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# *LEGAL PROTECTION OF THE WEAKER SIDE IN PRIVATE LAW OF THE REPUBLIC OF SERBIA*

***Abstract:*** *Serbia belongs to the group of countries which have had a long and rich tradition of the weaker side protection, which has been influenced by different circumstances. Serbs, like many other Slavic peoples, had lived for a long time in large family communities, characterized by developed collective spirit, sense of unity and a high degree of mutual solidarity. Due to historical circumstances, such a model of social organization had been preserved until enactment of the Serbian Civil Code in 1844. After that, under the influence of economic liberalism, individualistic conception of law was strengthened for decades.*

*In the second half of the 20th century, a special legal system was shaped during the period of the Socialist Federative Republic of Yugoslavia, whose creators strived to find a balance between individualism and collectivism in private law and, at the same time, between the (liberal) market model of economy and state interventionism in that sphere. From the Yugoslav Federation, Serbia has inhereted a modern legislation, which is even today more advanced in some segments than the normative solutions in many more developed European countries. That is particularly true for the Obligations Act of 1978. Its provisions enabled the court to recognize and take*

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*into account specific position of the weaker side and to protect its interests in an adequate manner, sometimes steping away from the general legal regime established by law (correctrix legis).*

*There is a common opinion that debtors were overprotected under the previous system, while today's legal regulation favors creditors, especially buisness banks. New methods of securing claims, such as registered pledge, have been introduced and the existing legal institutes in that area have been substantially transformed. That is particalarly true for mortgage. In this context, the paper provides an overview of legal provisions related to the protection of the weaker side, including those which are envisaged in the Constitution and in a number of different legislative acts. Special attention is given to the current trends in the region and to the global perspective in that field.*

***Key words*****:** *private law; neoliberalism; weaker side protection; loans indexed in Swiss Franks.*

## 1. Introduction

There is no dispute that the protection of the weaker party in the area of private law is increasingly becoming a topical issue, which is evident not only in terms of the current developments in the modern society but also considering some historical experiences that the humanity has gone through in the course of previous decades and centuries.

Private law has always been in strong interaction with economy. Changes in one area have necessarily given rise to changes in another other area, and vice versa, which ultimately means that private law and economy have most frequently been subject to the same course of development and oscillations. Generally speaking, there are two courses of economic development, which have been interchangeable throughout history. There are periods characterized by economic liberalism, which implies limiting the influence of the state, a propensity towards deregulation, a prominent party autonomy, and a broad freedom of contract. These periods are, as a rule, followed by another period characterized by strengthening the influence of the state and state intervention in the sphere of economy, narrowing the party autonomy and limiting the freedom of contract. The changes in the course of economic development occur when the current model becomes dysfunctional or when (as a result of its application) tensions inside a particular society reach a critical spot. Humanity is currently at such a turning point. The pendulum of economic and legal history has apparently

reached the farthest limits of the neoliberal model. The great depression, economic crisis, and the growing state interventionism (etatization) point to the fact that great changes may be expected. In such circumstances, the stability of many societies will be challenged. Tensions will be lesser in societies which have more equitable and better balanced legislations, corrective regulatory mechanisms and relevant rules governing the protection of the weaker party.

In that respect, Serbia falls into the group of states which have a long-standing and abundant legal tradition, which has been influence by different circumstances. The Serbs, like many other Slavic peoples, had lived in large family communities for a long time, which developed their collective spirit, a sense of unity and a high degree of mutual solidarity. Due to historical circumstances, such model of social organization was preserved until the enactment of the Serbian Civil Code of 1844. After that, under the influence of economic liberalism, the individualistic conception of law was strengthening for decades. In the second half of the 20$^{th}$ century, a special legal system was shaped in the period of the Socialist Federal Republic of Yugoslavia, whose creators strived to find a balance between individualism and collectivism in private law and, at the same time, between the market (liberal) model of economy and the state interventionism in that sphere.

