracting parties' interests in priority.

7 See more about on, Retrieved 05, August 2018, from https://www.thebfa.org/

8 The European Code of Ethics for Franchising & its national Extensions & Interpretations, Retrieved 05, August 2018, from http://www.eff-franchise.com/Data/Code%20of%20Ethics.pdf

9 The European Code of Ethics for Franchising & its national Extensions & Interpretations, Retrieved 05, August 2018, from http://www.eff-franchise.com/Data/Code%20of%20Ethics.pdf 7

10 Civil Code of the Republic of Serbia – Working Document, Belgrade 29. May 2015, Retrieved 02, August 2018, from https://www.mpravde.gov.rs/files/NACRT.pdf

11 Art. 1288 para. 2, Civil Code of the Republic of Serbia – Working Document, Belgrade 29. May 2015, Retrieved 02, August 2018, from https://www.mpravde.gov.rs/files/NACRT.pdf

in the Republic of Serbia, [12] it is possible for the franchisor to undertake a series of fraudulent actions to the prejudice of the franchisee.

3.2. Renewal Clause

The position of the franchisee in a franchise relationship depends also on whether the agreement provides for the *renewal clause*.[13] By entering the *renewal clause*,[14] after the expiration of the term of the agreement, it is automatically extended for the period contained in the basic agreement. The *renewal clause*, creates a contractual relationship for indefinite time period. The *renewal clause* enables the franchisee to use the right to option, whether he continues to participate in the franchise relationship or they will step out of that relationship by their own free will.

Although the *renewal clause* represents an ideal option for the franchisee to renew the agreement in compliance with their business interests, the question arises whether it is being renewed under the same or changed terms and conditions. The provisions of the Working Document Civil Code stipulate that the franchisee who regularly performed their contractual obligations has the right to conclude the agreement to a new term under the same terms and conditions.[15] Some franchisor dislike approving a too-long term of the agreement as they believe amendments to the law may occur and they would prefer to have an option to respond earlier and not later, accordingly (Mendelsohn et. al., 2004:363).

The franchisee will not be able to renew the contract although they are entitled to, when the franchisor assesses that the market where the franchisee operates on or they operate on is not economically cost-effective any longer (Mendelsohn

12 See more about on, Retrieved 05, August 2018, from http://www.pks.rs/MSaradnja.aspx?id=679&p=0&

13 The renewal clause is a standard contractual provision regardless of the form of the appearance form of a franchise agreement.

14 The BFA Code requires that every agreement contains the ground for renewal of the agreement. The basis for contract renewal should take into account the length of the original term, the extent to which the contract empowers the franchisor to require investments from the franchisee for relinquishment or renovation, and the extent to which the franchisor may vary the terms of a contract on renewal. The overriding objective is to ensure that the franchisee has the opportunity to recover his franchise specific investments, both initial and subsequent ones, and to exploit the franchised business for as long as the contract persists. - The European Code of Ethics for Franchising & its national Extensions & Interpretations, Retrieved 05, August 2018, from http://www.eff-franchise.com/Data/Code%20of%20Ethics.pdf 8.

15 Art. 1289 para. 1, Civil Code of the Republic of Serbia - Working Document, Belgrade 29. May 2015, Retrieved 02, August 2018, from https://www.mpravde.gov.rs/files/NACRT.pdf

et. al., 2004:367). At the moment when the franchisor makes the decision not to extend the agreement, he is obliged to pay a reasonable compensation to the franchisee for the value of the franchise unit. The provisions of the Working Document Civil Code stipulate that in the event of termination of an agreement in this manner, the franchisee is entitled to compensation for increasing the value and the business image of the franchise system - the compensation for the increased *goodwill* - if the contributed to a significant volume of business of the franchisor and the business image of the franchise network throughout the term of the agreement.[16]

4. Unilateral Repudiation (cancellation) of the Agreement

The termination of an agreement through a cancellation occurs in all those cases when one contracting party repudiates the agreement for the violation of contractual provisions by the other contracting party that commits the violation of contractual provisions through an act or omission to act. In all these cases, where there is no consensual agreement repudiation, and the repudiation is requested by one of the contracting parties prior to the expiration of the contractual term[17] or where the agreement was concluded for an indefinite term, and the agreement ceases due to a cancellation of agreement as the result of the violation of rights and obligations thereof.

Cancellation of agreement can be: a) ordinary notice or b) extraordinary cancellation.

4.1. Ordinary notice

An ordinary notice is an instrument for terminating a permanent contractual relationship. The notice is a legally relevant declaration of will of one to the other contracting party granted on the basis of legal power (agreement or law) where the agreement concluded for an indefinite time period unilaterally terminates. On the basis of the provisions of the LCT, the debit relationship comes to an

16 Art. 1289 para. 2, Civil Code of the Republic of Serbia - Working Document, Belgrade 29. May 2015, Retrieved 02, August 2018, from https://www.mpravde.gov.rs/files/NACRT.pdf

17 „... should prior to the expiration of the time limit for performing the obligation it become obvious that one party is not going to meet his contractual obligation, the other party may repudiate the contract and claim damages." – Art. 128, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

end on the expiration of a cancellation time limit specified by contract; and if such a time limit is not specified by contract, the relationship comes to an end on the expiration of the time limit specified by statute or trade practice.[18] The notice may be given at any time, but not at a bad time;[19] given in a written form (in order to produce effect); and the notice term begins to run at the moment when the notice reaches the other contracting party. The contracting parties may stipulate in the agreement that their debit relationship ceases with the delivery of notice, unless something else is specified by statute for a specific case.[20] The creditor is entitled to request from the debtor what is due prior to the termination of liabilities on the ground of expiration of the time limit or the cancellation thereof.[21]

In regard to the termination of agreement, the LCT starts from the principle *pacta sunt servanda*.[22] On the basis of the postulated principle, it may be concluded that the LCT provides for a possibility of ordinary notice as a unilateral mechanism for terminating permanent debit relationships concluded for indefinite time period. With Art. 358 paragraph 1. of the LCT, that if the time period of the duration of debit relationship is not specified, each party may terminate it with a notice. On the basis of the aforementioned provision, which

18 Art. 358 para. 4, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

19 Art. 358 para. 3, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

20 Art. 358 para. 5, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

21 Art. 358 para. 6, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

22 Art. 17 para. 2, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

can be analogously applied to a franchising agreement, each contracting party is entitled - in the event that the agreement is concluded for an indefinite time period - to terminate the agreement with an ordinary notice at the moment they evaluate it as suitable.

However, one of the basic characteristics of a franchising agreement is that it is hardly ever concluded for an indefinite time period. The franchising agreement is most frequently concluded for a definite time period with a renewal possibility. With Article 357 of the LCT, a permanent debit relationship with a definite term limit ceases when the time limit expires, unless it is agreed or laid down by the law that following the expiry of the term, the debit relationship is extended for an indefinite time period unless cancelled in timely manner. It can be concluded on the basis of the aforementioned provision that the law does not provide for the *tacita reconductio* principle as a general solution for permanent debit relationships; thus, if the agreement does not provide for the extension mechanism, the question arises whether this institute provided for a licensing agreement, Article 709 paragraph 1 of the LCT, can be analogously applied thereof (Паривођић *et. al.,* 2004:289).

Besides the general provisions of the LCT which are applied to an ordinary cancellation, the application of the provisions which refer to commercial agency[23] and licensing agreement[24] is also possible. Yet, in addition to analogous application of the provisions on commercial agency and licensing agreements, a question also arises what if the agreement does not provide for a period of notice. According to the LCT provisions, a notice period for the termination of a contract of commercial agency must be communicated to the other party at least one month

23 "By a contract of commercial agency the agent shall assume the obligation to take permanent care that third persons enter into contracts with his principal, and to mediate in that respect between them and the principal, as well as to enter into contracts, after obtaining authorisation, with third persons on behalf and for the account of the principal, while the principal shall assume the obligation to pay to him, for each contract concluded, an agreed fee (brokerage)..." – Art. 790, LCT. „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

24 "By a licensing agreement a licensor shall assume the obligation to assign to a licensee, entirely or partially, the right of use (franchise) of an invention, technical know-how and experience, trade-mark, sample or model, while the licence shall assume the obligation to pay a specified fee in return" – Art. 686, LCT. „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

prior to the expiration of calendar quarter, and if the contract has lasted for three years, the other party must be given notice two months prior to the expiration of calendar year.[25] However, with licensing agreements if the notice period is not stipulated by agreement, it shall be six months, provided the licensor does not cancel the agreement during the first year of its validity.[26] Article 710 paragraph 2 of the LCT referring to a licensing agreement is in favour of the franchisee as it provides them with certain legal security, such as: a) the notice period is six months and b) the licensor/the franchisor cannot cancel the agreement during the first year of its validity. With the application of the mentioned provisions, the economic interests of the franchisee are protected, leaving him enough space to amortise the invested investment funds. Although the application of provisions on the notice period, which refers to licensing agreement provided for in (Article 710) of the LCT would be in favour of the franchisee, certain situations may occur when the shorter notice period is in favour of the franchisor, the provisions referred to in (Article 810) of the LCT related to cancellation of agreement on commercial agency should apply.

4.2. Extraordinary cancellation

Extraordinary cancellation as a mechanism of terminating continuous contractual relationships (permanent contract) occurs in all those situations when one contracting party fails to meet their obligation, where a serious violation of contractual obligations occurs.[27] Serious violation of contractual obligations happens by ruining mutual trust of contracting parties. When mutual trust is violated by certain improper behaviour by the other contracting party, it may represent a serious cause for terminating an agreement, a serious cause always has its grounds in the principles of thoroughness and honesty (Draškić, 1983:60).

25 Art. 810 para. 2, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

26 Art. 710 para. 2, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

27 A serious violation of contractual obligations means violations of those contractual obligations which represent the essence of a contractual relationship upon which it rests.

4.2.1. The application of general and special provisions of the Law on Contracts and Torts (LCT)

The application of general and special provisions of the LCT to the termination of a franchising agreement due to extraordinary cancellation is possible.[28] According to the provision of the LCT each party may repudiate the contract without a period of notice on the ground of serious causes, which must be stated.[29] On the basis of the mentioned provision, it is concluded that the repudiation occurs with immediate effect, there is no notice period, since the cause is so grave that the party stating the causes cannot expect the other party to continue the contractual relationship. With further application of the provisions of the LCT, it is stipulated that if the statement of repudiation of contract is made with no serious reasons, it shall be considered as a notice with the regular period of notice.[30] LCT stipulate the protection of one contracting party against any potential unconscientious behaviour of the other contracting party, foreseeing that an unfounded notice shall entitle the other party to repudiate the contract without notice.[31] In the event that one contracting party has repudiated the

28 „(1) Should in a contract with consecutive obligations one party fail to perform one obligation, the other party may, in a reasonable time limit, repudiate the contract regarding all future obligations, should existing circumstances obviously indicate that they, too, are not going to be performed.

(2) That party may repudiate the contract not only regarding future obligations, but also regarding obligations already performed should their performance alone be of no interest to him.

(3) The defaulter may preserve the contract after supplying an adequate guarantee. " – Art. 129, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

29 Art. 811 para. 1, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

30 Art. 811 para. 2, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

31 Art. 811 para. 4, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*",

agreement, without the existence of serious causes, they are obliged to compensate damages to the other contracting party. However, if the contract is repudiated on reasonable grounds, due to serious causes, they are entitled to damages by the other contracting party.[32] In regard to damages, this refers to the compensation of positive contractual interest of the injured party (simple loss – *damnum emergens* and profit lost – *lucrum cessans*).[33] A creditor shall be entitled to compensation for *damnum emergens*[34] and *lucrum cessans,*[35] which at the time of entering into contract should have been foreseen by the debtor as a possible consequence of breach of the contract, having regard to facts known to

1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

32 „An agent whose activity is interrupted due to an unfounded notice shall be entitled to compensation to cover his lost commission, and should he cancel the contract without grounds, the right to redress shall belong to the principal" – Art. 811 para. 3, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

33 „ Injury or loss shall be a diminution of someone's property (simple loss) and preventing its increase (profit lost) ..." – Art. 155, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

34 „The amount of damages shall be determined according to prices at the time of the rendering court's decision, unless something else be ordered by law" – Art. 189 LCT.; See „... while also taking into account the circumstances after the occurrence of damage, the court shall determine damages in the amount necessary to restore the material state of the person sustaining damage into the state it would have been without the damaging act or omission" – Art. 190, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

35 „In assessing the amount of the profit lost the profit which was reasonably expected according to the regular course of events or particular circumstances, and whose realization has been prevented by an act or omission of the tortfeasor shall be taken into account" – Art. 189 para. 3, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

him at the time or which should have been known to him.[36] In the event of fraud or intentional default due to gross negligence, the creditor is entitled to request from the debtor the reimbursement of entire damage caused by the contract violation, irrespective of the debtor's ignorance of those special circumstances by reason of which they have occurred.[37]

A question arises what happens if: a) a serious cause is not specified by the agreement, and it is in the interest of the franchisee; or b) what if a situation that is not a serious cause is foreseen by the agreement but the franchisor stated it in the agreement. In the first case, if a serious cause is not foreseen by the agreement, and it is in the interest of the franchisee, he may refer to the existence of a serious cause for the repudiation of agreement.[38] In the second case, the franchisor considering his economic dominance, may also foresee in the agreement the causes that do not represent serious causes for the repudiation of agreement but are in his interest. In such circumstances, in compliance with Article 143,[39] the court may reject the application of such provisions of the agreement. It is possible to stipulate an expansion of the circle of serious reasons by contractual provisions, whereby this expansion is acceptable if it does not

36 Art. 266 para. 1, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

37 Art. 266 para. 2, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

38 „... each party may repudiate the contract without a period of notice on the ground of serious causes, which must be stated. " – Art. 811 para. 1, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

39 „The court may deny application of specific provisions of the general terms and conditions precluding the other party to raise demurrers, or of those on the ground of which such party is left without contractual rights or loses time limits, or those which are otherwise unjust or excessively strict towards such party" – Art. 143 para. 2, LCT., „*Official Gazette of the SFR of Yugoslavia*", 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, „*Official Gazette of the FR of Yugoslavia*", 31/93, 22/99, 23/99, 35/99, 44/99 and „*Official Gazette of Serbia and Montenegro*", 1/2003 – Constitutional Charter, Retrieved 19 November 2018 from https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf

represent an excuse for leaving the relationships for the sake of another reason (Париводић, 2004:294).

The question arises what will happen if there are constancy and continuity of minor violations of the contractual obligations by the franchisee. Minor violations of contractual obligations in a continuous and constant manner, result in franchisor right to extraordinary cancellation, because they are not eliminated within the contractually stipulated time limit. Such minor violations of contractual obligations by the franchisee and their non-elimination represent a negligent attitude and disrespect of the other contracting party.

4.3. Serious reasons for cancellation of contract

Extraordinary cancellation franchising agreement is only possible in the event of occurrence of serious reasons (*good causes*) (Миљковић, 2014:365). *Good causes* are those reasons whose occurrence seriously violates the essential provisions of the agreement. The franchisor is obliged to stipulate in the draft agreement which violations of contractual provisions are considered serious reasons for extraordinary notice. If such reasons are stipulated in the draft agreement delivered to them (and later they have also accessed to the agreement) the franchisee has no possibility to refer to being misled thereof, and that if they were aware of the given requirements, would not access the agreement either (Миљковић, 2014:366).

4.3.1. Classified serious reasons

Serious reasons may be classified into two groups, as follows: a) the reasons that exist in the pre-phase of an independent commencement of business operations of the franchisee, and b) the reasons that exist in the phase of independent business operations of the franchisee.

Pre-phase of an independent commencement of business – The reasons that exist may refer to: a) training of the franchisee and b) franchise fee – initial fee. In the training phase, the franchisor is obliged to provide adequate training to the franchisee so that they can independently operate in agreement with the relinquished business method and business principles of the franchise network. The franchisor, in compliance with their own business experience, conducts the assessment of the business skills in the training phase, and on the basis thereof they assess whether the franchisee is capable to provide the expected contribution to the franchise network. If franchisee is assessed in the training phase as not capable to operate in expected manner in the future, the franchisor exercises the right to extraordinary cancellation of agreement.

Having accessed the franchise network, the franchisee is obliged to pay the initial fee and initial insurance premium. The initial fee and the initial insurance premium are the determined as conditional fees. The fees are to be paid by the franchisee in order to commence their independent business operations. Failure to pay the mentioned fees in the accessing phase, entitles the franchisor to exercise extraordinary cancellation of agreement due to the occurrence of serious reasons.

Independent business operations – The franchisee is obliged to adhere to contractual provisions and to carry out the undertaken commitments thereof, operating in line with the relinquished business method. Significant violation of contractual provisions may occur when[40] the relinquished licensed rights are abused. The abuse or inadequate use of license rights may refer to: 1) copyrights, 2) industrial property rights; 3) trademark; 4) license; 5) *know-how,* and all the other rights that make the franchise operations specific. The abuse of contractual provisions that constitute the essence of franchise operations represent a serious reason for extraordinary notice of cancellation. The violation of agreement refer to: 1) sales of goods or rendering services beyond the contractual area; 2) sales of non-exclusive goods; [41] 3) disclosure of a business secret; 4) failure to pay continuous franchise fee; 5) failure to pay fee for advertising, etc.

The reasons that do not directly refer to the violation of relevant contractual provisions, may also occur as serious reasons for extraordinary cancellation. The reasons that are not related to the agreement and represent serious reasons are: 1) bankruptcy of the franchisee; 2) illiquidity; 3) criminal verdict against the franchisee and the loss of the right to use a business unit (Tomić, 1986:97, Draškić, 1983:60-66).

Although there are serious reasons in favour of the franchisor, it should be pointed out that there are also serious reasons in favour of the franchisee. The franchisee may only use the right to extraordinary cancellation if the franchisor causes the occurrence of relevant violations of contractual provisions (inadequate training, failure to transfer *know how*, failure to transfer license rights, failure to transfer business secret, etc.) or due to their insolvency and bankruptcy. The franchisee rights to extraordinary repudiation of agreement are significantly narrower in relation to the franchisor's rights. Irrespective of the fact that the rights to unilateral repudiation are narrower, they are significant for the franchisee because they get an impression of legal security.

40 No intention is needed to exercise any right inadequately, the mere fact that it is inadequately exercised is sufficient.

41 Goods purchased from another supplier, and not from the franchisor or the entity, i.e. the supplier determined by the franchisor.

4.3.2. Whether serious reasons imply automatic cancellation of the contract

A question arises whether the occurrence of contractually stipulated serious reasons automatically generates the cancellation of agreement or not. Serious reasons are classified as curable or incurable (Mendelsohn, 2004:371). All serious reasons can be classified into two groups: a) those leading to an automatic cancellation of agreement; and b) those leading to cancellation of agreement following the expiration of additional time limit.

The reasons leading automatically to the cancellation of agreement are: 1) abuse of copyrights and industrial property rights; 2) disclosure of business secret; and 3) disclosure of *know how*.

The other reasons – although falling into the category of serious reasons - do not lead automatically to the cancellation of agreement, but only after the expiration of the additional time limit. The franchisor leaves additional adequate time limit to the franchisee during which they should eliminate the consequences of the results occurred, which represent the basis for an extraordinary cancellation of agreement. *For example*: if franchisee is late with the payment or does not pay entirely the continuous franchising fee within the specified period due to certain objective or subjective circumstances, and the franchisor leaves an additional time limit within which the franchisee is obliged to pay franchise fee entirely. The franchisor will not cancel the franchise agreement until the moment the sum of non-paid continuous fees reaches the critical level which burdens the franchisor's business operations. *For example*: when the franchisor conducts a control of business operations and quality, and observes certain deficiencies, they leave an additional time limit to the franchisee within which they are obliged to eliminate the observed inconsistencies – deficiencies in business operations in accordance with the instructions. Although above mentioned are classified as serious reasons, they hardly ever lead to an automatic cancellation of agreement, only if the franchisee does not eliminate or does not performs the undertaken commitments within the additional time limit.

5. Conclusion

Issues that imply the termination of the agreement, require the need for additional more precise forecasting inside the franchise agreement. It is always necessary to start from the point of view that the contracting parties know what is the best for them. The tendency for the agreement to regulate more effectively the issue of termination of the contract is of importance because of the dominance of the franchisor. The franchisor, using the franchisee's lack of knowledge on franchising, often abuses his dominant position. One should always be guided by the principle of pacta *sunt servanda*. The dominant position of the franchisor,

the lack of the developed business and court practice in R. Serbia questions the merits of the principle of pacta *sunt servanda*.

The franchisee as an inferior contracting party, often due to ignorance, oversees the Institute: a) the minimum fixed term of the agreement and b) *good cause*. By contractually forecasting the minimum fixed term of the agreement, the franchisee is on one hand guaranteed on one hand to depreciate the invested investment funds and start to gain profit, while on the other hand it is guaranteed that the franchisor will not be able to unilaterally terminate the agreement. Failure to anticipate a minimum fixed term of the agreement franchisee does not guarantee the franchisee to exercise the above rights. In addition, the contractual failure to anticipate the minimum fixed term, in the event of termination, leaves the franchisee to an uncertain and often unfair decision of the court. This is particularly, the case in countries with underdeveloped jurisprudence in the field of franchising business such as R. Serbia. It is in the interests of the contracting parties to foresee the serious causes (*good cause*) of the cancellation of the agreement. Good cause prevents fraudulent actions on both the franchisor and franchisees. The contractual prediction of good cause the basis of the cancellation of the agreement is specified.

Until the moment of enactment and entry into force of the Civil Code of the Republic of Serbia, in view of the termination of the franchising agreement, it is necessary to apply the general legal provisions contained in the Law on Contracts and Torts. Also, in addition to the application of general legal regulations, when termination of the franchising agreement, it is advisable to apply legal provisions relating to the termination of the agreement on commercial representation and the license agreements contained in the Law on Contracts and Torts. Only by applying the above rules, in the current circumstances, with the existence of a legal vacuum, all doubts about the regular termination and cancellation of the franchise agreement will be removed.

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ПРЕСТАНАК УГОВОРА О ФРАНШИЗИНГУ У СВЕТЛУ ПОЗИТИВНОГ ЗАКОНОДАВСТВА РЕПУБЛИКЕ СРБИЈЕ

Апстракт

Потреба капитала за освајањем нових тржишта кроз минимална инвестициона може се постићи путем франшизинга као специфичног инвестиционог метода уговорног пословања. Коришћење метода успешног пословања, смањени инвестициони ризици и аутономија у пословању су један од кључних разлога за приступање франшизинг мрежи од стране потенцијалног примаоца франшизе. У складу са одсуством законске регулативе у Републици Србији, на уговор о франшизингу примењују се одредбе Закона о облигационим односима. Одредбе Закона о облигационим односима којима се регулише престанак уговора о трговинском заступништву и уговора о лиценци могу аналогно применити на престанак уговора о франшизингу.

Кључне речи*: уговор о франшизингу, франшиза, престанак уговора, редован престанак, отказ, Закон о облигационим односима.*

ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879331T

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UDK: 341.24:502.1(497.11)
Рад примљен: 16.10.2018.
Рад прихваћен: 23.11.2018.

*СТАТУС РЕПУБЛИКЕ СРБИЈЕ У САВРЕМЕНИМ МЕЂУНАРОДНИМ УГОВОРИМА У ОБЛАСТИ ЖИВОТНЕ СРЕДИНЕ И УСТАВИ (1974–2006)***

Апстракт: *У уводном делу рада се указује на пораст значаја међународних уговора у области животне средине, као и на њихов значај за Републику Србију (РС). У централном делу рада се сагледава статус РС у међународним уговорима у области животне средине. Одвојено се даје приказ чланства у међународним уговорима пре и после 2006. године (доношење новог устава и стицање самосталности). Анализирају се и уставне и законске одредбе од значаја за регулисање питања закључивања и извршавања међународних уговора у периоду од 1974. године до данас. Указује се и на уставне одредбе од значаја за животну средину. За основу анализе су узети кључни међународни уговори глобалног карактера (пре свега они чији је депозитар генерални секретар УН), затим регионални међународни уговори закључени у оквиру Економске комисије УН за Европу (УНЕЦЕ), као и субрегионални међународни уговори од значаја за РС. Даје се и преглед међународних уговора у области животне средине у којима РС тренутно није чланица. У закључку се констатује да је РС постала чланица дела међународних уговора у области животне средине по основу сукцесије, иако је интензивирање активности на плану потврђивања кључних међународних уговора уследило у периоду након 2006. године. Ово се може везивати и за околности нормализације*

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** Рад је реализован у оквиру научног пројекта: „Србија у савременим међународним односима: Стратешки правци развоја и учвршћивања положаја Србије у међународним интегративним процесима – спољнополитички, међународни економски, правни и безбедносни аспекти" (број 179029), који финансира Министарство просвете и науке Владе Републике Србије, за период 2011–2017. године.

међународног положаја РС (након међународне изолације у последњој деценији XX века), као и за почетак процеса ЕУ интеграција РС.

***Кључне речи*:** *међународни уговори, животна средина, потврђивање међународних уговора, глобални међународни уговори, регионални међународни уговори, Република Србија, СФР Југославија, СР Југославија, сукцесија, ЕУ интеграције.*

1. Пораст значаја и броја међународних уговора у области животне средине и устави

Интензивирање активности у области животне средине од седамдесетих година XX века коинцидирало је са порастом броја међународних уговора нарочито током последње две деценије XX века.[1] Посебан подстицај активностима у области животне средине уследио је на таласу активности које су претходиле одржавању Стокхолмске конференције (1972), односно, двадесет година касније, и Рио конференције о животној средини и одрживом развоју (1992).[2] Интензивне активности, посебно у оквиру институција из система УН, настављене су и касније (Тодић, 2018а: 117). У теоријско-методолошким расправама посвећеним савременим активностима у области животне средине и покушајима међународно-правног регулисања појединих питања постоје различити приступи. Изгледа да би се могло тврдити да је тзв. интегрални приступ са елементима теорије одрживог развоја попримио карактеристике и значај општег оквира (Nilssona, Perssona, 2017). На тај начин се и стање у овој области често тумачи у сенци различитих дилема чија је основа економског карактера (Мојашевић, 2009). Питање неједнакости у међународним односима и повезивање овог питања са расправама о обезбеђивању праведног приступа ресурсима у литератури се повезују са ширим расправама о безбедносним изазовима. То је утицало и на појачано настојање држава да поједина питања уреде међународним уговорима. Управљање заједничким (границом подељеним) природним ресурсима, какви су,

1 За графички приказ видети: https://www.eea.europa.eu/data-and-maps/figures/environmental-agreements-since-1900 (11. 8. 2018). Од краја XIX века до почетка седамдесетих година XX века регулисање појединих проблема у области животне средине еволуирало је од „ресурсно оријентисане логиге" до приступа који подразумева вредновање заштите животне средне у ширем смислу, осим непосредно економске користи (Duppuy, Vinuales, 2016: 3).

2 Наравно, питање резултата који су остварени и ефикасности целог система чију основу чини актуелна архитектура међународних уговора, у литератури се често и на различите начине доводи у питање (Jabbour, Keita-Ouane, Hunsberger, Sa´nchez-Rodrıguez, Gilruth, Patel, Singh, Levy, Schwarzer, 2012).

нпр. водни ресурси, постало је посебно значајан предмет регулисања (Тодић, Златић, 2018). У делу литературе која је посвећена међународним уговорима у области животне средине расправљају се и друга питања као што су питање различитих чинилаца који утичу на опредељење држава да постану чланице неког међународног уговора, питање начина регулисања односа између међународног и унутрашњег права, питање динамике преузимања међународно-правних обавеза, правне технике и начина изражавања пристанка на обвезивање међународним уговорима (Baccini and Johannes, 2014; Cairncross, 2004; Frank, 1999; Orsini, 2016; Recchia, 2002; Roberts, 1996; Wagner, 2001), итд. Данас се са пуно основа говори о „систему" међународних уговора који, у зависности од примењене методологије и критеријума, чини значајан број међународних уговора различитог карактера и предмета уређивања.[3] Међународни уговори су постали једна од најзначајнијих форми манифестовања циљева међународне заједнице и држава појединачно у области животне средине.

Релевантност уставних одредби за статус у међународним уговорима у области животне средине у литератури се, углавном, не обрађује на експлицитан начин већ би ово питање требало посматрати у контексту начина како се устави одређују према међународном праву и међународним уговорима у целини. Међутим, у детаљнијој расправи о уставним нормама требало би имати у виду и одредбе које се односе на животну средину[4] и савремене тенденције у овој области.[5] Право на (здраву) животну средину постаје предмет уставног регулисања у већини савремених уставних текстова у свету (Gellers, 2012), а концепт људских права се обично разуме као оквир који се директно преплиће са стањем животне средине, решавањем проблема у овој области (Soveroski, 2007) и међународним уговорима у области животне средине (Shelton, 2002).

3 УНЕП-ов регистар садржи податке о 272 међународна уговора и амандмана на уговоре који су закључени у периоду од 1921. године до 2005. године (UNEP, 2005). Међутим, у неким базама података о међународним уговорима у области животне средине обухваћено је неколико хиљада међународних уговора.

4 У раду ће бити указано само на оне уставне одредбе које се директно односе на животну средину. Иако би сагледавање и других релевантних одредаба појединих уставних докумената (од посредног значаја за права у вези за животном средином) (Лилић, 2017: 216) допринело целовитијем разумевању основног питања које са анализира, због ограничености простора ове норме остају ван оквира анализе.

5 Jeffords и Minkler наглашавају значај уставних права у области животне средине са становишта резултата политике у области животне средине (Jeffords and Minkler, 2016), а Daly и May говоре о „глобалном конституционализму" у области животне средине (Daly and May, 2015).

У раду се даје приказ чланства РС у релевантним међународним уговорима и основних карактеристика уставног (и законског) амбијента од значаја за закључивање и извршавање међународних уговора.[6] У анализи је обухваћен период од чланства СФР Југославије (СФРЈ) у међународним уговорима до данас. Значај овог временског периода би требало сагледавати у контексту промена које су се догађале у организацији државе и уставним и законским променама од значаја за однос према међународним уговорима, промена у међународном положају РС (и државних заједница у чијем саставу је била), као и промена у савременој међународној политици и праву животне средине.[7] За основу анализе се узимају међународни уговори у области животне средине који су као такви категорисани од стране надлежних међународних организација, а пре свега УН.[8] Највећи број међународних мултилатералних уговора глобалног карактера у области животне средине закључен је уз активно учешће или различиту подршку институција из система УН. Одвојено се разматра чланство РС у међународним уговорима глобалног карактера (који су универзалног чланства или отворени за универзално чланство), и регионалним међународним уговорима закљученим у оквиру Економске комисије УН за Европу (УНЕЦЕ)[9] као и другим регионалним и субрегионалним уговорима од непосредног значаја за РС.

6 Поред тога, за закључивање и извршавање међународних уговора релевантно је више прописа у области државне управе (Тодић, 2018б), али о њима због ограниченог простора, овде неће бити говора. Такође, и развој и тренутно стање прописа у области животне средине (Тодић, 2017) може бити од значаја за поједина питања која регулишу међународни уговори. Однос унутрашњег и међународног права заслужује посебну анализу.

7 У детаљнијој расправи би имало смисла посебно размотрити промене у политици и праву животне средине у Европској унији (ЕУ), с обзиром на улогу и значај који ЕУ има у савременој политици и праву животне средине и процес ЕУ интеграција РС.

8 Мисли се на поглавље XXVII овог регистра. Ипак, за РС неки међународни уговори са овог списка, због свог регионалног карактера (који се не односи на европски регион), нису релевантни. Овде се не улази у посебну расправу о методолошким дилемама које су повезане са различитим приступима у дефинисању појма „међународни уговори у области животне средине". Оно је, на различите начине, повезано са питањем критеријума за дефинисање појмова животна средина, надлежности појединих органа и тела међународног и националног карактера, итд. Због тога би у широј анализи, свакако, требало узети у обзир и део међународних уговора који нису везани за поглавље XXVII из регистра УН (https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en, 7. август 2018), као што су поглавље XXI – право мора, поглавље IV – људска права, итд.

9 https://www.unece.org/env/treaties/welcome.html, 11. август 2018.

2. Чланство у међународним уговорима пре 2006. године

У првом временском периоду који се анализира (од устава из 1974. године до доношења сада важећег устава РС 2006. године), однос према међународним уговорима условљен је, између осталог, и чињеницом да је РС била чланица федерације, односно да је заједно са другим републикама (данас самосталним државама) чинила државу (или државну заједницу) у смислу међународног права. Имајући то у виду, чланство РС у међународним уговорима пре 2006. године има смисла разматрати кроз два одвојена периода. Пораст значаја међународних уговора у области животне средине и јача идентификација проблема у области животне средине као предмета интересовања у међународној заједници који су уследили од седамдесетих година XX века на известан начин коинцидирају са уставним променама. Устави СФРЈ и Социјалистичке Републике Србије (СРС) из 1974. године овде се узимају као почетак прве фазе која траје до доношења Устава РС из 1990. године. Период до доношења сада важећег устава (2006) узима се као други временски период ове фазе. Овоме би требало додати и чињеницу да се у овакву периодизацију не уклапа чињеница да је дуги временски период у примени био Закон о закључивању и извршавању међународних уговора из 1978. године[10] (Тодић, 1997), као и да је сада важећи Закон о закључивању и извршавању међународних уговора донет тек 2013. године.[11]

2.1. Нормативни оквир

2.1.1. У првом периоду прве фазе (од седамдесетих година XX века до Устава РС из 1990. године) уставни оквир односа према међународним уговорима прописан је одредбама Устава СФРЈ[12] и Устава СРС.[13] Устав СФРЈ (1974) је прописивао да „Федерација преко савезних органа", између осталог, „ратификује и обезбеђује извршавање међународних уговора, обезбеђује извршавање међународних обавеза Социјалистичке Федеративне Републике Југославије ..."[14] Осим тога, ратификација међународних

10 Закон о закључивању и извршавању међународних уговора, *Сл. лист СФРЈ*, 55/78, 47/89-УСЈ

11 Закон о закључивању и извршавању међународних уговора, *Сл. гласник РС*, 32/13. Овде изгледа да би се могло рећи да питање постојања закона који регулише питања закључивања и извршавања међународних уговора нема значаја за питање статуса у међународним уговорима у области животне средине, иако би ово питање могло да буде посебно размотрено.

12 Устав СФРЈ, *Сл. лист СФРЈ*, 9/74

13 Устав СРС, *Сл. гласник СРС*, 8/74

14 Чл. 281 Устава СФРЈ. (Видети и Чл. 283, 285, 286, 288, 290).

уговора била је и у надлежности Савезног изврШног већа.[15] Уређивање, заштита и унапређивање „човекове средине" који су од интереса за целу земљу и међународну заједницу било је прописано као „право и дужност федерације".[16]

Уставом Социјалистичке Републике Србије (СРС) било је предвиђено да Скупштина СРС „разматра питања из области спољне политике и међународних односа и даје сагласност на закључивање међународних уговора у случајевима предвиђеним Уставом СФРЈ."[17] (аут. под). Као и Устав СФРЈ, Устав СРС је садржавао и одредбу о „заштити и унапређењу човекове средине".[18] Човек има право на здраву „животну средину," а друштвена заједница обезбеђује услове за остваривање овог права.[19] Свако ко искоришћава земљиште, воду или друга природна добра дужан је да то чини на начин којим се обезбеђују услови за рад и живот човека у здравој средини.[20] Заштита и унапређивање човекове средине у надлежности је Републике,[21] месне заједнице,[22] општине.[23]

2.1.2. У другом периоду прве фазе (од 1990. до 2006. године) питање односа према међународним уговорима било је регулисано одредбама два уставна текста држава у чијем саставу је била РС (Уставу СРЈ[24] и Уставне повеље Државне заједнице СЦГ),[25] као и одредбама Устав РС из 1990. године.[26] Код анализе околности које су постојале у овом периоду, поред нормативног оквира, требало би имати у виду и санкције међународне заједнице које су биле заведене против СРЈ и које су трајале скоро целу последњу деценију прошлог века. То је значило и скоро потпуни прекид међународне сарадње у области животне средине.

15 Чл. 347, тач. 8 Устава СФРЈ. Ради се о оним међународним уговорима „чије ратификовање не спада у надлежност Скупштине СФРЈ."

16 Чл. 281, став 1, тач. 10 Устава СФРЈ.

17 Чл. 317, ст. 1, тач. 4 Устава СРС.

18 Чл. 89 Устава СРС.

19 Чл. 215 Устава СРС. Устав овде користи израз „животна средина", а не „човекова средина."

20 Чл. 216, ст. 1 Устава СРС.

21 Чл. 299, ст. 1, тач. 3 Устава СРС.

22 Чл. 130, ст. 2 Устава СРС.

23 Чл. 273, ст. 2, тач. 6 Устава СРС.

24 Устав СРЈ. *Сл. лист СРЈ,* 1/92.

25 Уставна повеља Државне заједнице СЦГ, *Сл. лист СЦГ*, 1/03

26 Устав РС, *Сл. гласник РС*, 1/90

а) Устав СРЈ (1992) је предвиђао да Савезна скупштина, између осталог, „потврђује међународне уговоре из надлежности Савезне Републике Југославије".[27] Питање места које међународни уговори имају у правном систему регулисано је чланом 16 Устава тако што је предвиђено да су „међународни уговори који су потврђени и објављени у складу са уставом и општеприхваћена правила међународног права саставни део унутрашњег правног поретка." У погледу „животне средине" Устав прописије право човека на „здраву животну средину и благовремено обавештавање о њеном стању."[28] Разграничење надлежности учињено је тако што је прописано да су у надлежности СРЈ, између осталог, и „основе заштите животне средине ... од интереса за целу земљу."[29]

б) Уставна повеља Државне заједнице СЦГ (2003) је прописивала да Скупштина Србије и Црне Горе доноси законе и друге акте о, између осталог, „ратификовању међународних уговора и споразума Србије и Црне Горе."[30] Истовремено, Уставна повеља је прописивала примат ратификованих међународних уговора и општеприхваћених правила међународног права „над правом Србије и Црне Горе и правом држава чланица."[31] Документ није садржавао посебне одредбе о „животној средини".

в) Према одредбама Устава РС (1990) Народна скупштина „ратификује међународне уговоре."[32] Истовремено, члан 135 Устава РС је прописивао да ће се „права и дужности које Република Србија, која је у саставу Социјалистичке Федеративне Републике Југославије, има по овом уставу, а који се према савезном уставу остварују у федерацији," остваривати „у складу са савезним уставом." Међутим, „кад се актима органа федерације или актима органа друге републике, противно правима и дужностима које она има по Уставу Социјалистичке Федеративне Републике Југославије, нарушава равноправност Републике Србије или се на други начин угрожавају њени интереси, а при томе није обезбеђена компензација, републички органи доносе акте ради заштите интереса Републике Србије." Устав гарантује право човека на „здраву животну средину", уз дужност

27 Чл. 78, тач. 4 Устава СРЈ.

28 Чл. 52 Устава СРЈ.

29 Чл. 77, ст. 1, тач. 4 Устава СРЈ.

30 Чл. 19 Уставне повеље СЦГ.

31 Чл. 16 Уставне повеље СЦГ.

32 Чл. 73, тач. Г Устава РС.

