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Institute of Comparative Law
Beograd, Terazije 41
e-mail:institut@icl.org.rs, www.comparativelaw.info
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Jelena Ćeranić, PhD[1]

Original scientific paper
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FLEXIBILITY CONCEPT IN THE CONTEXT OF EUROPEAN INTEGRATION – EVOLUTION, SURVEY AND PERSPECTIVES[2]

Abstract

The paper presents an attempt to shed the light on the importance of flexibility concept in the context European integration. The debate on flexibility in matters relating to the European integration is not new. The concept of flexibility has always been built into the foundations of the European construction. The paper primarily focuses on the evolution of theoretical and political debate on flexibility (Chapter 2), following by analyses of categories and examples of flexibility (Chapter 3). The flexibility concept was formally recognized by the Amsterdam Treaties. The enhanced cooperation provisions of the EU Treaties, whether in their Amsterdam or Nice or Lisbon guises, represent a key manifestation of a flexibility concept (Chapter 4). Nowadays, the mechanism of enhanced cooperation has only been initiated twice: first in the area of the law applicable to divorce and legal separation and second in the area of unitary patent protection (Chapter 5). Commission's White Paper on the future of Europe, from March 2017, offers five scenarios for the future integration models. One of them is differentiated integration based on flexibility concept (Chapter 6).

Keywords: *flexibility, European integration, European Union, differentiated integration, enhanced cooperation.*

1. Introductory remarks

Flexibility has always existed in European integration process. Numerous manifestations of diversification derive from the Treaties and

[1] Senior Research Fellow at the Institute of Comparative Law in Belgrade, Assistant professor at the Faculty of Law of the University of Banjaluka, e-mail: *ceranicj@gmail.com.*

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from the secondary law. Special regimes, derogations, exceptions, and safeguard clauses are to be found in the Treaties right from the start of the process of integration. However, those forms of differentiation were temporary, limited, and did not create permanent separation among the Member States.

There is a lot of secondary legislation which provides alternative solutions, and minimal or optional harmonization. These acts do not reflect objectively defined different solutions, but different views on the desirable content of the rule. They allow for some flexibility in the way common objectives are achieved. As far as exceptions are concerned, these regimes were either temporary, motivated by objective circumstances, or they were placed under the tutelage of the Community. Purely political and permanent exceptions were considered as anomalies, as they were derogations to the features of orthodox Community law which, evidently, can only be tolerated on the basis of Primary law.

Since the signature of the Treaty of Amsterdam, the notions of flexibility and differentiation have caught both political and scholarly attention and are becoming new paradigms in the study of EU law and politics. Several clauses authorize, in an abstract way, a majority of Member States to establish 'enhanced cooperation' between themselves in areas covered by the Treaties. There is a widespread feeling that unity and uniformity, which were the traditional characteristics of the European Community legal order in its early decades, have, to some extent at least, been replaced by the rival characteristics of flexibility and differentiation.

However, the flexibility is not a new phenomenon in European law. Political and doctrinal reflections on differentiation started at the beginning of the 1970s, after the first enlargement of the European construction. Enlargements brought a quantitative and qualitative increase in diversity in the Union and with it, the need for policy adaptations. The principle that all States must do the same thing at the same time and the rigidity of EU policy-making was an obstacle for further European integration.[3]

Nowadays, the ideas of flexibility and differentiated integration have been invoked as a possible solution for the EU crises. Namely, after decades of success, since 2008 the EU has been struggling with the most serious crisis in its history. The economic and political difficulties that the EU is facing at the moment threaten to undermine the fundamental values achieved by the Community, such as peace and stability in the European

[3] J. Ćeranić, "Differentiated integration – a good solution for the increasing EU heterogeneity?" in: *Multi-speed Europe* (eds. A. Kellerhals, T. Baumgartner), Europa Institute at the University of Zurich, Zurich 2011, 14.

Communities over the past sixty years.[4] Commission's White Paper on the future of the Europe, from March 2017, offers five scenarios for the future integration models. One of them is differentiated integration based on flexibility concept.

The aim of this paper is to give a historical overview of the debate and issues relating to flexible integration over past decades. The paper primarily focuses on the evolution of theoretical and political debate on flexibility, following by analyses of categories and examples of flexibility and enhanced cooperation mechanism as an institutionalized form of flexibility concept. Nowadays, the mechanism of enhanced cooperation has only been initiated twice. Finally, the paper analyses Commission's White Paper on the future of the Europe, from March 2017, which offers five scenarios for the future integration models. One of them is differentiated integration based on flexibility concept.

2. The evolution of theoretical and political debate on flexibility

In the period from 1974 to 2017, four waves of the flexibility debate can be distinguished.[5]

2.1. The first wave of the flexibility debate: 1974-1978

The debate on flexibility in matters relating to European integration is not new. The roots of the current differentiated integration debates can be traced back to the early 1970s. Although flexibility as a concept existed in the European Communities since its founding, the early debates on flexibility remained exclusive. There were, however, two springboards to the debate on flexible integration, which emerged in the mid-1970s.

The first springboard was the speech of Chancellor Willy Brandt to the European Movement in Paris in November 1974. On that occasion, Brandt claimed that the Community needed what he called "graduated integration". The underlying argument for applying the flexibility concept was that economic diversity was not necessarily compatible with the equal treatment of all (at that time) nine Member States. He stated that if all the countries were treated equally, the danger was that the cohesion among them would be undermined. As a solution, Brandt suggested that the objectively stronger countries were to be more closely integrated first and others to follow at the latter stage. It is important that there should be

[4] A. Rabrenović, J. Ćeranić, *Alignment of the Serbian Law with the Acquis Communautaire – Priorities, Problems, Perspectives*, Institute of Comparative Law, Belgrade 2012, 314.

[5] A. Stubb, *Negotiating Flexibility in European Union: Amsterdam, Nice and Beyond*, Palgarave Macmillan, Paris 2002, 34-40.

no permanent dissolution between stronger and weaker Member States. He was persuaded that the flexibility would have a centripetal effect which would drive the process forward and pull the weaker countries along into the core group.[6]

The Tindemans Report of December 1975 is considered as a second springboard for the flexibility debate.[7] Leo Tindemans, prime minister of Belgium and convinced federalist, in his 1975 report on the future of European integration focused less on the final goal of a federal Europe than on the model of what would be later called "multi-speed Europe".

Elaborating ideas put forth by Brandt, Tindemans argued that it was not 'absolutely necessary that in every case all stages of integration should be reached by all the States at the same time'. He pointed to the divergence of the economic and financial situation of the Member States and suggested that those states which were able to progress had a duty to forge ahead, and those states which had reasons for not progressing should allow the others to forge ahead.[8]

The Belgian leader also emphasized the difference between his model of multi-speed Europe – which assumes that all the Member States agree on the final goal of political integration, and only the speed with which they move toward it may vary – and the model of Europe à la carte. According to the latter model, no one must participate in everything, a situation that though far from ideal is surely much better than avoiding anything that cannot be cooked in the single pot.[9]

The original reactions to the Brandt and Tindemans proposals were negative. Most EU capitals immediately rejected any form of differentiation. Smaller Member States, in particular, feared that any differentiation would lead to different classes of membership and possible exclusion.

2.2. The second wave of the flexibility debate: 1979-91

Ralf Dahrendorf's Jean Monnet lecture of November 1979 marks the beginning of the second wave of reflections upon the concept of flexibility. He claimed that 'European union has been a remarkable political success, but an equally remarkable institutional failure'. Dahrendorf argued that the rigidity of Community policy-making was an obstacle to further

[6] *Ibid*., 34.
[7] Report by Leo Tindemans, Prime Minister of Belgium to the European Council, Bulletin of the European Communities, Suppl. I, 1976.
[8] A. Stubb (2002), 34.
[9] J. Gillingham, *European Integration, 1950-2003*, Cambridge University Press, Cambridge 2003, 91-92.

European integration. The solution was to agree on a short list of common and genuinely political decisions such as a common budget and a customs union while allowing more freedom to choose areas of cooperation in others. Dahrendorf called his vision 'Europe à la carte', which he defined as 'common policies where there are common interests without any constraint on those who cannot, at a given point of time, join them'.[10]

Dahrendorf's speech has to be put in context. It coincided with two important events: the second enlargement and the launching of the European Monetary System (EMS). The debate about Greek membership was in motion in 1979. In 1976 the Commission advised against Greek membership in its avis to the Council. The Council, however, defied the Commission and Greece negotiated its membership agreement, which was signed in 1979. In 1981 Greece became the tenth member of the EC. The second important event was the 1979 establishment of EMS, an initiative to create a zone of relative monetary stability in a world of fluctuating exchange rates. The EMS became an odd form of flexibility. Only EC Member States were allowed to participate in the EMS, although none was obliged to do so. And, indeed, Britain did not join the system.

At this stage, official papers on flexibility were also launched. The French Commissariat Général du Plan (1980), for example, argued for a Community of variable geometry. In May 1984, François Mitterand, speaking before the European Parliament, said that a multi-speed or variable geometry Europe was a virtual necessity. In preparing the Single European Act (SEA), the Dooge Committee (1985) estimated that differentiation, as means by which to achieve the objectives of the single market, would facilitate both the decision-making and negotiation of the Single Act.

It is interesting that from 1885 to 1991 there was a remarkable lacuna in flexibility debate, especially in the literature. It seemed that only certain politicians (Kohl and Mitterand) were engaged in debates about flexibility.

The shift in the debate was to come with the signing of the Maastricht Treaty and institutionalization of functional flexibility in the form of EMU and the Social Chapter.

2.3. The third wave on the flexibility debate: 1992-1997

Much of the credit for the resurgence of flexibility literature can be given to the differentiated arrangements established in the Maastricht Treaty. The Treaty on the European Union (TEU) introduced an array of functional flexibility in areas such as EMU, Social Policy, Common

[10] A. Stubb (2002), 35.

Foreign and Security Policy (CFSP) and Judiciary and Home Affairs (JHA). The Maastricht Treaty thus stepped up the debate by introducing flexibility into major policy areas.

Two decades after Brandt and Tindemans, there were to be three documents which triggered the debate on flexible integration in relation to the 1996-97 IGC. The first of these was written by two prominent German politicians, Wolfgang Schäuble and Karl Lamers (1994) of the CDU/CSU coalition party. The second was written by the Prime Minister of the United Kingdom, John Major (1994), and the third by the then Prime Minister of France, Edouard Balladur (1994). Each of them illustrated various forms of flexibility, the political implications and context.

2.4. The fourth wave of the flexibility debate: 1997-2017

"The Treaty of Amsterdam has turned the exception into a constitutional principle". [11] Its formal constitutional recognition by the Amsterdam Treaty and its subsequent confirmation by the Treaties of Nice and Lisbon marked the beginning of the fourth wave of the flexibility debate.

3. Categories and Examples of Flexibility

The vernacular of flexible integration should be narrowed to three main concepts and divided into theoretical and practical flexibility. The sub-categories of theoretical discourse are multi-speed, variable geometry and à la carte. The corresponding sub-categories of the practical discourse are transitional clauses, enabling clauses and pre-defined flexibility together with case-by-case flexibility, respectively. These main sub-categories correspond to three variables signifying flexibility – time, space and matter. The distinctions between time, space and matter are used as ideal types, not absolute categorizations, because differentiated integration inevitably refers to different speeds for different Member States in different policy areas and sometimes in different integrative units. [12]

3.1. Multi-speed/transitional clauses

The definition of multi-speed integration and transitional clauses are very similar. The approaches signify integration in which member countries decide to pursue the same policies and actions, not simultaneously but at

[11] E. Phillipart, M. Sie Dhian Do, "From Uniformity to Flexibility: The Management of Diversity and its Impact on the EU System of Governance", in: *Constitutional Change in EU: From Uniformity to Flexibility* (eds. G. De Búrca, J. Scott), Hard Publishing, Oxford 2000, 300.
[12] A. Stubb (2002), 43-44.

different times. The vision is progressive in that, although admitting to differences, the Member States maintain that the same objectives will be reached by all of them in due time. In this sense, it is primarily concerned with *when* integration takes place.[13]

Multi-speed integration is not new within the EU framework. One can look back to the Treaty on European Community from 1958 to discover that each Member State had transitional periods in relation to particular national concerns. Successive enlargements also brought a range of long-term special arrangements for areas such as the Faroe Islands and Greenland.

Transitional periods can apply to new and old policy areas. The underlying idea is that the *acquis communautaire* is to be preserved and developed. Transitional clauses are often used in accession agreements to give a new Member State a transitional period in a particular area.

The Treaty also introduced a very important element of multi-speed into the development of Economic and Monetary Union (EMU). Under the terms of the Treaty, the European Council was obliged to decide whether a majority of Member States had fulfilled the convergence criteria and was ready to go forward to stage three of EMU and to adopt the single currency. With the exception of Denmark and the United Kingdom, the Member States set out common objectives which were to be reached in due course. It should, however, be pointed out that EMU illustrates that a specific policy area can reflect many forms of differentiation.[14]

The secondary legislation also portrays a wide variety of examples of multi-speed integration. Some examples are the progressive elimination of agricultural support prices, the gradual abolition of monetary compensatory amounts, the implementation of value added tax (VAT) and the approximation of national law. This list is extensive.

3.2. Variable geometry/enabling clauses

The next two concepts of flexibility, variable geometry and enabling clauses, can also be used interchangeably. Variable geometry can be defined as a mode of flexible integration which admits to irreconcilable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser-developed integrative units.[15] The corresponding variable of these two terms is *space*. A Europe differentiated by space goes further in institutionalizing diversity than integration differentiated by time. Whereas integration

[13] A. Stubb, "A Categorization of differentiated integration", *Journal of Common Market studies*, 2/1996, 283-295.
[14] A. Stubb (2002), 47.
[15] *Ibid.*

differentiated by time defines and maintains a wide range of common objectives and goals, integration differentiated by space takes a view beyond the common objectives. According to this view, Europe, in all its diversity, should always organize itself around a multitude of integrative units. The emphasis is *who opts into what*.[16]

There are numerous examples of variable geometry both outside the Union and inside the Treaty framework.

Within Europe, but outside the Union, the pre-Amsterdam arrangements of the Schengen Agreements are an example of a conglomeration of states which pursue deeper integration within a separate integrative unit. These differentiations are not a form of multi-speed integration because they are not a part of the common objectives established in the Treaties. Nor can they be considered as examples of à la carte integration mainly because they are forms of opting-in, as opposed to opting-out.[17]

Variable geometry existed inside the Treaty framework, in a non-institutionalized form, before the Amsterdam treaty. Former article 306, for example, refers to the pre-existing Benelux cooperation. In essence, article 306 is a form of variable geometry because it allows for a specific group of Member States to pursue integration in a general policy area, in this case outside the Treaty framework.

3.3. *A la carte*/case-by-case flexibility or predetermined flexibility

The third main concept of differentiation is pick-and-choose or à *la carte* flexibility. By definition, the culinary metaphor of a Europe à la carte allows each Member State to pick and choose, as from a menu, in which policy area they would like to participate while, at the same time, maintaining a minimum number of common objectives. This approach is focused on *matters*, that is, specific policy areas. The issue here is *what* the Member State opts out of. This stands in stark contrast to both multi-speed Europe, which defines common objectives towards which Member State strive (in due time) according to ability, and variable geometry, which institutionalizes differentiation of Member States in order to create space between the various integrative units or forms of integration.[18] *A la carte* integration corresponds to both case-to-case flexibility and predefined flexibility.

The classic example of à *la carte* flexibility can be found in the British derogation from the Social Chapter. Protocol 14 states that '…The United Kingdom…shall not take part in deliberations and in the adoption of… proposals made on the basis of this Social Protocol…'.

[16] *Ibid.,* 48-52.
[17] *Ibid.,* 50.
[18] A. Stubb, (1996), 283-295.

In sum, à *la carte*, much like multi-speed and geometry variable, has been a part of Community process from the beginning. It might not always have been the preferred form of flexibility, but it has helped the Community to overcome a log jam.[19]

4. The Institutionalization of Flexibility

The concept of flexibility has always been built into the foundations of the European construction. The enhanced cooperation provisions of the EU Treaties, whether in their Amsterdam or Nice or Lisbon guises, represent a key manifestation of a pervasive phenomenon in the EU: differentiated integration.[20]

4.1. The Treaty of Amsterdam

The Amsterdam Treaty (1997) constitutionalized a notion of closer cooperation, by introducing for the first time the formalized possibility for the future development of flexible integration under the Treaties, subject to certain conditions.

Provisions on closer cooperation, introduced by the Amsterdam Treaty, provided a set of general principles for closer cooperation, supplemented by specific principles applying to pillar one and pillar three. No general provision for closer cooperation was made within pillar two, where the possibility of introducing flexibility was limited to constructive abstention.

The technique used in the Treaty was to authorize the Member States wishing to engage in closer cooperation to make use of the institutions, procedures, and mechanisms laid down in the Treaty, provided that the cooperation complies with certain guarantees relating to the objectives of the EU, the principles of EC and EU, the protection of the *acquis communautiare* and the single institutional framework, and the commitment to use closer cooperation only as a 'last resort' mechanism. A specific authorization by the Council was also required for each instance of closer cooperation, which must involve a majority of Member States but must be open to the participation of all Member States.

According to the Amsterdam Treaty provisions, authorization for establishing closer cooperation will be provided by the Council acting by a qualified majority, on a proposal by the Commission, after consulting the European Parliament. In the event that one of the non-participating Member States become unhappy about the move to closer cooperation by the majority, that Member State had to cite the important and stated reasons of national

[19] A. Stubb (2002), 54.
[20] *Ibid*., 25.

policy and no vote will be taken. In that case, the Council might request, by a qualified majority, that the matter is to be referred to the European Council, which would itself decide by unanimity. This mechanism was termed 'emergency brake'.