From the Yugoslav Federation, Serbia has inhereted a modern statutory regulation which is, even today, more advanced in some segments than the existing normative solutions in many more developed countries of Western Europe. That is particularly true for the Obligations Act of 1978, which was based on the visionary work of Mihailo Konstantinović, professor at the Faculty of Law in Belgrade, who was the original author of a number of legal provisions back in the 1960s. These provisions enabled the court to recognize and take into account the specific position of the weaker party, and subsequently to undertake relevant measures to protect the party's interests in an adequate manner, sometimes steping away from the general legal regime established by law (*correctrix legis*). That spirit of humanization and moralization can be observed not only in some provisions of this Act concerning contractual obligations but also in the provisions concerning the compensation for damage. The same spirit has been applied in drafting the legislative acts in the field of property law, succession law, consumer protection law and others. For that reason, the author of this article discusses the *weaker side protection* as a more comprehensive approach to this issue rather that *the protection of the weaker contracting party*. The efects of that protective mechanism largely depend on the developments in the region as well as on the global scale.

## 2. Constitutional Framework

The Constitution of the Republic of Serbia[1] prescribes: *All are equal before the Constitution and the law. Everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited*. (Article 21). However, the legislator has recognized that a special legal regime or particular legal protection needs to be adopted for some social categories, which are not in the same position as other citizens. Hence, the Constitution states: *Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.* This implies the concept of so-called "positive discrimination". The Constitution states that: *Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law.* Mothers shall be given special support and protection before and after childbirth. Special protection shall be provided for children without parental care and mentally or physically handicapped children. Children under 15 years of age may not be employed, nor may children under 18 years of age be performing jobs detrimental to their health or morals (Article 66). Extramarital community shall be equal with marriage, in accordance with the law (Article 62). A child shall enjoy human rights suitable to their age and mental maturity. Every child shall have the right to personal name, entry in the birth registry, the right to learn about its ancestry, and the right to preserve his/her own identity. A child shall be protected from psychological, physical, economic and any other form of exploitation or abuse. A child born out of wedlock shall have the same rights as a child born in wedlock (Article 64). Health care for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law (Article 68). Citizens and families that require welfare for the purpose of overcoming social and existential difficulties and creating conditions to provide subsistence shall have the right to social protection, the provision of which is based on social justice, humanity and respect of human dignity (Article 69). Everyone shall have equal legal status on the market. Acts, which are contrary to the Law and restrict free competition by creating or abusing monopolistic or dominant status, shall be strictly prohibited. Foreigners shall be equal on the market with the nationals (Article 84). Private, cooperative and public assets shall be guaranteed. Public assets shall become state assets, assets of the autonomous province and assets of

1 "Official Gazette of the Republic of Serbia", N° 98/2006.

local self-government units. All types of assets shall have equal legal protection (Article 86). The Republic of Serbia shall protect consumers. Activities directed against health, security and privacy of consumers, as well as all other dishonest activities on the market, shall be strictly prohibited (Article 99).

Constitutional provisions represent only a general regulatory framework. More specifically, this matter is regulated in much more detail by legal provisions envisaged in different areas of private law.

## 3. The Protection of the Weaker Party in Contract Law

### *3.1. General provisions of the Obligations Act*

*The Obligations Act* of 1978[2] prescribes: Parties to the obligation relations shall be free, within the limits of compulsory legislation, public policy and good faith, to arrange their relations as they please (Article 10). Parties to obligation relations shall be equal in terms of law (Article 11). In establishing obligation relations and realizing rights and duties out of these relations, the parties shall adhere to the principles of good faith and honesty (Article 12). The exercise of a right arising from obligation relations contrary to the purpose established or recognized by law regarding such right shall be prohibited (Article 13). In establishing obligation relations the parties shall not create rights and duties by which a monopoly position is created or used in the market place (Article 14). In establishing bilateral (consensual) contracts parties shall rely on the principle of equality of mutual consideration. Cases shall be determined by law where violation of this principle invokes legal consequence (Article 15). Parties to obligation relations shall be bound to proceed in engaging in legal transactions in accordance with fair trade custom and usage. Trade practices shall be applicable to obligation relations after the parties to the obligation relations have stipulated such application, or after relevant circumstances imply such intent (Article 21). Should a contract be concluded in conformity with a form printed in advance, or prepared and proposed in some other way by one of the contracting parties, unclear provisions shall be interpreted so as to benefit the other party (Article 100). Unclear provisions in a contract without consideration should be interpreted in the way less strict for the debtor, while in case of an onerous contract – in the way which establishes an equitable relationship between mutual commitments (Article 101). After a contract is nullified due to limited business capacity of one contracting party, the contracting partner of such person may request only the restitution of that part of the honored commitment