„сваког" да „штити и унапређује животну средину."[33] Прописује се и надлежност Републике (за „систем заштите и унапређивања животне средине"),[34] аутономне покрајине[35] и општине.[36]

2.2. Међународни уговори у којима је РС регулисала питање чланства пре 2006. године

Статус РС у међународним уговорима у периоду до 2006. године представља статус држава у чијем саставу је РС била у периоду пре распада бивше СФРЈ, односно у оквиру СР Југославије и Државне заједнице СЦГ.

2.2.1. Глобални међународни уговори

Статус у неколико међународних уговора глобалног карактера регулисан је путем сукцесије. У том смислу, у делу међународних уговора који се односе на климатске промене и заштиту озонског омотача РС је чланица Бечке конвенције о заштити озонског омотача,[37] Монтреалског протокола о супстанцама које оштећују озонски омотач и Амандмана на Монтреалски протокол о супстанцама које оштећују озонски омотач.[38] Србија је члан и Оквирне конвенције УН о промени климе.[39] У области биодиверзитета РС је чланица Конвенције о биолошкој разноврсности[40] и Картагена протокола о биолошкој заштити уз Конвенцију о биолошкој разноврсности, са

33 Чл. 31 Устава РС.

34 Чл. 72, тач. Г Устава РС.

35 Чл. 109, тач. Б Устава РС.

36 Чл. 113, тач. Е Устава РС.

37 Закон о ратификацији Бечке конвенције о заштити озонског омотача, са прилозима I и II, *Сл. лист СФРЈ – Међународни уговори*, 1/90

38 Закон о ратификацији Монтреалског протокола о супстанцама које оштећују озонски омотач, *Сл. лист СФРЈ - Међународни уговори*, 16/90, *Сл. лист СЦГ – Међународни уговори*, 24/04 – др. закон

39 Закон о потврђивању Оквирне конвенције Уједињених нација о промени климе, са анексима, *Сл. лист СРЈ – Међународни уговори*, 2/97

40 Закон о потврђивању Конвенције о биолошкој разноврсности, *Сл. лист СРЈ – Међународни уговори*, 1/01

анексима.[41] Такође, РС је чланица и Конвенције о међународном промету угрожених врста дивље фауне и флоре.[42] Што се тиче међународних уговора који се односе на управљање отпадом, РС је чланица Базелске Конвенције о контроли прекограничног кретања опасног отпада и о његовом одлагању.[43]

2.2.2. Регионални међународни уговори (УНЕЦЕ)

Међународни уговори у области животне средине закључени у оквиру активности УНЕЦЕ представљају најзначајнији део групације регионалних уговора. По основу сукцесије РС је чланица Конвенције о прекограничном загађивању ваздуха на великим удаљеностима[44] и првог протокола – Протокол о дугорочном финансирању Програма сарадње за праћење и процену прекограничног преноса загађујућих материја у ваздуху на велике даљине у Европи (ЕМЕП).[45]

2.2.3. Остали регионални, субрегионални и билатерални међународни уговори

Када се ради о регионалним/субрегионалним међународним уговорима, РС је чланица и неколико других међународних уговора. У неким од њих чланство је имала СФРЈ. То су: Конвенција о заштити Средоземног мора од загађивања,[46] са неколико протокола ратификованих или заједно са

41 Закон о ратификацији Картагена протокола о биолошкој заштити уз Конвенцију о биолошкој разноврсности, *Сл. лист СЦГ – Међународни уговори*, 16/05

42 Закон о потврђивању Конвенције о међународном промету угрожених врста дивље фауне и флоре, *Сл. лист СРЈ – Међународни уговори*, 11/01

43 Закон о потврђивању Базелске конвенције о контроли прекограничног кретања опасних отпада и њиховом одлагању, *Сл. лист СРЈ – Међународни уговори*, 2/99

44 Закон о ратификацији Конвенције о прекограничном загађивању ваздуха на великим удаљеностима, *Сл. лист СФРЈ – Међународни уговори*, 11/86

45 Закон о ратификацији Протокола уз Конвенцију о прекограничном загађивању ваздуха на велике даљине из 1979. године, о дугорочном финансирању Програма сарадње за праћење и процену прекограничног преноса загађујућих материја у ваздуху на велике даљине у Европи (ЕМЕР), *Сл. лист СФРЈ – Међународни уговори*, 2/87

46 Закон о ратификацији Конвенције о заштити Средоземног мора од загађивања, Протокола о спречавању загађивања Средоземног мора услед потапања отпадних и других материја са бродова и ваздухоплова и Протокола о сарадњи у борби против

Конвенцијом или касније,[47] као и Споразума о заштити вода реке Тисе и њених притока од загађивања.[48] Један број њих је потврђен у каснијем периоду (Конвенција о сарадњи за заштиту и одрживо коришћење реке Дунав,[49] Оквирни споразум за слив реке Саве и Протокол о режиму пловидбе.[50] У делу који се односи на билатералне споразуме СР Југославија је 1996. године потврдила Споразум са Руском Федерацијом о сарадњи у области заштите и унапређења животне средине.[51]

3. Чланство у међународним уговорима након 2006. године

3.1. Нормативни оквир

Питање односа према међународним уговорима регулисано је одредбама Устава РС (2006)[52] тако што је прописано да су „општеприхваћена правила међународног права и потврђени међународни уговори саставни део правног поретка Републике Србије и непосредно се примењују," као и да „потврђени међународни уговори морају бити у складу с Уставом."[53] Устав

загађивања Средоземног мора нафтом и другим штетним материјама у случају удеса, *Сл. лист СФРЈ – Међународни уговори*, 12/77

47 Закон о ратификацији Протокола о посебно заштићеним подручјима Средоземног мора, *Сл. лист СФРЈ – Међународни уговори*, 9/85; Закон о ратификацији Протокола о заштити Средоземног мора од загађивања и изворима са копна са анексима I, II и III, *Сл. лист СФРЈ – Међународни уговори*, 1/90

48 Закон о ратификацији Споразума о заштити вода реке Тисе и њених притока од загађивања, *Сл. лист СФРЈ – Међународни уговори*, 1/90

49 Закон о потврђивању Конвенције о сарадњи за заштиту и одрживо коришћење реке Дунав, *Сл. лист СРЈ – Међународни уговори*, 2/03

50 Закон о ратификацији Оквирног споразума о сливу реке Саве, Протокола о режиму пловидбе уз Оквирни споразум о сливу реке Саве и Споразума о изменама Оквирног споразум о сливу реке Саве и Протокола о режиму пловидбе уз Оквирни споразум о сливу реке Саве, *Сл. лист СЦГ – Међународни уговори*, 12/04 Овоме треба додати и неколико касније закључених протокола: Закон о потврђивању Протокола о заштити од поплава уз Оквирни споразум о сливу реке Саве, *Сл. гласник РС - Међународни уговори*, 16/14; Закон о потврђивању Протокола о управљању наносом уз Оквирни споразум о сливу реке Саве. *Сл. гласник РС – Међународни уговори*, 20/15; Закон о потврђивању Протокола о спречавању загађења вода проузрокованог пловидбом уз Оквирни споразум о сливу реке Саве, *Сл. гласник РС – Међународни уговори*, 19/15

51 Закон о потврђивању Споразума са Руском Федерацијом о сарадњи у области заштите и унапређења животне средине, *Сл. лист СРЈ - Међународни уговори*, 6/96

52 Устав РС, *Сл. гласник РС*, 98/2006

53 Чл. 16, ст. 2 Видети и Чл. 194, ст. 4 и 5 Устава РС. За шире о могућим слабостима процеса потврђивања међународних уговора видети: Тодић, 2013. Такође, предвиђена је и могућност ограничавања „слободе предузетништва", ако је то потребно, између осталог,

прописије и право свакога на здраву животну средину и на благовремено и потпуно обавештавање о њеном стању,[54] а Република Србија и аутономне покрајине су одговорни за заштиту животне средине. Истовремено, „свако је дужан да побољшава животну средину.“[55] Нормативни оквир који чини неку врсту околности од значаја за чланство у међународним уговорима у овом периоду чине и Споразум о стабилизацији и придруживању.[56] За овај период је карактеристична и интензивна активност на плану реформе система норми у области животне средине са првом групом прописа који су, с циљем усаглашавања са прописима ЕУ, усвојени 2004. године.

3.2. Међународни уговори у којима је РС постала чланица након 2006. године

3.2.1. Глобални међународни уговори

Неки међународни уговори глобалног карактера су дуго чекали на потврђивање од стране РС. Такав је случај са Конвенцијом о очувању миграторних врста дивљих животиња, Бон, 1979,[57] а на известан начин и Споразумом о очувању афричко-евроазијских миграторних птица водених станишта са Анексом 1 и Анексом 1а (1996),[58] Споразумом о очувању популација слепих мишева у Европи (1991),[59] као и са Кјото протоколом уз Оквирну Конвенцију УН о промени климе (1997).[60] У овом периоду су потврђени и Ротердамска Конвенција о поступку давања сагласности на основу претходног обавештења за одређене опасне хемикалије и

и ради заштите животне средине. Законом се могу ограничити и облици коришћења земљишта и располагања њиме.

54 Чл. 74, ст. 1 Устава РС.

55 Чл. 74, ст. 3 Устава РС.

56 Закон о потврђивању Споразума о стабилизацији и придруживању између Европских заједница и њених држава чланица, са једне стране, и Републике Србије, са друге стране, *Сл. гласник РС – Међународни уговори, 83/08*

57 Закон о потврђивању Конвенције о очувању миграторних врста дивљих животиња, *Сл. гласник РС – Међународни уговори*, 102/07

58 Закон о потврђивању Споразума о очувању афричко-евроазијских миграторних птица водених станишта са Анексом 1 и Анексом 1а, и измењени Анекс 2 и Анекс 3, који су саставни део Споразума, *Сл. гласник РС – Међународни уговори*, 13/18

59 Закон о потврђивању Споразума о очувању популација слепих мишева у Европи са Амандманом Споразума, *Сл. гласник РС – Међународни уговори*, 13/18

60 Закон о потврђивању Кјото протокола уз Оквирну Конвенцију Уједињених нација о промени климе, *Сл. гласник РС – Међународни уговори*, 88/07

пестициде у међународној трговини (1998),[61] као и Стокхолмска конвенција о дуготрајним органским загађујућим супстанцама (2001).[62] Хонгконшка међународна конвенција о безбедном и еколошки прихватљивом рециклирању бродова (2009) потврђена је девет година након усвајања.[63] Слична је ситуација и са Протоколом из Нагоје о приступу генетичким ресурсима и праведној и једнакој расподели користи које проистичу из њиховог коришћења уз Конвенцију о биолошкој разноврсности (2010).[64] Тринаест година је требало да се регулише статус у Конвенцији УН о борби против дезертификације у земљама са тешком сушом и/или дезертификацијом, посебно у Африци (1994),[65] слично као и у Међународној конвенцији о надзору и управљању бродским баластним водама и талозима (2004).[66] Три године након усвајања потврђени су Амандмани на Анекс Б Кјото протокола уз Оквирну конвенцију УН о промени климе.[67] За прихватање Доха амандмана на Кјото пороткол (2012) требало је пет година.[68] Париски споразум о клими[69] је пример уговора у којем је РС брзо регулисала свој статус.

3.2.2. Регионални међународни уговори

Најзначајнији регионални међународни уговори у којима је РС стекла чланство након 2006. године су четири међународна уговора закључена

61 Закон о потврђивању Ротердамске Конвенције о поступку давања сагласности на основу претходног обавештења за одређене опасне хемикалије и пестициде у међународној трговини са изменама и допунама, *Сл. гласник РС – Међународни уговори*, 38/09

62 Закон о потврђивању Стокхолмске конвенције о дуготрајним органским загађујућим супстанцама, *Сл. гласник РС*, 42/09

63 Закон о потврђивању Хонгконшке међународне конвенције о безбедном и еколошки прихватљивом рециклирању бродова, *Сл. гласник РС – Међународни уговори*, 12/18

64 Закон о потврђивању Протокола из Нагоје о приступу генетичким ресурсима и праведној и једнакој расподели користи које проистичу из њиховог коришћења уз Конвенцију о биолошкој разноврсности, *Сл. гласник РС – Међународни уговори*, 12/18

65 Закон о потврђивању Конвенције Уједињених нација о борби против дезертификације у земљама са тешком сушом и/или дезертификацијом, посебно у Африци, *Сл. гласник РС – Међународни уговори*, 102 /07

66 Закон о потврђивању Међународне конвенције о надзору и управљању бродским баластним водама и талозима, *Сл. гласник РС – Међународни уговори*, 5/18

67 Закон о потврђивању амандмана на Анекс Б Кјото протокола уз Оквирну конвенцију УН о промени климе, *Сл. гласник РС – Међународни уговори*, 38/09

68 Закон о потврђивању Доха амандмана на Кјото протокол уз Оквирну конвенцију Уједињених нација о промени климе, *Сл. гласник РС – Међународни уговори*, 2/17

69 Закон о потврђивању Споразума из Париза, *Сл. гласник РС – Међународни уговори*, 4/17

у оквиру УНЕЦЕ. То су: Конвенција о процени утицаја на животну средину у прекограничном контексту, Еспо, 1991,[70] Конвенција о доступности информација, учешћу јавности у одлучивању и доступности правосуђа у вези са питањима која се тичу животне средине, Архус, 1998,[71] Конвенција о заштити и коришћењу прекограничних водотокова и међународних језера и амандмана на чл. 25 и 26 Конвенције о заштити и коришћењу прекограничних водотокова и међународних језера[72] и Конвенција о прекограничним ефектима индустријских удеса.[73] Осим тога у овом периоду су потврђени и Протокол о тешким металима уз Конвенцију о прекограничном загађивању ваздуха на великим удаљеностима из 1979. године,[74] као и Протокол о дуготрајним органским загађујућим супстанцама уз Конвенцију о прекограничном загађивању ваздуха на великим удаљеностима из 1979. године.[75]

70 Закон о потврђивању Конвенције о процени утицаја на животну средину у прекограничном контексту, *Сл. гласник РС – Међународни уговори*, 102/07; Закон о потврђивању амандманима на Конвенцију о процени утицаја на животну средину у прекограничном контексту, Софија, 2001. и Цавтат, 2004, *Сл. гласник РС – Међународни уговори*, 4/2016; Видети и Закон о потврђивању Протокола о стратешкој процени утицаја на животну средину уз Конвенцију о процени утицаја на животну средину у прекограничном контексту, *Сл. гласник РС – Међународни уговори*, 1/10

71 Закон о потврђивању Конвенције о доступности информација, учешћу јавности у одлучивању и доступности правосуђа у вези са питањима која се тичу животне средине, *Сл. гласник РС – Међународни уговори*, 38/09; Као и Закон о потврђивању Протокола о регистрима испуштања и преноса загађујућих материја уз Конвенцију о доступности информација, учешћу јавности у доношењу одлука и праву на заштиту у питањима животне средине, *Сл.гласник РС – Међународни уговори*, 1/2010

72 Закон о потврђивању Конвнеције о заштити и коришћењу прекограничних водотокова и међународних језера и Амандмани на чл. 25 и 26 Конвенције, *Сл. гласник РС – Међународни уговори*, 1/10; Укључујући и Протокол о води и здрављу уз Конвенцију о заштити и коришћењу прекограничних водотокова и међународних језера, *Сл. гласник РС – Међународни уговори*, 1/2013

73 Закон о потврђивању Конвенције о прекограничним ефектима индустријских удеса, *Сл. гласник РС – Међународни уговори*, 42/09

74 Закон о потврђивању Протокола о тешким металима уз Конвенцију о прекограничном загађивању ваздуха на великим удаљеностима из 1979. године, *Сл. гласник РС – Међународни уговори*, 1/12

75 Закон о потврђивању Протокола о дуготрајним органским загађујућим супстанцама уз Конвенцију о прекограничном загађивању ваздуха на великим удаљеностима, *Сл. гласник РС – Међународни уговори*, 1/12

3.2.3. Остали регионални, субрегионали и билатерални уговири

Скоро тридесет година је било потребно да би се регулисао статус у Конвенцији о очувању европске дивље флоре и фауне и природних станишта Европе (Берн, 1979).[76] У овом периоду су потврђени и Конвенција о заштити и одрживом развоју Карпата,[77] Споразум између Републике Србије и Регионалног центра за животну средину за Централну и Источну Европу о правном статусу Регионалног центра за животну средину у Републици Србији,[78] Европска конвенција о пределу,[79] као и Мултилатерални споразум земаља Југоисточне Европе о спровођењу Конвенције о процени утицаја на животну средину у прекограничном контексту.[80]

Од значаја за област животне средине су и неки други међународни уговори чији је РС члан. Међу њима су и, нпр., Уговор између Владе Републике Србије и Организације за образовање, науку и културу (УНЕСКО) у вези са оснивањем Центра за воде за одрживи развој и прилагођавање климатским променама као Центра категорије 2 под покровитељством Унеска,[81] Меморандум о разумевању о институционалном оквиру Иницијативе за

76 Закон о потврђивању Конвенције о очувању европске дивље флоре и фауне и природних станишта Европе, *Сл. гласник РС – Међународни уговори*, 102/07

77 Закон о потврђивању Конвенције о заштити и одрживом развоју Карпата, *Сл. гласник РС – Међународни уговори*, 102/07. Са неколико протокола: Закон о потврђивању Протокола о заштити и одрживом коришћењу биолошке и предеоне разноврсности уз Оквирну конвенцију о заштити и одрживом развоју Карпата, *Сл. гласник РС – Међународни уговори*, 1/13; Закон о потврђивању Протокола о одрживом управљању шумама уз Оквирну конвенцију о заштити и одрживом развоју Карпата, *Сл. гласник РС – Међународни уговори*, 5/15; Закон о потврђивању Протокола о одрживом туризму уз Оквирну конвенцију о заштити и одрживом развоју Карпата, *Сл. гласник РС – Међународни уговори*, 5/15; Закон о потврђивању Протокола о одрживом транспорту уз Оквирну конвенцију о заштити и одрживом развоју Карпата, *Сл. гласник РС – Међународни уговори*, 13/18)

78 Закон о потврђивању Споразума између Републике Србије и Регионалног центра за животну средину за Централну и Источну Европу о правном статусу Регионалног центра за животну средину у Републици Србији, *Сл. гласник РС – Међународни уговори*, 1/10

79 Закон о потврђивању Европске конвенције о пределу, *Сл. гласник РС – Међународни уговори*, 4/11

80 Закон о потврђивању Мултилатералног споразума земаља Југоисточне Европе о спровођењу Конвенције о процени утицаја на животну средину у прекограничном контексту, *Сл. гласник РС – Међународни уговори*, 12/18

81 Закон о потврђивању Уговора између Владе Републике Србије и Организације за образовање, науку и културу (УНЕСКО) у вези са оснивањем Центра за воде за одрживи развој и прилагођавање климатским променама као Центра категорије 2 под покровитељством УНЕСКО, *Сл. гласник РС – Међународни уговори*, 92/14

превенцију и спремност у случају катастрофа за регион Југоисточне Европе (2013),[82] Измене и допуне Конвенције о физичкој заштити нуклеарног материјала (2005).[83]

Поред тога, РС је у овој фази закључила и неколико билатералних уговора о сарадњи у области животне средине,[84] међу којима су и Споразум између Владе Републике Србије и Владе Републике Азербејџан о сарадњи у области животне средине,[85] Споразум између Владе Републике Србије и Владе Републике Турске о сарадњи у области животне средине,[86] Споразум између Владе Републике Србије и Владе Републике Хрватске о сарадњи у области заштите животне средине и очувања природе.[87]

4. Међународни уговори у којима РС није чланица

У делу који се односи на међународне уговоре чији је депозитар генерални секретар УН РС није чланица Конвенције о праву непловидбених коришћења међународних водотокова (1997) и Минимата конвенције о живи (2013). Овоме треба додати и неколико протокола уз одговарајуће међународне уговоре. То су: Базелски протокол о одговорности и компензацији за штете које су резултат прекограничног кретања опасних отпада и његовом одлагању (1999), као и Нагоја, Куала-Лумпур додатни протокол о одговорности уз Картагена протокол о биолошкој сигурности.

У делу који се односи на регионалне међународне уговоре у којима РС није чланица доминирају протоколи и амандмани на протоколе уз међународне уговоре закључене у оквиру Економске комисије УН за Европу. Када се ради о Конвенцији о прекограничном загађивању ваздуха на великим удаљеностима то су: Протокол који се односи на смањење ацидификације,

82 Закон о потврђивању Меморандума о разумевању о институционалном оквиру Иницијативе за превенцију и спремност у случају катастрофа за регион Југоисточне Европе, *Сл. гласник РС – Међународни уговори*, 3/15

83 Закон о потврђивању измена и допуна Конвенције о физичкој заштити нуклеарног материјала, *Сл. гласник РС – Међународни уговор*и, 4/16

84 У детаљнијој анализи би требало узети у обзир и неколико споразума које је РС закључила са неким државама а односе се на сарадњу у области ванредних ситуација.

85 Закон о потврђивању Споразума између Владе Републике Србије и Владе Републике Азербејџан о сарадњи у области животне средине, *Сл. гласник РС – Међународни уговори*, 10/11

86 Закон о потврђивању Споразума између Владе Републике Србије и Владе Републике Турске о сарадњи у области животне средине, *Сл. гласник РС – Међународни уговори*, 8/11

87 Закон о потврђивању Споразума између Владе Републике Србије и Владе Републике Хрватске о сарадњи у области заштите животне средине и очувања природе, *Сл. гласник РС – Међународни уговори*, 13/18

еутрофикације и приземног озона (1999), као и амандмани на овај протокол (2012), Протокол о даљем смањењу сумпорних емисија (1994), Протокол о смањењу емисија испарљивих органских једињења и њиховим прекогранични угицајима (1991), Амандмани на протокол о тешким металима (2012), Амандмани на протокол о дуготрајним органским загађујућим супстанцама (2009). Овоме треба додати и Амандман на Конвенцију о доступности информација, учешћу јавности у одлучивању и доступности правосуђа у вези са питањима која се тичу животне средине (2005), као и Протокол о грађанској одговорности за штету узроковану прекограничним ефектима индустријских акцидената на прекограничним водама уз Конвенцију о заштити и коришћењу прекограничних водотокова и међународних језера и Конвенцију о прекограничним ефектима индустријских акцидената (2003).

5. Закључак

Питање чланства РС у међународним уговорима у области животне средине требало би посматрати у контексту неколико околности (укупних промена у односима међународне заједнице према проблемима у области животне средине укључујући и динамику пораста броја међународних уговора, промена у државном устројству и уставним претпоставкама односа према међународним уговорима и животној средини, динамике процеса ЕУ интеграција у којима се држава налази у последњих скоро две деценије, итд.). У том смислу могло би се говорити о две фазе односа РС према питању чланства у међународним уговорима. У првој фази (до 2006. године) кључни елементи од значаја за тумачење односа РС према међународним уговорима проистичу из чињенице да је РС једна од чланица заједничке државе, док је у другој фази, која до извесне мере коинцидира са почетком процеса ЕУ интеграција, РС самостална држава. За другу фазу је карактеристично значајно и постепено повећавање броја међународних уговора у којима је РС чланица. Ипак, изгледа да би се могло рећи да промене у уставно-правном односу према међународним уговирима и животној средини (када се ради о уставним одредбама које се непосредно односе на животну средину) немају кључни значај за динамику стицања чланства у међународним уговорима у области животне средине. (Уставне одредбе које су од посредног значаја за животну средину, због ограниченог простора, овде нису посебно анализиране). И чињеница да је до промена у законодавном оквиру од значаја за потврђивање међународних уговора дошло тек 2013. године могла би послужити као аргумент у правцу истог закључка. Иначе, анализирани устави садрже различите одредбе којима се регулише питање односа према међународном праву (и међународним

уговорима), као и животној (или „човековој“) средини, које би требало тумачити имајући у виду статус и надлежности РС у заједничкој држави. У целини, и одвећ елементарно сагледавање динамике стицања чланства РС у међународним уговорима у области животне средине открива известан застој током деведесетих година XX века, односно почетак повећања броја међународних уговора у којма је РС чланица у првој деценији XXI века. Ово коинцидира и са почецима реформе система норми у области животне средине у оквиру процеса усаглашавања националних прописа са прописима ЕУ. У већем броју међународних уговора глобалног и регионалног карактера, који су узети у обзир у овој анализи, РС је стекла чланство кроз процес потврђивања, као самостална држава. Чланство у једном броју међународних уговора проистиче из процеса сукцесије. Тренутно се може рећи да је РС чланица скоро свих најзначајнијих међународних уговора у области животне средине глобалног и регионалног карактера који су на снази. Ипак, када се ради о глобалним међународним уговорима, РС није чланица Њујоршке конвенције о праву непловидбених коришћења међународних водотокова и Минимата конвенције о живи.

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THE STATUS OF THE REPUBLIC OF SERBIA IN CONTEMPORARY INTERNATIONAL ENVIRONMENTAL AGREEMENTS AND CONSTITUTIONS (1974-2006)

Summary

The introductory part of the paper points to an increase in the importance of international environmental agreements, as well as their significance for the Republic of Serbia (RS). The central part of the paper studies the RS status in international environmental agreements. A distinction is made between the representation of membership in the international agreements before and after 2006 (the adoption of a new constitution and gaining independence). The constitutional and legal provisions pertinent for regulating the conclusion and execution of international agreements in the period from 1974 are evaluated. The author also emphasizes constitutional provisions of importance for the environment. The analysis is based on the key international agreements of a global character (primarily those whose depository is the UN Secretary General), regional international agreements concluded within the UN Economic Commission for Europe (UNECE), as well as sub-regional international agreements of relevance to the RS. An overview of international environmental agreements that the RS is currently not a member of is also provided. In the conclusion, it is noted that the RS obtained its membership in part of international environmental agreements on the basis of its succession, although the intensification of activities in the field of confirming key international agreements followed in the period after 2006. Such trend could also be related to the normalization of the RS international position (following the international isolation in the last decade of the 20th century), as well as the beginning of the RS's EU integration process.

Key words: *International agreements, environment, ratification of international agreements, global international agreements, regional international agreements, Republic of Serbia (RS), SFR Yugoslavia, FR Yugoslavia, succession, EU integration.*

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879351B

UDK: 347.51
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

CONTRIBUTION OF THE INJURED PARTY TO SUSTAINED DAMAGE[**]

Abstract*: Contribution of the injured party to his/her damage or shared responsibility for damages implies that the damages occurred not only due to offender's actions but that the injured party also contributed to the sustained damage. This fact should be taken into account when determining the amount of damages, i.e. to share responsibility for damage between the injured party and the offender. Roman law did not recognize shared responsibilities for damage, and the contribution of the injured party to sustained damage was regulated only after the adoption of the most important civil codes. Legal theories and laws of certain states use different terms for shared responsibility for damages. Another important issue is whether the injured party's responsibility is based on fault or contribution to the occurrence of damage. This paper investigates legal and theoretical assumptions of shared responsibility for damage in comparative law, with reference to the most significant civil regimes in the world and civil law regimes in some former SFRY states.*

Keywords: *damages, offender, the injured party, quilt, injured party's contribution, responsibility for damages, damage repairs.*

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[**] This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

1. Introduction

Contribution of the injured party to his/her damage or shared responsibility for the damage means that, besides the offender, the injured party has also contributed in some way to the occurrence of damage. The basic question of shared responsibility for damage is whether the injured party's co-responsibility for damages is based on his/her fault or some other factor.

Regarding shared responsibility for damage, some other issues are also significant, such as:

1. Can a delinquently incapable individual as an injured person receive the reduction of amount of damage compensation?

2. What is the impact on damage compensation of the fact that the damage was committed by the assistant or the representative of the injured party?

3. Is it relevant if the injured person placed himself/herself in danger?

In Roman law, there was no shared responsibility for damage. Such responsibility for damage did not exist even in reciprocal Roman law.

Shared responsibility for damage first appeared in the civil law of the 19thcentury, but not in the French Civil Code as the first historical source of civil law. Shared responsibility for damage was created by the need to better regulate the increased number of cases related to damage in contemporary social circumstances. Under these circumstances, it was not possible to ignore the fact that the injured party may in some way contributed to the occurrence of damage. In the observed foreign legislation, as well as in the legislations of the states formed after the dissolution of the former SFRY, it is evident that shared responsibility for damage is regulated with very few legal provisions of principal nature. Therefore, case law has a complex task in applying and interpreting these legal rules. Court practice also has a more important task to create quality solutions in terms of shared responsibility for damage.

An injured party can contribute to the occurrence of damage through active behaviour, passive behaviour or through omission. In addition, the injured party's contribution to sustained damage may consist of failing to take actions to limit or completely eliminate the effects of the resulting damage.

2. Shared responsibility for damage in comparative law

2.1.Austria

The Austrian Civil Code of 1811 (*Allgemeines Bùrgerliches Gesetzbuch)* providesin paragraph 1304 that there is shared responsibility for damage. According

to these provisions, "if the injured party bears quilt for any damage, then the injured party shall bear the damages in proportion to the offender, and if the proportion cannot be determined, the injured party shall be responsible for the same amount of damages". In Austrian jurisprudence and legal literature on shared responsibility for damage (for example, Koziol, 1986: 236; Rummel, 1992: 364), the most commonly used terms are the injured party's complicity and the injured party's co-responsibility (to a smaller extent).There must be a causal link between the injured party's behaviour and the sustained damage, so that the damages can be counted against the injured party as well (Koziol, 1986: 237). A victim's innocence (delict capacity) is required to be linked to the injured party's fault (guilt).However, in exception, co-responsibility for damage can possibly be attributed to children under the age of seven and to feeble-minded individuals if their behaviour differs from "the most basic precautionary measures".[1]This means that in most cases mentally incompetent individuals cannot be held responsible for damage.

In the cited paragraph, the Austrian Civil Code mentions the injured party's fault (guilt) as a prerequisite for his/her involvement in damage repairs. However, the theoretical part explains that the injured party's guilt is not guilt in the full technical sense of the word. Thus, there is no need to prove the unlawfulness of the injured party's behaviour; it is sufficient to prove the injured party's negligence for his/her own goods (Koziol, 1986: 236, 237).

According to the cited paragraph of the Austrian Civil Code, if there is shared responsibility for damage, then it is necessary to determine the share of responsibility for damage between the offender and the injured party; if it is not possible, the offender and the injured party will share the liability equally and bear the same amount of damages. In this case, the guilt of both offender and the injured party is taken into account, i.e. the injured party would not be responsible for damage if the offender acted with intent (*dolus*) or with utter negligence (*culpa lata*).The injured party's guilt is also observed, and if he/she acted intentionally, while the offender only acted with negligence, then the offender would not bear any responsibility. In the case of the same type or degree of guilt, shared responsibility for damage would certainly exist;thus, a part of damage repairs would be borne by both the offender and the injured party.

2.2.France

The French Civil Code of 1804 (*Code civil*) does not contain provisions on shared responsibility for damage. However, some other regulations contain provisions on shared responsibility for damage, such as the Labour Accidents Act, the Social Security Act, and the Commercial Code.

1 compare ZVR 1988, 46.

In French jurisprudence and legal literature (for example, Planiol-Ripert, 1952: 520),the term injured party's mistakes used for shared responsibility for damage. The injured party's behaviour must be the co-cause of the sustained damage; thus, without such behaviour, no damages would have incurred (Mazeaud-Tunc, 1970: 1460). The injured party's behaviour is the sole cause of damage if such behaviour was unpredictable and inevitable for the offender. The injured party's behaviour that co-caused the damages has to be unlawful in order to induce shared responsibility for damage. The injured party's behaviour that has caused the damage must be unlawful in order to share the responsibility for damage (Mazeaud-Tunc, 1970: 1467). The law does not set the proportion of damages borne by the offender and the injured party; hence, the court assesses the damage and awards damages by taking into account all the circumstances of the case. In particular, the type and degree of guilt of both the offender and the injured party are taken into account.

2.3. Germany

In the German legal literature (Larenz, 1982: 494) and jurisprudence, the terms *injured party's co-responsibility*, injured party's *co-causality* and injured party's *co-responsibility* are used to indicate the injured party's contribution to his/her own damage. The German Civil Code of 1896 (*Bùrgerliches Gesetzbuch*) states in paragraph 254: "If the injured party's guilt was involved in the occurrence of damage, the obligation to compensate and the scope of the remuneration are to be given depending on the circumstances, in particular whether the damage was predominantly caused by one side or the other. This is also true if the injured party's quilt is limited to failing to warn the debtor of the danger of causing a particularly serious damage for which the debtor did not know nor had to know, or failing to prevent or reduce the damage". These provisions may be criticized in the nomotechnical sense and in terms of content. Namely, it would be better not to state that the injured party's guilt was involved in the occurrence of damage, but that the injured party participated in the sustained damage and that a certain level of fault lies with him/her. In addition, it is unclear which circumstances the right to compensation for damage depends on, i.e. the scope of compensation. It is apparent from the quoted provisions that shared responsibility for damage does not only relate to the active behaviour of the injured party at the time of sustaining damage but also to his/her failure to prevent or reduce the damage. The German Civil Code does not regulate whether the mental capacity of the injured party is a presumption of shared responsibility for damage, and that issue is left to the court's case law.

Paragraph 278 of the German Civil Code reads: "The debtor is responsible for the guilt of his/her legal representative and for the persons serving in the fulfilment

of his/her obligations to the same extent as for his own guilt." Thus, the debtor will also be responsible for the sustained damage, even in case of shared responsibility, regardless of fact that his/her legal representative or assistant is guilty.

The injured party's fault referred to in German civil law does not mean guilt in the full meaning of the word; in fact, it means a certain lapse of the injured party who contributed to the sustained damage.

Shared responsibility for damage also exists in case of delinquent and contractual responsibility for damage. The injured party's behaviour must have the character of a co-causefor incurred damage, which may include both active and passive behaviour.

2.4. Russia

In Russia, a term *mixed responsibility* is used to designate shared responsibility. Article 404 of the Civil Code of the Russian Federation of 1994 states: "If the failure to fulfil obligations or the negligent fulfilment of the obligation was caused by the fault of both parties, the court appropriately limits the amount of the debtor's responsibility. The court is also empowered to limit the amount of the debtor's responsibility when the creditor has contributed to the increase of the incurred damage or failed to take appropriate measures for its reduction whether by intent, negligence, failure to fulfil or inappropriate fulfilment of obligations." It is apparent that shared responsibility for damage only refers to contractual and not to delinquent responsibility for damage. Shared responsibility is not applied if the injured party is delinquently incapable.

2.5. Switzerland

In Switzerland, shared responsibility for damage is regulated by the Obligations Act of 1911 (*Obligationen recht*), which states in Article 44, paragraph 1, as follows: "If the injured party has agreed to a harmful action or there are circumstances for which he/she is responsible, and which have contributed to the creation or increase of damages, or the position of the person responsible for the remuneration is otherwise difficult, the judge may reduce the remuneration obligation or completely abolish it". As can be seen in the Obligations Act, the term guilt is not mentioned at all. But, it is mentioned in the context of shared responsibility for damage in court practice and legal literature.

The injured party's coercion (Tuhr, 1974: 106) and the injured party's own guilt (Keller, 1993: 126) are the terms used in the Swiss legal literature and the jurisprudence for shared responsibility for damage. Other regulations also regulate shared responsibility for damage, and they are applied as a *lex specialis*

for certain areas, such as: the Railway Law, the Road Traffic Act, and the Electrical Appliances Act. The injured party's guilt is used in these regulations but it is not treated as guilt in the true or the technical sense since there is no legal obligation to protect oneself from harm. The injured party's co-responsibility for damage presumessanity, but court practice has accepted the standpoint that the injured party who is not sane also bears responsibility if imposed by equity.

3. Shared responsibility for damage in regulations of some former SFRY states and the Republic of Croatia

Shared responsibility for damage is also applied in the areas of delinquent and contractual responsibility for damage.

In the observed regulations of the former SFRY states, the provisions on shared responsibility for damage were taken from the former Federal Obligation Relations Act[2], which was applicable in the entire SFRY territory. Thus, nowadays, the Obligation Relations Acts of the Republic of Serbia[3] (Art. 192), Republic of Montenegro[4] (Art. 199), and the Federation of Bosnia and Herzegovina and Republika Srpska[5] (Art. 192) contain the following provision on shared responsibility for damage: "An injured party who has contributed to the occurrence of damage or has caused the damage to be greater than it would be otherwise, is entitled only to a proportionally reduced compensation. When it is impossible to determine which part of the damage stems from the injured party's action, the court will award compensation taking into account the circumstances of the case." This provision envisages delict responsibility for shared responsibility for damage.

The Obligation Relations Act of the Republic of Croatia[6]contains almost identical provisions in Art.1092, which reads: "An injured party who has contributed to the occurrence of damage or has caused the damage to be greater than it would be otherwise, is entitled only to a proportionally reduced compensation. When it is impossible to determine which part of the damages stems from the injured party's action or omissions, the court will award compensation taking into account the circumstances of the case". The only difference between the Croatian Obligation Relations Act and obligation relations acts of the Republic

2 Official Gazette of SFRJ no.29/1978, 39/1985, 46/1985, 45/1989, 57/1989; Official Gazette no.53/1991, 73/1991, 3/1994, 111107/1995, 7/1996, 91/1996, 112/1999, 88/2001, 35/2005.

3 Official Gazette of SRJ no.31/1993.

4 Official Gazette of Montenegro, no.27/2008, 4/2011, 22/2017.

5 Official Gazette of SFRJ no.29/1978, 39/1985, 46/1985, 45/1989, 57/1989; Official Gazette of BIH no. 2/1992, 13/1993, 13/1994; Official Gazette of Republika Srpska no. 17/1993, 3/1996.

6 Official Gazette no.35/2005, 41/2008, 125/2011, 78/2015, 29/2018.

of Serbia, the Federation of Bosnia and Herzegovina, the Republika Srpska, and the Republic of Montenegro is the fact thatthe injured party's conduct may also entail an omission, in case of inability to determine the damage. These provisions relate to delinquent responsibility for damage.

In the use of this institute, there is a significant difference between the Obligation Relations Act of the Republic of Croatia and the former SFRY Federal Obligation Relations Act and the Obligation Relations Acts of the Republic of Serbia, the Republic of Montenegro, the Federation of Bosnia and Herzegovina, and the Republika Srpska. Namely, the Croatian Obligation Relations Act uses in the subtitle of an article regulating this type of responsibility for damage the term "contribution of the injured party to his/her own damages", while all other aforementioned acts use the term "shared responsibility". The term shared responsibility is not adequate since the injured party cannot be legally responsible for himself/herself. "The responsibility of a responsible person does not diminish, nor is it shared with the injured party, but his/her obligation to compensation is reduced by a certain amount, compared to the total amount of damage caused. The injured party is not responsible for a part of the damage whose cause or increase can be attributed to the injured party, but he/she is not entitled to compensation for that part of damage. Namely, the injured party does not interfere with the legal right of others, while the violation of their own legal property is not forbidden. Accordingly, the injured party is not responsible for the harm he/she incurred to himself/herself, but suffers the consequences (damage) in the extent to which he/she has contributed to its occurrence or increase. Therefore, it is certainly better to speak of the contribution of the injured party to his/her own damage" (Gorenc, 2005: 1695).