Notwithstanding the innovatory character of the institutional dimension of these provisions, their practical utility has been regularly doubted in view of the severity of the conditions which need to be satisfied. The provisions were so restrictively drafted that it was difficult to conceive of the circumstances in which they could be used. However, the Treaty of Amsterdam, with its flexible agenda, should be seen as an opening rather than a closure, in terms of the development of the Treaty-based dimension of variable arrangements.[21]

4.2. The Treaty of Nice

The broad lines of the Nice Treaty amendments (2001) are rather easy to state. They raise the concern of the procedural conditions for engaging in flexibility and many of its substantive conditions.

As to the procedural conditions, the new provisions provided that the number of participating states had to be eight, even after Union enlarged. The emergency brake had largely been removed in pillar one and three. The substantive terms have also been changed, with the hurdles set by the cumulative conditions for EC Treaty flexibility being lowered. At the same time, the essential protections both for the non-participating Member States, for the institutions, and for the character of the Community legal order and the Union *acquis* were in large measure retained.

The role of the European Parliament in pillar one was marginally strengthened. The Parliament was given a veto over enhanced cooperation if it related to an area where legislation is normally to be adopted by co-decision. This was intended to protect democratic legitimacy. The already strong role of the European Commission was preserved.[22]

In regard to pillar two, the new Nice provisions formally established the possibility of enhanced cooperation but explicitly excluded matters having military or defence implications from the range of matters on which enhanced cooperation might be engaged.

4.3. The Treaty of Lisbon

Since the Lisbon Treaty (2009) merged together with the three pillars, there is no more difference between the procedures of initiating the enhanced cooperation mechanism in pillar one and pillar three.

[21] *Ibid.,* 91.
[22] J. Ćeranić, 28.

However, some specificity remained in the field of the Common Foreign and Security Policy.

With regards to the preparatory stage, conditions for triggering enhanced cooperation remain restrictive, according to the provisions of the Lisbon Treaty.[23] Building enhanced cooperation is only possible within the framework of the Union's non-exclusive competences[24] and it has to comply with the Treaties and the law of the Union.[25] Moreover, the aim shall be to further the objectives of the Union, protect its interests, and reinforce its integration process.[26] In this way, undermining the internal market or economic, social and territorial cohesion, discrimination in trade and distortion of competition between the Member States are to be prevented.[27] While enhanced cooperation can make use of common institutions and exercised competences by applying the relevant provisions of the Treaties,[28] the competences, rights and obligations of the "outs" are to be respected.[29] Enhanced cooperation shall not become an exclusive club, and hence the provisions of the Lisbon Treaty continue to demand that cooperation remains open at any time to all Member States.[30]

Only the "last resort" condition and the threshold for the minimum of participating Member States have been reformed. The "last resort" principle has been definitely removed by stating that the "last resort" can be established by the Council. The minimum number of Member States wishing to engage in enhanced cooperation is set at nine, instead of eight.[31] Nine States might currently be considered reasonable because it is a one-third of Member States out of EU twenty-seven countries (following UK's withdrawal).

When it comes to initiation, according to the Lisbon Treaty, Member States wishing to establish enhanced cooperation between themselves shall address a request to the Commission, specifying the scope and objectives of enhanced cooperation proposed, eliminating submitting a request directly to the Council.[32]

The Lisbon Treaty, for the first time, provides a possibility of initiating the enhanced cooperation mechanism in the field of Defense Policy, called Permanent Structured Cooperation.[33]

[23] Art. 20TEU; Art.326-334 TFEU; Art.46 TEU.
[24] Art. 20 (1) TEU.
[25] Art. 326 TFEU.
[26] Art. 20 (1) TEU.
[27] Art. 326 TFEU.
[28] Art. 20 (1) TEU.
[29] Art. 327 TFEU.
[30] Art. 20 (1) TEU.
[31] Art. 20 (2) TEU.
[32] Art. 329 (1) TFEU.
[33] Art. 46 TEU.

5. Enhanced cooperation as constitutional form of flexibility

Nowadays, the mechanism of enhanced cooperation has only been initiated twice: first in the area of the law applicable to divorce and legal separation and second in the area of unitary patent protection. The unitary patent system has not entered into force yet.

5.1. Enhanced cooperation in the area of the law applicable to divorce and legal separation

Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (also called Brussels IIa). While Brussels IIa had established common rules of jurisdiction based on a large number of connecting factors, it did not regulate what substantive law these courts would apply to divorce. It was claimed that the difference between national laws led to uncertainty regarding marriage dissolution and often, the law applied did not correspond to the legitimate expectations of EU citizens.[34]

Therefore, in July 2008 eight EU Member States[35] initiated enhanced cooperation area of the law applicable to divorce and legal separation. Thereafter, five Member States joined them.[36]

In July 2010, the Council authorized enhanced cooperation in the area of the law applicable to divorce and legal separation. It was justified on the basis of legal certainty, predictability, and in order to prevent a "rush to court" and/or "forum shopping".

Following the adoption of Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation,[37] the new Regulation, known as the Rome III, took effect in the 14 participating Member States on 21 June 2012. The other EU Member States are permitted to sign up to the pact at a later date.[38]

In this way, an EU instrument that comprises uniform conflict-of-laws rules to designate the substantive law applicable to divorce and

[34] N. Natov, "Enhanced cooperation between the Member States in the area of law applicable to divorce and legal separation", in: *Multi-speed Europe* (eds. T. Baumgartner, A. Kellerhals), Europa Institute at the University of Zurich, Zurich 2011, 80.

[35] Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain.

[36] Bulgaria, France. Belgium, Germany and Latvia formally joined them, while Greece withdrew.

[37] Council Regulation (EU) No. 1259/2010 on 20 December 2010 implementing enhanced cooperation in the area of law applicable to divorce and legal separation, 2010, Official Journal L 343.

[38] Lithuania joined in 2014; Greece in 2015; Estonia will join in 2018.

legal separation was elaborated. The Regulation provides higher legal certainty for international couples. It represents the first application of the enhanced cooperation mechanism within the Treaty of Lisbon.

5.2. Enhanced cooperation in the area of unitary patent protection

Protection of patents in Europe essentially rests on national law only. The European patent as granted by the European patent Organization, while internationally uniform as to the conditions of the grant, represents but a "bundle" of as independent national patents as have been asked by the applicant. As a consequence, the terms of the exclusive right, which they confer upon their owner, are determinate by the various national laws. It is to remedy this territorially fragmented and more or less diverse protection that, since about half century, the EU attempts to establish an autonomous system of unitary patent protection of its own design, but has failed to achieve it whichever way it chose.[39]

In December 2010, twelve EU Member States[40] expressed their wish to establish enhanced cooperation in the area of the creation of unitary patent protection. Two days later, the Commission issued a proposal for enhanced cooperation.

In February 2011, thirteen Member States[41] addressed the Commission expressing their wish to join enhanced cooperation. Thus 25 Member States has officially initiated the enhanced cooperation. Outside the cooperation remained Italy and Spain only. In March 2011 the Council authorized a group of 25 Member States to implement enhanced cooperation in the area of unitary patent protection.[42]

Finally, in December 2012 the European Parliament and the Council adopted the unitary patent package consisted of three components: two regulations (Regulation (EU) No 1257/2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection[43] and Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection

[39] H. Ullrich, „Harmonizing Patent Law: The Untamable Union Patent", *Max Planck Institute for Intellectual Property and Competition Law Research Paper*, 3/2012, 1-59.

[40] Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and United Kingdom.

[41] Belgium, Bulgaria, Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia.

[42] J. Ćeranić, *Unitarni patent*, Institut za uporedno pravo u Beogradu i Pravni fakultet Univerziteta u Banjaluci, Beograd 2015, 39-40.

[43] Regulation (EU) No 1257/2012 on 17 December 2012 of the European parliament and of the Council implementing enhanced cooperation in the area of the creation of the unitary patent protection, 2012, Official Journal L361.

with regard to the applicable translation agreements)[44] and the Agreement on a Unified Patent Court (UPC Agreement).[45]

The EU regulations establishing the unitary patent system entered into force on 20 January 2013, but they will only apply as from the date of entry into force of the UPC Agreement, that is, on the first day of the fourth month following the deposit of the 13th instrument of ratification or accession (provided those of the three Member States in which the highest number of European patents had effect in the year preceding the signature of the Agreement, i.e. France, Germany and the United Kingdom, are included).

Currently, all EU Member States except Croatia and Spain are participating in this enhanced cooperation. The participating Member States are currently working under the assumption that the unitary patent will become operational during the course of 2018.

6. White Paper on the Future of Europe

Many of the profound transformations Europe is currently undergoing are inevitable and irreversible. Other are harder to predict and will come unexpectedly. In order to categorize them to the best ability, Jean Claude Junker presents five scenarios for Europe by 2025 in White Paper on the future of Europe, in Mach 2017.[46] The starting point for each scenario is that the 27 EU Member States move forward together as a Union. The presented possibilities range from the *status quo* to a change of scope and priorities, to a partial or collective leap forward.

According to Scenario 1: *Carrying on*, the EU focuses on delivering its positive agenda.[47] According to Scenario 2*: Nothing but the single market*, the EU is gradually re-centred on the single market.[48] Scenario 4: *Doing less more efficiently* suggests that the EU focuses on delivering more and faster in selected policy areas while doing less elsewhere.[49] According to Scenario 5: *Doing much more together* the EU decides to do much more together across all policy areas.[50]

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[44] Council Regulation (EU) No 1260/2012 on 17 December 2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection with regard to the applicable translation agreements , 2012, Official Journal L361.

[45] The Agreement on a Unified Patent Court, *https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf*, last visited 5 December 2017.

[46] White Paper on the future of Europe, European Commission, COM(2017)2025 of 1 March 2017.

[47] *Ibid*., 16-17.

[48] *Ibid.,* 18-19.

[49] *Ibid*., 22-23.

[50] *Ibid*., 24-25.

In accordance with Scenario 3: *Those who want more do more*, the EU allows willing Member States to do more together in specific areas.[51] Thus the EU consisted of 27 Member States proceeds as today but certain Member States which want to do more in common, one or several "coalitions of willing" emerge to work together in specific policy areas. These may cover policies such as defence, internal security, taxation or social matters.

As a result, new groups of Member States agree on specific legal and budgetary arrangements to deepen their cooperation in chosen domains. As was done for Schengen area or the euro, this can build on the shared EU framework and requires clarification of rights and responsibilities. The status of other Member States is preserved, and they retain the possibility to join those doing more over the time.

By 2025 a group of Member States decides to cooperate much closer on defence matters, making use of the existing legal possibilities. Several countries move ahead in security and justice matters. Also, a group of countries, including the euro area and possibly few others, chooses to work much closer notably on taxation and social matters. Further progress is made at 27 to strengthen the single market and reinforce its four freedoms. Relations with third countries, including trade, remain managed at EU level on behalf of all Member States.

The positive side of this scenario is that the unity of the EU is preserved while further cooperation is made possible for those who want. However, citizens' rights derived from EU law start to vary depending on whether or not they live in a country that has chosen to do more. Questions arise about the transparency and accountability of the different layers of decision-making. The gap between expectations and delivery starts to close in the countries that want and choose to do more.

7. Concluding remarks

Nowadays, the European Union is struggling with its worst financial, economic and social crisis in post-war history. However, the current situation need not necessarily draw the limit for Europe's future. Europe has always been at a crossroads and has always adapted and evolved.

Taking into account the existing heterogeneity among the Member States and all challenges that EU is currently facing (*inter alia* the United Kingdom's decision to leave the EU), it is clear that the concept of the European integration process has to be redefined. Some lessons can be learnt from the past.

[51] *Ibid*., 20-21.

Broader, more historically oriented views of European integration might provide a suitable conceptual framework for courses concentrating on policymaking in the EU. In this respect, flexibility concept is of a great importance.

Doc. dr Jelena Ćeranić
Viši naučni saradnik Instituta za uporedno pravo u Beogradu
Docent Pravnog fakulteta Univerziteta u Banjaluci

KONCEPT FLEKSIBILNOSTI U KONTEKSTU EVROPSKIH INTEGRACIJA – EVOLUCIJA, PREGLED I PERSPEKTIVE

Rezime

Rad predstavlja pokušaj da se osvetli značaj koncepta fleksibilnosti u kontekstu evropskih integracija. Koncept fleksibilnosti je samog početka prisutan u okviru evropskog integracionog procesa. Iako formalno dugo nije bio priznat, još od osnivanja Evropskih zajednica ovaj koncept primenjivan je u različitim oblastima saradnje. Rad se najpre fokusira na evoluciju teoretske i praktične debate o fleksibilnosti (Poglavlje 2), nakon čega sledi analiza kategorija i primera fleksibilnosti u istoriji evropskih integracija (Poglavlje 3). Koncept fleksibilnosti institucionalizovan je Ugovorom iz Amsterdama u vidu odredbi o bližoj saradnji. S obzirom na veoma stroge uslove za pokretanje bliže saradnje, ovaj mehanizam izmenjen je i dopunjen Ugovorima iz Nice i Lisabona (Poglavlje 4). Do danas mehanizam bliže saradnje formalno je pokrenut samo dva puta: prvi put u oblasti prava koje se primenjuje na razvod i pravno rastavljanje i drugi u oblasti uspostavljanja unitarne patentne zaštite (Poglavlje 5). Uzimajući u obzir krizu u kojoj se Evropska unija nalazi još od 2008. godine, Evropska komisija je, u martu 2017. godine, objavila Belu knjiga o budućnosti Evrope. Komisija predlaže pet scenarija, tj. pet različitih integracionih modela za prevazilaženje krize u EU. Jedan od njih je diferencirana integracija koji počiva upravo na konceptu fleksibilnosti (Poglavlje 6).

Ključne reči: fleksibilnost, evropske integracije, Evropska unija, diferencirana integracija, bliža saradnja.

Vladimir Đurić, PhD[1]

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THE PRINCIPLES, ORGANIZATIONAL STRUCTURE AND LEGAL NATURE OF INSTITUTIONAL ARRANGEMENTS OF NON - TERRITORIAL CULTURAL AUTONOMY[2]

Abstract

In this work, the author analyses the solutions for the principles of formation, the organizational structure and the legal nature of institutional arrangements for non-territorial cultural autonomy in comparative law. The conclusion is that the organizational structure and the legal nature of the institutional arrangements of non-territorial cultural autonomy are different in comparative law. The complex organizational structure of such arrangements and their existence at different levels of political and territorial organization, which prevails in comparative law, problematizes the ,,non-territorial'' character of such autonomy and deviates from the theoretical model according to which non-territorial cultural autonomy carries out its authority over certain issues within the entire territory of the state, posing a risk that from the process of forming of bodies, through which such autonomy is realized, especially in the case of dispersed minorities, a certain number of their members could be excluded. The explicit definition of the legal nature of such arrangements is rare in the comparative law, but in most countries where such arrangements exist, the status of legal entities of public law is recognized at least indirectly or in constitutional court jurisprudence.

Keywords: *non-territorial cultural autonomy, principles, organizational structure, legal nature, comparative law.*

1. The meaning of non-territorial cultural autonomy

In general, the meaning of autonomy is derived from the Greek words „*autos*", with the meaning autonomous (self), on its own and „*nomos*", with the meaning of the law, the norm. Hence it would follow that the

[1] Research Fellow, Institute of Comparative law, Belgrade, e-mail: *v.djuric@iup.rs*.

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term „*autonomy*" can be translated as its own legislation, that is, its own regulation of norms, self-regulation. A closer definition of autonomy in the legal theory suggests that autonomy is a form of organization in which certain *territories or social groups* (underlines V.Đ.) have a special status and autonomous rights due to their peculiarities. A set of these autonomous rights means for their realization and a special organization constitute the autonomous status of those territories and social groups within a state, which guarantees such status.[3] Therefore, as this is correctly noticed in theory, most authors make a distinction between personal, administrative, functional, cultural and territorial forms of autonomy.[4] However, the meaning of these terms is neither identical nor uniform.

In constitutional and administrative law, the use of the term „territorial autonomy", or „political-territorial autonomy", is much more frequent and somewhat clearer. It implies the right of territorial units to make their own laws or the form of internal organization of a state or federal unit in a federal state through their bodies within the constitutional and legal order of the state. It is characterized by a relatively high level of autonomy of a particular territory and population of that territory, which is expressed in the sphere of legislation and execution, but not in the judiciary.[5] On the other hand, a somewhat broader definition of political autonomy of territorial units is given in the political literature. Thus, for example, it is stated that territorial political autonomy is an arrangement whose aim is to allocate resources to the group that differs from the majority of the population in the country, but which makes up the majority in a certain region. These resources should help the group express its different identity.[6]

If we take into account the above stated, and at least in the legal science relatively clearly defined concept of territorial autonomy, then we could conclude, according to approach per negationem, that „non-territorial autonomy", as a separate form of autonomy, is reduced to all forms which are not territorially based, that is, they do not have a territorial basis and do not refer to certain territories.[7] However, it is important to

[3] D.Mitrović, „Autonomija kao pojam i oblik, O smislu, vrstama i domašajima autonomije", *Anali Pravnog fakulteta u Beogradu*, vol. 51/3-4, 2003 417.

[4] M. Ackrén, *Conditions for Different Autonomy Regimes in the World*, Akademi University Press, Åbo 2009, 16.

[5] P. Nikolić, *Ustavno pravo*, Savremena administracija, Beograd 1994, 426.

[6] R. Lapidoth, *Autonomy. Flexible Solutions to Ethnic Conflicts*, United States Institute of Peace Press, Washington, D.C.: 1996, ch. 3.