2 "Official Gazette of Socialist Federal Republic of Yugoslavia", No 29/78, 39/85, 45/89, 57/89, and "Official Gazette of Socialist Republic of Yugoslavia", No 31/93, 22/99, 23/99, 35/99, 44/99.

which forms the property of the person with limited business capacity, or which was used to his benefit, as well as the restitution of that what was intentionally destroyed or transferred to another (Article 114). Should after concluding the contract circumstances emerge which hinder the performance of the obligation of one party, or if due to these circumstances the purpose of the contract cannot be realized, while in both cases this is expressed to such a degree that it becomes evident that the contract meets no more the expectations of contracting parties and that, generally speaking, it would be unjust to maintain its validity as it stands – the party having difficulties in performing the obligation, namely the party being unable, due to changed circumstances, to realize the purpose of contract, may request its repudiation. Repudiation of contract may not be requested if the party claiming the changed circumstances had a duty, at the time of entering into contract, to take into account such circumstances, or if he could have avoided or surmounted them. A party requesting repudiation of contract may not claim changed circumstances emerging after the expiration of time limit determined for the performance of his obligation. A contract shall not be repudiated should the other party offer or accept that the relevant terms of contract be altered in an equitable way. After pronouncing repudiation of contract, the court shall, at the request of the other party, impose a duty against the party requesting it, to compensate to the other party an equitable part of the loss sustained due to repudiation (Article 133). A party authorized due to changed circumstances to request repudiation of contract shall have a duty to notify the other party on his intention to request repudiation immediately after becoming aware of the emergence of such circumstances, and in case of not acting accordingly, the first party shall be liable for loss sustained by the other party because of failure to be notified about the request on time (Article 134). While deciding on repudiation of contract or on its alteration, the court shall be directed by principles of fair dealing, while especially taking into consideration the purpose of the contract, the normal risk involved with such contracts, general interest, as well as the interests of both parties (Article 135). The parties may disclaim in advance in their contract the right to claim changed circumstances, unless that is contrary to the principles of good faith and fair dealing (Article 136). Should performance of obligation by one party in a bilateral contract become impossible due to an event not attributable to either party, the other party's obligation shall be terminated too, while a party performing part of his obligation may request restitution according to the rules of restitution in case of unjust acquisitions. Should partial impossibility of performance be due to events not attributable to either party, one party may repudiate the contract should partial performance fail to meet his needs; otherwise the contract shall remain valid, while the other party shall be entitled to request proportionate reduction of his obligation (Article 137). A contract shall be null and void by which some-