The term shared guilt that was used before the entry into force of the former Federal Obligatory Relations Act was also inappropriate since the injured party cannot be legally guilty towards himself/herself. "The guilt of the injured party that could be the basis for the exclusion of the offender's responsibility is not guilt in the true sense of the word; thus, it is not sanctioned by the law. Namely, this guilt is in a negligent relation to one's own goods, which are, in fact, protected by law, but not against the title holder but against the actions of others. Therefore, the behaviour of the offender becomes legally relevant only at the moment of occurrence of the offender's obligation to compensate for the damage caused to his possessions"(Blagojević, Krulj, 1980: 522). Therefore, it is more acceptable and legally more appropriate to use the term found in the Obligation Relations Act of the Republic of Croatia, which uses the term *contribution* of the injured party to his/her own damage for this form of responsibility.

Article 346, paragraphs 4 and 5 of the Obligation Relations Act of the Republic of Croatia also refers to shared responsibility for damage, stating: "A party invoking a contract violation shall take all reasonable measures to reduce the damage caused by such a violation; otherwise, the other party may require a compensation reduction. The provisions of this Article shall also apply appropriately to the non-fulfilment of obligations not arising out of the contract, unless otherwise provided for some of them by this Act". Identical provisions can also be found in the former Federal Obligation Relations Act[7], the Obligation Relations Act of the Republic of Serbia[8], the Obligation Relations Act of the Republic of Montenegro,[9]and the Obligation Relations Act of the Federation of Bosnia and Herzegovina and Republika Srpska[10]. The same subtitle (amount of compensation) may be found in all of these legislative acts. All mentioned provisions relate to contractual responsibility for damage.

Article 347 of the Obligation Relations Act of the Republic of Croatia deals with contractual responsibility for damage, and is bound by shared responsibility for damage; it reads: "When the lender or the person for whom he/she is responsible has contributed to the occurrence of damage or its amount, or has aggravated the borrower's position, the compensation is proportionately reduced". An identical provision exists in the former Federal Obligation Relations Act[11], the Obligation Relations Act of the Republic of Serbia[12], the Obligation Relations Act of the Republic of Montenegro,[13]and the Obligation Relations Act of the Federation of Bosnia and Herzegovina and Republika Srpska[14]. The only difference is that the Croatian Obligation Relations Act contains the subtitle "Reduction of Fees", while all other mentioned laws contain the term "creditor's guilt" in the subtitle. Given that the emphasis here is on the contribution of the creditors as the injured party to their own damages, then it seems inappropriate to use the expression *creditor's guilt*, which could also be understood as the guilt of the injured party who cannot be legally guilty towards himself/herself. Also, individuals who a creditor is responsible for can contribute to the occurrence of damage, its amount or to the aggravation of the debtor's position. This is primarily the case of

7 Art. 266, paragraphs 4 and 5of the Federal Obligation Relations Act

8 Art. 266, paragraphs 4 and 5of the Obligation Relations Act of the Republic of Serbia

9 Art. 273, paragraphs 4 and 5 of the Obligation Relations Act of the Republic of Montenegro

10 Art. 266, paragraphs 4 and 5 of the Obligation Relations Act of the Federation of Bosnia and Herzegovina and Republika Srpska

11 Art. 267 of the Federal Obligation Relations Act

12 Art. 267 of the Obligation Relations Act of the Republic of Serbia

13 Art. 274of the Obligation Relations Act of the Republic of Montenegro

14 Art. 267 of the Obligation Relations Act of the Federation of Bosnia and Herzegovina and Republika Srpska

persons who are the injured party's employees and the attorneys of the injured party, and it may also apply to the injured party's guardians who are deprived of their business abilities. In any case, the debtor must himself/herself lodge a claim for the reduction of damage compensation since the court's official duty is not to determine the contribution to damage caused by the creditor and individuals he/she is responsible for.

Regarding contractual responsibility for damage, even if there is shared responsibility, the provisions on extraterritorial damages may also apply. This is stipulated in Article 349 of the Obligation Relations Act of the Republic of Croatia[15], which reads: "If the provisions of this Section are not otherwise prescribed, the provisions on extrajudicial damages envisaged in this Act shall apply *mutatis mutandis* to the compensation of this damage."

Shared responsibility for damage does not require the injured party's capacity for judgment or delinquency, but it is sufficient for the injured party to contribute to his/her own damage. In judicial practice, participation of a delinquently incapacitated person in his/her own harm is aligned with the higher force that has been extended to human actions. Previous jurisprudence in the SFRY took the view that shared responsibility requires sanity of the injured party (Kaladić, 2004: 111). However, later, prior to the entry into force of the former Federal Obligation Relations Act, court practice took the standpoint in which a delinquently incompetent person could contribute to the emergence of damage. "In some court decisions, the behaviour of a delinquently incapable person who contributed to the origin of injured party's damage was treated as an inevitable event, a higher force, or a case for which no one was responsible, which meant that the offender was entirely or partially exempt from damage responsibility" (Kaladić, 2004: 111).Such a court practice position is also logical because a person who is not capable of reasoning is not responsible for damage he/she has incurred to other persons, and no one can be held responsible for damage he/she has incurred to himself/herself. This is also confirmed by the provisions of the Obligation Relations Act of the Republic of Croatia on individuals who are not responsible for damage. "A person who, due to mental illness or retarded mental development or for any other reasons, is not capable of reasoning is not responsible for damage he/she causes to others. If anyone causes damages to others in the state of temporary mental incapacity, he/she is responsible for it, except for a person who proves that it is not their fault for entering such a mental state. If it is someone else's fault that person entered such a mental state, the person who caused it shall be the one responsible for damage."[16]"A minor by the age of seven is not responsible for damage. A minor from the age of seven

15 Taken from Art. 269 of the former Federal Obligatory Relations Act

16 Art. 1050 of the Obligation Relations Act of the Republic of Croatia.

to the age of fourteen is not responsible for damage unless it is proven that he/she was capable of reasoning at the moment of incurring damage. A minor after reaching fourteen years of age is responsible according to general rules on responsibility for damage."[17]

The injured party's guilt is not a presumption for the occurrence of shared responsibility for damage; it is the inadmissibility of conduct and the causality. In the case of the offender, all assumptions of responsibility for damage must be fulfilled: the existence of the offender and the injured party, the harmful act of the offender, damage, causal link between the harmful act and damage, and unlawfulness of the act. The former SFRY jurisprudence did not apply the rules on shared responsibility for damage if the offender intentionally caused damage. Later jurisprudence,even prior to the adoption of the Federal Obligation Relations Act and after that, began to apply shared responsibility even when the offender had acted intentionally (Kaladić, 2004: 113).Naturally, when it comes to determining damage compensation, it is important to note whether the offender acted with deliberation (*dolus*), extreme negligence (*culpa lata*), or just with ordinary negligence (*culpa levis*).From the quoted provisions of the Croatian Obligation Relations Act of the Republic of Croatia and the quoted provisions of the Obligation Relations Acts of some former SFRY states, it may be concluded that if it is possible to determine the amount of contribution of the injured party to resulting damage, i.e. the amount for which the compensation will be reduced; that reduction can be expressed as a percentage or as a fraction. On the other hand, when it is impossible to determine which part of damage stems from the injured party's actions or omissions, the court will award the compensation taking into account the circumstances of the particular case.

"The basis for reduction is the extent of the actual contribution of the injured party to the emergence or increase of damage, without taking into consideration intent or neglect as a weight. The assessment of the injured party's subjective bearing on the incidence or increase of damage is excluded. Only (un)usual behaviours and causality are established."(Crnić, 1987: 1049, 1050).

Shared responsibility for damage is also applied within the framework of objective responsibility for damage, which compares the significance of the injured party's contribution to damage and the significance of danger, i.e. dangerous activities. "Whether the offender is responsible on the basis of causation, i.e. in the framework of objective responsibility, the significance of the injured party's contribution to damage and the significance of danger, i.e. dangerous activities as a circumstance in relation to which the offender is responsible for damage occurrence is compared." If there is no actual damaging contribution of the

17 Art. 1051 of the Obligation Relations Act of the Republic of Croatia.

injured party to his/her damage, the injured party's contribution will be less significant than the offender's contribution; thus, damage compensation will not be significantly reduced. If there is a more significant contribution of the injured party to his/her damage, the damage could be equally divided between the injured party and the offender. If there is an extraordinarily significant contribution of the injured party to his/her damage, the injured party should receive only a relatively small portion of the compensation. If guilt is also determined for the offender, it will not be neglected but will, to some extent, depending on its degree, reduce the significance of the injured party's contribution in determining the key for the distribution of damages " (Kaladić 2004: 114).

4. Conclusion

Although not existent in the Roman law, shared responsibility for damage today is an indisputable institute in all contemporary civil law systems. The largest number of observed civil law remedies mention guilt of the injured party as a cause of his/her co-responsibility for damage. The laws of states created from the former SFRY emphasize the damage caused to the injured party through his/her detrimental behaviour, which seems more acceptable than the injured party's guilt. Since these regulations do not regulate shared responsibility for damages in detail or precisely, judicial practice has a complex task to build up the criteria for measuring the contribution of the injured party to his/her own damage.

Shared responsibilities could also be regulated by special regulations (*lex specialis*) in particular areas (such as: traffic, dangerous substances, dangerous activities), as it is prescribed in some countries (for example, in France and Switzerland). In that case, the provisions could be more specific and more substantive in relation to general regulations that mainly contain only the basic provisions on shared responsibility for damage.

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ДОПРИНОС ОШТЕЋЕНИКА ВЛАСТИТОЈ ШТЕТИ

Резиме

Допринос оштећеника властитој штети или подијељена одговорност за штету подразумијева да је штета настала не само штетниковом радњом него да јој је допринио и оштећеник. Тада је потребно и при поправљању штете то узети у обзир, односно подијелити одговорност за штету између штетника и оштећеника. У римском праву није постојала подијељена одговорност за штету, а допринос оштећеника властитој штети регулиран је тек доношењем најзначајнијих грађанских законика. У правној теорији и законима појединих држава користе се различити називи за подијељену одговорност за штету. Такође је спорно да ли се одговорност оштећеника темељи на кривњи или доприносу настанку штете. У раду се истражују законске и теоријске поставке подијељене одговорности за штету у упоредном праву с нагласком на најзначајније грађанскоправне режиме у свијету и грађанскоправне режиме неких држава бивше СФРЈ.

Кључне ријечи*: штета, штетник, оштећеник, кривња, допринос оштећеника, одговорност за штету, поправљање штете.*

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UDK: 347.56:378
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

*DEONTOLOGY AND LIABILITY IN THE ACADEMIC COMMUNITY***

Abstract: *Deontology is a science that deals with the obligations and duties that must be performed by a category of persons in the frame of professional responsibility, or a doctrine pertaining to professional ethics in a specific field. Liability is a comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation. In this paper, we analyze the juridical institutions pertaining to the academia and the status of university staff, with specific reference to the professional ethics and responsibility in the academic community.*

***Keywords*:** *deontology, liability, university, academia, law, education, rights, obligations, labour.*

1. Introduction

Deontology is a science that deals with the duties and obligations that must be performed by a certain category of persons in the frame of professional responsibility, in our case in the academic field, or a doctrine pertaining to the professional ethics in a specific field or profession. Liability is a comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation. In the present paper, we will analyse both of the juridical

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** This paper was presented at the International Scientific Conference "*Law in the context of addressing the Challenges of the Contemporary World",* held at the Faculty of Law, University of Niš, on 13th-14th April 2018.

institutions related to the academic field and the status of university staff, with specific reference to the professional ethics and responsibility in the academic community.

2. Deontology in the academic field

The word "deontology" derives from the Greek words "*deon*" (duty) and "*logos*" (science). It is a normative theory related to the study of morality. We find this idea in the work „*Ethical or Moral Science*" (1834), written by the English philosopher and jurist Jeremy Bentham. His work is structured in two parts: the first part examines the theory of virtue and the second one covers the practice of virtue. In this context, he explored the concept of ethics, and codes of ethical conduct that „ought to be respected" (Voiculescu, 2005: 17).[1]

Ethical norms adopted by the society, unfortunately, bear a political imprint but they naturally tend to satisfy the public interest of all citizens who should be treated equally under the law, regardless of their legal status or religious beliefs. Otherwise, legal rules and practices would become a dogma and an obstacle in building civilized human relations; as such, they would preclude protests against the dictatorship, corruption, inequality, differential treatment of gender, etc. All democracies have to eliminate the risk of politicizing the civil service, but this may only be wishful thinking.

It seems natural that academic staff should be continually guided in their work by moral principles and legal rules. Deontology in the academic field must be understood as ethical and professional conduct that needs to be exercised both by employees and volunteers (whose efforts should be rewarded as well), and which indisputably includes the fulfillment of professional obligations, the observance of rules of professional conduct, and ethical behaviour in performing professional duties (Todorascu, 2017: 7).[2].

We would like to frame this paper under a very interesting question: why everybody has deontology, but nobody has ethics? The answer to this question has been given by Cristian Ducu, a specialist in Applied Ethics: *"The answer is amazingly simple: it is due to the long-term absence of ethics in the academic field of reflection over it. We do not have a school of thought in the area of moral philosophy. We have no significant books and articles to change something. The situation is almost the same in the field of bioethics, maybe just slightly better. We*

1 Voiculescu, F. (2005). *Handbook of contemporary pedagogy*. Cluj-Napoca: Risoprint Publishing House.

2 Tudorascu, M. (2017). *Ethics and Deontology in public administration.* Cluj-Napoca: Risoprint Publishing House.

still do not have sufficient academic maturity to be fully aware of the need to take steps in this direction".[3]

In Romania, the legal provisions regulating this subject matter are contained in the National Education Law no. 1/2011 of the Republic of Romania. In addition, there are other significant internal documents: the University Charter, the Code of University Professional Ethics and Deontology, Rules of Procedure on University Ethics and Deontology, the Code of Ethics and Deontology of the University "*1 Decembrie 1918*" of Alba Iulia, Romania.

To be able to proceed in analysing these specific issues, we will provide a brief overview of the rights and obligations of academic staff, as envisaged in the National Education Law no. 1/2011 of the Republic of Romania.[4] In Title IV (Statute of Teaching staff), Chapter II (Status of teaching and research staff in higher education), Section 4 (Rights and obligations of the teaching staff), Article 304 (para. 2-10) of Law no. 1/2011 guarantees and ensures as follows: protection of employees' rights, and intellectual property rights on the scientific, cultural or artistic creation, in accordance with the University Charter and legislation in force; the academic liberty is guaranteed to members of the academic community, which enables them to freely express academic views in university space and have the freedom of teaching, research and creativity, in accordance with academic quality criteria; teaching and research staff have the right to publish studies, articles, volumes or works of art, to apply for national and international grants without restrictions on academic freedom; the teaching and research staff have the right to be part of associations and trade union, professional and cultural organizations, national and international organisations, as well as legally constituted political organizations, in accordance with the law; the academic staff holding a teaching position in education who are elected in Parliament, appointed for the Government or specific specialized positions in the state apparatus, the Parliament, the Legislative Council, the Constitutional Court, the Ombudsman, the Presidential Administration, the Government or the Ministry of Education, as well as those elected by Parliament to sit in central bodies of the state, have the right to reserve (withhold) the teaching post during the period of performing the public function but, throughout their term of office, the teaching staff can combine these functions with the teaching and research activity; the teaching staff are entitled to an annual paid leave, periods of rest leave, as well as to unpaid leave upon personal request for the purpose of specialization

3 See: https://www.avocatura.com/stire/13040/de-ce-toata-lumea-are-deontologie-dar-nimeni-nu-are-etica-o-discutie-cu-cristian.html

4 Legea educatiei nationale. Legea nr. 1/2011 (National Education Law), 5 ianuarie 2011, *Monitorul Oficial,* Partea I nr. 18 din 10 ianuarie 2011**;** http://legislatie.just.ro/Public/DetaliiDocumentAfis/125150#id_artA2413

or participation in scientific research in the country or abroad; the teaching staff are also entitled to receive salary for their work, medical insurance and assistance in relevant institutions, etc.

Article 305 of the Law no. 1/2011 provides protection to both teachers and students against a person or a group of persons who violate their human and professional dignity or hinder the exercise of their rights and obligations. The protection is provided by relevant authorities responsible for public order and persons authorised under the University Charter, without prejudice to the right to opinion, freedom of expression and academic freedom.

In particular, we would like to talk about legal education in connection with deontology. In that context, we would like to address the following issues: the adoption of general coordinates of institutional development related to changes that occurred in the period from 2011 until the present days; and the current academic, economic, political and social context. Depending on the prospective of short and medium term strategy, the Faculty of Law at the University of Alba Iulia (Romania),[5] has the following objectives:

- continuing and developing programs aimed at increasing the quality in education, in compliance with the national standards and criteria for assessing academic university structures and curricula;
- promoting a policy that encouraged personal excellence, professional evolution, attachment and loyalty to the institution;
- priority support of scientific research through a series of measures regarding the personnel, financing and providing logistics and material to the standards required for universities that have the education and research mission;
- restructuring curriculum closely to study programs and activities at the institutional level, and specialized professional routes, as well as introduction of new curricula;
- expansion of cooperation with similar faculties and research institutes in the country and abroad, through educational and research programs and teacher and student mobility;
- Faculty training to adapt to the restructuring imposed by European integration, expanding relationships with universities in Europe, under the institutional agreements, and compatibility curriculum and standards applied

5 Faculty of Law, University „1 Decembrie 1918" of Alba Iulia, Romania; http://drept.uab.ro/index.php?pagina=date_pg_text_fisiere&id=142&l=ro

in the European Union and communitarian acquis within the limits allowed by national standards;

- efficient management, based on strategic planning and quality assurance, developing programs with the financial available resources, or attracting specific services, programs and contracts with beneficiaries, including participation in EU-funded programs;

Expansion and modernization endowment for education and research, continued investment effort in teaching and research laboratories.

At the Law Faculty level, the management is achieved through the combined action and coherence of the two main branches of management: academic leadership and administrative leadership. When it comes to deontological rules, the issue is addressed by the University quality management as a matter of global strategy that engages all the components and processes of teaching, research and administrative work. We would like to conclude this part of the paper by referring to the words of Immanuel Kant: "*In law, a man is guilty when he violates the rights of others. In ethics, he is guilty if he only thinks of doing so.*"[6]

3. Liability in the academic field

Legal responsibility of the teaching staff in higher education entails liability established in disciplinary proceedings, which are governed by the rules and principles of labour law.[7] Ensuring discipline at work involves the application of disciplinary sanctions, in accordance with the law, against those employees who commit a breach of the obligations imposed on them as a part of a labour contract (either intentionally or negligently). On the other hand, disciplinary sanctions are traditionally divided into two groups: *general disciplinary sanctions* and *special disciplinary sanctions*. The special disciplinary sanctions apply to specific categories of employees, on the basis of laws that regulate their professional status.

Disciplinary rules applicable to academic staff are derived from the general provisions of the Romanian Labour Code, especially those pertaining to misconduct, but also those concerning the observance and implementation of disciplinary sanctions, as well as those pertaining to institutions involved in this stage of disciplinary action. In Romania, legal liability of higher education staff, including the teaching and research staff, the teaching and research auxiliary personnel, as well as the management, guidance and control of higher education personnel

6 See: https://www.brainyquote.com/quotes/immanuel_kant_134876

7 For more detalis on the matter, see A. Hurbean, *Disciplinary action of the teaching and research staff in the academic field*, 2014, ISI, Monduzzi editore, ISBN 978-88-7587-694-4.

is regulated by the National Educational Law no.1/2011 and Law no.206/2004 on the Proper Conduct in Scientific Research, Technological Development and Innovation. The first one (Law no.1/2011) is a general law on this matter, while the second one (Law no.206/2004) is a special law which supplements the provisions of the general law. This approach is rational and particularly significant in terms of establishing disciplinary offences and forms of liability.

The National Education Law no. 1/2011 stipulates two types of misconduct: a) serious misconduct, which implies substantial departure from the proper conduct in scientific research and academic activity; and b) misconduct strictly concerning the specific categories of university teaching and research staff and other employees. According to Article 310 of Law no. 1/2011, serious misconduct includes: plagiarism of the results or publications of other authors; fabricating results or replacing the results with fictitious data; and entering false information in applications for grants or funding.

On the other hand, Law 206/2004 governing Proper Conduct in Scientific Research Activities, Technological Development and Innovation[8] defines both the rules of conduct in these activities and the deeds that constitute violations of these rules, in detail; but, these legal provisions are strictly applied in the specified fields of scientific activity.

According to Article 2 of Law no. 206/2004, the rules of proper conduct in the research and development activity are: a) rules of proper conduct in scientific activity; b) rules of proper conduct in the activity of scientific communication, publication, dissemination and popularization, including the funding requests submitted in project competitions organized from public funds; c) rules of proper conduct in the institutional assessment and monitoring of research and development, evaluation and monitoring of research and development projects obtained through actions of the National Plan for Research, Development and Innovation, and evaluation of individuals in order to grant degrees, titles, positions, awards, distinctions, bonuses, attested or certified in research and development activity; d) rules of proper conduct in leading positions in research and development; e) rules of proper conduct regarding the respect for human beings and human dignity, preclusion of animal suffering, protection and restoration of the natural environment and ecological balance.

8 Portal legislativ: Lege 206/2004 of 27 mai 2004 privind buna conduită în cercetarea ştiinţifică, dezvoltarea tehnologică şi inovare (actualizată până la data de 28 ianuarie 2016); http://legislatie.just.ro/Public/DetaliiDocument/52457

In 2011[9], Article 2 was amended by introducing specific forms of misconduct that constitute a departure from the rules of proper conduct in the scientific work, to the extent that they do not constitute offences under criminal law. Thus, Article 2 (1) of Law 206/2004 includes: a) manufacturing results or data and presenting them as experimental data, such as data obtained by calculations or numerical simulations on computer, or data or results obtained by analytical calculations or deductive reasoning; b) falsifying the experimental data, or data obtained by numerical calculations or simulations on computer, or data or results obtained by analytical calculations or deductive reasoning; c) deliberately hindering, preventing or sabotaging research and development activity of other persons, including: unjustified blocking of access to research/development facilities; damage, destruction or manipulation of experimental devices, equipment, documents, software, electronic data, organic or inorganic substances or other living matter used by other persons to conduct, perform, or complete research/development activities.

The modified Article 2 (2) of Law 206/2004 includes forms of misconduct which constitute a departure from the rules of proper conduct in the activity of scientific communication, publication, dissemination and popularization, including the funding requests submitted in projects competitions organized from public funds, such as: a) plagiarism; b) self-plagiarism; c) inclusion in the list of authors of a scientific publication of one or more co-authors who did not significantly contribute to the publication, or exclusion of some co-authors who significantly contributed to the publication; d) inclusion in the list of authors of a scientific publication of a person without his/her consent; e) unauthorized publication or dissemination of unpublished results, hypotheses, theories or scientific methods; f) entering false information in applications for grants or funding, in application files for empowerment, for university teaching positions or for research and development positions.

Article 2 (3) of Law 206/2004 enlists the forms of misconduct that constitute a departure from the rules of proper conduct in the institutional assessment and monitoring of research and development, evaluation and monitoring of research and development projects obtained by actions of the National Plan for Research, Development and Innovation, and evaluation of individuals in order to grant degrees, titles, positions, awards, distinctions, bonuses, attested or certified in research and development activities; they include: a) non-disclosure of conflict of interest situations in conducting or participating in assessments; b) inobservance of confidentiality or violation of privacy in evaluation; c) discrimination

9 Law no. 206/2004 was amended and supplemented by the government Ordinance no. 28 of August 31, 2011, published in *Official Monitor* no. 628 on 2 September 2011; http://legislatie.just.ro/Public/DetaliiDocumentAfis/131196

in evaluation, on the basis of age, ethnicity, gender, social origin, political or religious orientation, sexual orientation or other types of discrimination (except for the affirmative measures provided by law).

Article 2 (4) of Law 206/2004 includes the forms of misconduct that constitute a departure from the rules of proper conduct in leading positions in research and development, such as: a) abuse of authority in order to become the author or co-author of publications of subordinate persons; b) abuse of authority to obtain salary, remuneration or other material benefits from research and development projects conducted or coordinated by subordinate people; c) abuse of authority to become the author or co-author of publications of subordinate persons, or to obtain salary, remuneration or other material benefits for spouses, in-laws or relatives to the third degree inclusively; d) abuse of authority to unjustifiably impose one's own theories, concepts or results to the subordinates; e) obstructing the work of ethics committees, a review committee or the National Ethics Council, during the analysis of some violations of proper conduct in research and development activity under subordination; f) inobservance or violation of legal provisions and procedures for compliance with the rules of proper conduct in research and development activity provided by the law, in Law no. 1/2011, in the Code of Ethics, in field-specific codes of ethics, in regulations governing the organization and operation of research/development institutions or in university documents (e.g. charters), as well as failure to implement the sanctions imposed by the ethics committees or by the National Ethics Council for Scientific Research, Technological Development and Innovation.

Article 2 (5) of Law 206/2004 refers to the forms of misconduct that constitute a departure from the rules of proper conduct regarding the respect for human beings and human dignity, avoidance of animal suffering, protection and restoration of the natural environment and ecological balance, which are stipulated in detail in the Code of Ethics developed by each university, or in the field-specific codes of ethics developed by every academic field.

Article 2 (6) of Law 206/2004 specifies other forms of misconduct that may lead to ethical responsibility (accountability) by association: a) active participation in the misconduct or offences committed by others; b) awareness or knowledge of the offences committed by others and failure to notify the competent ethics committee or the National Ethics Council; c) co-authoring publications containing falsified or fabricated data; d) failure to fulfil legal and contractual obligations, including those related to the mandate contract or funding contracts, in the exercise of management or executive functions or coordinating the R&D activities.

In the field of scientific research and academic activity, no other offences can be established other than those stipulated by the law. The actions and omissions

which may be regarded as forms of ethical misconduct are not established by the employee, but by the law. Thus, the actions and omissions that constitute a breach of ethical norms and may be the grounds for disciplinary liability must be enlisted in the University Ethics and Deontology Code, which is elaborated by each university, according to the university's field of activity.

According to Article 312 (para. 1) of Law no. 1/2011, the second category of misconduct which is subject to disciplinary proceedings entails every breach of duty of the teaching and research staff, auxiliary teaching and research staff, management staff, vocational guidance and control staff, based on the individual employment contract, as well as the violation of the rules of conduct set out in the University Charter. In this context, any breach of behavioural norms that may be detrimental to the interest of education and prestige of the unit/institution may constitute a disciplinary offence, as long as these rules have been established and communicated to the employees. So, the employees must observe not only the general obligations stipulated by the law, individual employment contract and collective labour agreements, and the rules of conduct envisaged in the University Charter but also the obligations arising from the employer's decisions, verbal or written orders (Țiclea, 2012: 782).[10] Within the meaning of the law, any breach of these orders may be regarded as misconduct which is subject to disciplinary action.

3.1. Disciplinary sanctions

The disciplinary sanctions which may be applied to teaching and research staff, and auxiliary teaching and research staff, in case of any violation of university ethics or envisaged rules of proper conduct are provided in Article 312 (para. 2) of Law no. 1/2011, as follows:

a) a written warning;

b) reduction of the basic salary (cumulated, if necessary), in line with the management, guidance and counselling indemnity;

c) suspension, for a limited period of time, of the right to compete for a higher teaching position, a management office, or a vocational guidance and institutional control position, a member of the examination board for PhD degree, master degree or graduation exams;

d) dismissal from the teaching position or management position in higher education;

10 Țiclea, A., *Tratat de dreptul muncii*, Bucharest, Universul Juridic Publishing House, 2012, pp.782

e) cancellation of the employment contract.

Besides these sanctions, Article 11 (1) of Law no. 206/2004 (amended in 2011) also stipulates the sanction of withdrawing and/or correcting of all published papers which violate the proper conduct rules in research and development activity.

According to Article 324 of the National Education Law no.1/2011 and Article 14 (1) of Law 206/2004 amended in 2011, the National Ethics Council for Scientific Research, Technological Development and Innovation may impose one or more disciplinary sanctions for proven misconduct in research and development activity:

f) a written warning;

g) withdrawal and/or correction of all works published in violation of proper conduct rules;

h) withdrawal of the title of a PhD mentor/supervisor and/or the habilitation certificate;

i) withdrawal of the PhD title, university teaching title or research degree, and/or demotion;

j) dismissal from the management position in the higher education institution;

k) termination of the employment contract on disciplinary grounds;

l) prohibition, for a specific period of time, to access to public research and development funds (Article 324 Law no.1/2011);

m) suspension, for a specific period of time ranging from 1 to 10 years, of the right to enter into a competition for a senior university position, a management position, guidance and institutional control function, or a member of competition committees;

n) removing the concerned person/persons from the project team;

o) stop funding the project;

p) stop funding the project with mandatory return of funds (Article 14(1) of Law 206/2004).

If the National Ethics Council establishes a serious violation of the law, it may impose the following sanctions (Article 325 of Law no.1/2011):

q) prohibition of employment in teaching and research positions of individuals proved to have committed serious violations of proper conduct in scientific research and academic activities, as established by law;

r) cancellation of the contest for an occupied teaching or research position, termination of the employment contract with the university, regardless of the time when somebody's serious violation of proper conduct in scientific research and university activity has been proven.

The disciplinary sanctions which can be imposed by the National Council of Ethic also include the sanctions applicable by the Ethics Committee. Disciplinary sanctions which can be applied in case of common disciplinary misconducts are the same as the sanctions imposed for breach of university ethics: a) a written warning; b) reduction of the basic salary (cumulated, if necessary), in line with the management, guidance and counselling indemnity; c) suspension, for a limited period of time, of the right to compete for a higher teaching position, a management office, or a vocational guidance and institutional control position, a member of the examination board for PhD degree, master degree or graduation exams; d) dismissal from the teaching position or management position; e) cancellation of the employment contract on disciplinary grounds (Article 318 of Law no.1/2011).

3.2. Application of sanctions

The divergence from the university ethics is the basis for establishing legal liability of the person who has committed such infringement. In universities, the Ethics Committee is the principal institutional body whose principal duty is to ensure compliance with the codes of ethics and analyse and resolve cases involving misconduct and violation of the university ethics on the basis of complaints or notifications, in accordance with the University Code of Ethics and Deontology (Article 306 (par.3a) of Law no.1/2011).. Any person, either from the university or outside the university, may notify the Ethics Committee about a violation of the university ethics committed by a member of the academic community (Article 308(1) of Law no.1/2011), or the Committee may take action *ex officio,* considering that academic and scientific research activity of the teaching and research staff is a public one.

The Ethic Committee is established at each university and its structure and composition is proposed by the University Board, authorized by the Senate and approved by the Rector. The committee members are people of professional and moral authority (Article 306 (par.2) of Law no.1/2011). After investigating and analysing the case, the committee decides on the sanction which will be applied, and issues a public report on the outcome of proceedings. The Ethics Committee

may be appealed to the National Ethic Council for Scientific Research, Technological Development and Innovation, either by the person who was found liable or by the person(s) who referred the case to the university ethics committee (Article 11 (2) of Law 206/2004).

The National Ethic Council analyses cases which have been referred to this body, or may take action *ex officio*. After the examination, the Council decides on the liability of the concerned person(s) and issues a report on the findings, including a reasoned decision; in case of establishing the person's liability for breach of university ethics or divergence from proper conduct in research and development activity, the Council proposes relevant sanctions to be applied, in compliance with the law (Article 323 (par.1) of Law no.1/2011). The report is made available to the general public by being published on the National Ethics Council's website.

The National Ethics Council decisions are endorsed by Ministry of Education, Research, Youth and Sport, which has legal responsibility to put the Council decisions into effect (Article 323 (par.3) of Law no.1/2011). Depending on the person(s) the sanctions refer to, the sanctions set by the National Ethics Council are implemented by: the Ministry of Education; the President of the National Authority for Scientific Research; the National Council for Certification of University Degrees, Diplomas and Certificates; the heads of contracting authorities that provide public funding for research and development; the heads of higher education institutions or research and development units (Article 326 of Law no.1/2011).

4. Conclusion

In the idea of the above, it is natural that in their activity, the academis staff, to be voiced by dignity of moral and legal rules. Only acting on these coordinates, the academic staff contribute to ensuring the effective completion of the specific activity and also to the fulfilment of the conditions of their duties.

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ДЕОНТОЛОГИЈА И ОДГОВОРНОСТ У ОБЛАСТИ АКАДЕМИЈЕ

Резиме

Деонтологија је наука која се бави обавезама и дужностима које одређена категорија особа мора испунити у оквиру професионалне одговорности, или доктрина која се односи на професионалну етику у одређеној области. Одговорност је свеобухватни правни појам који дефинише услове под којима одређена категорија људи реално или потенцијално подлеже законској обавези. У раду се даје приказ и анализа правних институција које се односе на високошколско образовање и статус универзитетског наставног особља, са освртом на професионалну етику и одговорност у академској заједници.

Кључне речи: *деонтологија, одговорност, универзитет, академија, право, образовање, права и обавезе, рад.*

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879377A

UDK:340.12
Рад примљен: 25.08.2018.
Рад прихваћен: 14.11.2018.

НЕОРЕАЛИЗАМ КАРЛА ЛЕВЕЛИНА (Karl Llewellyn)

Апстракт*: Као представник школе америчког правног реализма, Левелин сматра да је смисао права у његовој предвидивости и могућности појединаца да се, процењујући шансе за исход у спору, обрате суду. Право се по њему налази у реалним односима, а не у правним правилима. Под државом подразумева довољно организовану групу која је од сопственог и осталих народа призната као легитимна (став који је касније донекле кориговао, с обзиром на то да је легитимитет нормативни, а не социолошко-правни принцип). Његова социологија права је заснована на реалности судова и на примени резултата стварносних судова. Правно релевантним чињеницама сматра нацију, национално осећање, национално културно добро, генус хомо сапиенса... а правни живот сматра последицом међусобних дејстава одређених ефективних особа у друштву, а не реализацију правде.*

Наводећида изучавање правила или норми којима се усмерава понашање,представља један од начина изучавања права, Левелин прави одступницу у односу на класичну социолошку школу утолико што и нормама, а не само фактима, на овај начин признаје значај који оне имају у правном животу. Левелин прави разлику између науке о праву и самог права (без обзира што под правом подразумева реалне односе), излажући при томе модел теоријско-правног резона, као образац стварања највиших правних појмова.

Кључне речи*: држава, друштво, право, правда, реални односи, норме, суд, ауторитет, процес.*

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Доследан школи, којој поред њега припада и највећи број теоретичара северноамеричког континента, Левелинов ставодражава основне принципе школе америчког правног реализма: право је оно чега у свом радутреба да се придржавајусудија, шериф, службеник, чувар у затвору или адвокат, а његова се важност огледа у смислу предвидљивости правила којих ће се судија придржавати, као и могућности појединца да се, управо због могућности да предвиди која ће се правила применити, обрати суду (Llewellyn, 2008).

Право се у свом животу, сматра он, налази у свету бивства, као што се и живот уопште налази у свету бивства (SeinsWelt) (Llewellyn, 1977: 38). А систем права, као логички уређен однос (али систем права, схваћен на начин како се сходно поставкама овакве оријентације уопште може схватити, дакле као однос факата – подвукао С. А.), нигде се не може открити, тако да свеукупност у друштву не представља хармонија него равнотежа (Llewellyn, 1977: 40).

Ми бисмо само за почетак приметили да није уобичајено да се теоретичари социолошке школе уопште изјашњавају о питању систематике у праву, с обзиром на то да на ово питање социологизам у праву не може да понуди одговор, посебно не одговор који би био кохерентан принципима те школе, то јест био проверљив као и остали одговори које ова школа нуди, што значи да реализам не би могао да понуди одговор на питање систематике у праву а да не зађе у домен резона правног и логичкогнормативизма.

Ово би важило за систем права у његовој нормативно примењујућој димензији, с обзиром на то да социологизам право своди на чињенице, а не на идеје, као што то чине присталице нормативизма, док, када је реч о науци као скупу идеја о одређеном предмету, нема суштинских неслагања са нормативизмом. Тако Левелин сматра да свака научна грана има своје порекло и разлоге у практичном животу која током времена добија облик једног квазисистема постојећих чињеница и вредности ((Llewellyn, 1977: 41, Llewellyn, 2008. (дакле, чињенца, а не норми)). Разлика социологизма и нормативизма није у појму науке уопште, па и науке о праву, него о предмету те науке: по нормативизму, предмет науке представљају идеје (идеје о требању), а по социологизму су то реалне чињенице (путем којих се требање реализује) (Келзен, 1951: 163,164). Овде су правне одредбе, као и појам норме, у другој линији посматрања, ако норма као идеја има, или ако она може да има утицај на право (Llewellyn, 1977: 48, 49) – као став јасне разделнице две владајуће школе права: социолошке и нормативне! Левелин истиче да је људско поступање у центру сваког објективног посматрања (Llewellyn, 1977: 49), а под правним животом подразумева

узајамно деловање између одређених, ефективно код ауторитета признатих субјеката и осталих субјеката у друштву, уколико се поступање ових субјеката посматра као ефективно њихово поступање (Llewellyn, 1977: 70), док под државом означава довољно организовану групу која је од сопственог и осталих народа као легитимна призната (Llewellyn, 1977: 75).

Иако овакав став Левелина изгледа једноставан, и као критеријум помоћу којег се неспорно може идентификовати држава у односу на недржаву, ипак сматрамо да одредница „легитимно признање'" отвара дилеме на које ни нормативизам не може да понуди до краја егзактан одговор, а посебно не социологизам, будући да систем права, у чијој је основи легитимитет, не може постојати као однос чињеница, како то тврде социологисти, него само као однос идеја. Међутим, видевши и сам да правац којем припада не може да понуди поуздан критеријум легитимитета, наведени став о држави Левелин је допунио ставом да друштво без државе, без правних норми и уређеног реда и хијерархије органа, не само да је могуће него је и постојало (Llewellyn, 1977: 80). Али, овим не само да није решено питање државе, него је још и отворена дилема о томе која је разлика између државе и друштва, јер су, сходно његовом полазишту, основа права, а тиме и државе, друштвене чињенице, а како критеријум легитимитета није до краја одредио, мислимо да је код Левелина питање критеријума државе остало отворено. Ово тим пре што помиње легитимитет а не легалитет, јер легитимитет, за разлику од легалитета, имплицира неправне критеријуме као што су морал, обичај, конвенција... Сложићемо се да су ови критеријуми значајнији од права (несхватљиво би било да право буде у сукобу са моралом, зато је и легитимитет основ легалитета), али ипак сви ови критеријуми су корективни критеријуми права, а не независно постојећи од права.

Међутим, ова недоследност је слабост социолошке школе уопште, а не само школе америчког реализма. Једини излаз из овакве дилеме се пронађе је у решењу путем плурализма норми и њихових ставаралаца, уз неопходне модификације темељних правних принципа.Па се у том смислу наводи да је систем права произишао од државе који појединцима и савезима признаје одређена овлашћења и права – само један правни систем (ми бисмо пре рекли "подсистем" – С. А.), тј. део владајуће идеологије једног друштва поред сујеверја о вештицама, али ни у ком случају опис чињеница људских понашања. Такав један правни систем може бити нужан и неопходан за постизање правних циљева (Llewellyn, 1977: 195, 196).