[7] In theory, for example, it is stated that non-territorial jurisdiction exists when independent public authority is exercised in respect of certain individuals throughout the country, regardless of the fact that they inhabit a territory where other persons are subordinate to a similar authority with territorial jurisdiction - see A. Légaré, M. Suksi, „Rethinking the Forms of Autonomy at the Dawn of the 21st Century", *International Journal on Minority and Group Rights*, 15 (2008), 144.

point out that territorial and non-territorial autonomous arrangements do not exclude each other and that they can be simultaneously applied to a particular territorial unit or the entire state.

In the broadest sense, non-territorial autonomy is a generic term that refers to different practices and theories of empowerment and self-determination of minority communities that do not include exclusive control over a particular territory, but rather require the representation of the cultural segment of the population that inhabits that territory.[8] Since it can be seen as a generic term that refers to different practices and theories, non-territorial autonomy can encompass and/or be closely related to other terms from a wide spectrum of terms that relate to autonomy.

It is primarily about the terms of personal and cultural autonomy. In theory, it is specified that these are very closely related terms that refer to minority rights, or the rights of indigenous people.[9] The emergence of the terms „cultural" and „personal" autonomy relate to the works of the Austro-Marxists who considered them as a complex institutional arrangement in which ethnic groups („nations") would be organized as corporate self-governing entities based on individual membership, rather than territorial principle or place of residence.[10] In domestic theory, personal autonomy refers to the autonomy of communities that are not territorial, but personally based, respectively, it refers to certain national, religious, professional, class and similar social groups. Cultural autonomy refers to the rights of nations or ethnic groups as such, regardless of the territory that they inhabit, to develop their culture through their cultural institutions and the freedom to use their language.[11]

However, recently, in theory, the terms personal and cultural autonomy started to separate more distinctively. *Personal autonomy* implies individual freedom in exercising and dealing with personal identity[12] interests. In a similar context, it is emphasized that personal autonomy primarily refers to the use of the right of association in a horizontal dimension, between persons belonging to a minority group, to perform various cultural and other activities that the minority considers important.[13] A somewhat different approach, following the

[8] E. Nimni, „The Conceptual Challenge of Non-Territorial Autonomy", in: *The Challenge of Non-Territorial Autonomy, Theory and Practice*, (eds. E. Nimni, A. Osipov, D. J. Smith) 2013, 1.
[9] M. Ackrén, 16.
[10] K. Renner, „State and Nation", in: *National-Cultural Autonomy and its Contemporary Critics*, (ed. E. Nimni), 2005, 15-47.
[11] R. Marković, *Ustavno pravo I političke institucije* , Beograd 1995, 538.
[12] G. Shopflin, *Nations, Identity, Power*, 2000, 283, 284.
[13] M. Suksi, „Functional Autonomy: The Case of Finland with Some Notes on the Basic of International Human Rights Law and Comparisons with Other Cases", *International Journal on Minority and Group Rights*, 15 (2008), 196, 197.

Austro-Marxists, the term *personal autonomy* implies the legal link of the individual with certain autonomous institutions based on individual characteristics different from the place of residence.[14]

Cultural autonomy is by its nature based on the community, that is, collectivity, and it differs from personal autonomy by its purpose and goal, which is the reason why it expands the rights of a certain cultural, religious or linguistic groups. This form of non-territorial autonomy is inherent in regulatory powers so that it implies the right of self-regulation of a culturally determined group in terms of issues that affect the maintenance and reproduction of their culture.[15] In the regime of cultural autonomy, the state chooses not to impose its power on a minority group concerning a particular set of questions.[16] Such autonomy is non-territorial regarding exercising its powers in respect of certain issues on the territory of the whole state.[17] Cultural autonomy implies, according to some authors, that a cultural or ethnic group, which is empowered, must be organized as a vertically integrated corporation based on the individual membership with the elected management body that carries out certain public functions and authorities. It refers to ethnocultural self-management institutions which are not part of territorially determined public authorities and which regularly possess certain material or authoritative public resources.[18] Bringing the non-territorial autonomy in relation to certain institutions is of crucial importance for defining the concept of non-territorial autonomy by some authors. In this sense, it is concluded that the difference between personal (cultural) autonomy and minority rights is mainly institutional; without self-regulating institutions, personal (cultural) autonomy does not exist.[19] In theory, it is pointed out that the use of pure private law forms for the implementation of the aim embodied in the delegation of public powers, authority and tasks to an entity that presents itself as an autonomy arrangement for a minority is probably not possible.[20]

In order to examine comprehensively the legal position and the character of institutions of non-territorial cultural autonomy, first, it is

[14] E. Nimni, Introduction: National Cultural Autonomy Revisited, in *National-Cultural Autonomy and its Contemporary Critics*, (ed. E. Nimni), 2005, 8.
[15] M. Suksi (2008b), 196.
[16] M. Tkacik, 375.
[17] *Ibid*.
[18] A. Osipov, „Non-Territorial Autonomy and International Law", *International Community Law Review*, 13 (2011), 396.
[19] T. H. Malloy, „Introduction", in: *Managing Diversity Through Non-Territorial Autonomy: Assesing, Advantages, Deficiencies and Risks* (eds. T. H. Malloy, A. Osipov, B. Vizi), 2015, 5, 7.
[20] M. Suksi, „Non-Territorial Autonomy, The Meaning of '(Non)-Territoriality"', in: *Minority Accomodation Through Territorial and Non-Territorial Autonomy* (eds. T. Malloy, F. Palermo), 2015, 86.

necessary to determine how the principles and organizational structure are regulated in the comparative law, as well as how the legal nature of the institutions that make such autonomy is regulated. To be more precise, does the institutionalization of such autonomy indeed have non-territorial and public law character in all? This issue will be examined in the examples of the countries where non-territorial cultural autonomy is most developed - Hungary, Finland, the Russian Federation, Slovenia, Croatia and Estonia.

2. Principles and organizational structure

Legislation regulating non-territorial arrangements of minority self-government, that is autonomy, most often does not explicitly regulate the principles which such autonomy and organizational structures of institutions are based on and through which this autonomy is exercised. The legislation of the Russian Federation is an exception within the comparative law. According to the Article 2 of the Law on National Cultural Autonomy, the national-cultural autonomy in the Russian Federation is based on the principles of the freely expressed will of the citizens to belong to a certain ethnic community, their self-organization and self-government, the diversity of forms of internal organization of national-cultural autonomy, public initiatives with government support, respect for language, culture, tradition and customs of citizens belonging to different ethnic communities and legality. With some exceptions regarding the obligation to form a body through which non-territorial cultural autonomy is realized and the possibility for minority members to participate in the formation of such bodies, one can represent the viewpoint that minority non-territorial autonomy in other countries are based on similar principles, although these principles are not explicitly specified in the relevant legislation.

It is completely different regarding the organizational structure of the bodies through which non-territorial cultural autonomy is realized. This issue is clearly regulated in all analysed legislation. There are different solutions concerning the organizational structure of such bodies in comparative law.

In Finland, the Sami Parliament itself is a central organizational structure through which a non-territorial self-government is exercised in that country. This body is formed at the entire state level, which means that it represents the people of Sami and that it exercises its powers at the state level, which for understandable reasons, especially arising from the fact that the Sami people inhabit certain areas, has their own territorial dimension. Namely, the Law on the Sami Parliament prescribes

in the Article 38 that the candidates who received the highest number of votes, that is, the majority of votes, will be elected for the members of the Parliament, but under one corrective condition - that there are at least three candidates from each municipality in Sami homeland. If there are no such candidates from any of these municipalities, the three candidates with the largest number of votes from such a municipality will become the members of the Sami Parliament. In fact, this means that at least twelve members of the Parliament come from the municipalities in Sami homeland, while the other nine members may come from other parts of Finland, depending on the support they get, but in practice, this is rarely the case.[21] If such a solution is considered in the context of the fact that more than 60% of the Sami population lives outside of their homeland, it can be concluded that prescribing a corrective condition for determining election results, to some extent, was done at the expense of democratic legitimacy in order to promote the interests and connection with homeland. In fact, by such a solution, i.e. some kind of „key", it is ensured that, regardless of all circumstances, all parts of the Sami homeland are represented at least in the prescribed minimum extent.[22] In all the other countries, which are chosen for a comparative presentation, the organizational structure of the bodies, through which non-territorial autonomy is exercised, is not centralized. It is complex and, to a certain extent, it corresponds with the administrative-territorial organization of the state.

In Hungary, the Constitution in Article XIX paragraph 2 clearly stipulates that nationalities have the right to establish their own self-government *at the local and national level.* Act CLXXIX/2011 on the Rights of Nationalities (Minorities) in Article 50, paragraph 1 specifies that local nationality self-governments may be set up in localities, towns and metropolitan districts, and regional nationality self-governments in the capital and in the counties (but in the Act, they are under the common term „local self-government"). All self-governments, both local and state, are set up in the same way – by elections (see further text). In the previous Act from 1993, which for the first time established the concept of minority non-territorial self-governments, it was envisaged that self-government on the state and on the local level may be elected by minority electors, which consisted of municipal self-government councillors, as well as minority MPs in the Hungarian Parliament. It also envisaged that state self-government had certain authorities over local minority self-governments. According to the current Act, all minority governments, no

[21] M. Suksi (2015), 109.

[22] B. Krivokapić, „Etničke manjine u Finskoj i njihov pravni položaj", *Uvod u pravo Finske* (ed. B. Krivokapić), Beograd 2005, 82.

matter whether local or state, have the same legal status. They are set up in the same way and according to the provisions of Article 76, paragraphs 4 and 5, there is no hierarchical relationship between them. Therefore, the relations between local and national minority self-governments are based and realized within their competencies, obligations and responsibilities prescribed by the Constitution and the Act. Act CLXXIX on the Rights of Nationalities (Minorities) has also established a condition for the setting up of local minority self-governments. According to Article 56, paragraphs 1 and 2, elections for local nationality (minority) self-government shall be called if there are at least thirty members of the nationality (minority) on the site according to the results of the census regarding the nationality affiliation, or ten members of the minority in the case of regional self-government. Formation of local minority self-governments is not a condition for the formation of national minority self-government so that all groups that have the status of a national minority can constitute their self-government at the state level. Referring to the results of the population census is interpreted in theoretical works as an obvious effort of the legislator to avoid traps of abuse of the voting and voting rights, but such a solution, on the other hand, has raised a number of questions. Namely, during the 2011 population census, the declaration of nationality was optional and at the time of the census, there was no information that the results shall be used for the purposes of minority self-government elections. In practice, there were examples of significant differences between the results of the census and the factual situation. This was both in terms of population census recording a large number of members of a particular minority, disputed by minority self-governments, as well as in terms of the existence of settlements in which members of national minorities traditionally live, where a fewer number of members was recorded than expected. Therefore, on the recommendation of the Venice Commission, the Ombudsman proposed certain modifications in the legislation to ensure that in the event of a discrepancy between the population census and the factual situation, the legislator may establish a list of „historic settlements" in which minority rights would be directly guaranteed, but this proposal was not accepted.[23]

The complex organizational structure of non-territorial minority autonomous arrangements exists in Slovenia and the Republic of Croatia, but with somewhat different characteristics compared to the Hungarian model. Similar like in Hungary, members of national minorities in the Republic of Croatia can choose national minorities councils within local

[23] B. Vizi, „Minority Self-Governments in Hungary: a Special Model of NTA?", in: *Managing Diversity Through Non-Territorial Autonomy: Assessing, Advantages, Deficiencies and Risks* (eds. T. Malloy, A. Osipov, B. Vizi), 2015, 50.

self-government units in which a certain number of minority members live. According to Article 24, paragraph 1 of the Constitutional Law on the Rights of National Minorities, members of each national minority may choose national minority council in the self-government units where members of a national minority have at least 1.5% share in the total population, or where more than 200 members of a national minority are resident, or in the area of a regional self-government unit where more than 500 members of a national minority are resident. If the number of members of the national minority is less than above stated, with at least 100 members of the national minority living in the area of the self-government unit, then the representative of the national minority shall be elected for the territory of such a local self-government unit. The members of the national minorities' councils and national minorities' representatives are elected through direct elections. It is important to point out that Croatian legislation does not recognize the organizational form of national minorities' councils at the state level. Instead, the Constitutional Law on the Rights of National Minorities envisages, in Article 33, paragraph 1, that national minorities' councils, formed in different local self-government units, as well as in different units of regional self-government, can, for the sake of coordination or improving common interests, form the coordination of national minorities' councils. According to paragraph 4 of the same article of the Constitutional Act, the coordination of national minorities' councils for the territory of the Republic of Croatia is considered to have been justified when more than half of the l national minorities' councils of the regional self-government have entered into the agreement on the establishment of such coordination. Hence, the councils in the self-government units and the coordination of the state level councils are not established in the same way. There is no hierarchical relationship between the state-level coordination and councils in self-government units. Moreover, the Constitutional Law does not contain provisions on the manner of concluding, legal nature and eventual settlement of disputes in connection with the agreement on the establishment of the coordination of national minority councils for the territory of the Republic of Croatia.

In the Republic of Slovenia, according to Article 6 of the Law on Self-governing Ethnic Communities, members of Italian and Hungarian ethnic communities, *autochthonously settled in ethnically mixed territories* (underlined by V.Đ.), found municipal self-governing ethnic communities. The concept of „ethnically mixed territories" is one of the basic elements of the autonomous minority arrangement in Slovenia, which, unlike the Hungarian and Croatian models, is not numerically determined, but is regulated by individual statutes of local self-government units that designate

such territories as those with the settlements where members of the Italian and Hungarian minorities autochthonously live. Such concept is one of the problems of the autonomous minority arrangement in Slovenia since the territorial framework for minority protection is not always in concordance with the lifestyle of individuals migrating due to work or education.[24] The largest body of such municipal self-government is the council of a municipal ethnic community with self-government, which is elected by the ethnic community members through direct elections. According to Article 9 of the Law, municipal self-governing ethnic communities integrate into Italian or Hungarian self-governing ethnic communities in the Republic of Slovenia. Its highest body is the council. In practice, such integration is based on the statutory regulation issued by municipality councils, as well as by the council at the national level, by which is provided the number of members of a council established at the state level. The law does not regulate the issue of the relationship between the state level council and councils of self-governing municipal communities, but we should represent the standpoint that this relation does not have a hierarchical character, but it is defined by their statutes and by their competences, obligations and responsibilities prescribed by the Law.

The organizational structure of ethnocultural autonomy in the Russian Federation depends on the location of Russian population belonging to certain ethnic communities, as well as from the statutory solutions of the national-cultural autonomy itself. The fact that the establishment and functioning of national cultural autonomy are strictly related to the administrative and territorial division of the Russian Federation has led some authors to conclude that national cultural autonomy can hardly be regarded as „extraterritorial" in that sense.[25] The Law on National Cultural Autonomy in Article 5 envisages the possibility for national cultural autonomy to be local, regional and federal. The law does not prescribe any numerical criteria for determining in which local units it is possible to establish local cultural autonomy. Local national-cultural autonomy of Russian citizens, who are regarded as a certain ethnic community, may form regional national-cultural autonomy, and two or more regional national and cultural autonomies created in subjects of the Russian Federation may establish interregional organs to coordinate

[24] M. Komac, P. Roter, „The Autonomy Arrangement in Slovenia, An Established Institutional Framework Dependent on Implementation of Minority Protection", in: *Managing Diversity Through Non-Territorial Autonomy: Assesing, Advantages, Deficiencies and Risks* (eds. T. Malloy, A. Osipov, B. Vizi), 2015, 99.

[25] A. Osipov, „Autonomy as Symbolic Production: The case of contemporary Russia", in: *Minority Accommodation Through Territorial and Non-territorial Autonomy* (eds. T. Malloy, F. Palermo), 2015, 186.

their activities, but such bodies have no interregional national-cultural autonomy nature. At least half of the registered regional national-cultural autonomy forms federal national-cultural autonomy. There is a fundamental difference in the way of forming local cultural autonomy on the one hand and regional and federal cultural autonomy on the other hand. The citizens choose local cultural autonomy, while regional and federal cultural autonomy is chosen indirectly.

The legislation of Estonia envisages a very special model of the organizational structure of the bodies through which non-territorial cultural autonomy is realized. Namely, the cultural council, the main organization of cultural autonomy of the national minority at the state level, elected in direct elections, can form city or district cultural councils or establish local cultural representatives. The procedure for the forming of the city and/or district cultural councils, as well as their competencies, is regulated, according to Article 22 of the Law on Cultural Autonomy of National Minorities, by the statute of cultural autonomy adopted by the council elected at the state level. Such solution reminds some authors of the autonomous arrangements existing in federal or decentralized states in which the competences of constituent units are legally defined and protected.[26]

3. Legal Nature

A special issue within the analysis of institutional arrangements of non-territorial cultural autonomy is the definition of self-governing bodies through which non-territorial cultural autonomy is realized, that is, the legal subjectivity and legal nature of such institutions.

In Hungary, Act CLXXIX on the Rights of Nationalities (Minorities) from 2011, for whose adoption, according to the Constitution, two-thirds majority of the present members is required, defines nationality self-government in Article 2, paragraph 2 as *an organization established on the basis of this Act by way of democratic elections that operates as a legal entity, in the form of a body, fulfils the nationality public service duties as defined by law and is established for the enforcement of the rights of nationality communities, the representation and protection of the interests of nationalities and the independent administration of the nationality public affairs falling into its scope of responsibilities and competence at a local, regional or national level;* which is a legal person, according to Article 76 paragraph 3 of the Act. Nationality cultural autonomy is under paragraph 3 Article 2 of the Act, and in accordance with the constitutional formulation of the right on self-government, defined as

[26] B. de Villers, „Protecting Minorities on a Non-Territorial Basis – Recent International Developments“, *Beijing Law Review* 3/2012, 176.

a collective nationality right that is embodied in the independence of the totality of the institutions and nationality self-organizations under this Act through the operation thereof by nationality communities by way of self-governance. Based on the given provisions of the Constitution and the Act, it can be concluded that the law distinguishes cultural autonomy from nationality self-government. The cultural autonomy embodies a great variety of collective rights, including the establishment of nationality self-government. The self-government, as an elected body, is rather the materialization of cultural autonomy, a representative forum, and an administrative tool to realize cultural autonomy.[27] Also, it has the nature of the body, in fact, public law status.