one, while taking advantage of another being in need or in poor material situation, or by using his insufficient experience, recklessness or dependence, stipulates for himself, or in favor of a third person, the benefit which is in obvious disproportion to that what has been given or done to another in return, or what he has promised to give or do. Provisions of the present Act on consequences of nullity and partial nullity of contract shall apply accordingly to the usury contract. Should a person sustaining damage request that his obligation be reduced to a just amount, the court shall meet such request favorably should this be possible, and in such a case the contract with the corresponding alteration shall remain valid. A person sustaining damage may submit a request for reducing the obligation to a just amount within five years from entering into contract (Article 141). At the debtor's request, the court shall reduce the amount of liquidated damages if it finds that they are excessively high compared to the value and significance of the subject of obligation (Article 274). The period of unenforceability due to statute of limitations shall not run: (i) between spouses; (ii) between parents and children during the validity of parental right; (iii) between a ward and his guardian, and/or a guardianship organization in the course of the guardianship relationship, and until relevant accounts are settled; (iv) between two cohabitates during the course of such cohabitation (Article 381). The limitation period shall also run against a minor and other person without business capacity, regardless of whether they have a legal representative. However, time barred claims of minors having no representative and other unrepresented persons without business capacity, shall not take place until the expiration of a two year period from their regaining business capacity or obtaining a representative. Should a period of time shorter than two years for the expiration of a claim be specified, while the creditor is a minor without a representative or other person without business capacity and without a representative, the limitation period relating to such claims shall begin to run after the creditor has gained capacity to engage in business, or after obtaining a representative (Article 385). Unenforceability due to statute of limitations of a claim against a person serving his military term, or being on maneuvers, shall not take place until the expiration of a three month period after completing the military term or after the end of maneuvers (Article 386). Negotiating parties may limit or entirely exclude the seller's responsibility for substantive defects of the object. A contractual clause limiting or excluding responsibility for defects in goods shall be null and void if a defect was known to the seller, if he failed to notify the buyer thereof, or if the seller imposed such clause by using his particular monopoly position. A buyer forfeiting his right to repudiate the contract due to a defect in the goods shall keep the remaining rights on the ground of such defect (Article 486).

### *3.2. The Consumer Protection Act*

According to the *Consumer Protection Act* of 2014[3], a consumer may not waive his rights conferred upon him by the provisions of this Act. A contract provision which directly or indirectly deprives a consumer of or limits his rights stipulated in this Act shall be regarded as null and void. Nullity of a contract provision will not necessarily render the contract void in its entirety, if it can produce legal effects without such provision. A consumer's proposal for a contract conclusion made to a trader does not oblige a consumer to adhere to such a proposal. The Act shall also apply to the contracts aiming at or resulting in a circumvention of provisions of this Act (Article 3). Unfair commercial practices shall be prohibited. Connected therewith, the burden of proof shall rest with a trader who ought to prove that he had not been involved in such practices (Article 17). Commercial practice shall be regarded as unfair: if it is contrary to the requirements of professional diligence; if it substantially distorts or is likely to substantially distort the economic behavior, in respect of a certain product, of the average consumer to whom such practice applies, or to which he is exposed, or behavior of an average member of a group, when a commercial practice pertains to a group of consumers (Article 18). A commercial practice shall be regarded as aggressive if, considering all circumstances of a specific case, a trader by way of harassment, coercion, including the physical force, or prohibited influence, impairs, or is likely to impair freedom of choice, or a conduct of an average consumer in respect of a certain product, thereby inducing, or threatening to induce a consumer to take an economic decision which he would not have otherwise taken. A prohibited influence shall be regarded as an abuse of a position of power aiming at exerting pressure on a consumer in manner which substantially limits his ability to obtain information required for a decision making, regardless of whether a physical force is being employed, or it is made likely to be employed (Article 22). Furthermore, the Act provides a special protection of minors in that it prohibits sales or serving of alcohol drinks, as well as giving such drinks as a present, including bear, tobacco products and pyrotechnic devices to persons below the age of 18. If a doubt arises in connection to one's age, a trader is neither obliged to sell nor to serve the abovementioned products, unless a consumer presents a valid ID, a passport, or a driving license (Article 24). The Act also enshrines a whole array of provisions which indirectly ensure a protection of the weaker side.

### *3.3. Act on the Protection of Financial Services Consumers*

The *Act on the Protection of Financial Services Consumers* of 2011, as amended in 2014[4], regulates the rights of consumers of financial services provided by banks,

3 "Official Gazette of the Republic of Serbia", No 62/2014.