С друге стране, рефлексије оваквог схватања државе на право су да се држава не може посматрати као обухватајуће јединство, него само као

један од савеза међусобно конкурентних, у одређеном сукобу или трпљењу. Без обзира што истиче захтев да представља свеукупност, Левелиндржаву ипак означава кроз два монопола: монопол на новац и на физичку силу (Llewellyn, 1977: 191).

Све у свему, неореалистичка школа чији је један од главних представника К. Левелин, представља реакцију против телеолошке и морализаторске оријентације социолошке јуриспруденције са циљем елиминације телелошких елемената и вредносних судова, не само из социологије права него и из јуриспруденције уопште (Гурвич, 1997: 162). Социологија права Левелина је заснована искључиво на реалности судова и на примени резултата стварносних судова (Гурвич, 1997: 163) (најважнија Левелинова оригиналност би могла бити да је скренуо пажњу социолога права на значај и аутономију феномена примене (Карбоније, 1992: 111), те, сматра он, правници нису они који стварају право него њега ствара друштво, и оно је већ дато (Гурвич, 1997: 166). Друштво је стално у покрету, тако да стално треба преиспитивати право да би се установило у којој мери одговара друштву (Гурвич, 1997: 166).

Гурвич правилно примећује да Левелин запада у нерешив проблем када тврди да је право оно што званичници чине решавајући спорове (полазећи од Холмсове дефиниције да је право прорицање онога што ће судови учинити) са концепцијом права као директног производа друштва, када „званично понашање" може бити у директном сукобу са животом друштва, да би излаз из ове противуречности пронашао у решењу да право чини не само „понашање званичника" него и „понашање лаика", односно да је право оно што људи и судови заиста чине (Гурвич, 1997: 167).

Међутим, Љуелин касније напушта концепцију права „као прорицања званичног понашања", и поново га дефинише у домену социологије права која, по њему, мора водити рачуна о најразличитијим групама којих има у разним врстама друштва, као и о улогама појединих група које оне у праву имају. Правно релевантним чињеницама сматра нацију, национално осећање, национално културно добро, генус хомо сапиенса, и све ово у њиховој међузависности (Llewellyn, 1977: 30). Наводи да је суштина сваке групе везана за правне послове и правне активности које су део живота људи који живе у различитим групама, због чега су правни системи обухватних друштава плуралистички (Гурвич, 1997: 168, 169).У димензији значења постоји јасна потреба разликовања између правних, са једне стране, и моралних, религиозних, економских и других значења, са друге стране. До правног значења се може доћи без икакве филозофске анализе, односно осећаја правде или правичности, него је, сматра он, за разумевање

правног значења довољна социолошка дескрипција која се у том случају исцрпљује кроз друштвено значење нормативне генерализације која се састоји у „пројектовању и идеализовању правних образаца“ (Гурвич, 1997: 170). Оваквом Левелиновом анализом, чија је суштина противуречна и свакако имплицира плуралистичку сложеност права, он сеприближава Гурвичовој анализи права – наводи сам Гурвич (Гурвич, 1997: 171). По Гурвичу је Левелинов појам јуриспруденције споран: он је превазишао „правни реализам“ али није успео да изгради „идеални реализам“ који узима у обзирсоциологију права као однос између духовних значења и друштвених структура (Гурвич, 1997: 172).

Левелин сматра да човек има природну способност да прави „нормативне генерализације“ на два начина: репетицијом постојећег понашања и стварањем прецедената путем решавања проблематичних случајева. Са друге стране, право производи „уобичајено понашање“ и ствара ауторитет у спорним случајевима (Молнар, 1994: 253). Правни живот је међусобно дејство одређених, ефективних особа у друштву, а не реализација правде (Молнар, 1994: 253). Главне функције права су да каналише друштвено понашање у циљу избегавања конфликата и да разрешава спорове (Молнар, 1994: 254).

Расправљајући о конкретним питањима правне процедуре, сматра да постоје две врсте слободе судског одлучивања, и то: арбитрерна слобода и праведна, односно мудра слобода. По њему, судијама се не сме ограничити праведна и мудра слобода, али им се свакако мора одузети арбитрерна слобода (Молнар, 1994: 252).

У смислу функционалистичког схватања права које заступа, у чланку „Право и друштвене науке – посебно социологија“ разликује шест функција права, односно правних послова: 1. посао одржавања групе као целине; 2. посао решавања друштвених проблема и ангажовања правних институција у том правцу као што су парламент, судови, арбитраже итд.; 3. посао предупређења проблематичних случајева путем законодавства; 4. посао алокације ауторитативних исказа појединцима како би ови знали ко има какве обавезе; 5. посао социјалне стимулације у циљу добробити свих појединаца и целог друштва; 6. посао правног заната у циљу оспособљавања судија, законодаваца, адвоката итд. (Молнар, 1994: 254).

Начин на који Левелин расправља је такође карактеристичан за школу којој припада. Тако у делу *The Bramble Bush*, поред тога што излаже личне ставове о праву уопште, излаже и разлику између материјалног и процесног, као и јавног и приватног права, задатке које студенти у правној школи треба да савладају, објашњава систем устројства правосуђа, разлике у поступању

пред првостепеним и другостепеним судом, као и односизмеђу супротних страна на суду, односно разлике њихових процесних позиција.

С обзиром на то да је основни принцип правног реализмаподела права на реално и нормативно, његово бивство, па онда и одвајање од права свега што је „нормативно" и које као такво, по овој теорији нема пуно тога заједничког са „правом" (фактичким односима), тако и Левелин у својим делима расправља о процесним питањима, позицији суда у целом процесном спектаклу и односу према чињеницима на основу којих суд формира одлуку, као и о целом току поступка, испитивању сведока, оцени веродостојности исправа, доброј вери, унакрсном испитивању итд., али о свему овоме као фактичким, а не као нормативним чињеницама. Он још говори и о начину одлучивања (а не о начину на који треба одлучивати, дакле о ономе што се стварно дешава, а не о томе шта треба да се деси) првостепеног и другостепеног суда, као и о дејству судске одлуке, с обзиром на њено својство да она делује у будућности, па тако овде, управо објашњава значај који судска одлука има у Common-law систему.

Међутим, расправа о оваквим питањима, са аспекта излагања материје теоријскоправног нивоа (на шта Левелин у својим расправама претендује) отвара дилему да ли овакво излагање уопште може да буде део концепције теорије која поставља најопштије принципе права, односно критеријуме разликовања права и неправа. Вероватно да би ова питања пре спадала у домен конкретне правне науке (процесноправне теорије), али с обзиром на то да реализам важење поставља у директну пропорцију са постојањем правног понашања (што се код Келзена доводи у директну вези само у случају ефикасности (Келзен, 1951:4253), а иначе се важење најоштрије разликује од постојања –што је темељни принцип нормативне теорије), широка лепеза питања најразличитије правне релеванције је самоподразумевајућа последица оваквог приступа.Кроз снажну расправу питања процесног и материјалног права, на начин потпуно доследан правцу којем припада, Левелин поставља парадигму права: да се оно налази само у реалности, дакле никако у правилима.

Али, с обзиром на то да разликује „јуриспруденцију као вештину, од ње као чисте науке" (Гурвич, 1997:165,166), (сама ова чињеница да јасно разликује нормативне од научних појмова, сврстава га у ред теоретичара који превазилазе опсег реалистичке јуриспруденције, који питање разликовања ових појмова никада до краја нису егзактно решили) Љуелин (у књизи „Начин поступања Чејена") наводи да постоје три начина у изучавању права: први је идеолошки, и односи се на правила или норме којима се усмерава понашање; други је дескриптиван, и односи се на правну

праксу, односно реално понашање; и на трећи начин се изучавају инстанце конфликта, тужбе итд. (Молнар, 1994: 260).

Овде бисмо приметили да, јасно разликујући норме и понашања на основу њих, Левелин ипак прави одступницу у односу на класичну социолошку школу утолико што прихвата могућност независног постојање норми, па у том смислу и претходно прописаних норми, а не само постојање фактичких односа и на основу њих формулисаних правила понашања.

Међутим, остало је нејасно шта то код њега значи дескрипција реалног понашања? С обзиром на то да се ради о дескрипцији, опште прихваћеном градацијом нивоа спознаје стварности, дескрипцијом или описивањем настаје коментарисање, а не и наука, за чији је настанак потребно применити експликативни, односно објашњавајући метод. Ако овде дескрипција није некакав колоквијални начин означавања научног метода уопште, онда је питање где престаје коментарисање, као нижи ниво спознаје стварности који настаје на основу описивања (дескрипције), а где и како настаје наука, као виши ниво спознаје стварности који настаје на основу објашњења (експликације) (Петронијевић, 1932)?

Онолико колико његове методолошке основе дозвољавају, Левелин прави разлику између науке о праву и самог права! То он показује и у композицији дела *The Bramble Bush* које се састоји из дела у којем се расправља о правној науци у суштинском смилу, и у којем се као таквом излажу највиши појмови права, и дела у којем се расправља о правној науци у формалном смислу, што би управо био онај део у коме износи програм изучавања правних дисциплина у правној школи, где се студентима дају обавештења о начину на који ће стицати знања правне науке, програм студирања итд.

У оквиру првог дела, у коме се расправља о правној науци у суштинском смислу, можемо уочити разликовање две групе појмова, тако што писац јасно раздваја најниже и највише појмове, покушавајући дауспостави јасне везе између једних и других, и управо покушавајући да изводи једне из других, с обзиром да теорија права највише појмове гради на најнижим, а преко најнижих проверава тачност највиших појмова, што би представљало школски пример образца стварања појмова теоријске правне науке, без обзира на чињеницу да ли право схватамо као идеју или као однос факата. Тако да се код њега среће пример правног резона који као такав не нуди само списак готових решења највиших правних појмова, него има и претензију да представља парадигму методолошког поступка теоријског нивоа правног мислилаштва, што се може видети када он са апликативног, догматичко-коментаришућег начина правног резона покушава да пређе на највиши експликативни начин правно-

научног закључивања, при чему користи индуктивни и дедуктивни модел логичко-правног резоновања. Тако да се кроз његове радове на више места одсликава веза коју он покушава да пронађе између конкретних и општих правних појмова, као и веза ових са другим нормативним појмовима. Те, с обзиром да се право не може раздвојити од правде и морала, Левелин снажно наглашава везу ових појмова и њихову међусобну условљеност, што је иначе карактеристично за социологизам, а за амерички правни реализам посебно. Он подвлачи велики значај који за успостављање основног реда у друштву има едукација, у том аспекту и право, јер путем одговарајућих социјалних механизамагарантује функционисање успостављеног реда.

Теоријска социологија се по њему не може погрешно схватити: као систем који је емпиријски проверљив него као начин функционалне анализе (Llewellyn, 1977:16). Инсистира да се његови појмови имају разумети у једној шароликости и противуречности друштвеног хаоса(Llewellyn, 1977:24). Радна методика оваквих његових поставки има као свој циљ одрживо и употребљиво биће, односно има за циљ да досегне одрживе и употребљиве научне везе, при чему су одрживост и употребљивост увек временски одређени (Llewellyn, 1977:24,25). Сходно свему наведеном, сматра да управо наука бивства (Seins wissenschaft), која може бити само социологија права, јесте језгро сваког правног проблема (Llewellyn, 1977:41), из чега експлиците произилази да за правну науку, као науку требања, односно науку која изучава својеврсно требање – правно требање, овде нема места. У сваком случају, постављајући питање шта за науку бивства представља правни живот, односно шта за овакво новије природнонаучно посматрање представља центар правног материјала (Rechtsstoffes), одговор даје егзактно, на начин да то у сваком случају нису важеће правне норме, односно одредбе. Ако се такве правне одредбе и њихова догматичка обрада сматрају правом, односно ако се под правном науком схвати наука о нормама, односно наука требања (Soll-Wissenschaft), онда, сматра он, нема смисла дискутовати о речима (Llewellyn, 1977:44)!!!

Ово би био коначни домет Левелиновог става. Овакав исход, по нама свакако не успева да превлада основне слабости социологизма, којим се логичка основа права доводи у питање, а са њом и систематика права, као начин постојања сваког нормативног бивства, не само правног него и моралног, обичајног, религиозног, конвенционалног и сваког другог. Иако прави разлику између логичког и научног резоновања (у делу *The Bramble Bush*), по њему је научно само оно што је реално, никако требајуће. Чим се систематика појмова (без обзира да ли су у питању нормативни или научни појмови) доводи у питање, а по природи ствари се мора доводити у питање пошто је право у фактима, а не у појмовима, ондаје питање шта

то логично може бити у праву, као законитости исправног мишљења, јер право не сматра идејом, па ни логичком идејом, него само радњом (иако радње имају временску и просторну димензију, али не и логичку). Тако остаје да све што може бити логично, а име везе са правом, у ствари и није право него мисао о праву, односно наука којој је право предмет изучавања. У овом учењу, дакле, идеје постоје једино у науци о праву, док право чине само радње. Право као идеја не постоји!

Све ово отвара питање на основу чега људске радње можемо сматрати сагласним или у супротности са правом, пошто се право само кроз људске радње исцрпљује. И још, ако се људско понашање не објашњава помоћу специфичног, правног, требања, онда се мора објашњавати путем нагона за задовољење потреба, што би онда био главни критеријум људског правног делања. У том случају би логичко разумевајући метод, као најважнији метод изучавања који користи правна наука, требало да буде замењен објашњавањем путем закона каузалитета, закона узрока и последице, односно еволуције, дакле природних закона. Питање је да ли би онда правна наука могла и даље да се сматра друштвеном науком. Јер, не може се предмет науке истраживати применом закона еволуције и каузалитета, а науку која изучава такав предмет сматрати и даље друштвеном науком. Предмет друштвених наука су појаве које се изучавају логичко-разумевајућим методом!

У сваком случају, позитиван допринос ове торије је што, наглашавајући поједине правне појмове, изнова отвара дискусију о њима. „Његова изванредна терминологија одликује се, у сваком случају, и тиме што не користи старе термине у новим значењима и што снажном упечатљивошћу преноси она значења код којих је то потребно. Изрази 'правни занат', 'правни начини', 'правна грађа', 'проблемски случај' и 'рашчишћавање незгодних ситуација' – говоре сами за себе" (Паунд, 2000: 396). С друге стране, ограниченост резултата става који Левелин заступа може се приписати слабостима и искључивости правца којем припада, и који пориче постојање појединих димензија права, без којих уопште нисмо сигурни да се право може у потпуности схватити.

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NEOREALISM OF KARL LEWELLIN

Summary

As a representative of the School of American Legal Realism, Lewellin thinks that the meaning of the right is in its predictability and the ability of individuals, assessing the chances in a dispute, to address the court. In his view, the right is found in real relations, and not in legal rules. He understands the state as a sufficiently organized group that is recognized by its own people and other peoples as legitimate, which is a stance that he later corrected to some extent since legitimacy is a normative and not a sociological and legal principle. His sociology of law is based on the reality of the courts and the application of the results of the real courts. He considers a nation, a national feeling, a national cultural asset, a genus of homo sapiens ... to be legally relevant facts, and he views legal life as the interaction of certain effective persons in a society rather than the realization of justice.

Stating that studying the rules or norms by which behavior is guided is one of the ways of studying the law, Lewellin makes a retreat in relation to the classical sociological school by recognizing the significance of both legal norms and facts in legal life. Lewellin makes a distinction between the science of law and the law itself (no matter what it implies in real terms), exposing the model of the theoretical and legal reason as a form of creating the highest legal concepts.

Key words*: State, society, law, justice, real relations, norms, court, authority, process.*

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879387S

UDK: 347.26(37)
Рад примљен: 30.09.2018.
Рад прихваћен: 02.11.2018.

УНИВЕРЗАЛНОСТ ПРАВИЛА РИМСКОГ ПРАВА ВЕЗАНИХ ЗА ИНСТИТУТ СЛУЖБЕНОСТИ

Апстракт: *Нека античка права, попут египатског, дошла су до одређених облика службености. Ипак је тек римско право овај институт развило у потпуности. Наравно, развој института је био спор и постепен. Почев од земљишних службености, најпре сеоских, а потом и градских, да би се у класичном периоду користиле и личне службености. Иако су сва ова права била прилично разнородна ипак су сврстана у један институт. Вероватно да је и то сврставање прилично различитих права у једну категорију још једна од заслуга великог правника Гаја. Путем рецепције, правила римског права везана за институт службености у готово непромењеном облику постала су саставни део великих буржоаских кодификација. Тако су та правила доспела и у наш Српски грађански законик из 1844, након чега су постала саставни део потоњих закона који су регулисали својинске односе, па и новог „Нацрта Законика о својини и другим стварним правима.“ Оваква ситуација нам даје за право да говоримо о универзалности правила римског права када је реч о институту службености.*

Кључне речи*: универзалност, правила римског права, институт службености.*

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1. Универзалност правила римског права

Римско право је робовласничко, али има неке одлике и решења која имају универзални карактер, која га чине прихватљивим и у средњем веку и данас (Станојевић, 2000: 14). Овако јасно и недвосмислено је изнео свој став професор Обрад Станојевић. Свакако да је он последица чињенице да је, путем рецепције, велики број правила римског права постао део модерних позитивних права скоро свих европских земаља. И не само европских. Путем утицаја великих буржоаских кодификација XIX века, пре свега Француског и Немачког грађанског законика, у земљама, њиховим колонијама, та правила су постала део грађанских законика земаља Латинске Америке, па чак и Јапана.

Како је било могуће да знатан број правила римског права постане део модерних правних система? Чињеница је да римско право, иако робовласничко, има и неке друге ванкласне особине, може се рећи универзалне. Како је највећи број правила римског права настао у периоду веома развијене робно-новчане трговине, логично је да су она морала регулисати односе између продавца и купца, зајмодавца и зајмопримца, закуподавца и закупца, односе својине, стварних права на туђим стварима и сл. Ова и слична правила имала су ванкласни карактер. Када се томе дода и „правничка генијалност" Римљана, онда не чуди да се говори о универзалности бројних правила римског права која су они створили. Јер, „као што су Грци измислили филозофску дисциплину (па чак ни данас нема таквог филозофа који би сматрао сувишним да се образује у њиховој школи), тако су Римљани измислили правну вештину, и још нема знака да их је у тој области ико заменио" (Виле, 2001: 118). Појмове које су дали римски правници, попут својине, уговора, облигације, самог права, што их више поново откривамо, све више се показују зачуђујуће способнима да одговарају потребама садашњег доба (Виле, 2001: 120). Отуда не чуди да су та „универзална" правила римског права прешла дуг пут до савремених права (савременог српског права), преко Византије утицало је и на српско средњовековно право. Путем рецепције, и на средњовековна права других европских земаља. Грађанским кодификацијама XIX века велики број правила римског приватног права постаје позитивно право.

2. Институт службености у римском праву

Институт службености, иако један од најстаријих, налазимо га још у Закону 12 таблица, па све до Јустинијановог права, има „универзални карактер." Скоро да нема ниједног института римског права који је у тој мери постао саставни део модерних права.

Поједина античка права познавала су одређене правне институте који су личили на службености. Египатско право познавало је појаву која је подразумевала да се из имовине издвоји део имања и повери свештеницима који ће из приноса са тог дела имања исплаћивати трошкове неопходне за култ мртвих (Theodorides, 1983: 1003–1021). Ипак ниједно античко право није институт службености развило као што је то учинило римско право. Данашње право је скоро у потпуности, са минималним изменама, прихватило институт службености онако како су га Римљани створили и уобличили, задржавши: поделу, општа начела, тужбе које их штите (Карајовић, 1996: 124). Такође су задржана римска правна правила која се односе на начине стицања и престанка службености. Сва поменута правила су успела да буду очувана кроз дуг историјски период и да путем рецепције постану значајан део савременог српског права које регулише ову изузетно важну област (Станковић, 2017: 541).

Иако је неспорна чињеница да су, у највећој могућој мери, правила римског права везана за институт службености постала део савременог српског права, као и савремених права већине европских земаља, треба рећи да у службености (*servitutes*) спадају веома различити облици права на туђим стварима. Назив службености долази отуда што некоме нечија ствар служи. Односно, неко има право да користи ствари које му не припадају (туђе ствари). У најранијем периоду римске историје јавиле су се земљишне, и то сеоске службености. Са развојем Рима и повећањем броја становника, јавиле су се и градске службености. Тек у класичном праву налазимо личне службености.

Заслуга за сврставање великог броја разноврсних права у један институт, под називом службености, приписује се Гају (*Gaius*). Тако, описујући бестелесне ствари, Гај наводи да њима припадају и плодоуживање, као и права на градским и сеоским непокретностима, које се још називају службеностима (Gai, Inst. II, 14). Даље, говорећи о стварним тужбама, каже да се у њиховом захтеву наводи „да нам припада неко право, као што је право употребе или плодоуживања, право прелаза, прогона стоке, водовода, право на подизање зграде преко одређене висине, право на видик…“ (Gai, Inst. IV, 3). Иако наведеним одређењима и набрајањима појединих службености нису обухваћене све до тада познате, може се видети и закључити да је заиста реч о веома разнородним облицима права на туђим стварима. Да сва та права припадају истој категорији закључује се из чињенице да на истом месту говори и о земљишним службеностима и о плодоуживању.

3. Институт службености у српском средњевековном праву

Прва фаза утицаја римског права на српско право била је путем византијског црквеног права у средњем веку. Утицај византијског права одвијао се у два облика: као рецепција и као традиција (Соловјев, 1998: 188). У почетку су то били закони црквени који су имали неприкосновену снагу у православној цркви, али и закони у области брачног и породичног права. За даљи утицај римског права био је пресудан превод *Номоканона* који је 1219. године сачинио Свети Сава. Био је то превод Фотијевог *Номоканона* из 883. године. То није био обичан превод јер је поред извода из Јустинијанових *Новела* (Novellae) унео и тзв. *Мојсијев закон* и цео *Прохирон*. *Прохирон* је у средњовековној Србији познат под називом Закон градски. Неки његови делови су заједно са *Еклогом* и Земљорадничким законом (*Nomos Georgikos*), чинили садржину српске компилације која је носила назив Јустинијанов закон. Доношењем Законика цара Душана наставља се утицај римског права. Традиција византијског права нарочито се осећа у односима аграрног и грађанског права. Прописи о сеоским службеностима и о аграрним преступима су као и у византијском праву.

У византијском праву *Прохирон* у тридесет осмој глави, која носи назив, *De novis operibus,* говори о различитим врстама службености. Правила о службеностима помешана су са полицијским правилима о зидању нових зграда. Користећи ту грађу, Матија Властар сачинио је једну крађу главу своје *Синтагме* под истим називом. Редактори скраћене *Синтагме* су главу о службеностима у потпуности задржали без икаквих измена.

Дакле, у српско средњевековно право, правила о службености су дошла кроз компилације византијског права.

Међутим, о сеоским службеностима нема одредаба ни у скраћеној *Синтагми* ни у *Законику Јустинијана*. О постојању ових службености податке добијамо из повеља српских владара. Тако су постојале следеће сеоске службености:

- Службеност која говори о водовођи (*aquaeductus)*, праву узимања воде са црквеног земљишта. Ова службеност помиње се у *Скопској повељи* из 1300. године (Тарановски, 2002: 492).
- Службеност сечења дрва у брдима која су припадала цркви. Ова као и претходна службеност настајале су на основу уговора (Тарановски, 2002: 492).
- Службеност појења стоке била је честа и претпоставља се да је постојала на темељима старог српског обичаја (Тарановски, 2002: 492).

- Службеност прогона стоке и паше је такође била честа. Разумљиво јер је у том периоду сточарство у знатном делу државе било основно занимање (Тарановски, 2002: 492). Службеност паше у жупи била је регулисана законом. Тако чланови 74–75 *Душановог законика* регулишу ову врсту службености.

Одредбе о градским службеностима садржане су у скраћеној *Синтагми* и примењиване су у истом облику у српским средњовековним градовима. *Прохирон*, као једна од важнијих збирки византијског права, о разним врстама службености говори у глави XXXVIII, која носи назив *De novis operibus*. Правила о службеностима су измешана са полицијским правилима о зидању нових кућа, односно зграда. Матија Властар је од правила садржаних у овој глави сачинио једну крађу главу К-3 своје Синтагме, *Властарове Синтагме*, задржавши исти назив. Како је касније настала нова верзија *Синтагме*, скраћена *Синтагма*, њени писци сачували су главу која садржи правила о службеностима у потпуности без икаквих промена, као главу К-2.[1] Живот у градовима попут Скопља, Сера, Призрена наметао је поштовање правила о службеностима које су неретко биле и повод судских спорова. Прихватање правила византијског права у градовима било је неминовно јер је већинско становништво у њима било грчког и романског порекла и владало се по правилима византијског права (Острогорски, 1970: 7–20).

Скраћена *Синтагма* познавала је следеће службености:

- Једна зграда не може другој одузимати видик на море (Соловјев, 1998: 436).
- Ово не важи за вртове, или ако је размак између зграда већи од 100 стопа (Соловјев, 1998: 436).
- Забрањено је пуштати дим из оџака на суседну зграду осим ако о томе нема посебне правине (правила) (Соловјев, 1998: 436).
- Забрањено је бацати ђубре око суседног зида (ипак може да постоји службеност, *servitus sterquilini* Соловјев, 1998: 436).
- Забрањено је зазидати прозор суседу при градњи нове куће (осим ако постоји уговор) (Соловјев, 1998: 436).

У *Законику Јустинијана* који је примењиван у средњовековној Србији налазимо следеће правило: "Ако имају суседи куће близу (једну другој) и један од њих хоће да зида (кућу) изнова, да не заклони своме суседу прозор који

1 Глава Властарове Синтагме која садржи правила о институту службености преузета је из Прохирона и та глава садржи само правила световних закона. Од 64 одредаба Прохирона, Властар је за своју Синтагму изабрао само 18 одредаба.

гледа на море или на поље, или у винограде или на било коју страну, осим ако је са пристанком тог суседа" (Марковић, 2007: 123). Даље: „И они који живе у високим кућама (могу да) забране (суседима) да граде пећ близу, да им не смета дим и то могу забранити." „Ако је твој зид налегао на моју кућу, треба да га исправиш" (Марковић, 2007: 124). Из датог се може видети да су службености које су примењиване у средњовековној Србији преузете из византијског права, где су правила преузета из римског права.

Дакле, када је о службеностима реч јасно је да су правила преузета у истом облику у коме су постојала у римском праву (градске службености), али у мери која је била потребна. Сеоске службености су такође преузете, али оне ипак носе и печат српског обичајног права.

4. Институт службености у Српском грађанском законику

Правила римског права везана за службеност нашла су место и у Српском грађанском и законику и каснијим законима који су регулисали својинске односе, као и у „Нацрту закона о својини и другим стварним правима". Тако је римско начело да се службеност не састоји у чињењу (D. 8, 1, 15, 1) нашло место у АГЗ у § 482 и СГЗ у § 343: „...онај коме служеће добро принадлежи није обавезан што чинити, но само је дужан допустити другоме, да овај какво право ту има, или је дужан штогод не чинити, што би иначе као господар у својој ствари чинити право имао". Изузетак од овог правила установио је Павле (*Paulus*) и према њему, власник послужног добра (у овом случају зида) морао је обављати поправке како не би дошло до штете на згради суседа који је стекао право да је наслони на туђи зид (D. 8, 2, 33). О овом изузетку говори § 348 СГЗ: „који на свом зиду .... суседа свога здање наслоњено држи..... тај мора од чести исти зид поправљати".

Римско начело да се не може установити службеност на службености (D. 33, 2, 1) садржано је у § 346 СГЗ: „службеност свака која је за ствар једну везана, остаје постојана и она се не може на друго лице пренети. Начело да лице у чију корист је установљена службеност мора исту вршити на обазрив начин (*civiliter*) (D. 8, 1, 9), односно да се власнику не нанесе штета. Ово начело садржано је у § 484 АГЗ, а касније и у § 345 СГЗ, према коме титулару службености не припада право да службеност простире на даље, већ се мора држати граница које су, према самој природи или израженој вољи власника послужног добра, опредељене. Садржи га и Закон о основама својинско правних односа (члан 50) и Нацрт закона о својини и другим стварним правима (члан 312), у смислу да се стварне службености врше на начин да се што мање оптерећује послужно добро.

Римску поделу службености на личне (употреба и плодоуживање) и стварне (земљишне, пољске и градске) прихватио је АГЗ (§ 472, § 473, § 478) и СГЗ (§ 334 и § 338). У СГЗ наводи се да службености леже на пољском добру, њиви, ливади и служе за удобност другом пољском добру или леже на кућама и кућним земљама и служе на удобност другој кући или кућној земљи, а да има и оних службености које се само за једну особу вежу (употреба, уживање, становање). Нацрт закона о својини и другим стварним правима у потпуности прихвата римску поделу и у члану 307 каже да службености могу бити стварне, стварно – личне, службеност грађења и личне службености.

У Риму у пољске службености убрајани су право преласка пешице преко туђег земљишта (*iter*), право преласка колима (*via*), право прогона стоке (*actus*), (*aquaeductus*), право црпљења воде са туђег извора, право напајања и напасања стоке, печења креча и вађења песка (D. 8, 3, 1), а АГЗ (у § 477) и СГЗ (у § 335) преузели су ову поделу земљишних службености. Слична је ситуација и са градским службеностима у Риму (забрана подизања зграде до одређене висине, одвођење кишнице на туђи кров или двориште, уграђивање греде у туђи зид, прављење балкона, надстрешнице на туђем ваздушном простору) (D. 8, 2, 2). Римска подела ових службености ушла је и у АГЗ (§ 475 и 476) и у СГЗ (§ 336).

5. Закључна разматрања

Такође, када је реч о подели личних службености и њиховом појмовном одређењу (плодоуживање, употреба, становање), решења дата у АГЗ (§ 478, § 473, § 509, § 521), СГЗ (§ 338, § 374, § 372, § 373, § 384, § 385), Закону о основама својинскоправних односа (члан 60) и Нацрту закона о својини и другим стварним правима (чланови 358) готово у потпуности преузета су из римског права (D. 7, 1, 1; D. 8, 1,1; D. 7, 8, 2; C. 3, 33, 13).

Према римском праву, службеност се могла стећи пословима *inter vivos* (уговором) и *mortis causa* (тестаментом и легатом), на основу судске пресуде у деобним споровима (*adiudicatio*) и застарелошћу (*longi temporis praescriptio*) (Gai. Inst. II, 29–33; D. 41, 3, 4, 28; C. 7, 33, 12, 4). Врло слична решења садрже АГЗ (§ 480), СГЗ (§ 340), Закон о основама својинскоправних односа (члан 51) и Нацрт закона о својини и другим стварним правима (члан 324).

Уз одређене измене, АГЗ (§ 1411 - § 1502), СГЗ (§ 387 - § 392), Закон о основама својинскоправних односа (члан 58) и Нацрт закона о својини и другим стварним правима (чланови 333–338, 354, 389–400) уважавају разлоге због којих престају службености које су установили стари Римљани – смрт титулара личних службености, стицање права својине и права службености

на једној ствари од стране истог лица (*confusio* код земљишних службености и *consolidatio* код плодоуживања), пропаст ствари или исцрпљивање користи од ње, промена суштине ствари, одрицање и некоришћење ствари, наступање рока или резолутивног услова (D. 8, 6, 1; D. 8, 2,6).

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UNIVERSAL NATURE OF ROMAN LAW RULES RELATED TO THE SERVITUDE INSTITUTE

Summary

Some rules from the ancient times, for example, from the anceint Egypt, contained some forms of the servitude. Yet, it was Roman law that developed this institute to its fullest form. Of course, this development was slow and gradual. It started with the land servitudes, first referring to rural and then to urban areas. In the classical period, personal servitudes were developed. Although all these rights belong to different categories, they were, nevertheless, all classified into a single institute. The achievement of classifying rather different rights into one category can be attributed to Gaius, the great Roman jurist. The Roman law rules related to servitudes became, through reception, the constituent part of many great bourgeois codification, almost in their original form. These rules entered our Serbian Civil Code of 1844, and subsequently became the part of many subsequent Serbian laws which regulate property relations, including the latest „Draft of the Law on property and other related rights". This all gives us the right to speak about the universal nature of Roman law rules related to the servitude institute.

Key words: *universal nature, Roman law rules, servitude institute.*

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879397I

UDK: 347.426(37)
Рад примљен: 29.09.2018.
Рад прихваћен: 22.11.2018.

*ОДГОВОРНОСТ ЗА ШТЕТУ ПРИЧИЊЕНУ ТУЂИМ РАДЊАМА У РИМСКОМ ПРАВУ***

Апстракт: *Према правилима римског права за утврђивање деликтне одговорности било је неопходно да постоји неколико испуњених услова: противправна радња, да је због ње наступила штета, да између прва два услова постоји узрочна веза и да постоји кривица деликвента. Полазећи од схватања кривице као субјективног односа штетника према извршеној радњи, може се посредно закључити да нико није био дужан да одговара за штету која је настала туђом радњом. Међутим, од овог правила постојао је изузетак, а то је било у оним случајевима када је штета причињена од стране лица alieni iuris или робова, када је pater familias био у обавези да испуни обавезе или да надокнади штету коју су причинили његови укућани. До утврђивање ове врсте одговорности (ноксалне одговорности), дошло је у другом периоду републике, када је сам развој правно-економског промета, захтевао ширење обима правне способности лица alieni iuris и робова. Наиме, пошло се од основног принципа да је дужност сваког pater familias да брине и пази кога под свој кров прима и коме поверава вршење својих послова. У случају непоштовања овог правила, било намерно или из разлога небрижљивости, pater familias је био дужан да надокнади штету или да преда деликвента оштећеном у тапсіріит, како би својим радом надокнадио губитак у имовини тужиоца. У раду се најпре даје општи приказ одговорности pater familias за штету причињену од стране лица alieni iuris и робова, као посебан облик одговорности за штету причињену туђим радњама, а потом се, посебан акценат*

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** Рад је саопштен на међународној научној конференцији „Право пред изазовима савременог доба» организованој на Правном факултету Универзитета у Нишу 13 - 14.04. 2018. године

Рад је резултат истраживања на пројекту Правног факултета Универзитета у Нишу "Заштита људских и мањинских права у европском правном простору", који финансира Министарство за науку и технолошки развој, бр.уговора 179046.

ставља на онај случај одговорности pater familias када су лица alieni iuris и робови били именовани за капетана брода (actio exercitoria).

***Кључне речи**: штета причињена туђим радњама, pater familias, ноксална одговорност, лица alieni iuris и робови, actio exercitoria.*

1. Увод

Полазећи од дефиниције деликта у римском раву, под деликтом (*delictum*) се подразумевала свака радња коју је учинио становник римске државе, а која није била у складу са позитивно-правним прописима, тј. свака недозвољена радња – *maleficium*. До недозвољених радњи могло је доћи како у домену јавног, тако и у домену приватног права. Ако је било речи о деликтима приватног права (*delicta privata*), тада се радило о крађи или штети причињеној другом лицу. Полазећи од схватања римског права, да штета подразумева однос деликвент-штета, може се посредно закључити да нико није био дужан да одговара за штету која је настала туђом радњом, односно да нико није био одговоран за штету у којој посредно или непосредно није учествовао.

Међутим, од овог правила постојао је изузетак, а то су били они случајеви када је штета била причињена од стране лица *alieni iuris* или робова. У таквим ситуацијама *pater familias* је био у обавези да испуни обавезе или да надокнади штету коју су причинили његови укућани. До утврђивање ове врсте одговорности дошло је у другом периоду републике, када је сам развој правно-економског промета, захтевао ширење обима правне способности лица *alieni iuris* и робова, са једне стране, и потребе да се обезбеди правна сигурност, са друге стране. Наиме, пошло се од основног принципа да је дужност сваког *pater familias* да брине и пази кога под свој кров прима и коме поверава вршење својих послова.[1] У случају непоштовања овог правила, било намерно или из разлога небрижљивости, *pater familias* је био дужан да надокнади штету, односно да одговара за штету коју је његово лице *alieni iuris* или роб нанело трећем лицу или да преда деликвента оштећеном у *mancipium* (*noxae deditio* – „предаја због штете"), како би својим радом надокнадио губитак у имовини тужиоца. То, са дру-

1 Изузетак од правила да нико није био одговоран за штету у којој посредно или непосредно није учествовао, предвиђао је и Српски грађански законик из 1844. године (у даљем тексту: СГЗ). Тако се у ставу 2, параграфа 810, наводило „...али ако би ко таква лица у служби држао, која су као скитнице, неваљалци и злочинци познати, и који никакве исправе за себе немају; онда он за сву штету, коју би ови учинили, одговарати мора". Сасвим је извесно да је оваква одредба нашла место у СГЗ као директна последица рецепције римског права, најпре у Аустријском грађанском законику. Српски грађански законик из 1844., осмо издање, Београд, 1911.

ге стране, није значило да је *pater familias* одговарао баш за сваку штету (нпр. одговорност није постојала ако је штету нанео роб у стању пијанства или лице *alieni iuris* приликом туче у крчми)(Аранђеловић, 1923:34)[2], већ се имала у виду само она штета која је настала на основу правног посла који је лице *alieni iuris* или роб закључило са трећим лицем по налогу *pater familias*. У том случају *pater familias* је био у приватно-правном односу са трећим лицем на основу правног посла, законских прописа и евентуално недозвољених радњи.

У овом раду дат је општи приказ одговорности *pater familias* за штету причињену од стране лица *alieni iuris* и робова, као посебан облик одговорности за штету причињену туђим радњама, а посебан акценат стављен је на онај случај ове врсте одговорности, одговорности *pater familias* за штету причињену од стране лица *alieni iuris* и робова, када су била именована за капетана брода (*actio exercitoria*).

2. Прилике у држави у доба републике

У другом периоду развоја римске државе, у периоду републике, са географским ширењем и економским јачањем државе (IV и III век пре нове ере), а нарочито након пунских ратова и пада Картагине 201. године пре нове ере, јавила се потреба да се у сваком погледу одговори новонасталим приликама и потребама друштва. Рим више није био мала монолитна заједница, која се као до тада простирала на седам брежуљака (*septimontium*), у којој су само живели *cives*-римски грађани, већ је обухватао читаво Апенинско полуострво (на коме је живело хетерогено становништво)(Игњатовић, 2012:328)[3], а након победе над Картагином и цело Средоземље. (Игња-

2 И СГЗ у § 810 наводи да одговорност газде постоји само у оним случајевима када је знао да је до штете дошло од стране његових службеника који су скитнице, неваљалци или злочинци, а обављали су посао по налогу газде. Тако, Аранђеловић наводи пример: „Предузимач Н. зида Петру неку грађевину. Калфе предузимачеве не пазе при зидању и добацивању цигле, те испусте једну циглу и повреде кога мимопролазника. Хоће ли повређени моћи тражити накнаду штете од предузимача? Је ли дотични штетни поступак калфин за предузимача туђе дело? Очигледно да јесте, и предузимач повређеноме не би одговарао према тач. 1. § 810. Али ако је предузимач знао, да су дотичне његове калфе скитнице, неваљалци или злочинци, онда ће он за штету одговарати. Газда, дакле, одговара трећим лицима за штету, коју овима нанесу газдини службеници вршећи од газде наложени посао, ако је газда знао, да су му службеници скитнице, неваљалци или злочинци".