Estonian legislation does not determine explicitly legal nature of cultural councils, and in theoretical comments, it is rightly observed that the Law in force is nothing more than a „broad framework".[28] That is, the status of these bodies is not clear and, more importantly, they do not even have legal subjectivity[29] or public law status which obviously limits the possibilities for minority cultural development through NTA structures.[30] Minority self-governments in Estonia are not legal persons, and at best, a self-government established under the law may function as a „coordinating council of its own minority".[31] Although in theoretical comments of the Estonian legislation the opinion that cultural councils do not have the status of a legal person prevails, there are opinions based on their right to establish taxes for the members of the minority and that they are the „public law authorities", more precisely, a „public law corporations with powers similar to local self-government"[32]. In 2012 the Estonian Ministry of Culture finally represented the view that cultural autonomy is a form of self-government that may be realized by a legal person and the latter may be a non-profit association or a foundation. In

[27] B. Vizi, 46.

[28] D. J. Smith, „Challenges of Non-Territorial Autonomy in Contemporary Central and Eastern Europe", in: *The Challenge of Non-Territorial Autonomy, Theory and Practice* (eds. E. Nimni, A. Osipov, D. J. Smith), 2013, 125.

[29] V. Poleshcuhuk, „Changes in the Concept of National Cultural Autonomy in Estonia", in: *The Challenge of Non-Territorial Autonomy, Theory and Practice* (eds. E. Nimni, A. Osipov, D. J. Smith), 2013, 156.

[30] D. J. Smith, „NTA as a Political Strategy in Central and Eastern Europe", in: *Minority Accomodation Through Territorial and Non-Territorial Autonomy* (eds. T. Malloy, F. Palermo), 2015, 171.

[31] A. Osipov, „Non-Territorial Autonomy in the Post-Soviet Space", in: *Managing Diversity Through Non-Territorial Autonomy: Assesing, Advantages, Deficiencies and Risks* (eds. T. Malloy, A. Osipov, B. Vizi), 2015, 217.

[32] C. Decker, "Contemporary Forms of Cultural Autonomy in Eastern Europe: Recurrent Problems and Prospects for Improwing the Functioning of Elected Bodies of Cultural Autonomy", in: *The Participation of Minorities in Public Life*, 2008, 108.

other words, cultural autonomy is an additional form of organization of people who have already self-organized voluntarily.[33]

In Finland, Article 1, paragraph 1 of the Act on Sami Parliament, it is stated that Sami people shall, among themselves, elect the Parliament to carry out the tasks related to cultural autonomy. Therefore, it follows from the provision of the Act that Sami Parliament is a body that carries out tasks related to the cultural autonomy that the people enjoy. The Act does not explicitly determine the legal nature of that body, but it follows from a number of provisions of that Act that it is a special legal subjectivity with certain characteristics of state bodies, that is, of public law legal persons.

The Slovenian Law on Ethnic Communities, which have self-government, does not explicitly determine the legal nature of the council of the ethnic community with self-government. However, according to Article 2 of the Law, which explicitly stipulates that ethnic communities with self-government are, as such, public legal persons, or legal persons of public law, it can be said that the community with self-government is, in fact, an institution. That is, as the Law explicitly stipulates, it is the body, through which a legal person of public law, performs its functions. Theoretical comments clearly emphasize that bodies of communities, having public-law status, perform public-law functions, unlike other organizations that gather community members for the purpose of social activities, but which act in accordance with civil law.[34]

The Constitutional Law on the Rights of National Minorities in Croatia in Article 25, paragraph 1 prescribes that a national minority council is a non-profit legal person in a territorial self-government unit. There was no provision in the original text in the Act from 2002 that explicitly determined the legal subjectivity and legal nature of the coordination of a national minority council, which has been created for the whole country. Amendments to the Act from 2010 stipulate that the coordination of a larger national minority for the territory of the Republic of Croatia is a „non-profit legal entity". The Constitutional Court of the Republic of Croatia also dealt with the legal nature of the Council and the coordination of the national minorities councils. *In the decision in which it pointed out that the Constitutional Law on the Rights of National Minorities does not have the character of a constitutional, but organic law, the Constitutional Court has represented the view that the law „regulates the procedure of election, the way of work and jurisdiction of, among others, the national minorities' councils as special political institutions*

[33] V. Poleshcuhuk, "Russian National Cultural Autonomy in Estonia", in: *Managing Diversity Through Non-Territorial Autonomy: Assessing, Advantages, Deficiencies and Risks* (ed. T. Malloy, A. Osipov, B. Vizi), 2015, 241.
[34] B. de Villers, 178.

(underlines V.Đ.) in order to ensure the participation of national minorities in the public and political life of the Republic of Croatia".[35] In a subsequent decision, the Constitutional Court of the Republic of Croatia considered the national minorities councils as „a particular institutional form through which members of national minorities in local and regional self-government units could have a direct influence on resolving issues within the authority of the local representative body and local executive and administrative bodies, which relate to them or affect their position or rights ... ". Therefore, „in accordance with the above, national minorities councils have the status of legal entities of public law".[36]

The Law on National Cultural Autonomy (N 74-FZ) defined the term cultural autonomy in Russian Federation. *According to the Article 1 of this Law, cultural autonomy is a form of national and cultural self-determination through the public organization of citizens (underlines V. Đ.) of the Russian Federation belonging to certain ethnic communities who consider themselves to be in the status of a national minority in the relevant territory on the basis of voluntary self-organizing with the goal to solve issues related to preserving their identity, developing language, education and national culture, strengthening the unity of the Russian nation, harmonizing inter-ethnic relations, promoting inter-religious dialogue, and implementing activities aimed at social and cultural adaptations and integration of migrants.* In short, according to law, cultural autonomy is a non-territorial form of self-determination on cultural issues for ethnic groups[37] in the form of a public association. The *new State Strategy of state policy on nationalities*, which was approved by the President's decree in 2012, emphasizes that national cultural autonomy is „*a civil society institution* intended to enjoy ethnocultural rights regardless of the place of residence of the citizens".[38] Although, as pointed out, national-cultural autonomy in the Russian Federation is legally determined as a public organization, in fact, a public association, it is somewhat different from ordinary (public) associations. First of all, only ethnic communities that have the status of a national minority in a particular territory can create it. Another difference between national cultural autonomy and other public associations is the definition of cultural autonomy according to which it represents a public association of *citizens* of the Russian Federation, although the Constitution does not know the restriction of citizenship

[35] U-I-1029/2007, *Narodne novine,* No. 47/2010.
[36] U-I-3553/2011.
[37] N. Torode, "National Cultural Autonomy in Russian Federation: Implementation and Impact", *International Journal on Minority and Group Rights*, 15/2008, 180.
[38] According to A. Osipov (2015), 185.

for membership or participation in public associations.[39] In other aspects of status, non-territorial cultural autonomy in the Russian Federation is identical to ordinary public associations.

4. Conclusion

The analysis of the presented solutions suggests that the organizational structure and the legal nature of the institutional arrangements of non-territorial cultural autonomy are different in the comparative law. The complex organizational structure of the bodies through which the non-territorial cultural autonomy is realized and the existence of its institutional arrangements in areas smaller than the state is not fully in accordance with the theoretical model according to which non-territorial cultural autonomy exercises its authority over certain issues within the territory of the state and problematizes its „non-territorial" nature. The existence of various organizational forms and institutional arrangements in territories smaller than the state imposes the issue of the adequacy of such solutions because most minority rights and policies regarding national minorities are implemented, protected and formulated at the state level. Also, the correspondence of the organizational structure with the administrative and territorial organization of the state opens the issues of determining the administrative units in which such bodies can be formed, the uniformity of the way in which they are formed as well as the legal regulation of the relations between such bodies formed at different levels of organization. Establishing of non-centralized organizational structures through which non-territorial autonomy is realized at different levels of administrative and territorial organization on the one hand can reflect an approach that recognizes the fact that the connection between territory and national identity is very strong and that it is of a central importance for self-understanding, history and aspirations of national groups, which is clearly recognized in theory.[40] However, on the other hand, such approach, by means of norms that contain numerical criteria on minorities' members regarding determination at which levels of administrative and territorial organization it is possible to educate minority non-territorial autonomous arrangements, risks to exclude a certain number of minorities' members from the process of forming bodies through which non-territorial autonomy is realized, in the case of dispersed minorities, which problematizes the possibility that such bodies represent minorities as collectivities.

[39] A. Osipov, "National Cultural Autonomy in Russia: A Case of Symbolic Law", *Review of Central and East European Law*, 35/2010, 39.

[40] W. Kimlicka, „National Cultural Autonomy and International Minority Rights Norms", *Ethnopolitics 6 no3/2007,388.*

Comparative solutions regarding the legal nature of institutional arrangements for non-territorial cultural autonomy point to the conclusion that legislation rarely tends to explicitly define their legal nature. On the other hand, it is clear that in most of the countries where such institutional arrangements exist, even in an indirect way through the establishment of their powers, or in constitutional jurisprudence, the status of legal entities of public law is recognized. The solutions according to which such institutional forms do not have a public legal character deviate from the theoretical model according to which the use of purely private legal forms for the implementation of the goal embodied in the delegation of public powers, authorities and tasks to an entity which is an autonomous arrangement for a minority is not possible.

Dr Vladimir Đurić
Naučni saradnik, Institut za uporedno pravo u Beogradu

NAČELA, ORGANIZACIONA STRUKTURA I PRAVNA PRIRODA INSTITUCIONALNIH ARANŽMANA NETERITORIJALNE KULTURNE AUTONOMIJE

Rezime

U radu autor analizira rešenja o načelima formiranja, organizacionoj strukturi i pravnoj prirodi institucionalnih aranžmana neteritorijalne kulturne autonomije u uporednom pravu. Zaključak je da su organizaciona struktura i pravna priroda institucionalnih aranžmana neteritorijalne kulturne autonomije u uporednom pravu različiti. Složena organizaciona struktura takvih aranžmana i njihovo postojanje na različitim nivoima političko-teritorijalnog organizovanja koje u uporednom pravu preovlađuje problematizuje „neteritorijalni" karakter takve autonomije i odstupa od teorijskog modela prema kome neteritorijalna kulturna autonomija svoja ovlašćenja u pogledu određenih pitanja vrši na čitavoj teritoriji države, rizikujući da iz procesa formiranja tela posredstvom kojih se takva autonomija ostvaruje, naročito u slučaju disperznih manjina, isključi određeni broj njihovih pripadnika. Izričito definisanje pravne prirode takvih aranžmana ređa je pojava u uporednom zakonodavstvu, ali je u većini država u kojima takvi aranžmani postoje njima, makar i

na posredan način ili u ustavnosudskoj praksi, priznat status pravnih lica javnog prava.

Ključne reči: neteritorijalna kulturna autonomija, načela, organizaciona struktura, pravna priroda, uporedno pravo.

Prof. Gordana Gasmi, PhD[1]
Jovan Protić, M.A.[2]

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EUROPEAN SOCIAL MODEL AND NON-STANDARD FORMS OF EMPLOYMENT

"It took us some years to realize that the new universal market did not by itself deliver growth and happiness for all. Hence the whole debate on first trade and labour standards and then the social dimensions of globalization. This strengthened the drive for a more coherent approach to promoting employment, rights, social protection and social dialogue: the Decent Work approach. It also strengthened the call for globalization that is fair, as outlined by the World Commission on the Social Dimensions of Globalization (2004)."

Kari Tapiola, ex-Executive Director of the International Labour Organization

Abstract

The study is focused on the analysis of the open question of the European Social Model in the light of new forms of employment. The role of the social policy in the Member States of the European Union (EU) has been modified far from the concept of social justice and social security. Therefore, the welfare state has disappeared in the EU.

Prevalent ideas of the humane economy have been neglected in the contemporary momentum of the EU. When it was celebrated only economic criteria, the current development of society could be very fast, but at the same time extremely destructive, manifested in the inappropriate expansion of large-scale social problems, especially in long-term unemployment. In this context, it is important to consider non-standard forms of employment.

[1] Institute of Comparative Law, Belgrade, Senior Research Fellow, mail: *gordana.gasmi@gmail.com.*
[2] International Labour Organization, ILO National Coordinator for Serbia, mail: *protic.jovan@minrzs.gov.rs.*

This is even more essential, bearing in mind the huge existing problem of youth unemployment, especially highly educated.

Keywords: *European Union, European Social Model, employment.*

1. Introduction

Social models and reforms seem to be developed under political and economic pressure rather than as an integrated part of a coherent economic policy. Thus, the European Social Model was not an integral part of the development of the European Communities before the launching of the internal market and a significant process of enlargement in mid-90-ties. The introduction of the term "European Social Model" into a political vocabulary is bound to the name of former President of the EU Commission Mr Jacques Delors, a great advocate of the deepening of integration within the European Union (EU) towards the Euro-federalism and the father of the single currency.

In mid-90-ties, Mr Delors, with the term "European social model" marked the distinction between economic and the social system of the EU and the United States of America. European social model means everything in common and general in the management of social systems of European countries, EU Member States[3].

The economic challenge of the European social model is evident primarily in the fact that the financing of the system depends on the prosperity and economic growth, but in conditions of current slow economic progress and changes in the labour market. Consequently, bearing in mind almost ten-years long economic and financial intra-regional crisis within Eurozone (since 2008) and at the same time, the crisis at the global level, of vital importance is to analyze European social model in light of new forms of employment. In the countries most affected by the economic crisis, the population faces significant restrictions on the number of employees, especially in public services, wage cuts, pensions, trade union protests and requirements related to social rights.

Mass unemployment is rising, and in Greece and Spain youth unemployment is currently higher than 50 percent. High level of unemployment caused the weak political power of trade unions and a decrease of their negotiating influence in the protection of basic social rights (freedom of association, collective bargaining, non-discrimination, equal remuneration, the abolition of forced labour and the minimum age

[3] G. Gasmi, O. Zorić, "Evropski socijalni model između prava i politike – da li EU ima socijalno prijateljsko lice", in: *Religija politika pravo* (eds. J. Ćirić, M. Jevtić, V. Džomić), Beograd-Budva 2015, 115-116.

to employment which is the original child labour standard). Detailed restructuring of the industry, privatization of public services and increased use of seasonal workers have contributed to the loss of part of the influence of trade union organizations and to the sharp rise of unemployment in the EU. There were close to 23 million unemployed people of working age in the EU in 2015 but around 50 million people in a broader category of labour slack, encompassing inactive people wishing to work and underemployed, involuntary part-timers as well as the unemployed[4].

2. Concept of European Social Model

European social model is based on the recognition that social justice can contribute to economic efficiency and progress. The Commission's 1994 White Paper on social policy (COM (94)333)[5] described a 'European social model' in terms of values that include democracy and individual rights, free collective bargaining, the market economy, equal opportunities for all, and social protection and solidarity. The model is based on the conviction that economic progress and social progress are inseparable: "Competitiveness and solidarity have both been taken into account in building a successful Europe for the future."

In its strategy 'Europe 2020 year for smart, sustainable and inclusive growth'[6], adopted in 2010, the European Union reiterated its commitment to the European social model by stating that it seeks to create more and better jobs throughout the EU. To reach these objectives, the European Employment Strategy encourages measures to meet three headline targets by 2020:

- 75% of people aged 20-64 in work;
- school drop-out rates below 10% at least 40% of 30-34–year-olds completing third level education;
- at least 20 million fewer people in or at risk of poverty and social exclusion.

The actions outlined in the flagship initiative "An Agenda for new skills and jobs" are essential to meet these targets.

The European social model is considered to be unique in its dual focus on economic and social principles. In a Communication on

[4] European Foundation for the Improvement of Living and Working Conditions (Eurofound), "Estimating labour market slack in the European Union", *https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1711en1.pdf*, last visited 18.7.2017.
[5] *http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-social-model*, last visited 18.07.2017.
[6] Eurofound, "Estimating labour market slack in the European Union", *https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1711en1.pdf*.

"Employment and social policies: A framework for investing in quality" (COM (2001) 313), the Commission contrasts the "European social model" of public social spending with the "US model", which relies on private expenditure, highlighting the fact that 40% of the US population lacks access to primary health care, although *per capita* expenditure as a proportion of GDP is higher in the US than in Europe.

The EU Commission also emphasises that it is not only the existence of jobs but also the characteristics of employment that are important to the European social model. The EU's commitment to inclusion is reiterated in the European Platform against Poverty and Social Exclusion, which forms part of the Europe 2020 Strategy, stating that combating social exclusion, promoting social justice and fundamental rights have long been core objectives of the European Union, which is founded on the values of respect for human dignity and solidarity[7].

The notion of social justice contains core idea that all members of a society should have equal benefits and opportunities. In its early days, the term social justice specifically targeted poverty and the need for an equal distribution of resources. Today, the term has acquired a broader and more detailed definition.

The recent study "Globalisation and the reform of the European social models" prepared by André Sapir for the think-tank Bruegel and presented at the ECOFIN Informal Meeting in Manchester on 9 September 2005 argued that there is not one European social model, but rather four – the Nordic, Anglo-Saxon, Mediterranean and the Continental[8]:

- The Nordic model (welfare state, high level of social protection, high level of taxation, extensive intervention in the labour market, mostly in the form of job-seeking incentives);
- The Anglo-Saxon system (more limited collective provision of social protection merely to cushion the impact of events that would lead to poverty);
- The continental model (provision of social assistance through public insurance-based systems; limited role of the market in the provision of social assistance)
- The Mediterranean social welfare system (high legal employment protection; lower levels of unemployment benefits; spending concentrated on pensions)

[7] Eurofound, "European social model", *http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-social-model*, last visited 18.7.2017.
[8] Euractiv, "EU debates European social model", *https://www.euractiv.com/section/social-europe-jobs/news/eu-debates-european-social-model/*, last visited 18.7.2017.