4 "Official Gazette of the Republic of Serbia", No 36/2011, 139/2014.

financial leasing providers and traders, as well as conditions and a manner of exercising and protecting these rights. According to this Act, the fundamental principles of consumer protection are: the right to enjoy equal position as the financial service provider; the right to protection against discrimination; the right to be informed; the right to defined or definable contractual obligation and, the right to protection of rights and interests (Article 5). A financial service contract shall be drawn up in writing or on another durable medium. Each contracting party shall receive a contract copy. The contract shall not contain provisions by virtue of which the consumer waives of his rights guaranteed by the Act (Article 7). For the purpose of this Act, terms applicable to consumers, terms for establishing the relationship between a consumer and a financial service provider and the procedure for their mutual communication, as well as terms of transactions between a consumer and a provider of a service concerned, shall be regarded as general business terms and conditions of financial services providers. Through general business terms and conditions, a financial service provider shall ensure the application of good business customs, good business practices and a fair treatment of consumers, as well as a compliance of these terms with regulations (Article 9). The Act also enshrines a whole array of provisions which indirectly ensure a protection of the weaker side.

## 4. Weaker side protection in Tort Law

According to the general provisions of the Contracts and Torts Act of 1978[5]: Should loss or injury be caused by a person otherwise not liable for it, and recovery cannot be obtained from the person having a duty to supervise him, the court may – should equity so require and particularly due to material situation of the tortfeasor and the person suffering damage – order the tortfeasor to pay damages, entirely or partially. Should loss or injury be caused by a mentally competent minor unable to redress it, the court may – should equity so require and more particularly due to material situation of parents and the person suffering loss or injury – oblige the parents to pay damages, entirely or partially, although not being at fault (Article 169). (1) The court may, while taking into account the material situation of the person sustaining loss, order the person liable to pay an indemnity which is lower than the amount of damages if it was not caused either willfully or by gross negligence, and if the liable person is in poor material situation, so that payment of full indemnity would bring him into poverty. If the tortfeasor has caused damage while doing something for the benefit of the person sustaining loss, the court may order a lower indemnity, while taking into account the degree of care the tortfeasor was otherwise applying to his own

5 "Official Gazette of Socialist Federal Republic of Yugoslavia", N° 29/78, 39/85, 45/89, 57/89, and "Official Gazette of Socialist Republic of Yugoslavia", N° 31/93, 22/99, 23/99, 35/99, 44/99.

affairs (Article 191). In case of violation of an individual right, the court may order that, at the expense of the tortfeasor, the sentence (or the correction) be made public, or it may order that the tortfeasor take back the statement causing the violation, or order something else which would reach the purpose, otherwise apt to be achieved by indemnity (Article 199). A person being induced to unlawful intercourse or lewd act by deceit, force or misuse of a relationship of subordination or dependence, as well as a person being a victim of some other criminal offence in violation of personal dignity and morale shall be entitled to equitable damages for mental anguish suffered (Article 202). (See: Nikolić, 2007: 80 etc.).

## 5. Weaker side protection in Property Law

*The Registered Pledge Act* of 2003[6] states: If the pledgor is a physical entity, the Contract on Pledge cannot predict that the ownership of the object deposited as pledge is transferred to the pledgee, if the claims are not settled by the due date. In that case, the Contract on Pledge cannot envisage that the pledgee can, if the claims are not settled by the due date, either sell the item deposited as the pledge, or keep the item for himself (Article 9).

## 6. Weaker side protection in Inheritance Law

The *Inheritance Act* of 1995[7] states: Inheritance based on law or will, or any benefit of a will cannot be given to unworthy person: the one who has willingly murdured the testator, or tried to do so; the one who has, by means of coercion, threat or fraud, compelled the testator to make or revoke a will, or its provision, or has prevented him in doing so; the one who has, in intention to prevent the testator's last will, destroyed or hid the will, or falsified it; the one who has greatly disobeyed the legal duty of supporting the testator, or has not provided him necessary help. The court examines the worthiness *ex officio* (Article 4). If, after signing the contract on support, circumstances change to such extent that its fulfillment becomes drastically more difficult, the court can, upon request of either contracting party, regulate their relations again, or abolish them.(Article 202).

6 "Official Gazette of the Republic of Serbia", No 57/2003, 61/2005, 64/2006, 99/2011.

7 "Official Gazette of the Republic of Serbia", No 46/95, 101/2003, 6/2015.