3 Неки од покорених народа у овом периоду били су на далеко вишем културном нивоу од Римљана. То је нарочито био случај са Етрурцима. Они су већ познавали развијене робовласничке односе и високу техничку културу, нарочито у обради метала...Грци, који су настањивали градове на југу Полуострва, били су мајстори прекоморске

товић, 2012:338)[4] Новонасталим променама, које су се позитивно рефлектовале на развој привреде и које су довеле и до крупних рефлексија у друштвеном погледу, више није одговарало старо, ускогрудо, строго, формалистичко право, које је једино предвиђало правну заштиту Квиритима (*ius civile*, *ius Quiritum*), у првом реду патерфамилијусу.

Разуме се, да је право које је било створено до тада, стављало патерфамилијаса у средиште правне заштите, јер је породица била строго патријахална и сва власт припадала је њему, као оцу породице. Ова патријахалност суштнски се разликовала од оне коју срећемо код осталих старих народа.[5] Будући да је одлучивао о свим питањима везаним за чланове своје породице, логична је била и његова суштинска улога приликом регулисања свих имовинско-правних односа. *Pater familias* је одлучивао о свим правним пословима који би се закључивали, укључујући при том и закључење брака као најбитнијег правног посла. Отуда је, његово право посебно долазило до изражаја у случају жене и лица *alieni iuris*. Као лица која су живела по његовом праву, она су имала ограничену правну способност и потпуну неспособност да закључују правне послове, односно није им признавано ни право *ius comercii* у оквиру *capacitas iuridica*.(Игњатовић, 2018:225) То је даље значило да је питање закључивања правних послова, било у искључивој надлежности *pater familias*, а базирало се на савесности и поштењу (*bona fides*) уговорних страна.

Међутим, са свеукупним развојем у периоду републике, а посебно након пунских ратова, ситуација се битно променила. Будући да је Рим у овом периоду био већ моћна и територијално велика држава, услед учесталих ратовања, дошло је до нагомилавање ратног плена, што је са једне стране утицало и на промену у својинској стуктури (појава приватне својине), те се одатле све чешће јављала потреба за ослобађањем од власти патерфамилијаса (еманципација синова). Са друге стране, окупација околних народа довела је до тога да се дошло у додир са различитим културама, различитим добрима, па се, самим тим, јавила потреба за учесталом тр-

трговине. У Кампањи су били врло развијени занати...Покоравајући ове народе, Римљани нису уништили њихове културе. Оне су само биле заустављене у њиховом развитку а затим укључене у римску ратну и државну машину. То је, у великој мери, подигло производне снаге Римљана и њихов општи културни ниво.

4 У овом периоду настале су и прве провинције (Сицилија и Сардинија). Провинцијама се означавало подручје изван Италије, које је било подвргнуто римској власти и коме је управљао римски намесник.

5 Римски патријархат био је измењен путем правних правила која су фаворизовала агнатско сродство на рачун когнатског: сва лица која су произашла од праоца, па макар она и не била у крвној вези са њим били су агнати. Овако утврђено сродство имало је за циљ јачање власти шефа породице у свим аспектима друштвеног живота.

говином и закључивањем различитих правних послова у исто време на различитим странама државе.[6] Новонасталим приликама посебно је одговарало увођење *traditio* као неформалног начина за стицање својине, који је омогућавао брз промет, стицањем својине *a manu in manu*. Ослобађање трговине од строгог формализма, који је до тада био присутан кроз форму *mancipatio*, условио је потребу за сужавањем обима правне способности *pater familias*, а у корист лица *alieni iuris* и робова.

Сужавање обима правне способности оца породице у корист лица која су живела по његовом праву, довело је до тога да су лица *alieni iuris*, па чак и робови могли да иступају у правно-економском промету и да по налогу оца породице закључују одређене правне послове. На тај начин *pater familias* је могао да удовољи својим новонасталим потребама. Иако је преовладавало схватање, нарочито код Римљана из виших друштвених слојева, да је директно учествовање лица *alieni iuris* и робова у тим пословима испод њиховог достојанства, старешине породице радо су делиле профите, тако што су били власници ових робова, а одредбе старог римског права су то и предвиђале, навођењем да себи прибављамо не само сопственим радњама, већ и преко других лица, лица *alieni iuris* и робова, било да су они то стекли, уговором или наследством. У том случају *pater fanilias*, се сматрао власником који је убирао плодове са својих ствари.

G.2.86: *Adquiritur autem nobis non solum per nosmet ipsos, sed etism per eos quos in potestate manu mancipiove habemus; item per eos servos, in quibus usum fructum habeus; item per homines liberos et servos alienos quos bona fide possidemus. De quibus singulis diligenter dispiciamus*.(Станојевић, 2009:122)

Међутим, учешће лица *alieni iuris* и робова у правно-економском промету довело је и до одређене правне несигурности, јер нико није хтео да се са тим лицима упушта у пословање, нити да склапа правне послове, јер нису имали властиту имовину, а господара нису могли, на овај начин, да обавезују. Осим тога, велику сметњу укључивању тих особа у правни промет представљало је римско схватање да уговори обавезују само оне

6 Трговинска размена одвијала се у два правца. Производи у којима је Рим оскудевао увозили су се из провинција, а вишак производа из Рима и околине се извозио. Најтраженије је било маслиново уље, затим вина, која су временом потиснула и грчка вина и добро се продавала на истоку. Милионско становништво Рима и Италије добављало је жито са Сицилије и из Египта, руда се увозила из Шпаније, а луксузна роба са истока. За пословее извоза најчешће се везује израда велике количине производа од метала у Путеоли, у Напуљском заливу. Велики проценат трговинске размене односио се на трговину робовима, због значајне потребе за радном снагом. У складу са георгафским положајем и путевима, многи градови су се временом развили у трговачке центре, од којих су се неки специјализовали за одређену врсту трговине.

који учествују у њиховом склапању. Ако би било таквих који су склопили какав правни посао са овим лицима, нису ни на који начин могли да наплате своје потраживање(Шарац, 2011:45), јер је било речи о природним облигацијама (*obligationes naturalles*), неутуживим али наплативим. Зато је новонастала ситуација захтевала додатну активност претора, која се састојала у доношењу едикта, којима су биле уведене нове тужбе (*actiones adiecticiae qualitatis*).(Бујуклић, 2013:142)[7] Увођењем нових тужби, био је проширен обим одговорности *pater familias,* тако што је он могао да одговара и за штету причињену туђим радњама, чиме се пружила додатна могућност трећим лицима да захтевају правну заштиту судским путем.

3. *Actiones adiecticiae qualitatis*

У циљу несметаног развоја правно-економског промета и превазилажења новонастале правне несигурности, претор је пронашао решење, тако што је омогућио лицима *alieni iuris* и робовима да склапају правне послове и то тачно у одређеним ситуацијама, које је наводио у едикт, и за које је предвиђао правну заштиту трећим лицима, путем одређених тужби. То је чињено на тај начин што је претор у већ постојећој тужби, само мењао имена субјекта, тако што је у интенцији формуле наводио име лица *alieni iuris* или роба, које је закључило правни посао, док је кондемнација и даље била уперена против патерфамилијаса.(Шарац, 2011:46) На овај начин, био је направљен изузетак од правила *inter partes*, проширена је била уговорна одговорност патерфамилијаса (ноксалан одговорност), (Групче, 1962:166)[8] јер до тада патерфамилијас није одговарао за за уговорне обавезе својих укућана. У циљу решења настале правне ситуације, залагањем претора било је уведено шест таквих ноксалних тужби које су се односиле на тачно одређене ситуације: *actio quod iussu*, *actio institoria*, *actio exercitoria*, *actio de peculio*, *actio tributoria* и *actio de in rem verso*.

7 Од лат.***adiecticius*** – додат, назив који су средњевековни правници (глосатори) дали, јер су обавезе које су оне производиле, биле „придодате" основној одговорности патерфамилијаса.

8 Увођење ноксалне одговорности, где породични старешина деликтно одговара за штету коју су причинили његови укућани, била је последица општеприхваћеног принципа да је било нужно да се надокнади свака причињена штета. Међутим, примена овог принципа по правилу се односила на оно лице које је причинило штету. Али код ноксалне одговорности имамо ситуацију која представља изузетак од овог правила. Реч је било о одговорности која је у великој мери слична са савременом одговорности родитеља за штету коју причине њихова деца, али се од ње разликује јер је била заснована на сасвим другачијим принципима. Римљани су ноксалну одговорност строго везивали за личност, тако је ноксално био одговоран сваки патерфамилијас у чију би породицу, лице које је причинило штету, прешло.

Actio quod iussu, била је тужба којом се пружала правна заштита трећим лицима у случају када је *pater familias* наређивао лицу *alieni iuris* или робу да закључи одређени правни посао са неким трећим лицем, које је већ било обавештено о таквом правном послу или ако је *pater familias* овластио треће лице да са његовим лицем *alieni iuris* или робом закључи одређени правни посао. За обавезе преузете из овако закљученог правног посла *pater familias* је одговарао за цео износ дуга (*in solidum*). Ова тужба је добила назив по изјави (*iussum*), коју је давао *pater familias* трећем лицу.(Шарац, 2011:47)

G.4.70: *Inprimis itaque si iussu patris dominive negotium gestum erit, in solidum praetor actionem in partem dominuvme conpravit; et recte, quia qui ita negotium gerit, magis patris dominive quam filii servive fidem sequitur.*(Станојевић, 2009:318) [9]

Actio institoria, била је тужба по основу које је *pater familias in solidum* одговарао за обавезе које би произашле из правних послоава које су закључили његова лица *alieni iuris* или робови док су управљали трговачком или занатском радњом по његовом налогу.

G.4.71: *...Insistoria vero formula tum locum habet, cum quis tabernae aut cuilibet negotiationi filium servumve aut quemlibet extraneum sive servum sive liberum praeposuerit, et quid cum eo eius rei gratia cui praepositus est contractum fuerit. Ideo autem insistoria vocatur, quia qui tabernae praeponitur insistor appelatur. Quae et ipsa formula in solidum est*. (Станојевић, 2009:318)[10]

У класичном праву тужба са истим дејством допуштала се против *pater familias*, за обавезе које би у границама својих овлашћења преузео *procurator omnium bonorum*.(Игњатовић, 2007:20)

Actio exercitoria била је тужба која се подизала у оним случајевима када би *pater familias* поставио лице *alieni iuris* или роба за капетана брода. Ова тужба биће предмет посебне анализе у наредном делу рада.

Actio de peculio предвиђала је правну заштиту за ону ситуацију када је *pater familias* давао лицу *alieni iuris* или робу део имовине (*peculium*), на самостално управљање. У оваквој ситуацији он је само делимично од-

9 Најпре, ако је правни посао закључен по изричитој наредби (*iussum*) оца (старешине породице) или господара, претор је давао тужбу на целокупан износ (*in solidum*) против оца или господара; и то је правилно, јер онај који закључује посао пре рачуна на веру оца или господара, него сина или роба.

10 Тужба *institoria* се употребљава онда када неко постави за пословођу крчме или трговачке радње сина или роба или било које лице ван породице било да је роб или слободан човек, па је са њим закључен уговор у вези с пословима за које је овлашћен. Назива се *institoria* зато што се онај који је постављен за пословођу крчме (трговачке радње) зове институтор (продавац). И ова тужба гласи на целокупан износ дуга.

говарао за обавезе преузете из закључених правних послова. Заправо, патерфамилијас је одговарао за обавезе само до вредности пекулијума. Правно гледано, пекулијум је и даље био у власништву *pater familias*, али је стварно том имовином уз одређена ограничења располагао син или роб. Да би се доказало да је *pater familias* јемчио за синовљеве обавезе, односно обавезе роба до висине пекулијума, у формуларном поступку, у формулу су биле увођене речи *de peculio*, па је отуда и назив за ову тужбу био *actio de peculio*.(Шарац, 2011:49)

G.4.72a: *Est etiam de peculio et de in rem verso actio a praetore constituta. Licet enim negotium ita gestum sit cum filio servove, ut neque voluntas neque consensus patris dominive intervenerit, si quid tamen ex ea re, quae cum illis gesta est, in rem patris dominive versum sit, quatenus in rem eius versum fuerit, eatenus datur actio. Versum autem quid sit, egat plena interpretatione. At si nihil sit versum, praetor dat actionem, dumtaxat de peculio, et edictum utitur his verbis. Quod edictum loquitur et de eo, qui dolo malo peculium ademerit. Si igitur verbi gratia ex HS.X, quae servus tuus a me mutua accepit, creditori tuo HS.V solverit, aut rem necessariam, pro V quidem in slodum damnari debes, pro ceteris vero eatenus, quatenus in peculio est. Ex quo scilicet apparet, si tota HS. X in rem tuam versa fuerit, tota HS.me consequi posse*... (Станојевић, 2009:318)[11]

Код ове тужбе, *pater familias*, је морао да намирује повериоце по редоследу како су се јављали, јер се строго поштовао принцип *occupantis est melior condicio* (D.15.1.10). (Шарац, 2011:49) До висине вредности пекулијума *pater familias* је одговарао целом својом имовином.

Actio tributoria се користила у оним случајевима када је лице *alieni iuris* или роб добијало пекулијум за вођење трговачких или занатских радњи, па је дошло до банкрота. Код ове тужбе није поштован редослед намирења поверилаца, као што је то био случај код *actio de peculio*. Из тог разлога, али из чињенице да је *pater familias* код *actio de peculio* одговарао целокупном

11 Постоје такође и *actio de peculio* и *actio de in rem verso* које је створио претор. Може бити закључен посао са сином или робом у коме није било нити воље нити сагласности оца или господара, а да је ипак од тог посла, који је са овим лицем закључен, отац или господар имао корист. Колика је била његова добит, на толики износ се даје тужба. Шта се сматра добити треба подробно објаснити. Ако није било никакве добити, претор даје једино тужбу *de peculio* и у едикту су употребљене речи из ове тужбе. Едикт такође говори и о ономе који је преваром одузео пекулијум. Ако је, примера ради, од десет сестерција који је твој роб узео од мене на зајам, он исплатио твом повериоцу пет или је купио за пет неку неопходну ствар, нпр. брану за породицу, а осталих пет потрошио на неки други начин, за првих пет досуђује се целокупан износ, а за осталих пет онолико колико се буде нашло у пекулијуму. Из овога се може јасно видети: ако је свих десет утрошено у твоју корист, могу да захтевам целокупан износ...

својом имовином, за повериоце је била много сигурнија тужба *actio de peculio* за разлику од тужбе *actio tributoria*.

G.4.74a: ....*Sed huic sane pleruflique expedit hac potius actione uti quam tributoria. Nam in tributoria eius solius peculi ratio habetur, quod in his mercibus est quibus negotiatur filius servusve quodque inde receptum erit; at in actione de peculio peculii totius*. (Станојевић, 2009:320)[12]

Actio de in rem verso била је тужба којом се пружала правна заштита у оним случајевима када би лице *alieni iuris* или роб нешто утрошило да би побољшало положај *pater familias*, да би побољшало његову ствар или спречило њено пропадање. Увођењем ове тужбе било је предвиђено још једно процедурално средство, поред *condictio* и *restitutio in integrum*, којим су се отклањале последице неоправданог увећања нечије имовине на штету другог лица.(Бујуклић, 2013:143) Дакле, код ове тужбе, *pater familias* је одговарао трећем лицу само до висине обогаћења.

На основу свега наведеног, може се видети да је делатношћу претора и дефинисањем одређених ноксалних тужби као средстава правне заштите трећих лица, у великом био осигуран положај трећих лица, која су закључивала какав правни посао са лицима *alieni iuris* или робовима, јер је ризик за њихово евентуално лоше пословање сносио *pater familias*. Међутим, оно што се захтевало од трећих лица приликом закључења оваквих правних послова, било је да утврде и да провере да ли су ова лица заиста закључивала послове на основу налога патерфамилијаса, затим, наштa се тај налог односио и колика је била висина пекулијума, који им је *pater familias* поверио на коришћење.

3. *Actio exercitoria*

Потреба за одређеним степеном опрезности код трећих лица приликом закључивања правних послова са лицима *alieni iuris* и робовима, посебно је долазила до изражаја и код тужбе *actio exercitoria*. Наиме, ако је роб или лице *alieni iuris* било постављено за капетана брода (*magister navis*), и ако је у току пловидбе доживело неку хаварију, могло је по сигурном упловљавању у луку да затражи зајам од банкара. У том случају, банкар, као поверилац био је дужан да провери да ли је заиста постојало овлашћење од стране *pater familias* за управљање бродом, као и да ли је брод заиста током пловидбе доживео какав квар. Ако је банкар то установио, у том случају

12 ...И често ће бити погодније употребити ову тужбу уместо тибуторне, јер се код *actio tributoria* под пекулијумом подразумева једино роба којом тргује син или роб, као и добит из трговине, док се код *actio de peculio* све рачуна у пекулијум.

настајала је обавеза за *pater familias*, чак и у оним ситуацијама када би тај зајам роб или лице *alieni iuris* прокоцкало или пропило. Ово из разлога што се сматрало да није дужност банкара да води рачуна о овлашћеном лицу, већ самог *pater familias* да брине и пази кога под свој кров прима и коме поверава вршење својих послова.

О овој врсти одговорности патерфамилијаса за радње лица *alieni iuris* и робова, почиње да се говори са развојем поморске трговине и са све чешћом праксом закључивања уговора о превозу робе морем.

3.1. Уговор о превозу робе морем

Окупацијом околних народа, Римљани су дошли у додир са орјенталном културом, која је била на много вишем нивоу него што је то била римска. То је био период "занетости за све што је било грчко". Подлогу свеукупних промена у периоду републике није представљало само сусретање са грчком културом, већ интезивни развој трговине, која је условила нову поделу у друштвеној структури. Земљорадника је заменио трговац.

Промена у друштвеној структури и додир са Грчком, утицали су на промену у друштвеној свести, па самим тим и на промену схватања суштине правних односа као и прихватање нових правних правила под притиском трговачких потреба. Све више се напуштао формализам старог права, за кога се сматрало да је основ правног дејства, и акценат се стављао на *consensus*, сагласност воље уговорних страна, као и на жеље уговорних страна приликом закључивања правног посла.

Освајањем грчких острва, а посебно острва Родос, Римљани су дошли у додир са већ постојећим правилима која су регулисала поморску трговину. Отуда је и уговор о превозу робе морем, био дефинисан у складу са реципираним одредбама поморског права острва Родос, које су Римљани назвали *Lex Rhodia de iactu*, па је и сам уговор о превозу робе морем тако назван.[13]

Уговор о превозу робе морем у римском праву, био је један специфичан облик уговора *locatio-conductio*, тачније *locatio-conductio operis faciendi*, па су сходно томе, сва правила која су се примењивала на овај уговор, примењивала и на његов специфичан облик (подврсту), на уговор о поморском превозу робе.

13 *Lex Rhodia de iactu* ("Родски закон о избаченим стварима"), представља типичан пример онога што бисмо назвали успешним правним трансплатантом, и то не некаквим наметнутим решењем, већ правилом које је систем прималац (римско право), од система донора (пловидбено право Родоса) својевољно и квалитетно имплементирало.

Дакле, уговор о поморском превозу робе, као специфичан вид *locatio-conductio operis faciendi*, представљао је консенсуални, двострано-обавезујући, теретни, *bona fides* уговор, дефинисан у доба римске републике, који је био заштићен тужбама *actio conducti* и *actio locat*. Према правилима овог уговора, једна страна се обавезивала да у уговореном року обави одређену активност (*conductor*), а друга да заузврат плати одређену суму новца (*locator*). Предмет овог уговора био је не сам рад или радна снага, већ коначни резултат рада (*opus*), тј. да се превезе роба са једног места на друго, и накнада (*merces*), која се за такву услугу плаћала.

Да би уговор о поморском превозу робе могао да производи правно дејство, неопходно је било да су се уговорне стране сагласиле око ова два битна елемента уговора, тј. о роби која се давала на превоз, и о накнади, која се плаћала за извршен превоз робе морем. Уговор се закључивао између власника робе и капетана брода, који је у античком периоду, по правилу, био и власник брода (*dominus navis*), па је самим тим и заповедао бродом и убирао накнаду за извршену услугу.

Међутим, пуноважност уговора могла је да зависи и од трећег лица. До овога је дошло нешто касније, када функције власника брода и капетана брода нису биле обједињене у једној личности. То је управо био период након пунских ратова када је дошло до ширења обима правне способности лица *alieni iuris* и робова на рачун патерфамилијаса, односно, када је дошло до ширења обима одговорности патерфамилијаса за радње ових лица. Тако је за капетана брода, по налогу патерфамилијаса, могло да буде именовано и неко треће лице (*alieni iuris* или роб), кога је патерфамилијас овластио као свог пуномоћника (*magister navis*).

На основу добијеног налога *magister navis* је заступао власника брода (патерфамилијаса) и технички је управљао бродом. Тако је, *exercitor navis* био бродар, односно превозник, тј. страна која је организовала пловидбени подухват, и из тог разлога је сносио све користи и штете од давања брода и то *in solidum*, док је *magister navis* био само капетан брода, по налогу *exercitor navis*.(Пезељ, 2017:311)

За настанак и пуноважност овог уговора, поред постигнуте сагласности воља уговорних страна, било је неопходно и да буду испуњени услови у погледу предаје робе за наручени посао. Сва укрцана роба морала је бити уписана у бродску књигу и о њој се вршио детаљан попис "*in scriptis*". Исправа, која је садржала детаљан попис робе, није могла бити доступна трговцима. Тај примитивни облик теретног листа морао је да садржи име власника терета, попис робе, њене ознаке, тежину и количину.

Обавеза укрцавања робе, директно се односила на *locatora* (наручиоца посла) и била је нужна претпоставка за овај вид locatio-*conductio operis faciendi*. При том, из саме природе овог уговора произилазило је да су се под робом подразумевале све покретне ствари биле оне по природи потрошне или непотрошне. Уколико је било речи о покретним а непотрошним стварима, на њима је *conductor*, по правилу, имао детенцију. Али ако је била у питању покретна потрошна ствар (у случају транспорта вина или жита морем), онда је *conductor* у тренутку пријема робе постајао и њен власник уз обавезу да по извршеном превозу врати исту количину исте врсте ствари. Друга обавеза *locatora* била је да плати цену за извршен превоз робе. Цена је по правилу била изражена у новцу, али могло је бити и другачије одређено. Најзад, *locator* је био дужан да обезбеди како укрцавање, тако и искрцавање робе, када би брод сигурно пристигао у луку. За заштиту својих права, *locator* је на располагању имао *actio locati*, а у случају крађе робе или оштећења робе у току превоза морем, могао је да користи *actio furti et damni adversus nautas* (Игњатовић, 2017:190) и општу тужбу *actio in factum*.

Најчешће је бродом била превожена роба више различитих власника. Редак је био случај да се бродом превозила роба само једног власника. Како је роба која је превожена морем била у својини више поверилаца (наручилаца посла), у случају избацивања робе са брода (незгоде на мору, напада пирата, олује..), дешавало се да су власници били неравномерно оштећени. Зато се поставило питање да ли је у духу права да у таквим околностима, када је роба једног власника жртвована за опште добро осталих власника, да ли коначни губитак треба да падне само на жртву. Решење за ову ситуацију је управо садржао *Lex Rhodia de iactu*, који је предвиђао да у случају "опште хаварије"(Болонча, Амижић, Пезељ, 2017) сви повериоци (*locatori*), као и власник брода (*conductor*), солидарно сносе штету у сразмери са вредношћу њихове спашене робе.

Paul. D. 14, 2 , 1. *Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sartiatur quod pro omnibus datum est*.

Обавеза *conductora* била је да изврши наручени посао (превоз робе морем). Дакле, предмет његове обавезе (*opus*), био је резултат рада-извршен превоз робе морем. Ово је нужно било повезано са ценом, коју је имао право да прими само у случају када је обавио поверен посао. При том, био је дужан да обезбеди сигуран превоз робе, и да према роби поступа са највећом пажњом као *bonus pater familias*.

Зато, његова одговорност, није била *omnis culpa*, већ је у неким случајевима одговарао и за стручост чланова своје посаде и својих помоћника, а у не-

ким случајевима и за *custodia*. Овај вид одговорности, додатно, је отежавао положај *conductora*, јер је његова одговорност била и иначе већ пооштрена, и у доба републике је добила обележје објективне одговорности (*culpa in custodiendo*). Увођење овог вида одговорности било је неопходно, јер је она представљала основ на коме се базирао однос поверења између даваоца и корисника услуга. Са друге стране, непостојање овог вида одговорности доводило је до општег стања несигурности, па су тако бродари, у једном периоду, били на „лошем гласу", јер се сматрало да су често организовано деловали са крадљивцим, а све у намери да себи прибаве противуправну имовинску добит. (Бујуклић, 2013:432)

3.2. Actio exercitoria

У првим данима развоја поморске трговине, поморски превоз обављао је сам патерфамилијас (*dominus navis*). То је био период када су још увек функције власника и заповедника брода, биле обједињене у једној личности. Међутим, са развојем римске државе, у другом периоду републике, све више се, када је реч о поморском превозу робе, издвајала посебна личност, заповедник брода (*magister navis*), који је по налогу патерфамилијаса обављао превоз робе морем.(Пезељ, 2017:315)[14] Најчешће је патерфамилијас за заповедника брода именовао неког од својих лица *alieni iuris* или робове. Укључивање ових лица у послове поморске трговине, нужно је захтевало интервенцију претора, јер се наведена правна несигурност, која се јављала и у осталим случајевима када је било речи о закључивању правних послова између лица *alieni iuris* и робова са трећим лицима, појавила и у случају када су ова лица била постављена од стране патерфамилијаса за заповедника брода. Интервенција претора у овом случају, односила се на увођење посебне тужбе, *actio exercitoria*, која је почела да фигурира поред до тада постојећих тужби за заштиту права локатора (*actio locati* и *actio furti et damni adversus nautas)*.

Дакле, *actio exercitoria* била је тужба која се примењивала у оним ситуацијама када је штета била причињена трећим лицима, али не радњама самог патерфамилијаса, већ његових укућана (лица *alieni iuris* или робова). Ову тужбу оштећени је могао да подигне против патерфамилијаса (*exercitor navis*),[15] који је у конкретном случају био лице које је искоришћавало брод и коме је припадала свакодневна добит од брода. То је даље значило и да

14 Римско право познавало је осим власника брода *exercitor navis*, особу којаје за свој рачун професионално обављала поморски транспорт и која је одговарала трећим особама за обавезе из бродског пословања.

15 Отуда и назив за ову тужбу *actio exercitoria*, јер је њоме била установљена одговорност *exercitora* за обавезе које су произвеле особе постављене за заповедника брода у вези

је код ове тужбе патерфамилијас одговарао у целини (*in solidum*), као и код *actio quod iussu* и *actio insistoria*.

У случају судара бродова, до кога је дошло кривицом чланова посаде или *magister navis*, римско право је стојало на становишту да патерфамилијас одговара према начелима одговорности за штету коју почине чланови његове посаде, на роби, стварима и особама на броду, и то на квазиделиктној основи (*actio furti et damni adversus nautas*), па је зато одговорност патерфамилијаса била процењена, према правилима преторског права, *in duplum*. Значи, да је римско право код судара бродова стајало на становишту одговорности по принципу кривице.(Хорват, 1967:8)

У ситуацијама када је долазило до бродолома, још од најранијег периода постојала су супротна размишљаља о томе, да ли у овом случају патерфмилијас одговара и за оне ствари које су *magister navis* или чланови његове посаде задржали за себе, а које су биле нанете на обалу. Према једном схватању, сматрало се да је постојао прастари обичај по коме су становници обале могли након бродолома да задрже ствари које би се нашле на обали за себе, и то путем окупације. Из тога се изводи закључак да су ово право имали онда и чланови посаде, па и сам *magister navis*, што би у крајњем значило да патерфамилијас није одговарао. Међутим, према другом опште прихваћеном схватању, сматрало се да у оваквим ситуацијама важи правило задржавања власништва. То је даље значило, да уколико би чланови посаде или *magister navis*, по преживелом бродолому, задржали ствари за себе (*lucrandi animo*), они би чинили крађу таквих ствари, (Хорват, 1967:14) па је у том случају патерфамилијас морао да одговара по основу пеналне тужбе *actio in factum*, или по основу *actio furti et damni adversus nautas*, па и по основу *actio exercitoria*. Наиме, дошло се до закључка да је било неопходно да се власници ствари извучених из мора, након бродолома, морају изјаснити да ли је било речи о дерелинквираним стварима. Само након ове изјаве власника, те ствари су могле бити предмет присвајања, и то окупацијом, и само у том случају се патерфамилијас могао ослободити одговорности.

Са друге стране, сматрало се да ако је неко лице, члан посаде, *magister navis*, користио опасну ситуацију, страх и тескобу, која влада приликом бродолома, да је починио грабеж, који је био изједначен са пљачкашким походом (*rapina*). У том случају против патерфамилијаса је могла бити подигнута и пенална тужба, по основу које би он био одговоран за четвороструку вредност робе. (Хорват, 1967:15)[16] Наведена правила важила су и у случају

с пословањем брода. *Exercitor* је био страна која је организовала поморски превоз, па је самим тим сносио све користи и штете од давања брода.

16 Према једном рескрипту цара Антонија Пија, према тежини дела, могао се према овим лицима покренути и кривични поступак, у коме су се, зависно од сталежа,

„генералне хаварије“, добровољног избацивања терета са брода у море у опасним ситуацијама. У доба Јустинијана наведени деликт био је убројен у деликте јавног права, нарочито када је било речи о превозу државне робе морем. У том случају *magister navis* је био дужан да буде саслушан под тортуром, јер се радило о заштити јавних интереса.

У случају спашавања и помагања на мору, само једно место у Јустинијановим Дигестама упућује на то да је идеја о помагању била позната и Римљанима. Позивајући се на сенатску одлуку из времена цара Клаудија, предвиђено је било да је требало казнити, и то према *Lex Cornelia de sicariis*, све оне који би силом спречили да се не помогне броду или људима на броду у опасности. (Хорват, 1967:23) Из овога може да се посредно закључи да је помагање било обичајна дужност, и да уколико би то ускратили чланови посаде или *magister navis*, који су по налогу патерфамилијаса обављали пловидбени подухват, да је патерфамилијас и у том случају могао бити позван на одговорност по основу *actio exercitoria*.

4. Закључак

На основу свега наведеног у раду, може се закључити да је старо римско право строго поштовало принцип *intuitu personae* када су у питању биле контрактне обавезе, односно да је важило правило да уговори обавезују само оне који учествују у њиховом склапању. Са друге стране, када је била у питању деликтна одговорност, важило је правило да нико није био дужан да одговара за штету која је настала туђом радњом, односно да нико није био одговоран за штету у којој посредно или непосредно није учествовао. Међутим, са свеукупним развојем у периоду републике, а посебно након пунских ратова, ситуација се битно променила. Будући да је Рим у овом периоду био већ моћна и територијално велика држава, услед учесталих ратовања, дошло је до нагомилавање ратног плена, што је са једне стране утицало и на промену у својинској стуктури (појава приватне својине), те се одатле све чешће јављала потреба за ослобађањем од власти патерфамилијаса (еманципација синова). Са друге стране, окупација оклоних народа довела је до тога да се дошло у додир са различитим културама, различитим добрима, па се, самим тим, јавила потреба за учесталом трговином и закључивањем различитих правних послова у исто време на различитим странама државе. Новонасталим приликама посебно је одговарало увођење *traditio* као неформалног начина за стицање својине, који је омогућавао брз промет, стицањем својине *a manu in manu*. Ослобађање

примењивале јавне казне (шибање и рлегација), осуда на јавне радове, односно на радове у рудницима за робове.

трговине од строгог формализма, који је до тада био присутан кроз форму *mancipatio*, условио је потребу за сужавањем обима правне способности *pater familias*, а у корист лица *alieni iuris* и робова. Сужавање обима правне способности оца породице у корист лица која су живела по његовом праву, довело је до тога да су лица *alieni iuris*, па чак и робови могли да иступају у правно-економском промету и да по налогу оца породице закључују одређене правне послове. На тај начин *pater familias* је могао да удовољи својим новонасталим потребама. Учешће лица *alieni iuris* и робова у правно-економском промету довело је и до одређене правне несигурности, јер нико није хтео да се са тим лицима упушта у пословање, нити да склапа правне послове, јер нису имали властиту имовину, а господара нису могли, на овај начин, да обавезују. Ако би било таквих који су склопили какав правни посао са овим лицима, нису ни на који начин могли да наплате своје потраживање, јер је било речи о природним облигацијама (*obligationes naturalles*), неутуживим али наплативим. Зато је новонастала ситуација захтевала додатну активност претора, која се састојала у доношењу едикта, којима су биле уведене нове тужбе (*actiones adiecticiae qualitatis*). Увођењем нових тужби, био је проширен обим одговорности *pater familias,* тако што је он могао да одговара и за штету причињену туђим радњама, чиме се пружила додатна могућност трећим лицима да захтевају правну заштиту судским путем. Са друге стране, развојем овакве врсте правних послова, који су се закључивали по налогу патерфамилијаса, створени су били темељи за рађање једног новог института , који ће се појавити знатно касније у римском праву, *mandatum*, уговор о заступништву.

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LIABILITY FOR DAMAGE CAUSED BY ACTIONS OF ANOTHER IN ROMAN LAW

Summary

Roman law strictly underlined the principle of intuitu personae in contractual obligations. When it comes to civil liability for delicts, the rule was that no one was to be held liable for the damage he did not cause directly or indirectly. However, when frequent warfares resulted in the accumulation of loot, which led to the emergence of private property, there was an increasing need for the liberation from the influence of the pater familias. At the same time, the development of trade required participation in legal transactions and the liberation from strict formalism by introducing traditio as an informal way of acquiring property. The new circumstances required to narrow the scope of the legal capacity of the pater familias, in favor of alieni iuris and slaves, in order to enable them to participate in legal and economic transactions, according to the orders of the pater familias.

Although a step forward in trade liberalization, these changes generated some legal uncertainty, due to the restraints imposed by third parties regarding legal transactions, and considering that alieni iuris and slaves did not have their own assets. These legal transactions represented the obligationes naturalles, which did not enjoy judicial protection. The adoption of the edict which introduced new actions (actiones adiecticiae qualitatis) extended the scope of responsibility of the pater familias for damage caused by actions of another, thus providing additional opportunities for third parties to seek legal protection by judicial means. By instituting this extended liability, the pater familias was obliged to compensate the damage caused by a person alieni iuris or slave from his household to a third party, or to hand over the delinquent to mancipium in order to compensate the loss in the plaintiff's property, which ultimately corresponded to the need to adapt the legal solutions to the new trading circumstances, while preserving legal security.

Key words*: damage caused by actions of another, pater familias, noxal liability, alieni iuris, slaves, actio exercitoria.*

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879415Z

UDK: 339.52
Рад примљен: 02.07.2018.
Рад прихваћен: 17.09.2018.

АКТИВНА ЛЕГИТИМАЦИЈА У ПОСТУПКУ РЕШАВАЊА СПОРОВА ПРЕД СВЕТСКОМ ТРГОВИНСКОМ ОРГАНИЗАЦИЈОМ[*]

Апстракт**:** *У оквиру система за решавање спорова пред Светском трговинском организацијом (СТО) процесна легитимација се везује за круг субјеката који могу имати својство стране у спору, као и за услове које ти субјекти морају испунити како би водили конкретни спор у својству тужиоца или туженог. Чланице СТО имају неограничену аутономију у погледу одлучивања о покретању поступка и активна легитимација није подложна провери ex ante од стране било ког институционалног тела СТО. Од чланица СТО се, међутим, очекује да поступају у складу са начелом добре вере приликом иницирања поступка. Систем решавања спорова пред СТО је ексклузивно намењен њеним чланицама. Државе и остале територије које нису пуноправне чланице Организације немају право на приступ овом механизму. Такође, приватна лица, појединци и компаније не могу поседовати ни активну ни пасивну процесну легитимацију. Компаније, међутим, кроз своје формално и неформално деловање, имају de facto значајну улогу у поступцима који се воде пред СТО.*

Кључне речи: *Светска трговинска организација, систем решавања спорова, активна легитимација, DSU споразум.*

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1. Увод

У оквиру Споразума о оснивању Светске трговинске организације (даље и: СТО) усвојен је Договор о правилима и процедурама за решавање спорова (енг. *Dispute Settlement Understanding*, даље и: *DSU*), као део Завршног акта Уругвајске рунде, потписаног априла 1994. године. Споразум *DSU* представља основни процесно-правни извор за решавање спорова у оквиру СТО.

До краја 2017. године званично је пред органима СТО покренута процедура решавања спорова 535 пута.[1] У контексту права СТО, основ спора између чланица СТО представља непоштовање одредби које су садржане у одговарајућим споразумима ове огранизације. На тај начин, чланица која је „прекршилац" права СТО користи бенефиције отвореног тржишта других чланица, док истовремено штити своје тржиште стварајући баријере које онемогућавају истоврсне бенефиције за њих. Мотиви за кршење обавезе могу бити разни, а најчешће се ради о заштити домаће индустрије од конкуренције из увоза, или извозној промоцији сопствене индустрије. Решавање спорова између чланица СТО представља слојевит и комплексан процес, који се може поделити на три основне фазе: претпарничну, парничну и постпарничну.

Овај рад се бави процесно-правним претпоставкама покретања процедуре решавања спорова између чланица СТО у претпарничној фази спора. Говори се о условима за активну процесну легитимацију чланице СТО која је заинтересована да покрене процеуру пред органима СТО против друге чланице, за коју сматра да примењује мере несагласне са правом СТО. Посебна пажња је посвећена настојањима у литератури да се приступ систему решавања спорова пред СТО омогући и приватним лицима, пре свега компанијама које су директно погођене несагласним мерама чланица СТО. Иако немају право на приступ *DSU* систему, указује се на значајне механизме формалне и неформалне природе које компаније могу користити приликом утицаја на своје владе да покрену процедуру пред судећим телима СТО.

2. Стварна и процесна легитимација у поступку решавања спорова пред СТО

Питање стварне и процесне легитимације, како активне тако и пасивне, у оквиру система решавања спорова пред СТО има исти значај као и код

1 У вези са актуелним бројем регистрованих процедура видети интернет сајт СТО: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

националних грађанско-процесних система. Разлика која постоји између стварне и процесне легитимације у националним правним системима може се *mutatis mutandis* пресликати и на питање легитимације у оквиру *DSU* механизма. Стварна легитимација код тужиоца подразумева да је он носилац одређеног правног овлашћења, док у односу на туженог стварна легитимација значи да је то лице носилац одређене правне дужности. Стварна легитимација није процесно, већ материјално-правно питање од кога зависи основаност тужбеног захтева. У националним грађанско-процесним системима, суд ће, уколико не утврди стварну легитимацију код тужиоца или туженог, одбити тужбени захтев као неоснован. У контексту *DSU* система, стварна легитимација се везује за основ покретања процедуре пред судећим телима СТО. У начелу, чланица СТО има основа да покрене процедуру против друге чланице уколико ова примењује мере које су несагласне са нормама обухваћених споразума СТО.[2] Чланица СТО има активну стварну легитимацију уколико је ималац права и интереса који су гарантовани одредбама обухваћених споразума, док друга чланица има пасивну стварну легитимацију уколико је својим унутрашњим мерама повредила своју дужност поштовања тих одредби и тиме нанела штету чланици-тужиоцу.