The Sapir study concludes that only the Nordic and the Anglo-Saxon models are sustainable.

European social model is based on the recognition that social justice can contribute to economic efficiency and progress. Legal origin of so-called "Social Europe" can be found in the Rome Treaty establishing European Community (TEC, 1958) that set down basic social objectives:

Promotion of employment, improved living and working conditions…..proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment.

In contemporary conditions, one can easily notice that all of the above mentioned social goals are still relevant. The Charter of Fundamental Rights of the European Union (EU)[9] includes chapters on freedoms, equality and solidarity, articulating rights to fair and just working conditions, social security and social assistance, gender equality, as well as trade union rights, such as collective bargaining and strike action. The EU is well known not only for more than a half of the century of peace but also because of its economic and social progress during previous decades. Although this prosperity, especially economic, but also political ones, are very much endangered in current momentum[10], the central principle of the EU is one of solidarity and cohesion, also proclaimed in the Lisbon Treaty (TFEU, 2009). This assumes that economic growth must serve to encourage overall social welfare, and not take place at the expense of any section of society[11].

Consequently, Article 8 of the TFEU states that the Union, in all its activities "shall aim to eliminate inequalities, and to promote equality, between men and women". Further, it states that the Union, in defining and implementing its policies and activities, "shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health" (Article 9), and that the Union "shall aim to combat discrimination based

[9] The Charter of Fundamental Rights of the European Union (EU) entered into force together with the Lisbon Treaty of the EU, on the 1st December 2009, while it was previously formulated in 2000. More detailed in G. Gasmi, *Quo vadis EU? Relevantni pravni i institucionalni faktori*, Beograd 2016, 68-74.

[10] P. Vimont, "The Strategic interests of the European Union", *Policy Paper, Foundation Robert Schuman, European Issues*, No 404, September 2016, *https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-404-en.pdf*.

[11] For example, Ireland, formerly one of the poorest countries in the EU, has greatly benefited from the EU financial support and became a dynamic economy, even though it failed to pass on this economic advancement to all its citizens. Similar economic growth improvement is now visible in some of the newer EU Member States in Eastern Europe.

on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (Article 10).

The Lisbon Treaty fully recognizes the role of the social dialogue and the social partners in its Article 152, which states that 'The Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy". The TFEU also contains the legal framework for the European social dialogue in Articles 154-155 TFEU. The Treaty's employment title embodies the so-called "open method of coordination" for the European Employment Strategy (Articles 145 to 150 TFEU).

3. Where did disappear welfare state in EU?

The goal of the welfare state is to create social security in accordance with existing ideals of justice and equality through regulatory and shaping measures of public policy in economic and social life. The state of well-being is characterized by social-political instruments, which can be divided into two groups: the first pillar is a social security system, and the second pillar consists of the individual and collective rights of employees.

A prerequisite for the financial sustainability of the welfare state is a well-functioning economy that provides jobs and revenues of the state. In addition to the economic elements, the concept of a constitutive element of the state of well-being is also a concept of social justice[12]. It would be wrong to view the welfare state mainly as a burden and it is undeniable that welfare states encapsulate values that people across the EU cherish.

German Chancellor Angela Merkel warns that the EU accounts for just seven percent of the world's population and a quarter of its gross domestic product (GDP), but as much as half of its welfare spending. Her underlying message is that Europe spends too much on social policies and thus has no choice but to retrench[13]. Austerity measures are the reason for budget cuts, but other threats to the sustainability of the welfare state are more fundamental: an ageing population and adapting to evolving societal expectations.

Intensifying competition from emerging markets has also seen globalization become a threat because the cost of welfare policies has undermined the competitiveness of companies in the EU. Precisely, in

[12] *Culture and Welfare State - Values and Social Policy in Comparative Perspective* (eds. W. van Oorschot, M. Opielka, B. Pfau-Effinger), Edward Elgar Publishing Limited, 2008, 61.

[13] Iain Begg, "Can EU Countries Still Afford Their Welfare States?", 2015, *https://www.chathamhouse.org/expert/comment/can-eu-countries-still-afford-their-welfare-states*, last visited 18.7.2017.

a more competitive environment, due to globalization, the EU has to significantly reduce strong welfare measures of social protection[14] and at the same time to ease regulation for business if it is to compete with emerging markets such as China and India.

The biggest components of welfare spending are poverty relief, health and pensions, whereas unemployment benefits cost relatively less. The sustainability of the EU current welfare models is affected by the ageing of the EU population[15], which is the result of two phenomena: a low birth rate, which results in a falling working population and a longer life expectancy. According to the 'main scenario' of the latest Eurostat population projections, Germany's population has already started to shrink and is expected to fall from 82 million in 2013 to 74 million by 2050. The UK's population, by comparison, will rise from 64 million to 77 million over the same period. This scenario includes substantial net migration into the EU, which already has happened, by the exceptional influx of refugees and migrants in EU countries seen as favoured destinations (Germany, Sweden, and Italy). The refugees and migrants entering the EU put short-term pressures on social security budgets and social housing, but the numbers do need to be put into perspective. Even as many as one million migrants would be just 0.2 percent of the EU population and well under one percent of the number of people in the EU dependent on welfare budgets. In the longer term, migrants tend to move into jobs and become net contributors to the national budgets. Moreover, with many European countries facing a decline in the working population, the arrival of younger dynamic workers is likely to prove helpful[16].

In many EU countries, welfare states are funded in part by taxes on labour. This creates what economists call a 'wedge' between the labour cost and the wage, or put another way, the difference between what the employee receives and what the employer pays. It causes difficulties if competitors from emerging market economies are able to undercut their

[14] Social expenditure *per person* in the EU in 2012 (the most recent year available, using a harmonized definition) was € 7,600, but with a range from € 18,900 in Luxembourg to just € 927 in Bulgaria. The UK figure was € 8,700 (£6,340). Average EU spending *per citizen* is almost the same as in the United States and well below that in Switzerland, after adjusting for price differences. Iain Begg, "Can EU Countries Still Afford Their Welfare States?", 2015, *https://www.chathamhouse.org/expert/comment/can-eu-countries-still-afford-their-welfare-states*, last visited 18.7.2017.

[15] There are also marked differences among the EU countries. Over the past 15 years, the average fertility rate (children per woman) in the EU has been 1.54, ranging from barely over 1.3 in Hungary and Spain, and 1.36 in Germany, to 1.8 in the UK and just under two in Ireland, France and Sweden. *Ibid.*

[16] Without immigration, the EU as a whole would see its population fall by eight per cent up to 2050, instead of a small rise of 3.6 per cent. *Ibid.*

European counterparts. There are plenty of ideas for how to resolve the challenges facing the welfare state. The demographic consequences can be mitigated by restraining high payments, asking people to work longer or finding ways of boosting the economically active population. Bringing young migrants into the labour force could also be part of the solution, which may explain Germany's more accommodating stance towards the refugee crisis since 2015.

However, welfare reform is often proven to be very difficult. It inevitably involves taking away what some people have to give to others and, unsurprisingly, the winners keep quiet while the losers shout loudly. Therefore, an enormous number of young unemployed people have protested in Portugal, Italy, Greece and Spain[17].

According to some authors' estimates, the modern economy cannot be established without social goals[18], because if only the economic criteria were respected, the path of social development would be very fast, but at the same time extremely cruel, manifested in the inappropriate spread of major social problems. Therefore, social reasons must be taken into account and respected, because such trend gives modern economies a human dimension[19].

There is a growing recognition that the EU itself creates a series of obstacles, not only for economic and social development in Europe but also for social reforms.

The first barrier is the democratic deficit[20], which has existed from the very beginning of the EU functioning but has increased in the last few years. An official message from the EU and the governments of the EU Member States, with the support of the European Trade Union Confederation (ETUC) and other parts of European trade union movements, is the opposite. They argue that the 2009 Lisbon Treaty on EU represents an important step towards increasing democracy and that the directly elected European Parliament has the authority of decision making in many areas.

In the opposite direction, however, some Member States have been found (especially Greece), to a greater or lesser extent, under the management of the European Central Bank and the European Commission, with the support of the IMF, face to face with the financial crisis. In addition, the EU Parliament is marginalized in adopting the process of developing new pacts and agreements, such as the Stability

[17] In some EU media, a crushing shortcut for these countries in English was "PIGS - Portugal, Italia, Greece, Spain", alluding to their severe economic problems that jeopardize Eurozone.
[18] D. Kočović, *Socijalna politika*, Fakultet političkih nauka, Beograd 2007, 179.
[19] *Ibid.*
[20] G. Gasmi, *Pravo i osnovi prava Evropske unije*, Beograd 2013, 303-306.

Pact and the like. Finally, the EU Commission has gained new powers to impose economic sanctions on the Member States that do not follow strict (financial and political) criteria for economic stability. This prevents the unimpeded exercise of power by democratically elected parliaments at the national level. This is how the transfer of power is performed to the appointed, i.e., a bureaucratically established EU Commission. All those processes further influence the undemocratic decision-making procedures in the European Union, with the final negative outcome for the welfare state and prosperous social reforms in the EU.

4. Social Policy – does it contribute to optimal employment rate?

In the modern era, there are different conceptions and models of social policy and their scientific classification. In practice, the following applies in particular:

- Neoliberal model,
- Welfare state (social-democratic model),
- Combined models (or pragmatic solutions).

The semantic meaning of social policy is the ability to manage society. Social policy is the activity of the state and other actors focused on:

- Prevention of social risks,
- Assistance, support and inclusion of poor and socially excluded residents,
- Equalization the life chances of citizens,
- Raising the level of general well-being and social security.

The term "social security" was first used by Simon Bolivar in his speech in Angostura and emphasized that "the most perfect system of governance that is capable of achieving the highest benefit, which accomplishes the greatest possible social security and, to the maximum extent, political stability". The prevailing opinion is that social policy should be limited to the issues of social security and management of social services. Social policy is in the function of alleviating social contradictions and preserving social peace in a modern civil society. The optimal employment rate has a crucial role in social peace and stability of each state.

However, current processes in the EU point to a significant shift from this original role of social policy. Namely, the open method of coordination, which was established at the EU Lisbon Summit of

2000, is being applied as part of the Lisbon Agenda for the promotion of sustainable growth and employment in the EU. The closer elements of this concept of harmonization of national economic policies of EU Member States are:

- Determining the economic policy guidelines for the Union,
- Introduction of quantitative and qualitative indicators and standards, tailored to the needs of different Member States and economic sectors,
- Translating EU guidelines into national and regional policies, by setting specific tasks,
- Periodic monitoring, evaluation and review.

The EU Maastricht reforms of '93 year represent the largest institutional jump in social policy in the EU until then. However, this social-political breakthrough was distorted by the rejection of Great Britain[21] to accept the concluded Social Protocol with the Maastricht Treaty on the EU. The powers of the EU institutions have been considerably extended (labour law, social protection and security), the scope of application of decision-making by a qualified majority has been extended, and a quasi-corporatist procedure has been created to involve European social partners.

However, the institutional and legal improvements of the EU social policy could not stop the eruption of the financial crisis within the Union since 2008. Market deregulation, unequal distribution of profits and financial speculation contributed to the detriment of social rights of employees. Therefore, this situation is titled as „casino economy". The advocates of neoliberalism disclaim their responsibilities. While their unbridled speculation and the massive redistribution of wealth from the bottom to the top have triggered the crisis, they state that people "have lived above their financial ability." The myth that is still spreading is that pensions are the real causes of the crisis. In particular, the social elites and dominant media in the EU portray as an example Greece where the residents received economic privileges without any real economic basis. This is used as a propaganda to legitimize a widespread attack on the welfare state. The European Trade Union Institute (ETUI)[22] quickly documented that these accusations were false. For example, labour productivity rose twice as fast in Greece than in Germany from 1999 to 2009. According to OECD statistics, on average Greeks work much more

[21] It was accepted by the then eleven out of a total of twelve Member States, in 1993. Because of the British Government's refusal to accept the Social Protocol, at the last moment, the so-called "Opt-out" method of entry into force of this Protocol was applied.

[22] ETUC, "EU on a 'Collision Course' with Social Europe and the Autonomy of Collective Bargaining," February 4, 2011, *http://etuc.org*, last visited 18.7.2017.

hours per year (2,152) than Norwegians (1,422) or Germans (1,430).

In several EU Baltic countries, in Bulgaria, Greece, Ireland, Portugal, Romania, Spain, Hungary, wages, working conditions and pensions have been seriously weakened. Pensions have been reduced by fifteen to twenty percent in many countries, and wages in the public sector have been reduced from five percent in Spain and over forty percent in the Baltic. In Greece, the number of public sector employees has been reduced by more than twenty percent, and it is even more demanded, while in Spain, only ten of the public sector jobs are filled, one in five in Italy, and every second public sector vacancy in France. In Germany, ten thousand jobs in the public sector have already been shut down[23]. Value Added Tax (VAT) has dramatically increased in several countries, social benefits are cut, especially for the unemployed and the disabled, budgets are reduced, labour laws have been significantly amended and weakened (in particular with regard to employees' protection). Minimum wages are reduced[24].

Exactly this is the origin of the importance of trade unions. The ongoing process of negotiation between representatives of workers and employers to establish the conditions of employment[25] - the collectively determined agreement may cover not only wages but also hiring practices, layoffs, promotions, job functions, working conditions and hours, worker discipline and termination, and benefit programs.

In the meantime, the capital taxation is constant or even reduced. Due to a general weakening of the trade unions, collective agreements and labour rights are isolated from negotiations with trade unions and are determined by the regulations of the government or as a political decision. Increasing the competitiveness of European enterprises is set as the main goal and all social interests are subordinate to it. This represents a new and dramatic situation in Europe. Michael Hudson, a former economist at Wall Street and now a professor at Missouri University[26], notes that there is a massive struggle against workers and their rights: the EU uses the banking crisis mortgages as an opportunity to punish the governments of Member States (the example of Greece) and even lead them to bankruptcy, if they do not agree to reduce wages. Hence, a new type of economic centralization through the activities of the European Central Bank (ECB) appeared. There is an operational independence of

[23] G. Gasmi, O. Zorić, 124.
[24] G. Gasmi, P. Dedeić, R. Weber R., "Comparative Analysis of Minimum Wages in Western Balkans and in the European Union", *Review of International Affairs*, No. 3/2016, 32.
[25] M. Andersson, C. Thornqvist, "Determining wages in Europe's SMEs: how relevant are the trade unions?", *European Review of Labour and Research*, 1/2007, 17.
[26] Michael Hudson, "A Financial Coup d'Etat", October 1–3, 2010, *http://counterpunch.org*, last visited 18.7.2017.

the ECB from the political influence of national governments[27]. Namely, on the one hand, this is a feature of democracy, but in the process of a severe financial crisis, it takes on the traits of the new financial oligarchy.

There is no one compact answer to the question whether social policy contributes to optimal employment rate. The example of the key ingredient of social policy is unemployment benefits that provide individuals with some income security as they look for work. However, unemployment benefits also change the incentives facing the unemployed, lengthening the job search. By easing the pressure of finding employment, the social protection system benefits the unemployed at the expense of overall productivity and long-run economic growth[28]. More negative effects of some social policy measures could be found in the tax increase, which will likely exacerbate unemployment by making it more expensive for companies to hire new employees.

On the other, positive side, there are many constructive contributions of social policy to employment rate, such as non-standard forms of employment, being a recent phenomenon. Regarding labour market effects, employee sharing, job sharing and interim management seem to be most beneficial among the new employment forms[29].

5. Non-standard employment forms

Regular full-time employment which we nowadays consider as a standard form of employment stems from the so-called Fordist model of production, developed in the early 20th century in America by Henry Ford, the founder of the Ford Motor Company. Ford has introduced the single largest change in the patterns of mass production and consumption in the realm of process engineering, which was the main driver behind the transformation from craft production to mass production. Ford's innovations in machine tools and gauging systems made possible the moving assembly line and linear production through fragmented and simplified repetitive work tasks, whereby "a standard product produced by standard machinery using standardized methods and standardized human labour for a standard working day"[30].

[27] G. Gasmi (2013), 205- 211.

[28] E. Norcross, E. Washington, „The costs and consequence of unemployment benefits on states", *Mercatus Center, George Mason University*, No. 67, January 2010, 2.

[29] Eurofound, „New forms of employment", Publications Office of the European Union, Luxembourg 2015., 140.

[30] M. Serrano, "From standard to non-standard employment: the changing patterns of work", in: *Between Flexibility and Security – the rise of non-standard employment in selected ASEAN countries* (ed. M. Serrano), Jakarta 2014, 10.

With the predominance of this more flexible model of production, accompanied by the flexibilization of the workforce in both industrialized and developing countries, there has been a significant global shift from standard employment to non-standard employment. Non- standard forms of employment (hereinafter "non-standard employment forms", or "NSEF") represent a group of various employment arrangements that differ from standard employment and include: (1) temporary employment, (2) part-time work, (3) temporary agency work and other forms of employment involving multiple parties, and (4) disguised employment relationships and dependent self-employment[31] .

Temporary employment, where workers are engaged for a specific period of time, includes fixed-term, project- or task-based contracts, as well as seasonal or casual work, including day labour. In the majority of countries, fixed-term contracts are regulated by specific legal provisions on the maximum length, the number of renewals, and valid reasons for recourse. Casual work there represents very short-term or occasional engagement of the workforce, often measures in a number of days or weeks, where the wage is set by the terms of the daily or periodic work agreement. It is primarily the characteristic of low-income developing economies but is lately ever more present in highly developed economies in the jobs associated with the "on-demand", "platform" or "gig" economy (such as the jobs driven by service-oriented applications). Temporary employment is mostly present in the economic sectors with seasonal fluctuations such as agriculture, although the "gig" economy has lately been largely present in the transport sectors (the companies such as "Uber"). Companies also resort to this form of employment in the situations where short-term lack of workers might represent a bottleneck due to the hikes of demand, or due to a more significant temporary absence of workers.