## 7. Weaker side protection in Enforcement Act

Under the *Act on Enforcement and Securing Claims* of 2011,[8] the following items cannot be subject of enforcement: 1) clothes, footware and other objects of personal use, bedcloths, dishes, furniture that is necessary for the enforcement debtor and members of his household, such as: a stove, refrigerator and heating appliances; 2) food and coal/fuel/wood for heating, which the enforcement debtor and members of his household need for a period of three months; 3) cash money of the enforcement debtor who has regular monthly income, providing that it does not exceed the legally prescribed amount of monthly income which is, under the law, exempt from enforcement until the debtor receives the next monthly income; 4) decorations, medals, war memorabilia and other signs of decoration and award, personal letters, manuscripts and similar private scripts of the enforcement debtor, including family pictures; 5) devices essential for daily life and operation of persons with physical or other disabilities; 6) postal packages or postal money transfer sent to the enforcement debtor, prior to delivery (Article 70).

## 8. Trends

Like other transition countries, Serbia has enacted a large number of regulations harmonized with the European legal standards. Some areas have been subject to substantial changes as compared to the legislation which was in force in the former Yugoslavian Federation. There is a common opinion that debtors were overprotected under the previous system, while today's legal regulation favors creditors, especially buisness banks. New methods of securing claims, such as a registered pledge, have been introduced and the existing legal institutes in that area have been substantially transformed. That is particalarly true for mortgage. The process of claim enforcement has become much simpler and more efficient. The list of items which are excluded from enforcement has been significantly reduced. The substantial changes in the sphere of law have been accompanied by substantial changes in the sphere of economics. Rapid impoverishment of citizens and social stratisfaction ensued. The number of unemployed people is permanently growing. Economy and citizens are burdened by loans with extremely high interest rates. More and more people are unable to pay their debts. Such developments threaten to trigger a crisis of the banking sector, as well as an array of other social problems. The seriousness of the situation may be illustrated by a rather unusual event whose main actors are the Central Bank of Serbia, business banks and overindebted citizens.

8 "Official Gazette of the Republic of Serbia", No 31/2011, 99/2011, 109/2013, 55/2014, 139/2014.

According to the assessments of competent institutions of the Republic of Serbia, during the first decade of the 21st century and prior to the beginning of the great economic crisis, around 30,000 citizens accepted loans in domestic currency, which were indexed in Swiss Franks. In the meantime, due to the exchange rate differences, an enormous increase of debts occured. Among the users of such loans was the former president of the Competition Protection Commission, who took a loan indexed in Swiss Franks in 2007; at the time, the loan was worth 85,000 Euros. After four years of payment, she owed 92,000 Euros. The first installment was 58,000 RSD (dinars), while the last payed installment was 105,000. A huge number of citizens were in a similar situation.

The Central Bank of Serbia made an official statement addressing the problem. The statement read: "The National Bank of Serbia, as the institution responsible for the stability of the financial system and protection of the users of financial services, has conducted a detailed analysis of the data on these loans, especially compared to the loans indexed in Euros. On that occasion, all the relevant social and financial components of the situation of the loan users have been taken into account. The results of the analysis confirm that the unfavorable changes of the currency relations between the Swiss Frank and Euro have brought a certain number of citizens of the Republic of Serbia to a state when they are no longer able to settle their installments on time, or they do it with serious difficulties. (...) Banks should, in accordance with this recommendation, enable the users of the housing loans indexed in Swiss Franks to pay their loans in such a way that the loan installments are calculated on the basis of the exchange rates which were valid on the day of accepting the loan, corrected with the increase of value of Swiss Frank in comparison to Euro, by no more than 8%. (...) Due date for payment of every prolonged claim could not be shorter than three years from the due date of single annuity, except in case of loan being due earlier. In order to ease the hard situation of the users of these loans, in accordance with this recomendation, banks should not calculate and take interest from claims for which deadlines have been prolonged. (...) Having in mind the unambiguous attitudes, expressed in court judgements, upon lawsuits filed by loan users, which are moving towards declaring nullity of the stated bank margins, due to disrespect of the relevant provisions of the Obligations Act, the National Bank of Serbia recomended the banks to regulate relations with the loan users, in an appropriate manner, because of the extra money which was claimed, based on the increase of the variable, indefinable elements of the interest rate, i.e. to calculate the extra money as payment of the debt in advance."