Процесна легитимација представља овлашћење за вођење парнице, односно способност странке да у сопствено име води парницу. Активна процесна легитимација је могућност странке да своје право оствари покретањем конкретне парнице, односно овлашћење конкретног тужиоца да против конкретног туженог покрене парницу. У оквиру *DSU* система, процесна легитимација се везује за круг субјеката који могу имати својство стране у спору пред судећим телима СТО, као и на услове које ти субјекти морају испунити како би водили конкретни спор у својству тужиоца или туженог.

3. Процесна легитимација у систему решавања спорова пред СТО

Систем решавања спорова предвиђен механизмом СТО је ексклузивно намењен њеним чланицама. Државе и остале царинске територије које нису пуноправне чланице Организације немају право на приступ *DSU* механизму. То је и разумљиво, имајући у виду да се на државе и територије изван СТО не примењују права и обавезе из обухваћених споразума. Зато не могу тужити, нити бити тужене пред њеним органима. У том смислу се *DSU*

2 „Обухваћени споразуми" (енг. *covered agreements*) су споразуми из пакета права СТО услед чије повреде чланица СТО може покренути процедуру правне заштите пред органима СТО против друге чланице, која врши повреду. Дефинисани су у Апендиксу I *DSU* споразума.

механизам разликује од система у оквиру Међународног суда правде (*International Court of Justice – ICJ*), који дозвољава државама које нису чланице Организације уједињених нација да буду тужиоци, тужени или умешачи у поступку пред Судом (Palmeter, Mavroidis, 2004: 29).

Чланица СТО има право да затражи правну заштиту у оквиру *DSU* механизма без обзира да ли је претходно исцрпла правне могућности пред органима и судовима чланице која примењује дискриминаторне мере.[3]

Питање активне легитимације у контексту *DSU* процедуре представља кумулативни одраз следећих принципа:

- Прво, чланице СТО имају неограничену аутономију у погледу одлучивања о покретању поступка. То могу учинити када год сматрају да за то имају одређени интерес;
- Друго, активна легитимација није подложна провери *ex ante* од стране било ког институционалног тела СТО и не постоји могућност „забране" покретања поступка;
- Треће, од чланица СТО се очекује да поступају у складу са начелом добре вере приликом иницирања поступка.

На основу прве реченице одредбе III (7) *DSU,* чланица СТО је дужна да пре покретања процедуре процени да ли ће у томе имати успеха. Неопходно је да код иницијатора поступка постоји уверење да ће поступак резултовати позитивном одлуком судећих тела СТО.

Када се ради о постојању правног интереса код тужиоца, судећа тела СТО су става да је реч о категорији која није подложна преиспитивању од стране тих тела. У спору *EC – Bananas III* Апелационо тело (АТ) је *locus standi* из члана III (7) *DSU* интерпретирало на начин да се од чланице СТО очекује да поседује велику дозу „самоконтроле" (енг. „*self-regulating*") приликом процене да ли ће имати користи од покретања поступка.[4] У том смислу, чланице СТО поседују широку дискрецију у погледу одлуке да ли да случај упуте судећем телу СТО. Овакав став је „ишао на руку" САД које су биле један од тужилаца у овом спору. Будући да се радило о мерама које су се односиле на увоз банана, Европска заједница (тужена у спору) оспоравала је постојање правног интереса САД да покрену спор, јер оне нису значајнији

3 Видети Извештај Панела у спору *Guatemala – Cement II*, пар. 8.83. Цео назив предмета: *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000: XI, 5295.

4 Видети пар. 135 Извештаја. Цео назив предмета: *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997: II, 591.

произвођач нити извозник банана. Међутим, АТ је сматрало да САД имају потенцијални извозни интерес и да њихово унутрашње тржиште банана може бити погођено мерама ЕЗ. Штавише, АТ се сложило са аргументацијом Панела да одредбе III (3) и (7) *DSU*, као ни све остале одредбе овог Споразума, не предвиђају ни експлицитно ни имплицитно постојање „правног интереса" као предуслова који мора постојати код чланице која намерава да покрене процедуру.[5]

Прва реченица члана III (7) *DSU* представља одраз процедуралног принципа добре вере. Наиме, природа ове одредбе указује на обавезу инструктивне природе: чланици СТО се оставља да сама, у доброј вери, процени могући исход спора и да у складу са тим донесе одлуку о покретању процедуре. Међутим, *DSU* не успоставља механизам који би чланицу обавезао на такво поступање, нити предвиђа одговарајући систем провере и санкција у случају супротног понашања. Панел није овлашћен да испитује да ли је чланица СТО заиста поступала у доброј вери када је покренула процедуру. Домет одредбе III (7) *DSU* је ограничен на препоруку чланицама да поступају у доброј вери приликом употребе права на правну заштиту пред органима СТО, а њена сврха се састоји у превенцији фраудолозног вршења права. Уколико чланица не поступи у складу са природом одредбе III (7) *DSU*, то не утиче на њено право да иницира поступак. И у том случају панел има овлашћење, односно дужност, да се упусти у одлучивање о меритуму спора. Према мишљењу које је исказало АТ у спору *Mexico — Corn Syrup (Article 21.5 — US)* судећа тела СТО морају уважити **претпоставку** да је тужилачка страна поступала у доброј вери и да је стекла претходно уверење да ће покретање спора за њу бити корисно. Судећа тела не поседују надлежност да залазе у утврђивање тих околности, нити тужена страна може оспоравати постојање такве претпоставке.[6]

Овакав став додатно поткрепљује и одредба III (3) *DSU* која предвиђа да се спорови морају решавати у складу са начелом ефикасности, када чланица СТО „сматра" да јој је било која повластица на основу обухваћених споразума умањена мерама друге чланице. Употреба термина „сматра" указује да је фокус на субјективној перцепцији чланице.[7] Не ради се, дакле, о објективној категорији која је подложна испитивању од стране судећег тела СТО.

5 Пар. 132 Извештаја.

6 Видети пар. 73 и 74 Извештаја. Цео назив предмета: *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001: XIII, 6675.

7 Видети Извештај АТ у спору *US — Upland Cotton*, пар. 264. Цео назив предмета: *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005: I, 3.

Активна легитимација није условљена постојањем евентуалне штете коју трпи чланица – тужилац, мада се штета претпоставља. Према мишљењу које је АТ исказало у спору поводом имплементације препорука из Извештаја *EC — Bananas III,* чланица СТО која трпи штету услед несагласних мера друге чланице, без сумње поседује активну легитимацију за покретање поступка. Међутим, постојање штете није *conditio sine qua non* активне легитимације: страна ће имати *locus standi* и уколико се штета не може утврдити.[8] То произилази и из тумачења АТ да чланице СТО имају широку дискрецију у погледу иницирања процедуре решавања спорова.

Уколико чланица СТО сматра да друга чланица својим активностима крши поједини обухваћени споразум, то је довољно да се претпостави да је уверена у свој успех пред судећим телима СТО, односно да је приликом иницирања процедуре поступала у доброј вери. Штавише, када се ради о спору због кршења СТО обавеза, постоји презумпција штетног дејства, на основу члана III (8) *DSU*. Из тога се претпоставља да чланица која покреће поступак има и економски интерес за такву акцију. Економски интерес се може посебно претпоставити с обзиром на чињеницу да су прави иницијатори решавања спорова компаније које послују у чланицама СТО и од чијег успеха на међународном тржишту зависи развитак националне привреде. Са друге стране, и одсуство сагледљивог економског интереса не спречава чланицу СТО да се активно легитимише као тужилачка страна.[9] Како је нагласио поступајући Панел у спору *EC — Bananas III* (са чиме се касније сагласило и АТ):

„ [...] са повећаном међузависношћу глобалне економије, [...] Чланице имају већи улог у спровођењу СТО правила него у прошлости, с обзиром да постоји већа вероватноћа него икада, да ће било која девијација испреговараног баланса права и обавеза утицати на њих, директно или индиректно."[10]

Ови разлози, према мишљењу Панела и АТ, пружили су довољно оправдање за САД да, у складу са одредбама *GATT*-а, поднесу тужбу против мера Заједнице које су се односиле на увоз банана. Међутим, АТ је у истом

8 Видети Извештај АТ у спору *EC –Bananas III (Recourse to Article 21.5 of the DSU by the United States)*, пар. 463–464. Цео назив предмета: *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA, adopted 22 December 2008.

9 Видети Извештај Панела у спору, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000: I, 49, пар. 7.13.

10 Видети пар.7.50. Извештаја Панела у спору *EC — Bananas (Ecuador) III.*

Извештају нагласило да ниједан фактор који је поменут у овом случају не треба нужно да буде опредељујући у другим случајевима.[11]

Морамо истаћи да је оваква одлука АТ унела дозу недореченост и несигурности у систем решавања спорова (Davey, 2001: 98). Судећа тела СТО су током решавања овог спора несумњиво била под притиском, што је и резултирало оваквим ставом. Панел и АТ су одлучили да том приликом стану на страну САД, што су учинили уз помоћ натегнутог тумачења активне легитимације од кога се и само АТ оградило, наглашавајући да таква интерпретација не треба нужно да буде опредељујућа за будуће случајеве.

Према речима Цветковића, *„либерални приступ у односу на активну легитимацију нов је и контроверзан: у пракси GATT-а нема традиције такве врсте. Њиме се отвара простор да право на покретање спора пред СТО добије карактер „actio popularis“, јер теоретски, свака држава чланица Светске трговинске организације може имати интерес да спречи било коју материјалну повреду обухваћених споразума* (Цветковић, 2010: 20–21). Некадашњи генерални директор СТО Паскал Лами (Pascal Lamy) је ову карактеристику система решавања спорова навео као доказ хипотезе о „комунизацији“ права СТО: свака држава може да захтева спровођење норме правног система СТО чак и када нема свој непосредни интерес у спору. Тиме се реализује процес „институционализације међународне одговорности“ и осигурава „поштовање за норму, а не поштовање страха од репарације“ што у крајњем води трансформацији СТО из „друштва“ у „заједницу“ (е. *„from society to community“*) (Lamy, 2007: 976; Цветковић, 2010: 21).

Без обзира на широку могућност прекомерне и неосноване употребе *DSU* механизма, чланице СТО су у приличној мери рационалне када је такав вид правне заштите у питању и добро процењују изгледе за успех у поступку. Оваква тврдња се може поткрепити податком да је проценат успеха тужилачких захтева преко 90 одсто (од 197 спорова који су резултовали извештајем ОРС до краја 2015. године, у свега 17 је одбијен захтев).

4. Полемике о праву на приступ *DSU* механизму приватним лицима

Процедура решавања спорова резервисана је за државе и аутономне царинске територије које су пуноправне чланице СТО. Стране у поступку могу бити искључиво јавно-правни субјекти. Приватна лица, појединци и компаније не могу поседовати ни активну ни пасивну процесну

11 Видети пар. 138 Извештаја.

легитимацију. Правни систем СТО не познаје принцип директног дејства његових норми, као што је то случај са правним системом ЕУ. То значи да приватна лица не могу бити титулари права, нити се правилима СТО могу обавезивати. Суд правде ЕУ је категорично и аргументовано одбио могућност да се појединци позивају на норме СТО (исто је чинио и током ере *GATT*-а).[12] Наведено имплицира да појединци не могу ни тражити правну заштиту због кршења СТО норми. Ипак, не треба губити из вида да су приватне компаније управо актери који трпе највећу штету услед ограничавајућих мера чланица СТО. Централни принцип СТО се састоји у праву на приступ тржишту, чиме се у пракси углавном штите интереси транснационалних компанија (Picciotto, 2003: 380). Компаније могу трпети штету не само услед противправних мера држава изван њиховог седишта, већ и услед мера које спроводи њихова матична држава. Без обзира на чињеницу да чланице СТО имају искључиво право на заштиту у оквиру нормативног система СТО, управо се приватне компаније појављују као *de facto* иницијатори поступака, јер одлука чланице да покрене и истраје у поступку умногоме зависи од иницијативе и подршке приватног сектора.

У литератури су постојала, и даље постоје, заговарања да приватним лицима треба омогућити *locus standi* у систему решавања спорова пред СТО. Као главни аргумент наводи се да компаније представљају примарне актере светске трговине и да трпе највећу штету од дискриминаторних мера. Поред тога, истиче се да су компаније мање подложне политичким притисцима него што је то случај са државама. За разлику од тужбе државе, тужба приватне компаније се не може *a priori* тумачити као политички маневар (Schuyler, 1997: 2277; Catbagan, 2009: 279 и даље). Из тог разлога, компаније могу растерећеније приступити процедури него држава, која то питање и последице таквог чина готово увек сагледава из више углова. Компаније би као тужиоци свакако биле слободније и у изношењу аргументације током процедуре, за разлику од држава које су по том питању доста одмереније, пре свега због опасности од нарушавања политичких односа са државом са којом се упуштају у спор.

Ми се, свакако, можемо сложити са тим да би додељивање права на правну заштиту у оквиру СТО приватним лицима на први поглед допринело легализму међународне трговине, а самим тим и већем степену остваривања дистрибутивне правде. Уосталом, облик међународноправне процедуралне заштите у коме су учесници у спору приватна лица и државе већ пола века функционише на универзалном плану када су у питању стране инвестиције. Наиме, на основу Конвенције којом је основан

12 Реч је одлукама Суда у споровима „*International Fruit*" (спор из ере *GATT*-а) и „*Portuguese Textiles*". Детаљније о овоме: Цветковић, 2009: 250 и даље.

Међународни центар за решавање инвестиционих спорова (*International Centre for Settlement of Investment Disputes – ICSID*), приватни инвеститор може директно тужити државу пријема инвестиције у случају када сматра да је оштећен мерама државе које су у супротности са уговором, конвенцијом или законом који му гарантује одређена права. Ово важи уз услов да је надлежност Центра уговорена одговарајућим билатералним споразумом између државе порекла и државе пријема инвестиције, или непосредним (дијагоналним) споразумом између инвеститора и државе (Цветковић, 2007: 67 и даље; Цветковић, 2004: 249 и даље). Инвеститор, дакле, може остварити непосредну правну заштиту пред независном арбитражом, уз услов да држава претходно на то пристане.

Ситуација код правног режима међународне трговине је, међутим, другачија. Права и обавезе у оквиру СТО нису резултат појединачног уговарања, већ функционишу у оквиру јединственог и недељивог пакета. Материјално међународно право страних инвестиција није на такав начин централизовано. Државе аутономно одлучују о потписивању одређеног билатералног споразума о заштити страних инвестиција, као и о пријему инвестиције и уговорању одговарајућег система правне заштите за инвеститора. Право СТО не предвиђа такав вид аутономног иступања својих чланица. Осим тога, додељивање активне (стварне и процесне) легитимације приватним лицима захтевало би кореницу реформу правног система СТО која би подразумевала увођење принципа директног дејства СТО норми. На тај начин би се омогућила директна правна заштита за приватна лица, не само против мера других држава, већ и против мера држава у којима се налази њихово седиште или пребивалиште. Такође, јавила би се оправдана дилема да ли компаније и појединци могу, услед повреде СТО норме, правну заштиту тражити и пред националним судовима. Уколико би се дозволило директно дејство СТО норми по угледу на норме ЕУ, такав вид заговарања би имао утемељење. Због тих разлога, оваква фундаментална реформа још увек нема подршку међу чланицама СТО, што је и разумљиво. Последице таквог изобличавања права СТО би биле несагледиве и без сумње би нарушиле успостављени баланс права и обавеза.

Иако немају формалноправну могућност да иницирају поступак, компаније имају *de facto* значајну улогу у том процесу. Оне могу кроз своје формално и неформално деловање да утичу на одлуку државе у том погледу.

Компаније могу формално, уколико национално законодавство то предвиђа, упутити иницијативу (нпр. путем петиције) званичним органима државе да реагује уколико трпе одређену штету због дискриминаторних мера

друге државе. У националним законодавствима може бити предвиђена и обавеза државних органа да покрену процедуру заштите уколико постоји иницијатива приватног сектора. Пример је Трговински акт САД из 1974,[13] који у Секцији 302 предвиђа да свако заинтересовано лице може поднети иницијативу државним органима са циљем предузимања истраге у случају кршења трговинског споразума које САД примењују. Други пример се налази у секундарном законодавству ЕУ у области средстава заштите од трговинских ограничења трећих држава. У тој области је донета Уредба 3286/94[14] о процедури ЕЗ у области заједничке трговинске политике, којом су предвиђене мере за остваривање права која се заснивају на међународним правилима, посебно оним успостављеним у оквиру СТО 1994. године. Компаније из држава-чланица имају право, на подлози Уредбе, да од органа ЕУ захтевају одговор на било које трговинско ограничење успостављено од стране трећих држава са циљем изналажења мера за елиминисање штете и отклањање неповољних трговинских ефеката у међународној трговинској размени, сагласно усвојеним међународним правилима. Као услов примене таквих мера потребно је да трећа држава крши правила међународне трговине, посебно она која су предвиђена споразумима у систему СТО (Ћирић, 2013: 60–61). Ови примери илуструју значајну формалну могућност иницијативе када је у питању приватни сектор.

Компаније могу и на неформалан начин, путем лобирања, такође утицати на званичнике у погледу покретања поступка. Што је компанија већа, то је и њен утицај значајнији. Компаније су такође значајни неформални актери и током самог поступка. Будући да су заинтересоване за исход спорова, оне често пружају материјалну и саветодавну подршку представницима државе који непосредно, у својству правних заступника, учествују у процедури пред судећим телима СТО. Кроз сарадњу држава и компанија током иницирања и учествовања у поступцима пред СТО, успоставља се својеврстан вид јавно-приватног партнерства. Јавни и приватни актери, у том контексту, су узајамно зависни и утичу подједнако на животни стандард и свеопште благостање у друштву. С тим у вези, укрштају се и њихови економски интереси. Кроз удруживање својих ресурса (јавних и приватних), успостављају снажан заједнички капацитет и ефикасније остварују и штите бенефите који произлазе из права СТО (Shaffer,

13 Pub.L. 93–618, 88 Stat. 1978, enacted January 3, 1975, codified at 19 U.S.C. ch. 12.

14 Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (OJ L 349 of 31. 12. 1994). Amending acts: Regulation (EC) No 356/95 (OJ L 41 of 23.2.1995), Regulation (EC) No 125/2008 (OJ L 40 of 14. 2. 2008).

2003: 144–146). Приватне компаније, уколико су заинтересоване, могу представљати веома јаког савезника правном тиму који формално заступа чланицу пред *DSU* телима. Будући да су непосредни учесници на тржишту, компаније често поседују информације „из прве руке" о условима за приступ одређеним тржиштима и препрекама са којима се суочавају. Такве информације су драгоцене заступничком тиму државе, који на основу тога стиче сазнања о чињеничном стању и креира одговарајућу правну аргументацију (Durling, 2001: 148–149).

На основу наведеног, може се закључити да је улога компанија, како у иницирању, тако и у самом току процедуре и те како значајна, иако их правни систем СТО не препознаје као релевантне субјекте током поступка. Уместо директног, поседују индиректни приступ систему решавања спорова, који се рефлектује кроз могућност да убеде своју државу да покрене процедуру (Schoenbaum, 1998: 654). У сваком случају, веће ангажовање ширег круга актера у поступку правне заштите пред СТО може увек позитивно утицати на спремност државе да учествује у таквим процедурама.

5. Закључак

Систем решавања спорова у оквиру СТО је, формално, у значајној мери отворен за све чланице СТО у фази иницирања процедуре. Споразум *DSU* и пракса судећих тела СТО на прилично релаксиран начин уређују питање постојања активне легитимације, односно правног интереса чланице СТО за покретање процедуре решавања спорова против друге чланице.

Систем решавања спорова предвиђен *DSU* споразумом је ексклузивно намењен чланицама СТО. Државе и остале царинске територије које нису пуноправне чланице Организације немају право на приступ *DSU* механизму.

Чланице СТО имају неограничену аутономију у погледу одлучивања о покретању поступка. То могу учинити када год сматрају да за то имају одређени интерес. Активна легитимација није подложна претходној провери од стране било ког институционалног тела СТО и не постоји могућност „забране" покретања поступка. Чланица СТО може тужити другу чланицу када „сматра" да јој је било која повластица на основу обухваћених споразума умањена мерама друге чланице. Од чланица СТО се једино очекује да поступају у складу са начелом добре вере приликом иницирања поступка, односно да процене да ли ће у томе имати успеха. Чланици СТО се оставља да сама, у доброј вери и уз присуство очекиване дозе „самоконтроле", процени могући исход спора и да у складу са тим донесе одлуку о покретању процедуре. Од посебне важности је и став

судећих тела СТО да активна легитимација није условљена ни постојањем евентуалне штете коју трпи чланица која покреће процедуру. И одсуство сагледљивог економског интереса не спречава чланицу СТО да се активно легитимише као тужилачка страна.

Приватна лица, појединци и компаније не могу поседовати ни активну ни пасивну процесну легитимацију. Приватна лица не могу бити титулари права, нити се правилима СТО могу обавезивати.

У литератури су постојала, и даље постоје, заговарања да приватним лицима треба омогућити *locus standi* у систему решавања спорова пред СТО. Као главни аргумент наводи се да компаније представљају примарне актере светске трговине и да трпе највећу штету од дискриминаторних мера. Међутим, додељивање активне (стварне и процесне) легитимације приватним лицима захтевало би кореницу реформу правног система СТО, која би подразумевала увођење принципа директног дејства СТО норми. Последице таквог изобличавања права СТО би биле несагледиве и без сумње би нарушиле успостављени баланс права и обавеза унутар СТО.

Са друге стране, управо се приватне компаније појављују као *de facto* иницијатори поступака пред СТО, јер одлука чланице да покрене и истраје у поступку умногоме зависи од иницијативе и подршке приватног сектора. Компаније могу кроз своје формално (нпр. путем петиције) или неформално деловање (путем незваничних притисака и лобирања) утицати на одлуке својих влада да иницирају процедуру решавања спорова пред органима СТО.

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LOCUS STANDI IN THE DISPUTE SETTLEMENT PROCEDURE BEFORE THE WORLD TRADE ORGANIZATION

Summary

The issue of locus standi in the dispute settlement system before the World Trade Organization (WTO) is attached to the entities which can be parties to a disputes, as well as to conditions for the status of complainant or respondent in the certain dispute. Formally, the WTO dispute settlement system is considerably open for all WTO members in the initiating stage of dispute. The WTO members have unlimited autonomy regarding commencement of procedure and locus standi is not subject to ex ante control by any institutional body of the WTO. Nevertheless, the WTO members are expected to act in good faith during initiation of procedure. The WTO member should, in good faith and with appropriate level of „self-regulation", evaluate possible outcome of a dispute and, in accordance with it, decide about initiation of procedure against another member.

The standing before the WTO dispute settlement system is exclusively reserved for the WTO members. Non-member states and territories have no access to this forum. Also, private entities and companies have no locus standi. Private entities cannot be subject to the WTO norms and cannot enjoy rights and benefits from the WTO law.

Giving the locus standi to private entities would cause fundamental reform of the WTO legal system by imposing the principle of direct effect of the WTO norms. Consequenses of such reform would be unforeseeable. It would also lead to disturbance of the established balance of rights and obligations inside the WTO. Companies, nevertheless, through their formal and informal operating, can have a significant de facto role in procedures before the WTO dispute settlement system.

Key words: *World Trade Organization, dispute settlement system, locus standi, DSU.*

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Правног факултета у Нишу

Рад примљен: 02.12.2018.
Рад прихваћен: 07.12.2018.

Међународна научна конференција „*Право пред изазовима савременог доба*“, Правни факултет Универзитета у Нишу, Ниш, 13. и 14. април 2018. године

У склопу обележавања 58. годишњице рада Правног факултета у Нишу, 13. и 14. априла 2018. године организована је традиционална међународна научна конференција. Тема овогодишњег скупа била је „Право пред изазовима савременог доба“. Ова тема инспирисала је правне стручњаке да истраже све изазове са којима се правни поредак, у облику који смо до сад познавали, сусреће на почетку 21. века. У оквиру јавноправне, грађанскоправне, кривичноправне и трговинско-економске сесије, учесници су своје радове излагали на једну од подтема конференције: Право у функцији очувања друштвених вредности у савременом добу, Савремене технологије и право - примена, заштита и одговорност, Остваривање људских права, Доступност правде, Права миграната, Правна заштита миграната и Штета и последице штете.

Правни факултет у Нишу наставља традицију окупљања реномираних излагача са релевантних високошколских установа у земљи и иностранству. Ове године, учествовали су представници Европа института Универзитета у Сарланду (Немачка), Факултета права и администрације Универзитета у Ржешову (Пољска), Факултета за право, канонско право и администрацију „John Paul II“ (Пољска), Факултета правних и друштвених наука, Универзитет „1. децембар 1918.“ (Румунија), Правног факултета Универзитета „Ст. Климент Охридски“ (Бугарска), Правног факултета Универзитета Сакаруа (Турска), Правног факултета „Јустинијан Први“ Универзитета „Св. Кирил и Методиј“ (Македонија), Правног факултета Универзитета „Гоце Делчев“ (Македонија), Војне академије „Генерал Михаило Апостолски“ у Скопљу (Македонија), Правног факултета Универзитета у Бањој Луци (БиХ), Правног факултета Универзитета у

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Источном Сарајеву (БиХ), Правног факултета Универзитета „Џемал Бједић“ у Мостару (БиХ), Правног факултета Свеучилишта у Загребу (Хрватска), Правног факултета Свеучилишта у Осијеку „J.J. Strossmayer“ (Хрватска) и Велеучилишта „Лавослав Ружичка“ у Вуковару (Хрватска).

Своје прилоге изложили су и учесници са Правног факултета и Факултета политичких наука Универзитета у Београду, Правног факултета Универзитета у Новом Саду, Правног факултета Универзитета у Крагујевцу, Правног факултета Универзитета у Приштини (са привременим седиштем у Косовској Митровици), Академије за националну безбедност, Криминалистичко - полицијске академије, Института за криминолошка и социолошка истраживања и Института за међународну политику и привреду.

Пажњу учесника јавноправне сесије привукла су питања која представљају срж правног система: правни принципи у поретку правне државе, право као контракт и квазиконтракт и правно нормирање, вредносни систем друштва и домети модерне демократије у афирмацији идеје и вредности правде и праведног друштва. У фокусу су биле и теме везане за конституционализам - уставна ревизија, Србијин уставни идентитет, критички осврт на предлог амандмана на Устав РС, контрола уставности и законитости, права и слободе грађана према Уставу Републике Пољске. Учесници конференције дали су свој допринос и темама из области међународног јавног и дипломатског права. Јавност је, напослетку, упозната и са променама које је модерно доба унело у сферу радноправних односа.

Теме у оквиру кривичноправне сесије биле су хетерогене - учесници су се бавили питањима из области криминологије (појава и развој паметних градова из криминолошке визуре, утицај корупције на националну конкурентност), кривичног (алтернативне мере и санкције према малолетницима, прање новца) и кривичног процесног права (европски налог за хапшење, доказна форма у кривичном поступку, тужилачка дискреција, улога тужиоца у правичном кривичном поступку). Идући у корак са модерним технологијама, учесници су истраживали и теме везане за нове генетске технологије, компјутерски криминалитет и интернет превару. Изабравши фемицид и заштиту жртава насиља у породици, излагачи су показали да прате „горуће“ друштвене проблеме савременог друштва и храбро нуде решења.

Савремено доба донело је и велику мигрантску кризу, што је излагаче, углавном са подручја кроз које пролази „Балканска мигрантска рута“,

подстакло да се баве темама попут избегличког статуса и избегличке путне исправе и права азила.

На сесији која се бавила остваривањем људских права излагачи су дискутовали о праву на приватност, политичким правима и слободама и социјалној функцији својине, као и начину остваривања људских права путем стратешких парница и признања и извршења страних судских одлука.

Савремено доба унело је новине и у традиционалне правне односе, па су се излагачи бавили и електронским новцем и новчаним обавезама и криптовалутама. Теме које су биле предмет дискусије на грађанскоправној сесији односиле су се на различите гране грађанског права - стварно право (право својине, службености), облигационо право (накнада штете, правно уређење гаранција, уговор о поклону) и наследно права (облици завештања).

Учесници трговинско-економске сесије изложили су резултате истраживања у погледу управљања банкарским ризиком, теорије игара и права, уговора о франшизингу и савремених обележја јавног финансирања. Они су се, из више углова, бавили и положајем Народне банке Србије.

Другог дана усвојени су закључци конференције. С правом се очекује да плодна дискусија великог броја реномираних излагача буде путоказ законодавцу приликом креирања нових и измене постојећих законских решења.

Организовање конференције помогло је Министарство просвете, науке и технолошког развоја.

III РАДОВИ СТУДЕНАТА ДОКТОРСКИХ СТУДИЈА

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879437B

UDK: 340.12:004.414.23
UDK: 34:007

Рад примљен: 30.01.2018.
Рад прихваћен: 01.11.2018.

РАЧУНАРСКА СИМУЛАЦИЈА КЕЛЗЕНОВОГ МОДЕЛА ПРАВНОГ ПОРЕТКА У СВЕТЛУ ТЕОРИЈЕ ХАОСА КАО МОДЕРНЕ НАУЧНО – ФИЛОЗОФСКЕ ПАРАДИГМЕ

Апстракт*: Експанзивни техничко-технолошки развој и све интензивнија примена рачунарске платформе и кибернетичких метода у најразноврснијим областима друштвеног живота неминовно остварују и све снажнији ефекат у домену правне науке. У фокусу овог рада биће, пре свега, поступак рачунарске симулације модела правног поретка Ханса Келзена, као карактеристичан вид једног новог третирања правне материје са позиција рачунарске виртуелне стварности, а са циљем да се укаже на нове перформансе којима овакав проширени научни инструментаријум доприноси у поступку стварања, примене и испитивања права. Притом, биће учињен покушај да се читаво право као друштвена појава и припадајући му феномени сагледају у оквирима теорије хаоса, као све доминантније модерне научно-филозофске парадигме, те да се законитости на којима се постулира савремена интерпретација света и универзума разоткрију и у егзистенцији правних појава. С тим у вези, посебна пажња ће бити усмерена на проблем интерне динамике правног система, у смислу логике развоја и тенденција које исказује у својој изградњи, како би се указало на све недостатке иманентне овом процесу и из њих произилазеће негативне ефекте који би могли да се одразе на одређену друштвену заједницу.*

Кључне речи*: теорија хаоса, виртуелна стварност, Ханс Келзен, рачунарска симулација, правни модели.*

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1. Увод

У крилу модерне епохе остварује се плодоносна синтеза теорије хаоса као нове научне парадигме и рапидног развоја рачунарских технологија, што отвара потпуно нову димензију интерпретације друштвених, природних и вештачких феномена у светлу измењене перцепције света коју савремена мисао нуди. Наравно, оваква интелектуална струјања не остављају изоловану ни правну мисао, те све заступљенија примена достигнућа експанзивне кибернетике у правној науци врло брзо почиње да наговештава значајна проширења постојећег хоризонта у домену стварања, примене и испитивања права. Управо развој рачунарске виртуелне стварности отвара могућност радикално другачијег научног третирања правних феномена, те значајним проширењем постојећег методолошког апарата пружа снажан допринос савременој правној науци.

Срж оваквог научног концепта представља одбацивање традиционалних детерминистичких представа о свету, те се на бази уобличавања једне нове научно-филозофске свести, која универзум сагледава у свој његовој сложености, дезавуише стара, у научном свету дуго доминантна теза о строгој узрочности и превидљивости. Читав концепт рачунарске симулације ниче у амбијенту освеженом једним новим сензибилитетом, где се релативизацијом традиционалних научних канона и применом модерних технологија откривају нове перспективе старе проблематике. Есенцију овог новог обрасца мишљења и интерпретације света на веома језгровит и илустративан начин манифестује мисао Карла Попера: „Да је Бог хтео да све на свету створи још на почетку, Он би створио универзум без промене, без организма и еволуције и без човековог искуства промене. Али, Он је сматрао, чини се, да је живи универзум са догађајима неочекиваним, чак и за њега самог, много занимљивији од мртвог" (Попер, 1991: 167). У том смислу, нарочито интересантна веза између теорије хаоса и правне науке указује нам се кроз *концепт извесности* у оквиру којег нумеричком вредношћу изражен степен вероватности у наступању одређених догађаја и промена варира у амплитуди између граничних категорија *сигурности* и *немогућности* (Митровић, Вукадиновић, 2011). Штавише, значајно је нагласити да „међу значајне промене спада и то да се ми у пробабилистичком свету више не бавимо количинама и формулацијама које се односе на неки специфичан стварни свемир као целину, већ, уместо тога, постављамо питања на која се може наћи одговор у великом броју сличних свемира. Тако је случајност прихваћена не само као математичко оружје физике, већ и као део њене потке и њеног ткива" (Винер, 1964: 26).

Креирањем рачунарске виртуелне стварности, као специфичне методолошке платформе, отвара се нова димензија у коју правни феномени бивају транспоновани и изражени у облику одговарајућих симбола, те потпуно изоловани у односу на материјалну стварност која нас окружује, пружајући нам на тај начин могућност да предвидимо њихово понашање и ефекте које би произвели у реалном свету, без бојазни од евентуалних штетних последица до којих би експериментисање са одређеним новим правним актом или институтом могло да доведе у стварности. На овај начин, стваралац права стиче могућност антиципације у односу на све недостатке које би практична примена одређене норме или правног акта могла да садржи, као и на неповољне ефекте за друштвену заједницу који би на тај начин били генерисани.

Правна кибернетика представља релативно младу научну дисциплину, чије корене и разлог настајања треба тражити у потреби за проширењем методолошког спектра који стоји на располагању правној науци, те нарастајућој свести о неминовности прилагођавања постојећег инструментаријума савременом техничко-технолошком амбијенту. Нагли развој рачунарских технологија у модерној цивилизацији отклања многобројна традиционална ограничења у перцепцији и интерпретацији света око нас, отварајући читав дијапазон нових перспектива којима предмет науке може бити сагледан на значајно другачији начин. Универзалне унутрашње карактеристике *хаоса* као феномена, могућност да стихијски карактер функционисања неког система буде преображен у различите облике поретка, као и несумњиви стваралачки потенцијали којима располаже, своју најочигледнију форму задобијају својом пројекцијом у рачунарском виртуелном свету. У том смислу, „у хаосу постоји ред – иза хаоса скривају се геометријске структуре. Хаос, додуше, начелно ограничава могућност предвиђања, али и даје узрочно-последичне везе тамо где их пре нисмо ни наслућивали“ (Кузмановић, Васовић, Костић, Симић, Франовић, Гроздановић, Тодоровић Васовић, Ранковић Плазинић, 2013: 12).

Управо поменути квалитет хаоса омогућава истраживачима да у механизмима и законитостима који се назиру у хаотичности неког система, траже и проналазе кључ за разумевање сложених образаца на којима почива постојање и развој појава и система друштвеног живота, а првенствено права. Наиме, спонтано генерисање реда које нам у сложеним недетерминистичким системима открива метод рачунарске симулације, пулсирање система који се кроз след цикличних смена стабилности и нереда преображава из поретка у хаос, или обратно, који кроз сложени процес самоуређења стиче ред и организацију, као и уочени ефекти који нестабилност и аномалије на локалном нивоу могу да пројектују на

глобалне системе, представљају управо механизме функционисања права као друштвеног феномена који нам кроз разноврсност понуђених форми и симбола представља метод рачунарске симулације правних модела.

2. Теорија хаоса као идејни оквир рачунарске симулације

У сржи теорије хаоса лежи специфична представа стварности која из корена мења уврежене научне концепте и перцепцију света око нас, обезбеђујући један нови парадигматски оквир са широким могућностима реинтерпретације како природних и друштвених феномена тако и целокупног универзума. Овакав заокрет условљен је првенствено једним фундаментално измењеним односом према основним онтолошким категоријама, у светлу кога савремена научна и филозофска мисао у све већој мери преображавају своје традиционалне циљеве и стремљења, формулишући нове идејне матрице, како би нам пружиле један радикално другачији увид у природу целокупног битка.

Традиционална научна мисао своје постулате заснива на једном изразито детерминистичком тумачењу света, који полази од симплицистичке концепције универзума, који у суштини представља многострукост система који почивају на суштинској линеарности, те које, као такве, карактеришемо као предвидљиве. Строги детерминизам, са становишта поборника теорије хаоса, представља управо филозофски и научни анахронизам, који као препрека стоји на путу људског сазнања. Наиме, комплексност универзума и његова свепрожетост условљавају једну бескрајну динамику, која опет чини да се проучавани системи, без обзира на то да ли припадају сфери друштвених, природних или вештачких појава, показују као нелинеарни и непредвидљиви. Посматрање и тумачење света у светлу овакве строге узрочности заогрнуло је свет извесним идеалистичним рухом, представљајући га као комплекс система унутар којих промене у почетним условима изазивају предвидљиве и њима пропорционалне ефекте у будућем понашању посматраних феномена. Управо многострукост интеракција које се остварују у целокупној реалности искључује могућност да будуће промене и стања буду праволинијске и сразмерне њиховим узроцима. Један од основнх постулата тог новог концепта јесте порицање тезе о строгој линеарности система интегрисаних у укупни поредак универзума, као одраз плиме мисли произашле из помаљајућег новог осећања света, чији се сегменти могу пронаћи расути како у домену научног и филозофског промишљања тако и у сферама уметничког стваралаштва.[1]

1 Као посебно илустративан пример ове врсте из света књижевности вредело би навести причу *Моћ речи* Едгара Алана Поа. Заогрнувши је у рухо алегријске

Сазнање да читав свет који нас окружује почива на недетерминистичким основама, те да су такви системи услед сложености своје структуре склони нестабилности, која их променама услова који карактеришу њихово почетно стање води ка хаотичности, навело је научнике да напусте превазиђене методе третирања предмета њиховог интересовања. Та измењена слика света захтевала је нови приступ и методологију, и управо таква потреба широм отвара врата примени кибернетике као све популарније дисциплине.

Истовремено, као карактеристичан, развија се један строго критичан однос према конвенционалном третирању појма хаоса, које овај феномен поистовећује искључиво са нередом и нестабилношћу, упозоравајући да и сам хаос може претпоставити постојање организације и реда; штавише, да механизмима спонтаног организовања, о којима ће касније бити више речи, може да доведе до настанка реда и поретка тамо где их раније није било. Све ове идеје проналазе упориште управо у једном принципијелном схватању да „непредвидљивост, хаотичност, спонтаност и нестабилност поседују одређена универзална својства која математички могу да се прикажу помоћу атрактора (привлачилаца) и фрактала. То треба посебно да се истакне јер у хаотичним системима атрактори фракталног састава показују да и у нереду постоји ред и симетрија. Зато је фрактал мера уређености хаоса. На тај начин хаос сам себе уређује изнутра, и то успостављањем фракталних облика као образаца спонтане самоуређености“ (Митровић, 2000: 102).

Иако теорија хаоса у својој савременој варијанти представља младу научну теорију, клице схватања на којима се она темељи јављају се већ у раним, примитивним стадијумима развоја људског друштва. У том смислу, ова идеја суштински провејава кроз целокупну историју људске мисли, те се најраније манифестације оваквог доживљаја света испољавају у виду различитих религиских и космогониских тумачења, која се временом, еволуирајући кроз историју, у освит модерног доба заогрћу рухом различитих, како филозофских и научних теорија тако и литерарних остварења.