Two vulnerable groups of employees which are very exposed to temporary employment are migrants and the youths. According to the UN Population Facts report in 2013, some 3.2% of the world population was on the move, as 232 million international migrants were recorded[32]. In most cases, the migrants are engaged through temporary employment contracts or temporary agency work in their new countries of temporary residence, in a variety of sectors subject to seasonal fluctuations such as agriculture, tourism and catering, construction, etc. The youths often seek temporary employment in order to combine it with education or training,

[31] ILO, *Non-standard employment around the world – understanding challenges, shaping prospects*, ILO, Geneva 2016, 2.

[32] UN Department of Economic and Social Affairs, "UN Population facts 2013/2", New York 2013, 1, *http://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2013-2_new.pdf*.

mostly in industrialized nations. In less developed nations the temporary engagement of youth often represents a way of cost savings, so many of them tend to stay relatively long under temporary contracts, unable to find a permanent job.

Part-time work stands for the engagement of workers for fewer than the normal working hours, which many countries establish as legal thresholds that distinguish part-time from the full-time work, usually up to 30 hours per week. Part-time employment has been on the rise in many parts of the world over the past decades, as it can represent an important means for integrating women into the labour force, who because of domestic and care responsibilities, would otherwise not be available to engage in paid work. Yet whether part-time employment helps to promote gender equality depends on the quality of the part-time job. Public policies, including social security and tax policies, have at times reinforced the gender divide in the labour market but can be designed to promote good-quality part-time work[33].

A particular form of the part-time work includes „on-call-work" (or the "zero-hours") – an arrangement under which the employer is not obliged to set a particular number of hours of work in advance; this non-standard form of employment has lately become increasingly popular in the United Kingdom and in the United States of America.

Temporary agency work is an ever-more widespread non-standard form of employment, whereby the workers are not directly employed by the company to which they provide their services, but by a temporary work agency. In this multi-party arrangement, the employment relationship is mostly concluded between the worker and the agency, which on the other hand signs a commercial contract for its services of "renting of the labour force" with the beneficiary company. This means that there is no employment contract between the worker and the user company, although there are examples of shared legal obligation between the agency and the company when it comes to the occupational safety of the workers.

According to the World Employment Confederation (formerly known as CIETT) in 2013, around the world, a total number of 60.9 million people gained access to the labour market through a private employment agency (with 40.2 million working as an agency worker)[34]. In some countries, the share of temporary agency workers has been much higher than the global average of 1.6%, such as in some sectors such as manufacturing in India, where their share went up to 35%.

[33] ILO, *Non-standard employment around the world – understanding challenges, shaping prospects*, 11.

[34] CIETT, *Economic report*, 2015, 4 *http://www.wecglobal.org/fileadmin/templates/ciett/docs/Stats/Economic_report_2015/CIETT_ER2015.pdf*.

Disguised employment relationship, according to the International Labour Organization (ILO) "is one which is lent an appearance that is different from the underlying reality[35]". It is typically an attempt to distort the employment relationship and diminish the legal protection of the worker by giving the employment relationship a different form. It may also have a form in which the designated employer is only an intermediary, whereas the real employer is released from any involvement in the employment relationship and thus has no responsibility to the workers. The most radical way to disguise the employment relationship consists of giving it the appearance of a relationship of a different legal nature, whether civil, commercial, cooperative, family-related or other[36].

Finally, the dependent self-employment describes a situation in which a self-employed worker provides services at the open market for commercial contracts, but in fact remains dependent upon one or few clients who require the bulk of his services, thus making him rely on the constant demand from them for his services. These workers are typically not covered by the provisions of labour law or employment-based social security, although a few countries have adopted specific provisions to extend some protections to dependent self-employed workers.

6. The factors of growth of the non-standard employment forms

Several stages of globalization and the growth of inter-relatedness of the labour markets around the world have nourished the spread of the non-standard employment forms (NSEF) and their importance in the labour markets has grown throughout the past few decades. The factors affecting the NSEF are numerous and vary from one country to another, but they can be grouped into macroeconomic, factors related to the world of work and the effects of the cost reductions.

Each wave of economic recession and crises inevitably affects the labour market, where the concerns about the uncertainty brought by the crisis make the companies more cautious in hiring, whereby they resort more to temporary forms of the labour contract, which is especially true about the aftermath of the Great Recession in the USA.

Another way for many companies to respond to the drop in demand and avoid laying-off workers is the internal reorganization of working hours, whereby the workers accept to work shorter hours for a proportionally smaller wage to avoid losing their jobs. This measure was most widespread in Germany during the latest global economic

[35] ILO, *ILO International Labour Conference, 91st session, Report V*, Geneva 2003, 24.
[36] *Ibid.*, 25.

crisis, where approximately 1.2 million workers accepted the reduction of their working hours, on average, by one-third while maintaining their employment relationship. At the same time, the recent global economic crisis has also shown an adverse effect towards the workers employed through NSEF, where those working under temporary and multi-party employment relationships were the first to be let go and that was the case on both sides of the Atlantic when the crisis arrived[37].

The causes of a more widespread use of the NSEF in the last few decades related to the world of work are above all the waves of globalization which puts pressure onto the local labour markets, consequent technological and organizational changes in the enterprises, and a visible shift of jobs from the primary and secondary to the tertiary economic sector – the services.

An unprecedented international competition with constant pressures to reduce costs, outsource whenever possible and struggle to become and remain part of the global supply chains have all been an immediate consequence of the consecutive waves of globalization onto manufacturing and agriculture. International trade in intermediate goods has been made easier by the trend of liberalization and removal of cross-border barriers, creating ever-bigger pressure onto the local suppliers to reduce costs and ensure in-time production. That, in turn, leads them to outsource and subcontract labour and to use workers for short periods of time repeatedly hiring them on short-term contracts, so the use of NSEF itself can be seen as a "logical extension of global outsourcing", as it facilitates variation in the numbers of workers, tasks undertaken and wages paid, to meet changing buyer orders at low labour cost. However, simply employing cheap labour that produces poor quality goods could lead to a shift down or out of the value chain, if competitors are better able to manage the pressures. In response, many supplier firms employ a core regular, combined with a casual irregular, labour force. The core labour force provides the requisite skill and training to ensure consistency and quality of output. The casual labour force provides flexibility by using temporary workers (often undertaking similar tasks to core workers) to meet variations in output[38].

The expansion of global supply chains is closely related to technological developments and new organizational strategies of enterprises. New information technologies (IT), better infrastructure and consequent improvements in logistics and transportation, allow businesses to organize and manage their production around the globe. In

[37] According to the ILO in Spain temporary employment dropped from 29 per cent in 2008 to 22 per cent in 2013 as a result of the economic crisis.

[38] S. Barrientos, "Labour chains': analysing the role of labour contractors in global production networks", *BWPI Working Paper* 153, Brooks World Poverty Institute – University of Manchester, Manchester 2011, 13-14.

fact, the new IT inventions have generated new forms of NSEF such as the internet platforms with their work-on-demand via apps, which is the essence of the "gig economy". At the same time, the companies resorted to the increased use of outsourcing in the past two decades in order to focus on their "core" competencies, investing their resources into activities that were central to their competitive advantages. However, while some businesses restricted outsourcing to peripheral functions, others came to rely on non-standard employment arrangements for what arguably were their "core" functions, such as some major hotel chains that outsourced front desk services and cleaning to third-party management companies.

In parallel with the mounting pressures onto the manufacturing and agriculture, the services sector grew over the past few decades and by 2013 employed nearly a half of the global workforce[39]. The issue with employment in services are the fluctuations in demand – far more volatile than those in manufacturing, which often instigate the companies to resort to flexible (non-standard) forms of employment, especially in some sectors such as hospitality and tourism, which is characterized by high fragmentation, global hotel chains and franchises, outsourcing, seasonality, and the need to provide services outside of standard working hours[40]. In addition, the growth of the retail sector and the subsequent extension of opening hours have also spurred the use of part-time employment, as firms often hire workers on part-time hours to cover these additional shifts. This growth has had implications for women's employment, as women are more commonly found in service industries, particularly retail.

Many enterprises use non-standard employment arrangements as they are often cheaper, because of lower wage or non-wage costs. In some instances, regulations may unintentionally – or deliberately – encourage the use of alternative arrangements, such as when part-time workers fall below the threshold of social security benefits, or when fixed-term contracts are allowed for permanent tasks[41]. The broad use of temporary contracts in European countries began in the 1970s with the deregulation of the labour markets, the aim of which was the increase in labour market flexibility and stimulating job growth. That trend was extended onto the jobs that were not temporary in nature and it involved an increase in

[39] ILO, "Global Employment Trends 2014: The risk of a jobless recovery", Geneva 2014, 23, *http://www.ilo.org/wcmsp5/groups/public/dgreports/dcomm/publ/documents/publication/wcms_233953.pdf,* last visited 18.7.2017.

[40] ILO, *Developments and challenges in the hospitality and tourism sector, Issues paper for discussion at the Global Dialogue Forum on New Developments and Challenges in the Hospitality and Tourism Sector, 23–24 Nov. 2010*, Geneva 2010, 10.

[41] ILO, *Non-standard employment around the world – understanding challenges, shaping prospects*, 5.

number and in the duration of temporary contracts. As a result, temporary employment grew in many European countries, so in the past two decades some of them had to implement counter-reforms to constrain the growth of temporary employment, but in many instances, the process has not been easy to reverse.

Non-standard employment examples have also grown in number due to the differences in social security protections for workers earning under a certain income threshold, such as the "mini-jobs" in Germany, where the people earning less than 400 EUR per month were exempt from contributing to social security and their employers paid contributions at a reduced rate. In addition to that, a drop in trade union membership and consequently smaller number of collective agreements (especially at the enterprise level) enabled companies to develop alternative employment arrangements, which were not in conflict with prevailing laws, but which ran counter to what had been prevailing practices. The growth of "zero-hours" contracts in the United Kingdom, "if and when" contracts in Ireland and "just-in-time scheduling" in the US and Canada was not due to the introduction of new legislation, but rather to the realization by businesses that it was not necessary to provide guaranteed hours to workers within the employment contract, and that new arrangements could be introduced to increase businesses' scope for employing labour more flexibly[42].

7. Concluding remarks

„*Honeste vivere, alterum non laedere, suum cuique tribuere".*
ULPIAN[43]

The blueprint for achieving social justice generally is often structured by the governmental implementation of laws/rights that provide equal distribution of resources and opportunities, which in effect protects human dignity. If a government supports inequality with oppressive laws then it is up to a non-government coalition to stimulate the change of such laws in a non-violent manner.

A further defining feature of the European social model, when contrasted with that of the USA, is the important role attributed to organisations of workers (trade unions) and employers in Europe. Although a report from Eurofound in 2008 points to a steady decline in union membership across the European Union, it shows that the weighted average union density in

[42] *Ibid*.
[43] "Honestly live, do not insult others, give everyone their own.", Justinian, Digest 1.1.10.

the EU Member States remains comparatively high, at just under 24%, according to figures contained in the Commission's Industrial Relations in Europe 2010 report,[44] which states that over the past few years, earlier trends towards declining union density, decentralisation of collective bargaining and greater employee participation have continued, and the company level has become more prominent in terms of bargaining.

The European social model is characterised by a high coverage rate of collective agreements. However, there are large differences in the role, coverage and effectiveness of collective bargaining around the EU. In many countries of the European Union trade union movements are generally weak and/or do not cover all industries sufficiently[45]. Overall, according to the report, an estimated 121.5 million of the 184 million employees in employment in the EU were covered by a collective agreement in 2008, which translates into an adjusted bargaining coverage rate of 66 %, or two-thirds of all EU employees. Over the past decade, the number of employees covered increased by more than eight million, but since employment increased much faster, the coverage rate has slipped by two percentage points. There are wide variations in coverage rates, however, ranging from virtually 100 % in Austria to less than 20 % in Lithuania.

The presence of non-standard forms of employment characterized by the fixed or short duration employment contracts, lower wages, limited or missing social security benefits, work at multiple worksites and low-skill job requirements without career prospect has been expanded beyond its "natural boundaries" and deepened by the accelerating globalization and the increased market uncertainties. "Disguised" under various names and forms, the non-standard employment is spreading throughout the labour markets of both developed and developing countries.

Non-standard employment forms are putting at stake the workers' rights – from the right to organize and the right to collective bargaining, to the right to employment-based social security and other elements of decent work. Those forms of employment should not be treated *ex-ante* as a negative phenomenon by the trade unions, but need to be regulated by the legislation in line with the international labour standards of the ILO and contained to those areas of economy where flexibilization is necessary, as a factor of job-creation and accompanied by the social security coverage.

[44] *http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-social-model*, 04.5.2011.
[45] G. Gasmi, P. Dedeić, R. Weber, 40.

Prof. dr Gordana Gasmi
Institut za uporedno pravo, Beograd
Jovan Protić, M.A.
ILO, Nacionalni koordinator za Srbiju

EVROPSKI SOCIJALNI MODEL I NEFORMALNI OBLICI ZAPOŠLJAVANJA

Rezime

Studija je fokusirana na analizu otvorenog pitanja evropskog socijalnog modela u svetlu novih neformalnih oblika zapošljavanja. Uloga socijalne politike u zemljama članicama Evropske unije (EU) modifikovana je tako da se nalazi daleko od koncepta socijalne pravde i socijalne sigurnosti. Dakle, država blagostanja je nestala u EU.

Prevalentne ideje humanije ekonomije zapostavljene su u savremenom momentumu EU. Kada su zastupljeni samo ekonomski kriterijumi, tekući razvoj društva može biti vrlo brz, ali istovremeno izuzetno destruktivan, manifestovan u neadekvatnom širenju velikih društvenih problema, posebno u dugoročnoj nezaposlenosti.

U tom kontekstu, važno je razmotriti nestandardne nove oblike zapošljavanja. Ovo je još bitnije, imajući u vidu ogroman postojeći problem nezaposlenosti mladih, posebno visoko obrazovanih. Značajna karakteristika evropskog socijalnog modela, u poređenju sa istim takvim u SAD, je važna uloga koja se pripisuje sindikatima i poslodavcima u Evropi. Otuda evropski socijalni model karakteriše visok stepen obuhvata kolektivnih ugovora, ali se njihovo prisustvo razlikuje po zemljama članicama.

Širenje mnogih neformalnih oblika zapošljavanja predstavlja izazov za evropski socijalni model u pogledu realizacije prava radnika, počev od prava na organizovanje i kolektivno pregovaranje, do prava na odgovarajuću socijalnu zaštitu i druge elemente koncepta pristojnih uslova rada. Uprkos tome, sindikati ne bi trebalo unapred negativno da sagledavaju nove forme nestandardnog zapošljavanja. Potrebno je da ovi oblici zapošljavanja budu regulisani u skladu sa međunarodnim principima ILO i ograničeni na sektore privrede u kojima je neophodna fleksibilnost, kao faktor kreiranja novih radnih mesta, ali uz odgovarajući obuhvat socijalne zaštite.

Ključne reči: Evropska unija, evropski socijalni model, zaposlenost.

Aleksandra Rabrenović, PhD[1]

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NEW CIVIL SERVICE LEGAL FRAMEWORK IN ALBANIA – THE ROADMAP FOR THE WHOLE REGION?[2]

Abstract

The objective of the paper is to analyse the Albanian civil service legislation changes with respect to recruitment, selection and termination of employment. The central sections of the paper examine new civil service legislation (Civil Service Law of 2013 and subsequent amendments of 2014) and its early implementation challenges. The author concludes that some aspects of the new civil service legislation, such as pool recruitment and permanent civil service recruitment commissions, may serve as a roadmap for other Western Balkan countries in the region, although their full effectiveness is yet to be proven in practice. The provisions which guarantee civil service professionalization and tenure, especially with respect to senior positions, are still not fully implemented and hence do not set a good example of how to move forward in this sensitive politico-administrative field.

Keywords: *civil service legal framework, recruitment and selection, termination of employment, Albania.*

1. Introduction

Civil service legislation provides an important basis for creating a civil service system based on merit. The objective of civil service legislation is to ensure the observance of the merit principle in all stages of human resource management. [3] The merit principle means that all human resource management processes, starting from the process of recruitment, appraisal, promotion, career development, rewarding, training and development are based on the professional competencies.

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[1] Research Fellow, Institute of Comparative Law, Belgrade, email: *arabrenovic@gmail.com* .

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[3] P. W. Ingraham, „Building Bridges over Troubled Waters: Merit as a Guide", *Public Administration Review*, 2006, 486–495.

The economic crisis and deterioration in service delivery that confronted all Western Balkans countries in the end of 2000s triggered thinking about the ways on how the civil service systems can be made more efficient, without compromising the merit principle. This especially refers to the process of recruitment and selection, which can incur significant costs both in terms of financial and human resources and be subject to political and partisan pressures, especially in the times when the private sector employment opportunities are limited.

Albania is one of the countries in the region which has changed its civil service legislative framework in order to attempt to both improve efficiency and merit-based recruitment and selection process in the civil service. Albanian Parliament adopted the new Law on Civil Servants in May 2013,[4] which was subsequently changed in December 2014.[5] The new legal framework has introduced several new recruitment instruments: permanent recruitment commissions, pool recruitment process and a new procedure for recruitment of senior civil servants.