Realizing the compexity of the entire situation, as well as the need to secure their long-term buisness interests by avoiding the debt crisis, business banks have excepted the kind advice of the Governor of the National Bank of Serbia,

and expressed their readiness to change the loan contracts and even to return to the users their unreasonably claimed margins.

Meanwhile, a few claims were filed against business banks. So far, four court decisions have been rendered by way of which the contracts in question were declared null and void in the part pertaining to the determination of interest rates. Nevertheless, the essential problem of the indexation of a principal claim in Swiss Franks has thereby not been resolved. In recent months, the situation has become even more complex given the drastic devaluation of the Euro. The indebtedness of indexed credit users in Serbia, as well as in other countries of the region, has considerably risen. It has predominatly been a result of occurrences at the international level, which were beyond the influence of either the state or the contracting parties. At the same time, it has become obvious that the national legislation has to provide much more effective mechanisms for the protection of the weaker side. The deficiency at the national level shall be overcome not only for the sake of resolving the present problems but also because of the risks inherent to the new challenges faced by the contemporary civilization.

## 9. The Global Perspective

The last few decades have been marked by neoliberalism. In the spirit of *laissez faire*, one of the basic premises was that things should be let go with the flow, and that state's influence should be reduced to a necessary minimum. In such circumstances, state structure was permanently weakening. The bodies of state power lost their economic strength because most of the state-owned property was privatized. In transitioning countries, due to hasty and uncontrolled privatization, more serious consequences arose. A significant part of social capital served for unjustified enrichment of individuals or flowed over the state borders. In impoverished societies, social tensions started growing, while state funds were left empty. Under the influence of neoliberalism, deregulation of social relations took place. In some countries, there was a significant decrease in the number of laws. The idea was to de-etatize the regulation and to regulate as many social relations by means of so-called self-regulation, within the civil society. *Summa summarum,* state was deprived of much of its property and of many legal instruments; thereby, it was deprived of the capacity to efficiently act in many spheres of social life (Nikolić, 2009: 1-25). The radical turn came in 2008, at the beginning of a great economic crisis. Contrary to the principles of neoliberalism, many countries started to interfere in financial and economic flows. However, the current events show that it was already too late for some of them.

Countries were unable to recover and consolidate, as much as it was needed. In the meantime, a structure efficient enough to take certain functions of state

bodies has not been developed at the supranational level (both regional and global). Currently, we have weak disorganized countries, undeveloped civil society and weak international community.

Economic growth rate has become the basic measure of social development. Most of humanity lives in everyday fear of deceleration and stagnation. It is thought that constant economic growth is a precondition for stability and development of every individual society, and of humanity as a whole. However, some facts defy this thesis. It is a well-known fact that the gap between the poor and the rich is widening in a vast majority of countries; concurrently, the gap between the developed and the developing countries is widening as well. It is obvious that something is not right. If some societies and the humanity as a whole are achieving constant economic growth, everyone should prosper. However, we have an opposite trend. The number of poor people is rapidly growing, and it is necessarily accompanied by social stratification. The poor are getting poorer, while the rich are getting richer.

Consumer society has faced the fact that there are limitations to economic growth. That problem could have been expected as the direction of change was fairly obvious. In previous decades, the industrial production has been significantly modernized. The need for live work force has been reduced owing to extensive robotization and use of modern technology. That means that the number of those who work and receive income is proportionally smaller nowadays. At the same time, the number of people who are solvent and can buy goods produced in modern factories has dropped as well. Although it has been expected that the number of people employed in the sector of services will proportionally grow, it has not happened. So, there is the question: is it possible to secure constant economic growth in such conditions; and what if we, as a civilization, have reached the end of the road, laid down by consumer society?