Као таква, ова нам се схватања, протежући се од египатских и вавилонских веровања и митова, преко религијских доктрина далеког истока, до филозофских система западне цивилизације, чине као спона која повезује и премошћује миленијуме, непрекидно сведочећи о универзалности

живописности, По такође заступа идеју о остварењу снажних ефеката изазваних деловањем несразмерно мањих промена, где се реч, као незнатна количина даха ослобођеног у безграничном етру, у беспућима свемира оваплоћује у световима блиставе лепоте и среће или мрачне трагичности.

проблема који окупирају људски дух. „То теорију хаоса приказује као универзалну општу теорију сложених динамичких система, која подједнако успешно указује на општу уређеност појава и система који се на локалном плану понашају насумично и хаотично, као и на општу неуређеност и хаотичност појава и система који на локалном плану показују уређеност и регуларност, што теорију хаоса представља као модерну теорију која на нов начин доводи у везу организацију са случајношћу, сврсисходност са спонтаношћу, ред са хаосом. У самој основи тог новог приступа стоји: свет је трајна нестабилност" (Митровић, Станојевић, 1996: 11). На овај начин сведочимо обликовању и афирмацији једног новог научног и филозофског сензибилитета, који своје упориште има управо у обликовању свести о универзуму као нестабилности, у све већој мери уважавајући идеје и представе света у којима статичност бива замењена динамичношћу, а строги детерминизам законима вероватноће. Надаље, хаос као феномен поседује и властиту стваралачку снагу. Управо продор овог сазнања налаже неминовно брисање знака једнакости између хаоса и деструкције. Наиме, хаос располаже специфичним стваралачким потенцијалом који извире из могућности спонтаног самоорганизовања, дакле, једног вида сопственог унутрашњег уређења које почива на поменутим сложеним механизмима фракталног структурисања, путем којих системи са хаотичним понашањем стичу стабилност.

3. Рачунарска симулација и право

Иако релативно млада научна дисциплина, правна кибернетика прати убрзани темпо развоја модерне цивилизације, те наспрам прилично скромних циљева са почетка њене практичне примене, ношена таласом техничко-технолошког прогреса, данас располаже широким могућностима за пружање драгоцених сазнања везаних за проучавање понашања најразноврснијих правних феномена, како на микро тако и на макро нивоу. Корене њене практичне примене проналазимо у англосаксонском праву, мада на том степену развоја разумљива ограниченост њених домета усмерава њене кориснике ка томе да резултате ове гране кибернетике траже и остварују првенствено у сфери класификације података и утврђивања садржаја позитивног права. Вртоглавим развојем рачунарских технологија рапидно се шири спектар могућности којима ова новоуобличена методологија може да допринесе правној науци. Уколико се нека појава или идеја могу на адекватан начин преточити у језик математичких симбола, те уколико је механизмима математичке једначине могућа интерпретација и проучавање таквог модела, онда се такав модел може сматрати верним одразом проучаване појаве или

закона. Успешност моделовања условљена је управо мером у којој креирани модели веродостојно приказују и објашњавају неку појаву.

Наравно, неопходно је било превалити дугачак пут како би се ограничења која су наметале уврежене детерминистичке представе о свету, те на њима заснован диференцијални рачун Њутна и Лајбница, били превазиђени, односно како би постепено уобличавање схватања да се у свету, а посебно у сфери друштвених појава, остварују најразноврснији облици нерегуларног понашања, отворило пут примени нових математичких метода. Развој те и такве свести управо је наметнуо потребу за применом нелинеарних једначина. Основна предност оваквог приступа је лежала у сазнању да „нелинеарним једначинама могу да се успоставе обриси једноставне типичности у хаотичном понашању, тј. може да се добије математички израз хаоса у коме постоји нека врста реда, а управо истраживање и откривање реда у нереду јесте главни задатак теорије хаоса" (Митровић, Станојевић, 1996: 82).

Данас се правни модели, захваљујући рачунарској симулацији и могућностима рачунарске и виртуелне стварности, могу симулирати на такав начин да унапред и без извођења експеримента могу да се стекну поуздана знања о будућем понашању неког закона, неке правне установе или о функционисању целокупног права.

Разумљиво, због њене специфичне природе, да је судбина ове дисциплине највише зависила од протагониста информатичке експанзије, те да су и њен раст и утицај на савремену правну науку расли упоредом са прогресом рачунарске платформе из које се развијала. У том смислу, правна кибернетика пролази кроз неколико развојних фаза, које се данас могу идентификовати као засебне гране ове научне дисциплине: *правометрија, правна информатика и правна модалистика.* Прва је усмерена првенствено ка решавању проблема несистематичности, нарочито присутне у системима англосаксонског правног круга, те њен циљ у првом реду треба тражити у коришћењу рачунарских капацитета ради остваривања прегледности и организације приликом складиштења правне материје. На тај начин се „машинским путем из тако сређеног система права могу ванредно брзо наћи норме које се траже, а које имају одређена обележја. Тако се норме могу средити по сродности своје правне садржине... Очито је колико је корисна употреба кибернетичког метода у ову сврху, особито за прецедентна права. Уместо да се претурају велики зборници са безброј норми, овим методом се одмах и без напора налази потребна норма" Лукић, 1995: 237).

Правна информатика се бави прикупљањем резултата до којих се дошло претходним истраживањем и проналажењем нових релевантних сазнања. У оквиру правне модалистике, као круне досадашњег развоја правне кибернетике, остварују се сложене операције, где се у оквиру рачунарске виртуелне стварности врши састављање и симулација математичких модела најразноврснијих правних појава, укључујући ту и само право. Наравно, овакво ограничавање примене кибернетичког метода на пуко сортирање садржаја одређеног правног поретка данас је увелико превазиђено, те нам управо поменута динамика развоја у области рачунарских технологија отвара пут вршењу знатно комплекснијих операција.

Данас креирање оваквих модела и њихова рачунарска симулација представљају безмало стваралачку делатност у оквиру које понашање датих модела може да буде приказано у виду најразноврснијих визуелних и аудитивних форми. У том смислу, „кибернетски методи су се у почетку користили искључиво за 'превођење' права са обичног, 'природног' језика на 'математички' језик. То јесте и данашњи задатак кибернетског метода. Али то се данас чини на неупоредиво лакши начин, и што је још важније, чини се на такав начин да стварање подробних, или чак сасвим реалистичних правних модела подсећа на уметност" (Митровић, 2000: 102).

Ова метода омогућава истраживачу да у потпуности контролише понашање и развој одговарајућег правног модела, те да по свом нахођењу успорава или убрзава целокупни процес, ограничавајући своју пажњу на понашање појединих сегмената испитиване појаве или посматрајући функционисање целине датог правног феномена. На овај начин савременом правнику се пружа инструментариј који му омогућава да „проникне у судбину" одређене појаве, те да на длану држи и сагледа читав будући живот неке правне норме, института, акта, па и целокупног правног система. У том смислу, виртуелни амбијент постаје поприште тестирања и развоја најразноврсијих облика правног света, својеврсно артифицијелно станиште у којем би правне појаве биле пажљиво „одгајане" и селекционисане пре него што би њима била насељена друштвена стварност.

Наравно, метод рачунарске симулације не претендује на пружање апсолутно истинитих резултата, већ – дубоко укотвљен у парадигми теорије хаоса, те у њеној мисли преовлађујуће скепсе у погледу потпуне истине као научне категорије – тежи сазнањима која остају у домену извесности и вероватноће. Стога, „када испитујемо неки правни модел, ми не очекујемо да ће добијени резултати бити истинити, већ да ће бити

високог степена вероватности, проверљивости и поткрепљивости" (Митровић, 2000: 102).

4. Појам права Ханса Келзена

У историји правне мисли Келзен оставља неизбрисив траг као доследни протагониста правног позитивизма који, у форми *чисте теорије права*, представља доминантну правну доктрину двадесетог века. Наиме, као теоретичар позитивно – правне провенијенције, намеће се као снажан заговорник идеје о „овоземаљском пореклу" права, које као такво – дакле, као искључиво друштвена творевина, не поседује никакву ванвременску, универзалну садржину, већ напротив, постоји потпуно независно од ње, а своје важење дугује форми, односно начину на који је оно створено. Келзеново дело зрачи снажним настојањем аутора да новим теоријским моделом учини идеју правног позитивизма пријемчљивијом схватањима епохе, те да као опонент различитим природно – правним струјањима у идеји чисте теорије права изнађе плодоносну формулу за превазилажење мањкавости ранијих приступа. На тај су начин његове идеје, кроз ревитализацију натуралистичке мисли, понуђене као алтернатива владајућим доктринарним схватањима, пруживши неспорно значајан допринос целокупној теоријско – правној баштини.

Секуларизам, као један од основних атрибута Келзенове природно – правне теорије, извире из остваренog дисконтинуитета у односу на јуснатуралистичке традиције његових претходника, који се манифестује у одсуству склоности да се норме и стандарди наведеног концепта права постулирају са ослонцем на извесне трансцедентне принципе изражене кроз појмове божанске правде, односно универзалне и непромењиве вредности иманентне самој људској природи. У том смислу Келзен тврди: „чиста теорија права настоји да јасно разликује емпиричко право и трансцеденталну правду, која не спада у њен специфични премет. Она у праву види не манифестацију једне надчовечанске власти, него специфичну друштвену технику засновану на људском искуству. Она одбија да буде правна метафизика" (Келзен, 2007: 11). Надаље, аутор је експлицитан: „На питање зашто је известан акт принуде – тј. чињеница да једно лице лишава друго лице његове слободе бацајући га у затвор – правни акт, одговор је: зато што је прописан индивидуалном нормом, судском пресудом. На питање зашто та индивидуална норма важи као део одређеног правног поретка, одговор је: зато што је створена у складу са кривичним законом. Тај закон, на крају, добија своје важење од устава,

пошто је прописан од стране надлежног органа на начин који прописује устав" (Келзен, 1998: 172).

Разумљиво је да се овај својеврсни процес градације не завршава код устава, будући да нам се, надаље, намеће питање шта самом уставу даје правну снагу, односно који је његов основ важења. Овакав осврт може да нам открије постојање и неког старијег, историјски посматрано, првог устава, који би као такав био „последња претпоставка, крајњи постулат, од кога зависи важење свих норми нашег правног поретка. Постулирано је да се треба понашати као што је наредило лице или лица која су донела тај први устав" (Келзен, 1998: 172).

Особеност Келзеновог концепта правног поретка, као рефлексија једне изразито позитивистичке оријентације која прожима његову мисао, те утискује свој печат у целокупној ауторовој интерпретацији права као феномена, јесте решеност да се таквом основном нормом „затвори хоризонт", што отклања сваку даљу потребу за религијским и другим метафизички фундираним образложењима. За разлику од позитивне правне норме, она своје важење не црпи из правног акта и одговарајуће правне процедуре на темељу којих настаје, већ из чисте претпоставке да важи. „Крајња хипотеза позитивизма јесте норма која овлашћује историјски првог законодавца. Читава функција те основне норме јесте у томе да дâ власт стварања права акту првог законодавца и свим другим актима који се заснивају на првом акту. Интерпретирати те акте људских бића као правне акте и њихове производе као обавезне норме, што значи као такав емпиријски материјал који се представља као право, могуће је само под условом да се претпостави да основна норма важи. Основна норма је само нужна претпоставка сваке позитивистичке интерпретације правног материјала" (Келзен, 1998: 173).

Дејство правних норми природно поседује и временску димензију, што значи да оне ступају на снагу, односно постају неважећим на начин одређен искључиво правилима поретка чији саставни део чине, што управо представља садржину принципа легитимитета, као једног од основних начела правног поретка. Међутим, и важење овог принципа познаје одређене изузетке, који се манифестују, пре свега, кроз ограничења која овом правилу намеће примена начела ефикасности. Разумљиво је да и основна норма, као темељ одређеног правног поретка, нема апсолутну снагу, те да је и сама подложна замени другом основном нормом. Наиме, у случају револуционарног рушења неког поретка са циљем нпр. промене облика владавине, регуларност, односно противправност неког понашања почињу да се процењују са становишта критеријума новоуспостављеног

поретка, односно новоустановљене основне норме, на основу које се гради и нови систем правила. Из овога следи да је неопходан услов важења норми које припадају одређеном правном поретку ефикасност истог, те да престанком важења правног поретка као целине престају да важе и норме које му припадају. На овај начин, принципом ефикасности остварује се извесна корекција принципа легитимности којим се предвиђа да дејство правне норме отпочиње и престаје у време и на начин прописан правилима поретка којем таква норма и припада.

За разумевање карактера основне норме и природе њеног односа према осталим нормама правног поретка које из ове бивају изведене, било би корисно проблем сагледати у светлу ауторовог дихотомног концепта *Sein/Sallen*. У том смислу Келзен напомиње да право јесте нормативни феномен који, као такав, припада сфери требања, али да сама основна норма мора непосредно да се наслања на одређене, за постојање правног поретка релевантне чињенице, обезбеђујући им неопходан правни ауторитет. С тим у вези, аутор подвлачи да функција основне норме јесте да омогући нормативну интерпретацију извесних чињеница, што значи – интерпретацију чињеница у смислу стварања и примене важећих норми. Отуда је садржина основне норме одређена чињеницама путем којих је поредак створен и путем којих се он примењује. Надаље, потпуно је извесно да понашање људи који су адресати норми одређеног правног система није и никад неће бити у потпуности усклађено са датим нормативним поретком, и управо постојање овог антагонизма даје смисао правном регулисању.

Хијерархијско структурисање као феномен иманентан правном поретку, представља управо динамичан процес који произилази из чињенице да правни систем сам регулише своје даље стварање путем правила које постојеће норме садрже о креирању нових. У том смислу Келзен закључује да „правни поредак није систем норми које су координиране једна са другом, и које стоје такорећи једна поред друге на истој висини, него је хијерархија различитих ступњева норми“ (Келзен, 1998: 182). Јединство правног поретка почива управо на чињеници да све норме у хијерархији правног поретка црпе своје важење из такве пранорме.

5. Симулација келзеновог модела права

Немогућност апсолутног разлучења феномена хаоса и реда условљена свеколиким прожимањем ових опречних принципа представља једну од темељних идеја нове концепције света коју промовишу заступници теорија хаоса. Већ је наглашено да овакав научни концепт проналази свој одраз и у

измењеном начину на који се и у сфери правне науке остварује перцепција правних појава. Схватање да не постоји потпуни ред и стабилност, те да сваки поредак и организација могу под одређеним условима да се преметну у различите облике нереда, свој репрезентативни израз и потребу налазе управо на примеру рачунарске симулације Келзеновог модела права. На овај се начин, трагом све уочљивије хаотичности, прати растакање принципа поретка и организације на којима се постулира постојање сваког правног система, те се разоткривају начин и механизми путем којих се овај преображај остварује.

Поступак рачунарске симулације Келзеновог модела састоји се из две фазе: у првој се утврђује ауторово поимање права његовим артикулисањем кроз одговарајућу дефиницију, те се овакав, дескриптиван модел права преводи у свој математички облик; у следећој фази добијени математички модел права се испитује техникама рачунарске симулације која се остварује на бази измена вредности промењивих, те управо ова делатност представља централни део целокупног поступка. „Следимо ли Келзенове главне идеје и ставове у Општој теорији права и државе и сами можемо да саставимо модел, „дефиницију", његовог појма права, према којој се право представља као хијерархијски (ступњевито уређен) динамички систем правила (тј. поредак људског понашања), на чијем се врху налази највиша, основна норма (пранорма), из које све друге норме, од највише до најниже, изводе своје значење" (Митровић, 2000: 158).

Управо на овом примеру јасно је изражен процес генерисања хаоса који произилази из чињенице да принципе реда и организације на којима се темељи правни поредак угрожава његова комплексност која се испољава управо у хијерархичности његове структуре, где број норми на сваком нижем степену хијерархијске лествице драстично расте, увећавајући тиме и могућност настанка несклада, односно колизије норми различитих нивоа општости. Управо у овој тенденцији умножавања норми слабије правне снаге крије се клица нереда који, узимајући маха кроз процес даље мултипликације, води ка све већој хаотичности система. Као што је већ напоменуто, дати поступак рачунарске симулације започињемо транспоновањем наведене дефиниције права (тј. његовог прескриптивног модела) у језик математичких симбола. На тај начин састављамо одговарајућу функцију:

$$P = f (pn, h)$$

При чему:

„P“ представља Келзенов појам права,

„f“ функцију, „pn“ правну норму и

„h“ хијерархију.

У том смислу, посебан утицај на понашање Келзеновог модела права има принцип *повратне спреге*. Деловањем овог механизма остварује се ефекат међусобног појачавања у датом систему који је предмет моделовања којим се „омогућава читавој хијерархијској структури права да се одржава, као и да главна хијерархијска структура доминира над секундарним, локалним хијерархијским структурама у праву“ (Митровић, Станојевић, 1996: 97). Надаље, значај њеног дејства у још се већој мери испољава у процесу преласка система из складног ка стању све веће неуређености, при чему се оно манифестује на начин да „спречава непрекидни раст прописа стварајући услове за њихову кодификацију, или пак нагло увећава њихов раст, стварајући услове за формално-правну револуцију“ (Митровић, Станојевић, 1996: 98). Специфичност дејства повратне спреге у простору између потпуно уређеног и крајње хаотичног понашања система нарочито се испољава у тенденцијама које се исказују након досезања наведених полова када њени ефекти настављају да се остварују али у супротном правцу. Наиме, у случају кодификације права наставља се процес умножавања правних норми, док у супротној ситуацији формално-правне револуције долази до поновног стварања права.

У том смислу, Мичел Фајгенбаум уочава да системи овог типа исказују „високи степен осетљивости у погледу зависности у односу на почетне услове. Будући да се веома мале разлике у почетним условима увећавају веома брзо, осим уколико почетни услови нису одређени са неограниченом прецизношћу, сво знање којим располажемо нагло се губи у корист наступајуће неизвесности“ (Feigenbaum, 1983: 33). Надаље, исти аутор долази до веома интересантног запажања да се суштина функционисања неког система заснива на постојању извесних универзалних константи, односно вредности чији нумерички израз успева да утврди. Наиме, број 3.5699 изражава ону вредност која представља тачку на којој стабилност и поредак уступају место хаотичном понашању у сваком систему, што потврђује тезу о постојању извесних универзалних својстава хаоса на основу којих се остварују одговарајући ефекти без обзира на евентуалне специфичности појединог система. Надаље, Фајгенбаум истиче да се та својства односе на брзину којом се неки систем приближава хаотичном

понашању кроз захухтали след периодичних дуплирања, чиме се кроз тзв. процес *бифуркације* формира карактеристично *бафуркационо стабло,* које кроз константно умножавње из њега произилазећих огранака води ка стању хаоса. Откриће да хаос није само плод пуке насумичности, већ да урушавање организације и реда у неком систему почива на математички одредивим, есенцијалним својствима овог феномена, представља уједно и једну од фундаменталних идеја теорије хаоса. Уочене законитости налазе своју јасну рефлексију управо у начину функционисања Келзеновог модела права, где нам рачунарска симулација јасно открива деловање бифуркационог механизма који се манифестује кроз поменути процес мултипликације правних прописа и норми на сваком нижем степену хијерархије правног поретка. На тај начин „такво циклично и ступњевито смењивање реда и нереда тежи ка све већем расипању и нереду у праву и производи све слабији ред на сваком нижем хијерархијском ступњу правних норми" (Митровић, Станојевић, 1996: 162).

У том смислу, Фајгенбаум појаву хаотичног понашања и његово напредовање кроз поменути процес бифуркације види као неминовну последицу остваривања специфичних величина које проналазе свој математички израз у одговарајућим бројевима, представљајући својеврсне универзалне генераторе нереда. Дакле, настанак и развој хаотичности постулирани су управо у таквим величинама и њихово наступање не бива условљено индивидуалним карактеристикама карактеристикама појединог система или евентуалном специфичношћу њених саставних делова. На овај начин „те математичке константе показују да хаос располаже универзалним својствима, као и да су Фајгенбаумови 'магични бројеви' у ствари темељне природне константе које важе за све што постоји" (Митровић, Станојевић, 1996: 161). Дакле, само унутрашње искуство хаоса као феномена, засновано на оваквим темељним константама, чини га иманентним сваком природном, друштвеном и вештачком систему. Надаље, пулсирање система у поменутом процесу урушавања првобитног поретка и организације јесте следеће интересантно сазнање које нам пружа рачунарска симулација Келзеновог модела права. Наиме, читав овај процес праћен је периодичним стабилизацијама система, тако да периоде хаоса смењују повремени периоди реда и стабилности, док се систем убрзано креће ка све већој дезорганизацији. Управо кроз ову тенденцију остварује се процес бифуркације, што потврђује тезу о универзалној законитости на темељу које систем тоне у нестабилност и хаос.

Несумњива је израженост испољених карактеристика у тенденцијама које захватају изградњу правног поретка у реалном свету, које се манифестују кроз различитост квалитета рада који се успоставља на

појединим нивоима правног поретка, те се организација успостављена уставним нормама својим квалитетом претпоставља поретку креираном на нижим ступњевима правне хијерархије, на којима се ред остварује у све разводњенијим формама. На тај начин овај циклични процес своје крајње исходиште има у стању потпуног хаоса, чиме се потврђује једна од доминантних теза поборника теорије хаоса, а то је да се у сваком реду налазе клице хаотичног понашања, те да стабилност и хармоничност одређеног система увек поседује тенденцију да у крајњој линији резултује потпуним хаосом.

У том смислу, као потпуно оправдан намеће се закључак да управо та могућност да се чак и Келзенов модел појма права, који је сасвим доследно логички заснован и развијен према хијерархијском начелу, на крају преобрази у своју властиту супротност – показује да примена теорије хаоса у праву има своје оправдање, да на описани начин може да се испитује било које конкретно право и да могу да се испитују правни узроци који доводе до расипања и до нереда у праву.

6. Закључак

Напослетку, корисно би било кроз један кратак осврт апострофирати најзначајнија обележја рачунарске симулације правних појава како би се указало на врло снажан и растући допринос који савремени развој рачунарских технологија, као и нагло развијајућа свест о неопходности њихове примене у сфери изучавања друштвених феномена остварују на подручју правне науке, подједнако у домену стварања, примене и испитивања права. Такође, успех правне кибернетике на пољу откривања развојних законитости правних појава, особености структуре правних система и сл., у значајној мери потврђује и основне поставке теорије хаоса, те нам се управо кибернетички модел представља као својеврсна спрега између теза на којима овај комплекс мишљења почива и модерне правне теорије и праксе. Због тога у прилици смо да сведочимо обликовању и афирмацији једног новог научног и филозофског сензибилитета, који своје упориште има управо у обликовању свести о универзму као нестабилности, у све већој мери уважавајући идеје и представе света у којем статичност бива замењена динамичношћу, а строги детерминизам законима вероватноће.

У том смислу, интензивним развојем рачунарских технологија остварена је претпоставка за проширење традиционалног методолошког апарата који стоји на располагању правној науци при третирању предмета свог интересовања. Проучавање рачунарски креираних модела у виртуелном

окружењу истраживачима омогућује да се коначно извуку из улоге пасивног посматрача, те да, преузимајући на себе задатак својеврсних модератора поступка симулације, у сваком тренутку контролишу брзину и начин понашања испитиване појаве и система, усмеравајући свој фокус на оне аспекте и елементе предмета истраживања са већим степеном релевантности. Поступак рачунарске симулације у многоме помера границе изучавања права као сложеног друштвеног феномена. Као што је речено, поступак рачунарске симулације обезбеђује изолован артифицијелни амбијент, са циљем да математички интерпретиран предмет интересовања смести у „безбедно" окружење у оквиру којег се остварује могућност праћења и испитивања комплетног развојног процеса датог модела, без ризика да се евентуални негативни ефекти таквог огледа одразе на постојеће друштвено окружење. Такав приступ искључује потребу за доношењем аката чији би непредвидљиви и нежељени ефекти могли да произведу последице које се накнадно не би могле у потпуности отклонити. На овај начин стваралац права стиче могућност антиципације у односу на све недостатке које би практична примена одређене норме или правног акта могла да садржи, као и неповољне ефекте за друштвени заједницу који би на тај начин били генерисани, што би значајно утицало на позицију законодавца приликом стварања правних прописа, нарочито оних чији би евентуални реформски карактер претио да произведе друштвене ефекте који би били у супротности са очекиваним. Такође, сагледавање сложених механизама на темељу којих се остварује ефекат лептира – као што је ка хаотичности усмерена тенденција изражена у процесу кроз који мале почетне промене у одређеном систему изазивају касније несразмерне ефекте – пружа истраживачу могућност да сагледа целокупну генезу ових појава, те да у аналогној стварности идентификује критичне тачке оваквих процеса.

На крају, преостаје нам да констатујемо да примена рачунарске симулације и виртуелне стварности заиста пружа значајан допринос у изучавању и интерпретацији комплексног света правних појава, те да се са даљим развојем рачунарских техннологија и сазревања свести о неопходности ширења постојећих хоризоната у домену научног третирања права, правној кибернетици указују светле перспективе.

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COMPUTER SIMULATION OF KELSEN'S MODEL OF LEGAL ORDER IN LIGHT OF THE CHAOS THEORY AS A MODERN SCIENTIFIC AND PHYLOSOPICAL PARADIGM

Summary

The intensive development of information technology has been a presumption for expanding the traditional methodological framework and instruments available to legal science in examining the complex phenomenon of law. Moreover, this extended framework provides an opportunity to align the procedures of creating and applying the law with the undamental principles of the Chaos Theory, as a modern scientific and philosophical paradigm which gives us opportunity to redefine the existing forms of perception of the entire Universe, as well as diverse domains of law. The use of computer-generated models in virtual reality allows researchers to stop being passive observers and to asume the role of moderators in computer simulations, enabling them to control the speed and the modus operandi of the investigated phenomenon, and to focus on the higher relevance aspects or segments of research. Thus, the legislator has the opportunity to anticipate any drawbacks in the practical application of a particular norm or legal act, as well as the adverse effects it would generate for the social community.

Key words**:** *the Chaos Theory, virtual reality, Hans Kelsen, computer simulation, legal models.*

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ПРЕГЛЕДНИ НАУЧНИ РАД
doi:10.5937/zrpfni1879455A

UDK: 342.9(497.11)
Рад примљен: 05.10.2018.
Рад прихваћен: 25.11.2018.

УПРАВНА СТВАР

Апстракт: *Правна сигурност, један од фундаменталних принципа, чијем остварењу теже савремени правни системи захтева прецизно и јасно дефинисање правних појмова, без остављања могућности за различите конструкције и произвољна тумачења, нарочито уколико се ради о суштинским појмовима појединих грана правне науке. Један од кључних појмова управне процедуре, чије је одсуство дефинисања у дугом периоду у позитивном законодавству Републике Србије изазивало многе потешкоће, јесте појам управне ствари. У раду су сагледани поједини напори правне теорије и судске праксе у настојању да пруже одговор на ово питање. Један део рада посвећен је анализи регионалног законодавства, које се налазило у готово истоветној позицији, недостатка дефинисања овог полазног појма управног поступка.*

Циљ рада је покушај да се установи да ли је одсуство прецизног дефинисања главног предмета управног поступка у тако дугом периоду довело до рестриктивног тумачења појма управне ствари и да ли је тиме умањена могућност заштите права и интереса странака у управном поступку. Такође, поставља се питање да ли су формулисањем прецизне законске дефиниција појма управне ствари у позитивном законодавству потпуно елиминисане недоумице у погледу предмета управног поступка, или су новим, проширеним појмом, отворене могућности за нове.

Кључне речи*: управни поступак, управни спор, управна ствар.*

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1. Теоријски појам управне ствари

У савременим друштвеним условима, присутне су различите теоријске концепције о самом појму Управног права, нарочито о улози и значају јавне управе, који су праћени неминовним реформским процесима. Чињеница да послови које обавља управа временом постају све бројнији, сложенији и захтевнији, уз употребу информационе технологије, додатно компликује теоријска разматрања. Како истиче Кавран „Како је и само право, сем што је скуп правних норми, истовремено и систем информација о понашању и то систематизован и логичан скуп, очевидно је да је право, не само особито погодно за поступак аутоматске обраде, на такав начин да се све информације могу користити на захтев, одмах, по посебним програмима коришћења, него да је и од стратегијског значаја за укупан друштвени развој, па треба што брже, тачније и потпуније да се користи, јер од њега зависи организовано понашање у друштву, што је и услов напретка" (Кавран, 1975: 405).

Један од кључних појмова управне процедуре, односно читаве науке Управног права, чије је одсуство дефинисања у дугом периоду у позитивном законодавству Републике Србије изазивало многе потешкоће, јесте појам управне ствари. Све до 2009. године, када је донет Закон о управним споровима, односно 2016. године, када је усвојен нови Закон о општем управном поступку, није постојало законско одређење појма управне ствари, што је изазивало озбиљне недоумице у раду органа управе, као и судова, који су у великом броју случајева морали да одлуче да ли се у конкретном случају радило о управној ствари, односно да ли је неки акт донесен у управној ствари или то није био случај. Правни теоретичари су у оваквој ситуацији осетили дужност да учине напоре и пруже своје виђење појма управне ствари. Отуда су у теорији присутне различите концепције о овом појму, а у мимоилажењима аутора приликом дефинисања огледа се и комплексност његове правне природе.

Стјепановић истиче да је управна ствар „таква активност државних органа, најчешће органа управе или организација са јавним овлашћењима, којом се стварају мењају или укидају управно-правни односи у погледу одређеног појединца или правног лица" (Стјепановић, 1978: 71). Са друге стране, Милков критикује ово становиште, истичући да „управна ствар није делатност, активност, нити то може бити. Ствар је статичка, а не динамичка појава. Управна ствар је правни предмет који треба да буде регулисан управним актом. Према томе, управна ствар, на начин, на који је дефинише Н. Стјепановић не може бити делатност, односно активност стварања, мењања или укидања управноправног односа. Управна ствар је

баш она ствар у којој таквом активношћу треба засновати управноправни однос“ (Милков, 1986: 502).

Перовић управну ствар дефинише као ситуацију ,,када државни орган, односно радна и друга организација у вршењу јавних овлашћења, решава на конкретан и индивидуалан начин о неком праву, правном интересу или обавези појединца или организације“ (Перовић, 1972: 71). Јелић истиче да је управна ствар ,,појединачна, по правилу неспорна правна ствар из неке управне области, у којој орган који води управни поступак, непосредно примењујући прописе, решава о праву, обавези или правном интересу странке, потврђује или региструје одређене податке, односно чињенице, врши управни надзор или спроводи административно извршење“ (Јелић, 1997: 15). Овај аутор објашњава да постоје две слабости приликом теоријских покушаја дефинисања појма управне ствари. Прва је та да један број писаца, када покушава да одреди суштину овог појма, показује велику опрезност и несигурност, јер се том приликом редовно служи разним резервама, чиме ,,у крајњој линији обеснажује своје интелектуалне напоре“. Друга група аутора често користи недовољно одређене и непрецизне изразе и појмове и тако крши основна правила дефинисања. Суштина ове друге слабости јесте да су дефиниције врло неодређене, непрецизне и немају никакву практичну вредност. У прилог постојања законског одређења појама управне ствари, овај аутор наводи следеће разлоге:

- концепт владавине права;
- организовање и вршење статистичких истраживања од интереса за целу земљу, која су од значаја за спровођење ЗУП-а, с обзиром на чињеницу да је искуство недвосмислено показало да је без дефинисања појма управне ствари немогуће јасно и прицизно одредити статистичку јединицу, односно статистички скуп у истраживањима;
- модернизација и рационализација управне процедуре, као подручја које је погодно за аутоматизацију процеса одлучивања, под условом да се претходно, тачно и прецизно утврде значења главних законских института на основу којих се мериторно решава о правима и обавезама и правним интересима странке у управном поступку;
- дефиниција, као материјални критеријум за разграничење управне делатности, као превасходно конститутивне активности од судске делатности, као декларативно- креативне и правнозаштитне делатности (Јелић, 1996: 693–694).

Мајсторовић сматра да је управна ствар ,,правна ствар, у којој се непосредном применом правних прописа решава о неком праву, обавези

или правном интересу одређене странке, ако за решавање те правне ствари, није надлежан суд" (Мајсторовић, 1977: 6).

Павле Димитријевић везује управну ствар за управни акт, те образлаже да се актима донетим у управним стварима сматрају акти који су донети „у вршењу делатности, које се не појављују као окончавање спорних ситуација, него као активност, која се изражава у прецизирању диспозиција за понашање појединаца." У том смислу поменути аутор дефинише вршење управе као „правно регулисано вршење државне власти у управним стварима" (Димитријевић, 1974: 350).

Томић, када је реч о појму управне ствари, сматра да се ради о ситуацији у којој треба донети решавајући управни акт, који се појављује као правна надградња управне ствари у којој се доносе управни акти, односно управни акт се издаје искључиво у оним ситуацијама које имају особине управне ствари. Томић дефинише управну ствар као „појединачну, начелно ванспорну животну ситуацију од јавног интереса, правно зрелу за ауторитативно регулисање од стране надлежног органа, у предвиђеном поступку непосредне примене прописа" (Томић, Блажић, 2017: 73). Даље истиче да термин управна ствар указује да би таква врста правне ствари морала да има неки заједнички „управни супстрат". Када у конкретној ситуацији овлашћени субјекти наиђу на такво обележје, њихова дужност је да, решавајући непосредном применом правних прописа о праву, обавези или правном интересу одређеног субјекта, издају управни акт. Решавање у управним стварима, по мишљењу овог аутора, представља одлучивање са позиције државне власти и на основу закона о извесном праву, обавези или правном интересу одређеног субјекта-странке непосредном применом правних прописа у неспорним појединачним ситуацијама (Томић, 2010: 152). Овај аутор је издвојио и следеће садржинске компоненте управне ствари:

- Непосредно правно дејство, непосредно решавајући карактер у примени прописа. Ово својство управног акта, који је донет у управној ствари, означава „решавање", односно одлучивање о нечијем праву, обавези или правном интересу на основу правних прописа и у њиховој примени.
- Ауторитативност је обележје решавања у управним стварима, које указује на то да је у питању облик вршења државне власти, односно примене јавних овлашћења. Ово својство управне ствари указује на то да у управним стварима могу да решавају једино организациони облици у саставу државе, односно недржавни субјекти када су им поверена јавна овлашћења.

- Јавни интерес указује на то да управној ствари, као одредници управног акта, није примерено било какво уговорно, нити вољно правно дејствовање.
- Управна ствар је увек појединачна, конкретна ситуација, док су опште законодавна и подзаконско-нормативна.
- Неспорни (ванспорни) карактер јер је, за разлику од судске, управна ствар неспорна ситуација (Томић, 2010: 156).

Марковић сматра да је „управна ствар конкретна, појединачна и неспорна правна ситуација, коју овлашћени субјекти ауторитативно и непосредно уређују непосредном применом закона (правних прописа)". У настојању да разграничи управну од судске ствари, Марковић истиче да управну ствар карактерише прецизирање примарне диспозиције опште правне норме, док се код судске ствари прецизира секундарна диспозиција опште правне норме (Марковић, 2002: 251).

Прица наводи основне карактеристике управне ствари:

- Управна ствар је искључиво појединачна правна ситуација, односно појединачни случај који треба управноправно уредити појединачном акцијом, односно вршењем власти у појединачном случају, те доношење општих аката, „не може се уподобити управној ствари, већ искључиво нормативној".
- Управна ствар је појединачна правна ситуација, чијим се управноправним уређењем остварује јавни интерес. Дакле, јавни интерес је преовлађујућа црта природе управне ствари, те остваривање појединачних интереса не сме бити у супротности са јавним интересом.
- Управноправно уређивање управних ствари је израз ауторитативног поступања овлашћених субјеката (органи управе, други државни органи, имаоци јавних овлашћења).
- Управна ствар је, по правилу, неспорна правна ситуација, управне ствари су готово увек једностраначке правне ствари (Прица, 2009: 129).

2. Управна ствар у законодавству Републике Србије са осврtом на судску праксу

У законима који су некада важили у домаћем праву, велики број норми садржао је појам управне ствари,[1] при чему се полазило од претпоставке да се ради о довољно познатом појму, за чијим дефинисањем није постојала

1 Нпр. чл. 3 Закона о општем управном поступку („Сл. л. СРЈ“, бр. 33/97) је прописивао да одредбе овог закона којима се, због специфичне природе управних ствари у појединим управним областима, прописују неопходна одступања од правила општег управног поступка, морају да буду у сагласности са основним начелима утврђеним овим законом. Чл. 5 поменутог Закона прописује да органи који поступају у управним стварима решавају на основу закона и других прописа. У управним стварима у којима је орган законом овлашћен по слободној оцени решење мора донети у границама овлашћења и у складу са циљем у коме му је овлашћење дато. Чл. 6, став 1 прописивао је да су при вођењу поступка и решавању у управним стварима органи дужни да странкама омогуће да што лакше заштите и остваре своја права и правне интересе водећи рачуна да остваривање њихових права и правних интереса не буде на штету права и правних интереса других лица, нити у супротности за законом утврђеним јавним интересом. Појам управне ствари помиње се као општепознат и у великом броју правних норми, које је садржао раније важећи Закон о управним споровима („Сл. л. СРЈ“, бр. 46/96). Тако, нпр. чл. 1 Закона о управним споровима прописује да у управним споровима судови одлучују о законитости аката којима државни органи и предузећа или друге организације које врше јавна овлашћења репавају о правима или обавезама физичких лица, правних лица или других странака у појединачним управним стварима. У чл. 5 се наводи да се надлежним органом у смислу овог закона сматрају државни органи и предузећа или друге организације кад у вршењу јавних овлашћења решавају у управним стварима. У члану 6 поменутог закона прописано је да се управни спор може водити само против управног акта, а да је управни акт, у смислу овог закона, акт којим државни орган и предузеће или друга организација у вршењу јавних овлашћења решава о одређеном праву или обавези физичког лица или правног лица или друге странке у управној ствари.

2 „Обавештење Агенције за приватизацију, којим се тужилац обавештава о раскиду уговора о продаји друштвеног капитала методом јавне аукције субјекта приватизације, због неиспуњења, по налажењу суда, не представља управни акт. Ово из разлога, јер наведено обавештење није донето у управној ствари нити се њиме непосредно решава, односно одлучује о неком праву и обавези тужиоца, већ се тужилац обавештава о даљим радњама туженог узрокованим неиспуњењем уговорних обавеза“ (Решење Врховног суда Србије У. бр. 5319/07 од 6. 2. 2008).

„Именовање представника друштвеног капитала у скупштину и управни одбор предузећа које послује друштвеним или државним капиталом, од стране Владе Републике Србије, према цитираном члану 400 а) Закона о предузећима, нема карактер управног одлучивања, јер не представља управну ствар, у којој је одлучено о појединачним правима и обавезама, већ акт пословања, те у конкретном случају нису испуњени услови за вођење управног спора, у смислу одредбе чл. 6 Закона о управним споровима, с обзиром на то да оспорено решење о именовању представника друштвеног капитала изван предузећа, у скупштину предузећа, нема карактер управног акта“. (Решење Врховног суда Србије У. 8522/07 од 25. 10. 2007).