The objective of this paper is to analyse the civil service legal changes with respect to recruitment, selection and termination of employment and their initial effects. Before starting the analysis, we shall outline the public administration principles established by SIGMA/OECD, in order to be able to assess the quality of the new legal framework. The central section of the paper shall analyse the new regulatory framework and early implementation challenges and lessons learned. The concluding part of the paper shall attempt to answer the question of whether the new legislative framework in Albania can serve as a roadmap for other countries in the region.

2. SIGMA Public Administration Principles on HRM – recruitment, selection and termination of employment

Due to national specificities, the area of human resources management is usually not a subject of international conventions or a part of *acquis communautaire*. This area is, instead, mainly "governed" by the so-called "*soft acquis"*, which constitute common standards of the EU Member States.[6] Although they are not legally binding, these standards can have significant practical impacts on the countries seeking EU membership,

[4] Law on Civil Servants, *Official Gazette of Albania*, No. 152/2013 – CSL 2013.

[5] Law on Amendments of the Law on Civil Servants, No. 178/2014, of 18.12.2014, *Official Journal,* No. 211, of 14 January 2015, p. 12727.

[6] M. Keune, „EU Enlargement and Social Standards – Exporting the European Social Model?", *The European Union and the Social Dimension of Globalisation, How the EU Influences the World* (J. Orbie, L. Tortell), Routhledge, 2009, 52.

as the European Commission uses them as benchmarks for assessing progress towards membership.

In order to develop human resource management requirements further, the European Commission SIGMA programme[7] has developed a document named "The Principles of Public Administration",[8] where the prominent place has been given to the fields of state/public administration and human resources management. The basic standards are defined in a quite detailed manner in line with the legislation of the EU member states, and they also involve good European practices in the field of human resources management and other public administration fields. We shall pay special attention to standards which relate to key human resource management elements: recruitment and selection and termination of employment.

SIGMA requires that the recruitment and selection process, either external or internal and regardless of the category/class of public servant, is clearly based on merit, equal opportunity and open competition. It also requires that the law which governs the position of civil servants clearly establishes that any form of recruitment and selection not based on merit is considered legally invalid.[9]

In order to ensure impartiality, competition procedure needs to be implemented by recruitment and selection committees, operating independently from political influence. Members of these committees should possess a solid understanding of the tasks performed in the advertised position, along with the skills and knowledge required for their performance.[10] They also need to be trained on selection procedures in order to be able to implement them in a consistent and fair fashion.

In order to ensure the protection of rights of all competing applicants, the competition results should be appealable before a second-instance administration body (normally, appeals commission), as well as the competent court (most often, administrative court). Furthermore, the criteria for demotion and termination of employment should be explicitly stated in the law. Like in the case of competition, civil servants should have the right of appeal against decisions on their demotion and employment termination.

[7] Having recognised the importance of a well regulated and organised public administration for the fulfilment of the membership requirements in all sectoral areas, in 1992 EU cooperated with the Organisation for Economic Cooperation and Development (OECD) to establish the SIGMA programme (SIGMA - *Support for Improvement in Governance and Management*). The Programme aims at providing support to public administration reform activities in (potential) candidate states. SIGMA programme is mainly funded by the EU and represents one of the main instruments of the European Commission in promoting capacity development in public administration to the EU (potential) candidate states.

[8] SIGMA/OECD, *Principles of Public Administration*, 2014, OECD publishing.

[9] *Ibid.,* 48.

[10] *Ibid.*

Special attention is paid to senior, i.e. managerial civil servants. SIGMA requires that direct or indirect political influence on senior managerial positions is prevented. There are further four major requirements with respect to managerial civil servants:

1) The category/class/level of senior managerial positions in the public service should be included into the scope of public service (usually the positions of the secretary-general of the ministry and director-general of the administrative body determine the upper dividing line between public servants and political appointees).
2) The criteria for recruiting persons to the senior managerial positions should be clearly established and disclosed;
3) The recruitment and selection process to the senior managerial positions, either external or internal, should be based on merit, equal opportunities and open competition;
4) The termination of employment of public servants holding senior managerial positions should only admissible in cases explicitly provided for and under the procedural provision established in the law.[11]

Finally, SIGMA Principles of Public Administration require that the objective criteria for the demotion of public servants and termination of the public service relationship be explicitly established in the law. These provisions should also be effectively applied in practice.[12]

3. Development of civil service legal framework in Albania 1996 - 2013

Albania adopted its first civil service legislation – Civil Service Law (CSL) in 1996. [13] The CSL provided a special legal status of employees of central administration and for the first time introduced a tenure of civil servants.[14] It also prescribed several guarantees regarding promotion, training and disciplinary measures of civil servants.

Although it represented an important step forward in securing the stability of employment of civil servants, the 1996 CSL also suffered from important deficiencies. It did not make a clear distinction between civil servants and political positions on the one hand and civil servants and technical staff, on the other hand.[15] It also did not require mandatory

[11] *Ibid,* 50.
[12] *Ibid.*
[13] Civil Service Law of Albania, No. 8095, of 1996, amended by Law No. 8300, of 1998.
[14] Article 33, point 1, of the Civil Service Law of Albania, No. 8/95 of 1996.
[15] G. Husi, "Public Administration in Albania and the Process of European Integration", *Academic Journal of Interdisciplinary Studies*, MCSER Publishing, Rome Italy, Vol 4, No 2 S2, 2015, 305.

open competition in the recruitment and selection process but allowed direct appointment by the institution which wanted to recruit a new employee.[16] The level of implementation of the Law was also rather low. This is due to the fact that the adoption of the Law was not accompanied by the elaboration and approval of the secondary legislation necessary for effective CSL implementation.[17] After the change of the Government in 1997, the level of observance of civil service rules came to the lowest point, as a large number of civil servants (especially at managerial levels), in spite of a proclaimed tenure, was dismissed.[18]

In 1999 the Albanian Parliament adopted a new civil service legal framework – the Law on the Status of Civil Servants,[19] which introduced important improvements in the regulation of legal status of civil servants. It clarified the concept of a civil servant (employees of central or local administration which exercise public authorities) and introduced mandatory recruitment by an open competition. It further governed in more detail other HRM functions, such as promotion, career advancement, performance appraisal, disciplinary measures and legal remedies in case of violation of civil servants rights.[20] The 1999 Law also established the Department of Public Administration (DoPA) as the main body in charge of the management of the civil service, as well as the Civil Service Commission, as an independent institution responsible for supervising the implementation of the Civil Service Law.[21]

In spite of generally well-established legal basis, which was to a high degree in line with European standards and SIGMA principles, the objective of the Law - the creation of a professional, merit-based civil service was not achieved.[22] One of the major impediments in this respect was, again, relatively low level of implementation, especially during the times of political transitions. Namely, the change of the Government in office in 2005, triggered the distrust between new politicians in power and civil servants and resulted in a high turnover of staff, especially at the senior level.[23]

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[16] *Ibid*.
[17] A. Shundi, "Civil Service Professionalisation in the Western Balkans", Expert report prepared for the SIGMA-OECD project on the state of civil service professionalization in the Western Balkan states, 2010, 5.
[18] *Ibid*, 71.
[19] Law No. 8549, of 11.11.1999 "On the Status of the Civil Servant" and its consecutive amendments.
[20] G. Husi, 305.
[21] *Ibid.*
[22] J. Meyer-Sahling, "Civil Service Professionalisation in the Western Balkans", *SIGMA Papers*, No. 48, 2012, OECD Publishing. http://dx.doi.org/10.1787/5k4c42jrmp35-en, 71.
[23] A. Shundi, 71.

4. New Civil Service Legal Framework 2013 - 2014

The third civil service legal framework in Albania (currently in force), established by the adoption of the Law on Civil Servants (CSL) in May 2013,[24] has entered into effect with a turbulent start. Shortly after its adoption, the entry into force of the new CSL was postponed to February 2014. Only a couple of months later, in December 2014, the substance of the CSL was amended.[25]

From the institutional point of view, the new CSL strengthens the role of DoPA[26] and establishes the Albanian School of Public Administration, which is responsible for vocational training of civil servants.[27] It also provides a basis for the creation of a Commissioner for Civil Service Monitoring, an administrative body responsible for monitoring the legality in civil service management.[28]

Intensive efforts have been invested to implement the new legal framework, through adoption of a comprehensive set of secondary and tertiary legislation. Thus, from January 2015 to April 2016, the Council of Ministers adopted a number of bylaws to support the implementation of the Civil Service Law.[29] The Department of Public Administration also issued a number of guidelines and organised training courses for HRM units in line ministries, subordinated institutions and independent institutions. In SIGMA's view, the degree of regulation in the primary and secondary

[24] CSL 2013.

[25] Law No. 178/2014 on amendments and supplements to Law No. 152/2013 on Civil Servants – CSL amendments 2014.

[26] Article 7 of the CSL 2013.

[27] The School of Public Administration enjoys administrative and academic autonomy, and is subordinated to the Ministry of the Interior. The School is tasked with developing two professional training programs: 1) professional training for top-level management 2) professional training and development programs for civil servants belonging to other staff categories. *Cf.* Article 8 of the CSL

[28] Article 11 of the CSL 2013.

[29] Decision of the Council of Ministers (DoCM) No. 262, 25 March 2015 on amendments to DoCM No. 142 on the Description and Classification of Job Positions of State Administration Institutions and Independent Institutions, etc., 12 March 2014; DoCM No. 243 on the expert category acceptance, parallel transfer, probation and appointment, 18 March 2015; DoCM No. 242 on appointment to the low-level and mid-level management categories, 18 March 2015; DoCM No. 338 on amendments and additions, 6May2015 to DoCM No. 118 on the procedures for appointment, recruitment, management and termination of the civil service relation for top-level management positions and members of the Top Management Corps (TMC), 5 March 2014; DoCM No. 124 on the suspension and dismissal from the civil service, 17 February 2016; DoCM No. 125 on the temporary and permanent transfer of civil servants, 17 February 2016; DoCM No. 1037 on procedures for the assessment of civil servants on obtaining and updating additional knowledge, 16 December 2015 .

legislation is balanced enough to allow flexibility and ensure the stability of the civil service.[30]

The new legal framework has introduced important shift from a mainly position based to a career based system (with some elements of position based system). The career elements are emphasised by ensuring sufficient horizontal and vertical mobility for lower-ranking positions. Namely, before a public competition is announced, state authorities are obliged to try to fill in the vacancy by a transfer of the existing civil servants. The transfer is done by selecting candidates who are at the same category as the vacant position. This task is entrusted to permanent internal committees, obliged to adhere to the principles of equal opportunities and merit.[31] Once this procedure is completed, the committees appoint the most successful candidate. The procedure may end without an appointment only if none of the candidates meets specific requirements for that position.[32]

If a vacancy is not filled on the basis of a transfer within the institutions, state authorities are obliged to internally announce such position with the purpose of promoting civil servants to a higher position.[33] The Government, however, at the beginning of a year may decide to use public competition procedure for up to 20 percent of all vacancies,[34] in order to ensure inflow of new human resources from the labor market with appropriate skills and knowledge for those positions. Given that state authorities are obliged to carry competitive procedure while filling in the vacant posts (with the exception of transfer for positions of the same category), it may be concluded that these procedures are in line with SIGMA Principles of Public Administration.

In order to improve the capacities of the members of selection panels, the new Civil Service Law introduced permanent recruitment commissions with a term of office of one year, which is a novelty for the whole Western Balkan region. Namely, recruitment and selection process is, as a rule, conducted by an *ad hoc* commissions in most of the Western Balkan countries. Due to an *ad hoc* nature of those committees, one of the often found weaknesses in the recruitment and selection system is a lack of capacity of the members to carry out this process effectively and professionally.[35] The establishment of permanent recruitment and

[30] OECD/SIGMA, *Monitoring Report: The Principles of Public Administration, Albania*, May 2016, OECD/SIGMA publishing, 13.
[31] Article 25, paragraph 3 of the CSL 2013.
[32] Article 25, paragraph 4 of the CSL 2013.
[33] Article 26, paragraph 2 of the CSL 2013.
[34] Article 26, paragraph 4 of the CSL 2013.
[35] J. M. Sahling *et al.*, "Improving the implementation of merit recruitment procedures in the Western Balkans: Analysis and Recommendations", a paper presented at the RESPA Conference in Danilovgrad in November, 2015.

selection commissions, which reduce the level of fluctuation of the commission members, should have a positive effect on acquiring a higher level of expertise, which is fully in line with SIGMA Principles.

Permanent recruitment commissions comprise of one employee of the Public Administration Unit, one civil servant from the authority that fills a vacancy and one external expert, normally a member of university staff.[36] The composition of recruitment commissions, where the majority of members is not from the authority that fills a vacancy, should improve impartiality and merit-based selection, which is also in line with SIGMA Principles. The Department of Public Administration has set up permanent selection commissions for recruitment to general or special administration groups in the state administration and separate ones for independent institutions. Selection of external experts had been organised through an open call.[37]

Unlike the previous practice of carrying out a separate public competition procedure for each vacancy, the new legal framework has introduced so-called "pool recruitment" in order to increase the efficiency of the recruitment process. Pool recruitment means that public competitions are announced periodically for several positions (usually entry-level positions) at once. This is expected to significantly reduce the recruitment and selection costs. Selection of all candidates is based on the written test, oral test and other selection methods, along with the assessment of work experience.[38] Successful candidates must exceed the 70% threshold of the total number of points, in which case they are included in the list of successful candidates.[39] The results of interviews account for 25% of the total number of points scored.

At the end of pool recruitment procedure, the best-ranked candidate(s) can choose one of the vacant positions. If there are more successful candidates than vacant posts, these candidates can be recruited once a new position becomes vacant within the next two years, which is how long the list of successful candidates will be valid.[40] In this way, the recruitment process should become cheaper and more efficient, as there is no need to carry out additional recruitment procedures for new vacancies. If in the meantime, another recruitment procedure is organized for the same group of jobs, all successful and not appointed candidates will be re-ranked in accordance with the new competition requirements.[41]

[36] Article 22, paragraph 4 of the CSL 2013.
[37] OECD/SIGMA (2016), 25.
[38] Article 20, paragraph 2 of the CSL 2013.
[39] Article 22, paragraph 5 of the CSL 2013.
[40] Article 23, paragraph 3 of the CSL 2013.
[41] Article 23, paragraph 3 of the CSL 2013.

Unsuccessful candidates have the right to appeal against unfair recruitment decisions. First, candidates are entitled to file a written complaint with the permanent selection commission. If not satisfied with their decision, they have the right to appeal to the Administrative Court. In 2015, only three candidates appealed to the Administrative Court of First Instance about recruitment.[42] Although it is good that civil service candidates have the possibility to appeal to the Administration Court, they do not have the chance to file a complaint to an independent administrative authority (but to the permanent recruitment commission), which is not in line with the SIGMA principles.

The CSL makes a clear distinction between senior managerial positions, so-called top management position and civil service positions, which is in line with the SIGMA Principles of Public Administration. Top management positions in the civil service include the following posts: general secretary, director of the department, and director of general directorates and equivalent positions (e.g. heads of subordinated institutions). The methods of recruitment and selection for top management positions are separately regulated by the CLS and secondary legislation.[43]

According to the original wording of the CSL (2013), appointment to a top management position is linked to completion of a comprehensive managers training, in order to ensure professionalism at the top of the civil service. The training course is provided by the Albanian School of Public Administration.[44] The Civil Service Law in principle allows only middle-level civil servants who meet specific requirements to apply for this training when the School announces a national competition, in order to ensure that civil servants have a priority in filling in senior positions and are able to develop their careers to the top levels of administration.

The selection of candidates for top-level management positions is carried out by the National Selection Committee. The National Selection Committee comprises of one representative of the Department of Public Administration, two representatives of the Albanian School of Public Administration, one representative of the top-level management staff and five independent experts.[45] The National Selection Committee was established in 2014, through the open competition.[46]

[42] OECD/SIGMA (2016), 25.

[43] Decision of the Council of Ministers No. 118 on the Procedures of the Appointment, Recruitment, Management and Termination of the Civil Service Relations of the Top-level Management Civil Servants and Members of the TMC, 5 March 3014; amended by DoCM No. 388, 6 February 2015.

[44] Article 27, paragraph 4 of the CSL 2013.

[45] Article 31 of the CSL 2013.

[46] OECD/SIGMA, (2016), 28.

The candidates who scored highest and exceeded the 70 percent threshold are appointed to top-level management positions and become members of this staff category. Persons who complete training for top-level management positions, subject to their consent, may also be appointed to positions of special coordinators and middle-level management.

The amendments of the CSL of 2014 have allowed, however, "direct" exceptional access to top management positions. The first one is of a transitory nature, through a competition until the first group finishes the training of the Public Administration Academy or in case the number of candidates who finish the program is insufficient. The second exceptional procedure assumes direct appointment from independent institutions, following an assessment conducted by the Department of Public Administration.[47] This procedure can be carried out if the number of civil servants coming from the previous two procedures is insufficient, which provides quite a large room for manoeuvre.[48] Once appointed, these staff is also obliged to attend the ASPA in-depth training and to take the exam.[49]

The criteria for termination of service have been fairly restricted by the adoption of the original CSL in 2013, but then quickly loosened by the CSL amendments of 2014.[50] Some authors argue that the most significant improvement of the 2013 CSL was its restrictive approach with regard to termination of employment.[51] The job of a civil servant was secure even in a case of a restructuring of an institution, when the position of a civil servant ceases to exist, in which case he/she needed to be transferred to another position of the same category within the civil service. This was changed by the 2014 CSL amendments, which broadened the grounds for dismissal to include closing or restructuring of public institutions[52]

[47] Article 30, paragraph 5 of the CSL. DoCM No. 118, Chapter VII, points 18-21, amended by DoCM No. 388.

[48] OECD/SIGMA, (2016), 28.