Consumer society apparently has many internal contradictions which are becoming ever more obvious. The financial, economic, and social crisis which the humanity has encountered proves that this model is unsustainable in its current form. That means that a different form of social organization should be developed. The question is: in which direction and on what basis? (Nikolić, 2012: 781-789).

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## *ПРАВНА ЗАШТИТА СЛАБИЈЕ СТРАНЕ У ПРИВАТНОМ ПРАВУ РЕПУБЛИКЕ СРБИЈЕ*

***Резиме***

*Нема сумње да ће питање правне заштите слабије стране у области приватног права бити све актуелније. На то упућују прилике у којима се налази савремено друштво, али и нека историјска искуства која је човечанство стицало претходних деценија и векова.*

*Приватно право је одувек било у снажној интеракцији са економијом. Промене у једној сфери су условљавале промене у другој, и обратно. То значи да су приватно право и економија најчешће имали исти развојни пут и исте осцилације. У основи, могло би се говорити о два развојна правца која се циклично смењују током историје. Постоје периоди које карактеришу економски либерализам, ограничавање утицаја државе, тежња за дерегулацијом, наглашена аутономија воље и широка слобода уговарања, а након тога, по правилу, следи период који је карактеристичан по јачању утицаја државе, државном интервенционизму у сфери економије, сужавању аутономије воље и ограничавању слободе уговарања. До промене правца развоја долази када актуелни модел постане нефункционалан или када услед његове примене тензије унутар одређеног друштва достигну критичну тачку. Човечанство се тренутно налази на једној таквој прекретници. Кратко економске и правне историје је, изгледа, досегло крајње тачке неолибералног модела. Велика рецесија (депресија), економска криза и растући државни интервенционизам, указују на то да се могу очекивати значајне промене. У таквим околностима, стабилност многих друштвених заједница ће бити доведена у питање. Тензије ће бити мање у друштвима које имају правичније и избалансирано право, корективне регулативне механизме и, у том контексту, правила о заштити слабије стране.*

*Србија спада у ред земаља које, у том погледу, имају дугу и богату традицију. На то су утицале различите околности. Срби су као и многи други словенски народи, дуго живели у великим породичним заједницама у којима је био развијен колективни дух, осећај за заједништво и висок степен узајамне солидарности. Захваљујући историјским приликама, такав модел друштвене организације је очуван све до доношења Српског грађанског законика 1844. године. Након тога, под утицајем економског либерализма, деценијама је*

*јачала индивидуалистичка концепција права. У другој половини XX века, у периоду Социјалистичке Југославије, обликован је специфичан правни систем, чији су креатори настојали да нађу равнотежу између индвидуализма и колективизма у приватном праву и, истовремено, између тржиног (либералног) модела економије и државног интевенционизма у тој сфери.*

*Од бивше југословенске федерације Србија је наследила савремену правну регулативу која је и данас, у појединим сегментима, напреднија од нормативних решења која постоје у многим развијеним западноевропским земљама. То посебно важи за Закон о облигационим односима из 1978. године. Његов аутор, Михаило Константиновић, професор Правног факултета у Београду, визионарски је, још шездесетих година XX века, формулисао низ одредаба које омогућују да суд препозна и уважи специфичну позицију слабије стране и да, потом, на адекватан начин заштити њене интересе, одступајући понекад, од општег правног режима уставновљеног законом (correctrix legis). Тај дух хуманизације и морализације се може уочити не само у одељцима Закона који су посвећени уговорним односима, већ и онима којима се говори о накнади штете. Под тим утицајем писани су и закони из домена стварног и наследног права, прописи о заштити потрошача и сл. Због тога овде говоримо о заштити слабије стране (weaker side protection), а не о заштити слабије уговорне стране (weaker party protection). Дакле, реч је о обухватнијем приступу.*

*У овом контексту је изложен само сумарни преглед одредаба које се односе на заштиту слабије стране, почев од оних које су садржане у уставу, до оних које се налазе у различитим законима. Ефекти тог заштитног механизма ће у великој мери зависити од укупних кретања у региону као и од глобалних процеса.*

***Кључне речи:*** *правна заштита, слабија страна, приватно право, Република Србија.*