потреба. Међутим, дугогодишња пракса је показала да је остављањем судовима да сами одлучују од случаја до случаја шта јесте, а шта није управна ствар, постојала могућност рестриктивног тумачења овог појма, а самим тим и умањење могућности заштите права и правних интереса странака.

Анализом судске праксе може се приметити неконзистентност у одлучивању, али и искључиво везивање управне ствари за управни акт. Такође, присутна је неадекватна аргументација судова у образложењима одлука, у којима су и због чега одлучили, да се у конкретном случају радило о управној ствари или зашто то није био случај. Приметни су и случајеви потпуног одсуства аргументације у образложењима судских одлука.[2]

Први пропис који је након вишедеценијског лутања судске праксе и правне теорије, дефинисао појам управне ствари јесте Закон о управним споровима,[3] усвојен 2009. године. Управна ствар је у смислу овог закона дефинисана као ,,појединачна неспорна ситуација од јавног интереса у којој непосредно из правних прописа произилази потреба да се будуће понашање странке ауторитативно правно уреди". У образложењу Предлога Закона о управним споровима наведено је да се дефинисањем појма управне ствари жели пружити бар неки оријентир судској пракси у препознавању предмета управног спора при испитивању тужби и пружању правне заштите.

Формулација ,,будуће понашање странке" је, по мишљењу аутора, неадекватна, јер се доношењем управног акта решава каква управна ствар и тада непосредно наступају последице по странку. Уколико се пак говори о будућем понашању странке, то би онда подразумевало једино да

,,Оспореним решењем одбијена је жалба директора основне школе, која је изјављена против решења просветне инспекције којим се налаже директору основне школе да попуни радно место секретара школе, сходно члану 67 и 162 Закона о основима система образовања и васпитања и да спроведе законску обавезу у року од 45 дана од пријема решења. У поступку претходног испитивања поднете тужбе, Врховни суд Србије је нашао да решење које се тужбом оспорава нема карактер управног акта из члана 6 Закона о управним споровима, којом одредбом је прописано да се управни спор може водити против управног акта, а ставом 2 истог члана је прописано да управни акт јесте акт којим државни орган или предузеће или друга организација у вршењу јавних овлашћења решава о одређеном праву или обавези физичког лица или правног лица или друге странке у управној ствари. У конкретном случају тужени орган оспореним решењем није решавао о каквој управној ствари, већ се ради о односу између Министарства просвете Републике Србије и основне школе, при чему Министарство просвете у односу на школу врши надзор над њеним радом, у коме поступку је и донето оспорено решење." (Решење Врховног суда Србије У. 6265/07 од 20. 3. 2008).

2 Закон о управним споровима, ,,Службени гласник РС", бр. 111/2009.

је појединачна, неспорна ситуација од јавног интереса већ решена, па треба да уследи извршење, у супротном је терминолошки врло непрецизно да су органи овлашћени да уређују будуће понашање странака.

Неколико година касније, тачније 2016. године, усвојен је нови Закон о општем управном поступку Републике Србије, у коме је дефинисан и знатно проширен појам управне ствари. Њиме је управна ствар дефинисана као ,,појединачна ситуација у којој орган, непосредно примењујући законе, друге прописе и опште акте, правно или фактички утиче на положај странке, тако што доноси управне акте, доноси гаранте акте, закључује управне уговоре, предузима управне радње и пружа јавне услуге".[3] Управна ствар је и свака друга ситуација која је законом одређена као управна ствар.

Закон о управним споровима садржи ужу дефиницију управне ствари, у односу на дефиницију садржану у Закону о општем управном поступку из разлога што се у управном поступку могу предузимати различите врсте управних активности, док се у управном спору могу оспоравати коначни управни акти. Друге врсте управног поступања не могу непосредно да буду оспорене пред Управним судом, већ се против њих може поднети приговор, ремонстративно правно средство у управном поступку. Даље се о приговору одлучује управним актом, који у зависности од положаја органа који је одлучио о приговору у управној хијерархији, може да буде нападнут жалбом у управном поступку и/или тужбом у управном спору (Лилић, 2016: 22).

2.1. Управни уговор

Управни уговор је нова категорија у правном систему Републике Србије. У Образложењу предлога Закона о општем управном поступку наводи се да увођење правног института управних уговора у наше законодавство доприноси остваривању једног од европских стандарда који се огледа у активној улози грађана у односима са јавном управом. Код овог правног института јавноправни субјект закључује уговор ради стварања одређене јавне користи за грађане и правна лица. Његова специфичност огледа се у одступању од општег режима уговорног права, јер се њиме појачавају овлашћења јавноправног субјекта у односу на другу страну уговорницу,

3 У Образложењу новог Закона о општем управном поступку наводи се да је предмет ЗУП-а знатно проширен тако да његова процесна правила обавезују државне и недржавне субјекте у следећим врстама управних активности: а) када доносе управне акте; 2) када доносе гарантне акте; 3) када закључују управне уговоре; 4) када предузимају управне радње; 5) када пружају јавне услуге.

а ради остваривања јавног интереса. Познато је да су основна начела уговорног права начело слободе воље уговорних страна, као и начело равноправности страна у облигационом односу. У овој концепцији је начело равноправности страна доведено у питање. Из тог разлога је другој уговорној страни признато право на приговор, односно право жалбе у законом прописаним случајевима, дакле у циљу уједначавања правне заштите уговорних страна.

У Закону у општем управном поступку Републике Србије уређена су основна питања везана за све управне уговоре, норме које се односе на њихово закључивање, стране уговорнице, измене, раскид и правна средства. Међутим, у нашем правном систему постоје типови управних уговора који су уређени посебним законима, Законом о јавно- приватном партнерству и концесијама, као и Законом о јавним набавкама.

Управни уговор, као правни акт, представља средство за обезбеђивање јавних служби, које је карактеристично за постојање тржишних услова. Највећи допринос при разради овог института даје француска правна теорија и пракса Државног савета. Почетком 19. века управни уговори су се сматрали приватно-правном материјом, те су изузетно, на основу закона, подвођени под јурисдикцију управног судства. Касније се у пракси јављала ситуација да су уговори са идентичним садржајем који су закључени са општином уместо са државом сматрани за приватно-правне уговоре. Оваква ситуација је постојала све док није схваћена неопходност постојања управних уговора у циљу несметаног обављања јавних служби (Димитријевић, 2017: 273).

Управни уговор је двострано обавезан писани акт који, кад је то посебним законом одређено, закључују орган и странка и којим се ствара, мења или укида правни однос у управној ствари.

Оно што карактерише управне уговоре јесу најпре стране уговорнице, где је једна страна уговорница увек јавноправни субјект. Друга карактеристика је да јавноправни субјект, закључењем управног уговора, жели да оствари неки јавни интерес.

Постоје аутори који, иако је управним уговорима прилично нарушена једнакост страна у облигационом односу, оправдавају већа овлашћења јавноправних субјеката, наводећи притом да, уколико би се странкама управног уговора допустила иста слобода коју имају странке уговора приватног права, спонтано би могло да дође до комерцијализације јавних делатности. Због тога су одређена ограничења код управних уговора нужна да се они не би претворили у обичан споразум усмерен према остваривању реципрочних користи уговорних страна (Singh, 2012: 97).

Што се тиче измене управног уговора, Законом је предвиђено да једна уговорна страна може да захтева од друге уговорне стране да се уговор измени и прилагоди насталим околностима, уколико би због околности насталих после закључења уговора, испуњење обавезе за једну страну постало отежано. Уколико нису испуњени услови за измену уговора или ако би измена уговора изазвала штету по јавни интерес, која би била већа од штете коју би претрпела странка, орган решењем одбија захтев странке.

Законом су предвиђени случајеви у којима орган може да раскине управни уговор, док странка нема ту могућност, већ могућност да изјави приговор, уколико орган не испуњава уговорне обавезе. Орган може да раскине управни уговор: 1) ако изостане сагласност странке да се уговор измени због промењених околности; 2) ако је то неопходно да би се отклонила тешка и непосредна опасност по живот и здравље људи и јавну безбедност, јавни мир и јавни поредак или ради отклањања поремећаја у привреди, а то не може успешно да се отклони другим средствима којима се мање дира у стечена права. Орган раскида управни уговор решењем у коме треба изричито да наведе и јасно да образложи разлоге за раскид уговора. Садржина управног уговора не сме да буде противна јавном интересу, нити правном интересу трећих лица, а на институт управних уговора сходно се примењују одредбе ЗУП-а, а супсидијарно одредбе Закона о облигационим односима.

Суштина разликовања управних од приватно-правних уговора састоји се у циљу, односно држава закључује управни уговор са приватно-правним лицима ради јединственог циља, обезбеђивања функционисања јавне службе, односно реализације неког општег добра и јавног интереса. Циљ приватно-правних уговора је приватног карактера (Томић, Блажић, 2017: 206).

Постоји више врста управних уговора: предузимачки уговори или уговори о извршењу јавних радова, уговори о набавкама за функционисање јавних служби, уговори о превозу ствари од јавног значаја, уговори о конституисању јавних служби, уговори о уписивању јавних зајмова, уговори о концесији.

2.2. Гарантни акт

Једна од новина управног поступка у правном систему Републике Србије је и увођење гарантног акта који је одређен као писани акт којим се орган обавезује да, на одговарајући захтев странке, донесе управни акт одређене садржине. Гарантним актом се не одлучује о правима и правним

интересима странке, већ се он доноси када је то приписано посебним законом и под условом да странка истакне захтев за његово издавање.

У Образложењу Предлога Закона о општем управном поступку наводи се да гарантни акт јесте новина у ЗУП-у, али није новина у правном систему Републике Србије. Као пример, наведен је Закон о држављанству Републике Србије,[4] којим је прописано да:

- ,,странцу који је поднео захтев за пријем у држављанство Републике Србије, а нема отпуст из страног држављанства или доказ да ће отпустом бити примљен у држављанство РС, може се на његов захтев издати потврда да ће бити примљен у држављанство РС, ако испуњава услове из чл. 14, став 1 Закона.

Закон о државној припадности и упису пловила[5] у члану 33 предвиђа могућност доношења решења које назива гарантни акт, прописујући да, ,,Када лучка капетанија у чији је уписник брод унутрашње пливидбе уписан, прими предлог за пренос уписа брода унутрашње пловидбе у уписник бродова унутрашње пливидбе друге лучке капетаније, донеће решење којим условно признаје право странци на пренос уписа брода унутрашње пловидбе у уписник бродова унутрашње пловидбе који води друга лучка капетанија".[6]

Гарантни акт је акт којим се управа правно обавезује (гарантује) да ће касније, у одређеном року, под одређеним условима, донети управни акт. Орган гарантује да ће донети управни акт, сагласно гарантном акту, само уколико странка то захтева и под условом да гарантни акт није противан јавном интересу нити интересу трећих лица.

Гарантни акт се доноси ако је то посебним законом одређено, што значи да се издавање гарантног акта може захтевати само у оним управним областима у којима је то посебним законом допуштено. У случају да орган донесе управни акт који није у сагласности са гарантним актом, странка може да поднесе жалбу. Од обавезе доношења управног акта у складу са гарантним актом може да се одступи у следећим случајевима:

4 Закон о држављанству, ,Службени гласник РС, бр. 135/04; 90/07; 24/18.

5 Закон о државној припадности и упису пловила, ,Службени гласник РС, бр. 10/13.

6 Милков, сматра да су примери, који су наведени у Образложењу предлога Закона погрешни, односно погрешно протумачени као гарантни акт. Нпр. по његовом мишљењу, поменута ситуација из Закона о држављанству, није у томе да се орган обавеже да ће донети одређени управни акт, већ да ће лице бити примљено у држављанство, ако испуњава остале услове из чл. 14, став 1 овог Закона. Дакле, орган му једино гарантује да ће бити примљен у држављанство Републике Србије ако испуњава законске услове, а то би било и без потврде, односно ,,назови" гарантног акта.

1) ако захтев за доношење управног акта не буде поднет у року од годину дана од дана издавања гарантног акта или другом року одређеном посебним законом;

2) ако се чињенично стање на коме се заснива захтев за доношење управног акта битно разликује од оног описаног у захтеву за доношење гарантног акта;

3) ако је измењен правни основ на основу кога је гарантни акт донет, тако што се новим прописом предвиђа поништавање, укидање или измена управних аката донетих на основу ранијих прописа;

4) кад постоје други разлози одређени законом.[7]

Приметно је да је нормиран широк дијапозон изузетака у којима орган може да одступи од обавезе доношења управног акта сагласно гарантном акту, што може да створи различите недоумице у пракси, па се поставља питање да ли је нови ЗУП био уопште спреман за адекватно правно нормирање гарантних аката. У Хрватској се, примера ради, не говори о гарантним актима, већ о јемству стицања одређених права, када је то прописано законом, те се о њему одлучује решењем које обавезује јавноправно тело, осим ако су се правна основа и чињенично стање битно изменили.

2.3. Управне радње

Делатност управе је хетерогена и присутна у најразличитијим областима људских активности. Управна делатност се не своди искључиво на доношење управних аката, већ обухвата и обављање управних радњи, које немају својство управног акта.

Изузетно важан сегмент управне делатности чини предузимање управних радњи или мера, које представљају материјалне акте (факте) управе. То су фактичка понашања органа управе. Материјални акти управе јесу заправо многобројне појединачне радње управе које имају и правно и фактичко дејство, јер се њима утиче на права, обавезе или правне интересе странака (Димитријевић, 2017: 282).

У Закону о општем управном поступку су под управним радњама, као пример, наведене управне радње, вођење евиденција, издавање уверења, пружање информација, примање изјава и друге радње којима се извршавају правни акти.

У теорији се врше различите класификације појединачних аката и радњи управе, а најчешће се разликују акти саопштења, примања изјава, акти

7 Чл. 18 Закона о општем управном поступку РС.

документовања и принудне радње. Документовање подразумева радње евидентирања, односно бележења чињеница и појава, али и активности пружања података који су евидентирани. Акти саопштења су појединачни акти управе, којима орган информише, обавештава, упозорава, саветује заинтересовану странку о најразличитијим чињеницама, које могу да буду од значаја за остваривање њихових права, правних интереса и испуњење обавеза. Под примањем изјава подразумева се начин на који органи управе долазе до одређених сазнања, информација, чињеница. Принудне радње представљају такве материјалне радње управе,које управи пружају могућност да нареди понашање неког субјекта, на које је он обавезан, а које је изостало, искључиво ако је то предвиђено уставом и законом и придржавајући се правила поступка.

Против управне радње законодавац је предвидео приговор као правно средство, али под рестриктивним условима. Приговор може да се изјави против управне радње, али и у случају да орган не предузме управну радњу коју је по закону дужан да предузме. Међутим, у поменутим случајевима приговор ће бити дозвољен само ако управна радња није повезана са доношењем управног акта, јер би у супротном могло да се изјави друго правно средство, жалба.

Потпуно нова управна ствар, која је регулисана Законом о општем управном поступку, јесте пружање јавних услуга, које се морају пружати тако да обезбеде квалитетно и под једнаким условима, остваривање права и правних интереса корисника јавних услуга и задовољавање њихових потреба.

Под пружањем јавних услуга сматрају се активности обављања привредне и друштвене делатности, односно послова за које је законом утврђено да се врше у општем интересу, којима се обезбеђује остваривање права и правних интереса, односно задовољавање потреба корисника јавних услуга, а који не представљају други облик управног поступања. Оном пружаоцу јавних услуга који не обезбеђује квалитетно и уредно, под једнаким условима остаривање права грађана и организација, као и задовољавање потреба корисника може се изјавити приговор. На тај начин обезбеђује се заштита од неадекватног, неквалитетног или неједнаког поступања приликом пружања јавних услуга.

3. Управна ствар у регионалном законодавству

Са проблемом недостатка законског дефинисања појма управне ствари, а с тим у вези и лутање судске праксе у настојању да да одговор на ово питање, сусреле су се и државе бивше СФРЈ. Као одговор на ово питање

правна теорија је покушала да пружи одговор, заузимајући критички став да је законско дефинисање овог појма од изузетне важности за вођење управног поступка.

О актуелности овог питања у праву Републике Хрватске сведочи изузетно богата пракса Управног суда Републике Хрватске, који је у својем избору одлука у периоду од 1977. до 2005. године истакао преко 200 пресуда у којима је суд одлучивао да ли се у конкретном случају радило о управној ствари. Тако је Управни суд Републике Хрватске заузео правно схватање да су по својој природи управни акти, а самим тим и управне ствари примање у државну службу, престанак службе, питање положаја, права, обавеза и одговорности државних службеника, као и именовање директора јавних установа. Управни суд је даље одлучио да се у конкретном случају радило о управној ствари која се тицала одузимања стручних и научних звања, али и у случајевима када су се доносиле одлуке о правима студената. Управна ствар, по мишљењу Управног суда Републике Хрватске, била је и одлука о исплати примања из пензијског и инвалидског осигурања, дозволе о прикључивању на електроенергетску мрежу, али и дозволе за грађење објеката, на одређеним локацијама. Став Управног суда, изражен у једној од пресуда, био је и да је одлука о дозволи, односно забрани сече дрвне масе, управна ствар и да има карактер управног одлучивања. У недостатку законског дефинисања управне ствари и као одговор Управног суда у сваком конкретном случају, да ли се ради о управној ствари или не, у Републици Хрватској је круг аката којима се признаје катактер управног акта проширен одлукама Уставног суда Републике Хрватске, чиме су ова тела постала обавезна у тим стварима да поступају према одредбама Закона о општем управном поступку ове државе. Тако, Управни суд Републике Хрватске је заузео став да је одлука о додели концесије управни акт, као и одлука о опозиву концесије (Ђерђа, 2007: 152–154).

У ранијем Закону о управним споровима Републике Хрватске био је дефинисан управни акт у материјалном смислу као акт који доносе државни органи и организације кад у обављању јавних овлашћења решавају у каквој управној ствари. Појам управне ствари у праву Републике Хрватске први пут је дефинисан у Закону о општем управном поступку,[8] као ,,свака ствар у којој јавноправно тело у управном поступку решава о правима, обавезама или правним интересима физичке или правне особе или других странака, непосредно примењујући законе, друге прописе и опште акте, којима се уређује одговарајуће управно подручје".

8 Закон о опћем управном поступку РХ, ,,Народне новине", бр. 47/09.

У образложењу предлога Закона о општем управном поступку Републике Хрватске предвиђено је да је прецизност законских одређења појединих појмова изузетно важна, из разлога што управно поступање постаје све сложеније, ниво правне сигурности странака се смањује, а постоји могућност да се значајно наруши начело владавине права. Због тога би нови Закон о општем управном поступку Републике Хрватске требало да осигура равнотежу између захтева за објективним, брзим одлучивањем са једне стране и заштитом права и легитимних интереса грађана и других странака, које учествују у поступку и институција цивилног друштва, са друге стране. Такође се наводи да поменути закон не садржи само козметичке промене, формулација и појмова, већ да предлаже истински модернизован законски текст, који би требало да буде један од главних инструмената политике јавне управе у Хрватској. У односу на постојеће стање, наглашава се да је појам управне ствари знатно проширен, од класичних управних ствари на врло опсежан круг других поступања јавне управе (тела државне управе и друга државна тела, тела јединица локалне односно подручне (регионалне) самоуправе у самоуправном делокругу, односно у пренетим пословима државне управе, те правне особе, друга тела или физичке особе, која темељем закона имају јавна овлашћења). Као посебно добро решење новог закона истиче се јасно одређење управног акта, као сваке појединачне одлуке, којом јавноправно тело једнострано одлучује о правима обавезама или правним интересима странака у управној ствари, чиме је прихваћена садржајна, а одбачена формална дефиниција управног акта. Тиме се решава досадашња ситуација у којој није постојала прикладна дефиниција управног акта, ради чега је био знатно сужен опсег хијерархијског, односно судског надзора над радом јавне управе у целини. На тај начин значајно се повећава ниво заштите права странака, јер постоји велики број појединачних предмета, који до сада нису били јасно одређени као управне ствари, односно као други облици управног поступања. Најважнија новина у новом Закону о општем управном поступку је могућност закључења управних уговора.

У законодавству Републике Црне Горе управна ствар је одређена као свака конкретна ситуација у којој јавноправни орган управним актом одлучује или другом управном активношћу утврђује или на други начин утиче на права, обавезе или правне интересе физичког лица, правног лица или друге странке у смислу Закона о општем управном поступу, као и свака друга правна ситуација која је законом прописана као управна ствар. Предмет ЗУП-а Црне Горе је широко постављен, а специфичност је и законско одређење управних активност као активности које подразумевају доношење управних аката, закључивање управних уговора,

заштиту корисника услуга од општег интереса, као и предузимање других управних активности у управним стварима, у складу са законом. У великом броју случајева црногорски судови су одлучивали да ли се у конкретном случају радило о управној ствари. Тако: 1) Предмет захтева којим се тражи оглашавање ништавом одлуке председника општине о одређивању социјалне помоћи за стамбено збрињавање није управна ствар; 2) Прекршај није управна ствар[9] већ повреда јавног поретка, утврђена законом или другим прописом за који су прописане санкције Законом о прекршајима; 3) Писмено обавештење дирекције за јавне гараже и паркиралишта упућено тужиоцу поводом његовог захтева за покретање поступка изазваног насилним уклањањем тужиочевог моторног возила има карактер управног акта без обзира на недостатке у форми, јер се у овом случају ради о одлучивању о праву и обавези тужиоца.[10]

Једно од дуго отворених питања у праву Босне и Херцеговине било је питање одсуства законског дефинисања управне ствари. Наиме, ни Закон о управном поступку, нити Закон о управним споровима Босне и Херцеговине, али ни закони ентитета и Брчко дистрикта нису садржали дефиницију управне ствари. Закон о управним споровима Босне и Херцеговине је дефинисао управни акт у материјалном смислу као ,,акт којим надлежне институције Босне и Херцеговине решавају о извесном

9 Једно од питања, које је дуго било актуелно у правном систему Републике Србије, јесте питање места и правне природе прекршаја, односно питање да ли су прекршаји управна или судска ствар, функција, односно управна или кривична материја. Прекршаји су деценијама уназад третирани као управноправни деликт, а решавање у прекршајним стварима, као делатност управе. Ова концепција је временом постала неодржива, јер су прекршаји врста деликта која је по основним карактеристикама много ближа кривичним делима, него што је то случај са управном делатношћу. Принцип легалитета nullum crimen nulla poena sine lege, и ne bis in idem важе и за прекршаје, али и многи други институти кривичног права, као што су санкције, начин одмеравања казне, начин, место и време извршења дела, учинилац, одговорност. Ове суштинске разлике између прекршајне и управне ствари довеле су до формирања посебних Прекршајних судова у Републици Србији, 2009. године, те је овим прекршајна ствар искристалисана као судска ствар и као таква битно различита од управне ствари.
De lege ferenda, иста ситуација би се могла догодити са материјом дисциплинске одговорности. Примера ради, Закон о државним службеницима, као и Закон о запосленима у аутономним покрајинама и јединицама локалне самоуправе, али и Закон о полицији предвиђају сходну примену Закона о општем управном поступку на она питања вођења дисциплинског поступка која нису уређена овим законом. То се поткрепљује чињеницом да се радни однос, државних, полицијских и локалних службеника заснива управним актом. Међутим, дисциплински поступак је за разлику од општег управног поступка тип казненог поступка, попут кривичног и прекршајног.

10 Пресуда Управног суда Црне Горе, У 753/2014, од 3. 10. 2014, Решење Управног суда Црне Горе, Упв 1/2013, од 17. 1. 2014. Пресуда ВСС. Увп. бр. 202/77, од 16. 11. 1978

праву или обавези грађанина или правног лица у некој управној ствари". Изменама и допунама Закона о управном поступку Босне и херцеговине, из 2016. године, додат је члан којим је дефинисана управна ствар као ,,свака ствар у којој јавноправни орган у управном поступку одлучује о праву, обавези или правном интересу странке непосредно примењујући законе, друге прописе и опште акте, којима се уређује одговарајућа управна област". Изузетно од поменуте одредбе, управна ствар је она ствар која је неким законом изричито одређена као управна ствар. Тако је, примера ради, Законом о управним споровима БиХ дато право на покретање управног спора и државним службеницима ако је коначним управним актом повређено њихово право из радног односа. То право им је признато и Законом о државној служби у институцијама БиХ. Дакле, у конкретном случају самим Законом дат је карактер управног акта актима којима је повређено право из радног односа државних службеника, те је тако у управне ствари закон сврстао и заснивање и престанак радног односа, али и питања положаја, права, обавеза и одговорности државних службеника. Може се приметити да Закон о управном поступку БиХ користи једну широку и неодређену формулацију ,,управна област", која оставља простор за различита тумачења.

Судска пракса је у Републици Српској имала кључну улогу у одређивању појма управне ствари, али је одликује прилична неуједначеност и бојазан да се у недостатку законског одређења овог појма могу угрозити повређена права странака и умањити пут за њихову заштиту. Тако: 1) Решење Министарства просвете Републике Српске, којим је у другом степену одлучено о признавању, односно непризнавању положеног испита студенту више школе, није управни акт, па се против њега не може водити управни спор. Оцењивање студената, а тиме и признавање положених испита, нису акти који се доносе у каквој управној ствари, у смислу Закона о управним споровима Републике Српске; 2) Решење Телекомуникација Републике Српске донето поводом рекламације на рачун телефонских услуга јесте управни акт. Суд је закључио да се у конкретном случају радило о управном акту који је донет у каквој управној ствари, јер је њиме решено о извесном праву, односно обавези, конкретно о обавези плаћања телефонског рачуна.[11]

У праву Републике Словеније управна ствар су сви случајеви у којима се одлучује о праву, обавезама или правном интересу физичког или правног лица из управног подручја. Поједина питања управног поступка могу бити другачије регулисана посебним законом, али ће се Закон о општем

11 Решење Врховног суда Републике Српске, бр. У-101/99, од 8. 6. 1999. Пресуда Врховног суда Републике Српске, бр. Увл-117/04, од 8. 12. 2005.

управном поступку примењивати супсидијарно, увек када тим посебним законима појединa питања нису регулисана.

Интересантно је да је Законом о општем управном поступку Републике Словеније предвиђено да ће се управни поступак примењивати у другим питањима јавног права који немају карактер управне ствари, како је она дефинисана поменутим законом, под условом да се ова подручја не регулишу посебним поступком.

Општа правила управног поступка у праву Републике Мађарске прописана су Законом о управном поступку и Закону о опорезивању, али и други акти могу да садрже одредбе које се примењују на управне поступке у посебним ситуацијама (нпр. Закон LVII из 1996. о забрани непоштених трговинских пракси и нелојалној конкуренцији и Закон CVII из 2011. године о јавним набавкама).

У Закону у управном поступку Мађарске, под управном радњом, подразумева се:

1) свака радња којом орган управе одлучује о правима и обавезама странке, верификује податке или чињеницу или право, води службену евиденцију или регистре или обавља административну контролу;

2) осим дисциплинских или етичких случајева, било који упис или уклањање из регистра у сврху обављања одређене делатности, ако закон прописује да се одређена делатност или професија може остваривати само након чланства у јавном телу или другој организацији. Закон о управном поступку Мађарске регулише управне уговоре између органа управе и странака као посебан облик управне радње.[12]

4. Закључак

Правна сигурност, а тиме и заштита права и интереса грађана, изискује да закони морају бити писани разумљивим и јасним језиком, прегледни, да чине складну целину, да би омогућили адекватну применљивост у свакодневној пракси.

Све до 2009. Године, када је донет Закон о управним споровима, односно 2016. године, када је усвојен нови Закон о општем управном поступку, није постојало законско одређење појма управне ствари, што је изазивало озбиљне недоумице у раду органа управе, као и судова, који су у великом броју случајева морали да одлуче да ли се у конкретном случају радило о управној ствари, односно да ли је неки акт донесен у управној ствари

12 Видети: http://www.aca-europe.eu/index.php/en/annual-reports, приступ. 25. 8. 2018.

или то није био случај. У тако дугом периоду велика одговорност је била на судској пракси да од случаја до случаја одлучује шта јесте, а шта није управна ствар. Судови су покушали да одговоре, на овако комплексно питање, у недостатку прецизног дефинисања појма управне ствари, али често су пружали неадекватне одговоре у својим пресудама, тачније образложењима пресуда, не наводећи адекватну аргументацију, због чега су одлучили да је у конкретном случају нека ствар управна, а због чега није, него су најчешће само констатовали ту чињеницу. Приметна је и неконзистентност у судском одлучивању.

Поставља се питање практичне применљивости нових дефиниција управне ствари у поменутим законима, јер оне не остварују своју сврху самим уношењем у законске текстове, већ је њихов циљ да послуже као оријентир, при настојању практичара, да разлуче да ли је нека ствар управна или то није случај, а све у циљу заштите права и на праву заснованих интереса странака.

Законом о управном поступку Републике Србије, усвојеним 2016. године, појам управне ствари значајно је проширен и обухвата доношење управних аката, гарантних акта, закључивање управних уговора, предузимање управних радњи и пружање јавних услуга. Проширен појам управне ствари јавио се као одговор на неке нове делатности управе, али је присутна бојазан да ће овако проширен појам управне ствари отварати нове недоумице, поготово када је реч о новим институтима, које наше право раније није познавало.

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ADMINISTRATIVE MATTER

Summary

Legal security, as one of the fundamental principles in the contemporary legal systems, requires more precise and clear definition of underlying legal concepts, without leaving possibility for different constructions and arbitrary interpretations, especially when it comes to the essential concepts in certain branches of law. The notion of administrative matter is one of the key concepts in administrative procedure but the absence of a definition of this concept in the positive legislation of the Republic of Serbia has given rise to many difficulties over a long period of time. This paper examines the individual efforts in law theory as well as in judicial practice to address this question. One part of the paper is dedicated to the analysis of regional legislation, which was in an almost identical position, given the lacking definition of this basic concept of administrative procedure.

The aim of this paper is to try to understand whether the absence of a precise definition of the main subject of administrative proceedings for such a long period of time has led to a restrictive interpretation of the notion of administrative matter, and whether the possibility of protecting the rights and interests of the parties in the administrative procedure is thus diminished. Also, the question arises whether formulating a precise legal definition of the concept of administrative matter in positive legislation would completely eliminate doubts about the subject of administrative proceedings, or generate new ones by enacting new extended concepts.

Key words**:** *administrative procedure, administrative dispute, administrative matter.*

ЗБОРНИК РАДОВА ПРАВНОГ ФАКУЛТЕТА У НИШУ (М51)

УПУТСТВО АУТОРИМА

Опште напомене	Рукопис рада компјутерски обрадити коришћењем програма ***Word***, у фонту ***Times New Roman* ћирилица (Serbian-Cyrillic)**, (осим оригиналних латиничних навода), **величина фонта 12 pt**, размак између редова 1,5. Формат странице треба да
Обим рада	Један ауторски табак - рад не треба да има више од **40.000 карактера**,
Језик и писмо	Језици на којима се могу објављивати радови су српски, енглески, руски, француски и немачки.
Наслов рада	**Наслов рада** куцати величином фонта **14 pt, bold**, Times New Roman
Аутор(и)	Име и презиме аутора, назив и пуна адреса институције у којој аутор ради, контакт e-mail адреса (величина фонта 12 pt). Све податке о ауторима, титула и институција,
Подаци о пројекту или програму*	На дну прве странице текста, треба навести у фусноти следеће: Назив и број пројекта, назив програма, назив институције која финансира пројакат.
Подаци о усменом саопштењу рада*	Ако је рад био изложен на научном скупу у виду усменог саопштења под истим или сличним називом, податак о томе треба навести у
Апстракт	Апстракт садржи 100-250 речи.
Кључне речи	Не више од 10 кључних речи на српском и енглеском језику (Key words).
Структура текста	1. Увод 2. Поднаслов 1 2.1. Поднаслов 2 2.1.1. Поднаслов 3 3. Поднаслов 2 4. Закључак Наслови и поднаслови пишу се фонтом 12 pt, **bold.**
Литература (*References*)	Пише се након текста, као посебна секција. Поређати све јединице азбучним редом по презимену аутора, а код истог аутора, по години издавања (од најновије до најстарије). Молимо ауторе да искључе команду numbering, тј. без бројева испред. (Погледати табелу на крају упутства).
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Огледни примерак рада	Овде можете преузети ОГЛЕДНИ ПРИМЕРАК РАДА

*** Ови подаци уносе се само у случају да рад испуњава наведене услове (пројекат или саопштење)**

УПУТСТВО ЗА ЦИТИРАЊЕ ЛИТЕРАТУРЕ

Навођење цитата треба урадити **у тексту**, као што је наведено у упутству. **Фус ноте** користити само када је неопходно пружити додатно објашњење или пропратни коментар, као и у случају позивања на нормативни акт, службена гласила и одлуке судова.

Цитати и позиви на литературу у тексту и листа библиографских јединица на крају текста морају се у потпуности слагати. Сваки цитат из текста и позив на литературу мора да се нађе на листи библиографских јединица, односно, свака библиографска јединица наведена у литератури мора да се нађе у тексту. Позив на библиографске јединице наводи се у оригиналном писму, без превођења.

Врста рада	**Референце – литература**	**Цитирање у тексту**
Књига, 1 аутор	Келзен, Х. (2010). *Општа теорија права и државе*. Београд: Правни факултет Универзитета у Београду.	(Келзен, 2010: 56)
Књига, Више аутора	Dimitrijević,V. Popović,D. Papić,T. Petrović,V. (2007). *Međunarodno pravo ljudskih prava*. Beograd: Beogradski centar za ljudska prava.	**Прво цитирање у тексту**: (Dimitrijević, Popović, Papić, Petrović, 2007: 128) **Наредно цитирање у тексту**: (Dimitrijević et al. 2007: 200)
Колективно ауторство	*Oxford Essential World Atlas.*(1996). 3.ed. Oxford: Oxford University Press.	(Oxford, 1996: 245)
Рад или део књиге која има приређивача	Nolte, K. (2007). Zadaci i način rada nemačkog Bundestaga. U Pavlović,V. i Orlović,S. (Prir.). *Dileme i izazovi parlamentarizma*. Beograd: Konrad Adenauer Stiftung. 279-289.	(Nolte, 2007: 280)
Чланак у часопису	Марковић, Р. (2006). Устав Републике Србије из 2006 – критички поглед. *Анали Правног факултета у Београду*. 2(LIV). 5-46	(Марковић, 2006: 36)
Енциклопедија	Pittau, J. (1983). Meiji constitution. In *Kodansha encyclopedia of Japan*. Vol. 2. Tokyo: Kodansha. 1-3.	(Pittau, 1983: 3)
Институција као аутор	Републички завод за статистику. (2011). *Месечни статистички билтен*. Бр. 11.	(Републички завод за статистику, 2011)
Прописи	Закон о основама система васпитања и образовања. *Службени гласник РС*. Бр. 62. 2004.	**Фус нота:** Чл. 12. Закона о основама система васпитања и образовања, *Сл. гласник РС*, 62/04
Судске одлуке	Case T-344/99 *Arne Mathisen AS v Council* [2002] ECR II-2905 *или* *Omojudi v UK* (2010) 51 EHRR 10 *или* Одлука Уставног суда ИУ-197/2002. *Службени гласник РС*. Бр. 57. 2003.	**Фус нота:** Case T-344/99 *Arne Mathisen AS v Council* [2002] *или* Одлука Уставног суда ИУ-197/2002
Електронски извори	Wallace,A.R. (2001). *The Malay archipelago* (vol. 1). [Electronic version]. Преузето 15.11.2005. http://www.gutenberg.org/etext/2530 *или* European Commission for Democracy through Law. *Opinion on the Constitution of Serbia*. Преузето 24.5.2007. http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp	**Навођење у тексту**: (Wallace, 2001) **Фус нота**: European Commission for Democracy through Law. *Opinion on the Constitution of Serbia*. Преузето 24.5.2007. http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp

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GUIDELINES FOR AUTHORS

General notes	The paper shall be processed in *MS **Word*** (*doc.*) format: paper size A4; font ***Times New Roman* (*Serbian-Cyrillic*),** except for papers originally written in *Latin* script; font size 12 pt; line spacing 1,5.
Paper length	The paper shall not exceed 16 pages. **An article** shall not exceed 40.000 characters (including spaces). **A review** shall not exceed 6.000 characters (inclusing spaces).
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Text structure	1. Introduction 2. Chapter 1 2.1. Section 2 2.1.1. Subsection 3 3. Chapter 2 4. Conclusion All headings (Chapters) and subheadings (Sections and Subsections) shall be in *Times New Roman*, font 12 pt, **bold.**
References	At the end of the submitted text, the author(s) shall provide a list of References. All entries shall be listed in alphabetical order by author's surname, and each entry shall include the source and the year of publication. When referring to the same author, include the year of publication (from the most recently dated backwards). Please, see the table at the end of the ***Guidelines for Authors***.
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Tables, graphs, figures	Tables shall be prepared in *MS Word* or in *Excell*. Photos, graphs or figures shall be in **jpg.** format.
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The citations should be included in the text, in line with the guidelines provided below. Footnotes shall be used only for additional explanation or commentary and for referring to the specific normative act, official journals, and court decisions.

In-text citations and reference entries shall fully comply with the list of bibliographic units in the References, provided at the end of the paper. Each in-text citation and reference entry shall be clearly cross-referenced in the list of bibliographic units and, vice versa, each bibliographic unit shall be entered in the text of the submitted paper. The referential sources shall be cited in the language and script of the original work (without providing an English translation).

Type of work	**References**	**In-text citation**
Book (a single author)	Jones, C. P. (1994). Investments: Analysis and Management. New York: John Wiley& Sons. Ltd.	(Jones, 1994: 123)
Book (a number of authors)	Osterrieder, H., Bahloul, H., Wright, G., Shafner, K., Mozur, M. (2006). Joining Forces and Resaurces for Sustainable Development Cooperation among Municipalities – A Guide for Pracititioners. Bratislava: UNDP	**First in-text citation:** (Osterrieder, Bahloul, Wright, Shafner, Mozur, 2006: 31) **A subsequent in-text citation:** (Osterrieder et all., 2006: 45)
Joint authorship (a group of authors)	*Oxford Essential World Atlas* (3rd ed.). (1996). Oxford, UK: Oxford University Press	(Oxford, 1996: 245)
An article or a chapter in a book with an editor	Scot, C., del Busto, E. (2009). Chemical and Surgical Castration. In Wright, R. G. (ed.), Sex Offender Laws, Failed Policies and New Directions (pp. 291-338). New York: Springer	(Scot, del Busto, 2009: 295)
Journal article	Sandler, J. C., Freeman, N. J. (2007). Tipology of Female Sex Offenders: A Test of Vandiver and Kercher. Sex Abuse. 19 (2). 73-89	(Sandler, Freeman, 2007: 79)
Encyclopedia	Pittau, J. (1983). Meiji constitution. In *Kodansha Encyclopedia of Japan* (Vol. 2, pp. 1-3). Tokyo: Kodansha	(Pittau, 1983: 3)
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Court decisions	Case T-344/99 *Arne Mathisen AS v Council* [2002] ECR II-2905; or *Omojudi v UK* (2010) 51 EHRR 10; or Constitutional Court decision IУ-197/2002, *Official Gazette RS*, No. 57 (2003)	**Footnote:** Case T-344/99 *Arne Mathisen AS v Council* [2002] or Constitutional Court decision IУ-197/2002
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