[49] Article 30, paragraph 5/1 of the CSL. DoCM No. 118, Chapter VII, 21, amended by DoCM No. 388; CSL, Article 66.1, point e/1 amended, establishes that the member of the TMC appointed through this procedure shall be released if he/she does not successfully complete the ASPA in-depth training.

[50] CSL, Articles 63-66; DoCM No. 124 of 17 February 2016 on Suspension and Dismissal from the Civil Service, which repeals the provisions on suspension and dismissal of civil servants established by the DoCM No. 171 on the Permanent and Temporary Transfer of Civil Servants and the Suspension and Dismissal from the Civil Service, 26 March 2014.

[51] According to the initial wording of the CLS, employment in the civil service could be terminated only if a civil servant resigns, dies, loses the Albanian citizenship, retires, is convicted of a crime, or is released from duty because of unjustified refusal to accept a mandatory transfer, because of complete health incapacity, two consecutive "non– satisfactory" performance appraisals, and/or is dismissed from the civil service, as a disciplinary sanction foreseen in Articles 57-61 of the law (Articles 63 to 66). G. Husi, 307.

[52] Article 50.6 of the CSL 2013.

and negative appraisal of the acquisition and updating of supplementary knowledge necessary for civil servants to accomplish their duties.[53] These amendments also speed up procedures that lead to termination of employment. Termination conditions, listed in the CSL, are the same for top-level management and other civil servants.

5. Early implementation challenges

Although the CLS has started to be implemented only in 2014 and hence it is still early to assess its effectiveness, some early problems in its implementation may already be detected. This relates primarily to the insufficient efficiency of recruitment and selection process and struggles to appoint top management positions on merit.

In spite of well-regulated pool recruitment procedures, a large number of vacancies in the civil service remains unfilled. Thus, for example, during 2015, only 60 percent of existing vacancies envisaged by Annual staffing plan for 2015 were filled.[54] This may be attributed to insufficient quantity and quality of candidates, as many of them do not fulfil the selection criteria.[55] This further opens the question of whether the selection criteria were set too high for the circumstance of the Albanian civil service and/or whether there is sufficient trust of citizens in the merit-based recruitment in the civil service.

Another problem observed in the implementation process is a lack of clarity of criteria to be used during the selection process, especially what needs to be tested during the written exam and the interview. Moreover, it seems that the type of questions asked during the selection process are mainly of a technical nature[56] and not based on testing the behavioural competencies of candidates, which are equally important for assessing the future work performance of civil service candidates.

Furthermore, and not surprisingly, one of the key problems in the implementation of the CSL is a merit-based selection to top management positions. The prescribed procedure of appointment of top-level officials through a competition followed by the training program organized by the Academy of Public Administration has still not been implemented, one of the reasons being a delay in the preparation of the training program.[57]

[53] New appraisal procedure was introduced by the amendments to the CSL Article 62 and regulated by DoCM No. 1037 on the Procedures of Evaluation of Civil Servants on Acquiring and Updating Additional Knowledge, 16 December 2015. *Cf.* OECD/SIGMA (2016), 25.
[54] OECD/SIGMA, (2016), 26.
[55] *Ibid.*, 22.
[56] *Ibid.*, 24.
[57] *Ibid.*, 29.

Appointments to the top management positions are instead done by using exceptional procedures foreseen in the CSL. In spite of this increase of flexibility in recruiting top management staff, a high number of vacancies still remains unfilled,[58] which may indicate a distrust of potential candidates in the merit-based recruitment for senior positions.

Finally, the biggest challenge faced by the implementation of the 2013 civil service legal framework was its inability to secure tenure of civil servants, due to political change of power which occurred right after the adoption of the CSL. Namely, the CSL was adopted in May 2013, which was followed by parliamentary elections held in June 2013, and the new Rama Government was formed in September 2013. One of the first decisions of the Rama Government was to postpone the effects of the CSL by 6 months, which was approved by the Parliament in October 2013.[59] This has resulted in a significant turnover of staff in the central administration of around 13 percent.[60] In its 2014 report, the EU Commission, using the data provided by the Department of Public Administration estimated that "since September 2013, around 380 civil servants in central institutions were dismissed, resigned or put on waiting lists and around 100 were downgraded out of a total of 1392 current civil servants. The department also estimated around 5.200 dismissals and resignations in subordinate institutions and agencies."[61]

In the meantime, the Government prepared several amendments to the Law No. 152/2013 that were adopted by the Parliament on 18 December 2014.[62] As mentioned earlier, the amendments of the CSL reduced the range of public positions that were considered by Law No. 152/2013 as the part of the civil service (Article 2), and allowed the Council of Ministers to open civil service positions of higher levels to individuals from outside the system (Article 29, paragraph 1 of the CSL). These amendments prove that the Albanian socio-political environment does not allow for high level of depoliticisation, as wished for by legal drafters of the 2013 CSL.

6. Conclusion

Similar to many other countries in the region, Albania has introduced new civil service legislation attempting to improve the effectiveness of the human resource management system. The 2013 CSL has introduced

[58] *Ibid*.

[59] G. Husi, 307.

[60] European Commission Staff Working Document: "Albania Stabilisation and Association Progress Report 2014", {COM(2014) 700 final}, Brussels, 8.10.2014, SWD(2014) 304 final, 9.

[61] *Ibid*.

[62] Law No. 178/2014, of 18.12.2014, *Official Journal* No. 211, of 14 January 2015, 12727.

important novelties in the HRM system, such as pool recruitment and permanent recruitment commissions and has also established a Public Administration Academy, as an institution responsible for civil service training, with special emphasis on senior civil servants.

The answer to the question as for whether the Albanian civil service legislation could serve as a roadmap to other countries in the region should at this point be "it may, but just to a certain extent". Pool recruitment and permanent civil service commissions could make an important step forward in improving the efficiency of the recruitment and selection process. Albanian example shows, however, that these good ideas do not guarantee effectiveness in practice, as around 40 percent of vacancies in the Albanian civil service are still not filled based on the new procedures.

As for securing the professionalism and stability of senior civil service positions, the Albanian example confirms the finding that passing of civil service legislation is not a panacea for depoliticisation.[63] Although the 2013 CSL has provided strong guarantees of civil service tenure and depoliticisation, they proved to be non-implementable in practice, due to a shift of power which occurred right after the adoption of the new legal framework. Furthermore, the top positions are still filled mainly on the basis of CSL exceptions, rather than through the regular procedure within the Academy for Public Administration. The Albanian case, therefore, cannot serve in this respect as a good example to other countries in the region. It instead shows that no "miracles" should be expected from the establishment of a good legal framework, which can quickly be changed or derogated following the wishes of "political masters".

The Albanian case also proves the experience of other Central and Eastern European countries (including other Western Balkans countries) that depoliticisation is a slow and reversible process.[64] It seems that in order to achieve professionalization of the top level officials, there is a need to build awareness of all key societal stakeholders, primarily politicians, that professional administration would enable them to implement their programs better and win citizens' trust in the next elections. This process, however, may take time and patience. In the meantime, setting more realistic goals and expectations of the legal framework, which governs these sensitive politico-administrative relations, and aligning it more closely with the reality, might be the best way to go forward.

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[63] T. Verheijen, A. Rabrenović, "The Evolution of Politico-Administrative Relations in Post-Communist States: Main Directions" in *Politico-Administrative Relations – Who Rules?* (ed. T. Verheijen), NISPAcee, 2001, 390-410.

[64] J.M. Sahling, "Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years after EU Accession", *SIGMA paper 44*, 2009, GOV/SIGMA (2009)1, OECD/SIGMA publishing.

Dr Aleksandra Rabrenović
Naučni saradnik, Institut za uporedno pravo

NOVI PRAVNI OKVIR SLUŽBENIČKOG SISTEMA U ALBANIJI – PUTOKAZ ZA CEO REGION?

Rezime

Cilj rada je da analizira novo albansko službeničko zakonodavstvo u oblasti zapošljavanja i selekcije i prestanka radnog odnosa. Pre započinjanja analize, autor izlaže Principe javne uprave u oblasti zapošljavanja koje je razvila SIGMA/OECD, kao osnov za ocenu novog službeničkog zakonodavstva. Centralni deo rada posvećen je analizi novog pravnog okvira službeničkog sistema (Zakona o državnim službenicima iz 2013. godine sa izmenama i dopunama od 2014). Autor zaključuje da neki aspekti novog službeničkog zakonodavstva, kao što su raspisivanje konkursa i selekcija koja se sprovodi za više radnih mesta odjednom, kao i uspostavljanje stalnih komisija za zapošljavanje, mogu poslužiti kao dobar primer drugim zemljama u regionu, iako njihova efektivnost još uvek nije sasvim potvrđena u praksi. Odredbe koje garantuju profesionalizaciju i stalnost radnog odnosa, posebno za službenike na položajima, nisu dale odgovarajuće efekte, i zbog toga ne predstavljaju dobar primer kako napraviti korak napred u ovoj osetljivoj službeničkoj oblasti.

Ključne reči: službenički pravni okvir, zapošljavanje, prestanak radnog odnosa, Albanija.

Prof. Milan Počuča, PhD[1]
Prof. Jelena Matijašević-Obradović, PhD[2]

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OBJECTIVES AND IMPORTANCE OF EU REGIONAL POLICY, WITH AN OVERVIEW OF THE SERBIAN POLICY OF REGIONAL DEVELOPMENT[3]

Abstract

EU regional policy is among the most important common EU policies. The aims of EU cohesion policy for the period 2014-2020 are set out in the Europe 2020 Strategy, and they concern smart, sustainable and inclusive growth. Of special importance to Serbia are EU regional policy financial instruments, in particular, the European Regional Development Fund which, inter alia, also finances cross-border cooperation projects. The Law on Regional Development stipulates that regional development shall, besides other sources, be financed from EU pre-accession funds, in the context of which the Instrument for Pre-Accession Assistance – IPA was very significant for Serbia and the Autonomous Province of Vojvodina in the period 2007-2013, while pre-accession support of IPA II Programme is expected for the period 2014-2020. Finally, the current direction of EU cohesion policy, expressed in the Europe 2020 Strategy, highlights the importance of this programme for the candidate member states, as well as for the neighbouring countries, indicating that the expansion of the area of implementation of EU rules will create new opportunities, both for the European Union, and for its neighbours.

***Keywords**: EU regional policy, EU funds, Europe 2020 Strategy, IPA, IPA II.*

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[1] Full professor, Faculty of Law for Commerce and Judiciary, University Business Academy in Novi Sad, e-mail: *pocucabmilan@gmail.com*.

[2] Associate professor, Faculty of Law for Commerce and Judiciary, University Business Academy in Novi Sad, e-mail: *jela_sup@yahoo.com*.

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1. Introductory remarks

The Treaty establishing the European Economic Community (EEC), as the original treaty which established the Economic Community in 1957, and which was ratified in 1958[4], laid the foundations of European Union (EU) regional policy development. The Treaty Preamble emphasizes the endeavour to ensure the economic and social progress of Europe as a whole, with the particular aim of gradually annulling the uneven regional development. Article 2 stipulates the EEC Principles, which primarily include the promotion of harmonic, balanced and sustainable development of economic activities, a high level of employment and social care, a permanent promotion of racial, gender and age equality, sustainable non-inflationary growth, a high level of competitiveness and convergence of economic performance, as well as a high level of care and improvement of the quality of living environment, raising the standard and quality of living, as well as economic and social cohesion and solidarity among the member states.[5]

The ratification of the Rome Treaty of 1958 simultaneously marks the beginning of the first of five developmental stages of EU regional policy. Historically speaking, EU regional policy has passed through five phases of development in total which, in terms of chronology, respectively cover the following periods: the first phase covers the period from 1958 to 1975, the second phase covers the period from 1975 to 1986, the third phase covers the period from 1986 to 1999, the fourth phase covers the period from 2000 to 2006, while the fifth phase covers the period from 2007 to 2013.

From the point of view of the EU Treaties, and following the chronological and systematic methodology, every treaty coming after the EEC Treaties, starting with the Single European Act[6], then the Maastricht Treaty (or the Treaty on the European Union)[7], through the Treaty of Amsterdam[8] and the Treaty of Nice[9], all the way to the Treaty of Lisbon[10],

[4] The Treaty Establishing the European Economic Community - EEC Treaty, Official Journal of the European Communities, 2002/C, is one of the three original Founding Treaties of the European Union. Besides it, the original Founding Treaties also include the Treaty establishing the European Economic Energy Community – Euratom, also in 1957 (which is also commonly referred to as a Rome Treaty) and the Treaty establishing the European Coal and Steel Community from 1951.

[5] Treaty Establishing European Economic Community - EEC Treaty, *Official Journal of the European Communities*, 2002/C, Preamble and Art. 2.

[6] Single European Act, *Official Journal of the European Communities*, L 169/1986.

[7] Treaty on European Union, *Official Journal of the European Communities*, C 191/01/1992.

[8] Treaty of Amsterdam, *Official Journal of the European Communities*, C 340/1997.

[9] Treaty of Nice, *Official Journal of the European Communities*, C 80/2001.

[10] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *Official Journal of the European Communities*, C 306/2007.

has included all the more important provisions aimed at supporting and developing EU regional policy. As an example, we can quote provision of article 130a of the Single European Act, which indicates that with a view to promoting a harmonious development, EEC shall develop and perform the operations which lead to strengthening its economic and social cohesion. The Community shall particularly make efforts to reduce the differences among regions and the underdevelopment of the least privileged regions, also including rural areas. In addition to provisions of the Single European Act, we can also refer to the essential meaning of individual provisions of the Maastricht Treaty (The Treaty on the European Union), in particular in the domain of EU regional policy support, which includes the stipulation that treaty provisions enable regional and local institutions to independently interact in EU decision processes.

In the prevailing opinion, EU regional policy is one of the most important EU policies. This statement is supported by numerous arguments, one of them being that EU regional policy is important in overcoming issues resulting from the common market and the integration process, and that it focuses on cohesion and solidarity with a view to improving the economic condition of poorer EU member states, and that, consequently, it allocates significant funds for financing strategic needs and interests in different development and investment areas, insisting on the development of innovations and competitiveness, modernisation, educational activities, protection of the living environment and, finally, it also acts as a "catalyst for future financing from public and private sources, not only by binding the EU member states to co-finance national projects but also by contributing to investors' trust"[11].

Based on the introductory remarks, in the next section, we will define the basic concepts, and present the aims and importance of EU regional policy, with special emphasis on financial instruments assisting less developed regions. We will also analyse the issues of legislative support to regional development in Serbia, focusing on the importance of the IPA programme for Serbia and the Autonomous Province of Vojvodina and, in the end, point to the EU cohesion policy focus for the period 2014-2020, and the challenges and recommendations relating to the process of implementation of pre-accession support for the same period.

[11] The European Commission, *European Union Policies: Regional Policy*, The Publications Office of the European Union, Luxembourg 2014, 3.

2. Regionalism and regionalisation, the etiology of disproportion in regional development

According to article 1 of the Declaration on Regionalism in Europe, Assembly of European Regions from 1996, a region is conceptually defined as a territorial legislative body which is directly below the state in terms of decision-making, and which possesses independent political administration.[12] Vuković, Jovanović and Grubišić point out that "European regions do not represent homogeneous entities and they significantly differ in terms of size, population, institutional structure, competencies and financial power. However, all European regions have the same primary objective: to contribute to the democratic aims and provide services to citizens at a level low enough "to be as close as possible to citizens and their needs", and high enough to achieve the economy of scope"[13].

The concept of regionalism can be defined in different ways, by applying different determinants and factors. Even though in theory regionalism has often been analysed from the geographical point of view (the physical-geography aspect, the statistical-geography aspect, the economic-geography aspect, etc.), because, as Komšić points out, "the root of the concept of "regionalism" is the Latin word region, which, among other things, also means a territorial area"[14], it realises its full terminological and content-related dimension through a number of determinants which define it, each from a different aspect. This primarily includes the social determinant (e.g. ethnic, racial, language, religious, cultural identity, etc.), the economic determinant (e.g. economic instruments of sustainable growth, the competitiveness of regional economy, etc.), the political determinant (e.g. ideological influences, political regimes, etc.), etc. According to Hurrell, "special emphasis is also laid on regional interdependence"[15].

In view of the aforesaid, regionalism is a specific response to state centralism, "and for that reason, its basic political concept is – decentralisation"[16]. Referring to Scruton's "A Dictionary of Political Thought", Komšić defines regionalism as "promoting forms of rule which

[12] Declaration on Regionalism in Europe, Assembly of European Regions, Basel, Switzerland 1996.

[13] D. Vuković, A. Jovanović, Z. Grubišić, „The Economic Aspect of Regionalization of European Countries", *Journal of Geographical Institute "Jovan Cvijic"* 1/2012, 35.

[14] J. Komšić, *Principi evropskog regionalizma*, Asocijacija multietničkih gradova Jugoistočne Evrope – Philia, Novi Sad 2007, 13.

[15] A. Hurrell, "Explaining the Resurgence of Regionalism in World Politics", *Review of International Studies* 4/1995, 334.

[16] P. Maldini, "Politički i administrativni aspekti regije: regionalizam, regionalizacija i regionalna politika", *Zbornik Sveučilišta u Dubrovniku* 1/2014, 135.

allow and stimulate the development of culture and institutions within regions with separate jurisdictions, and which include the transfer of essential political and legal competences to regional governments, with less than full sovereignty, but more than mere administrative functions"[17]. In other words, with the establishment of the European Union, as a specific supranational formation, which has gradually grown stronger with each phase of development, the role of the national state has grown weaker in proportion. On the other hand, along with the weakening of the national identity of the member states as individual political sovereignty entities, regional identities have grown stronger. Moreover, according to Maldini, "in the European Union, the region is established as a principle of state organisation founded on the ideas of autonomy and democracy which a regionalised state is built upon. It is one of the fundamental political principles of the European Union, which fosters cooperation and interconnections, as well as direct interregional cooperation, regardless of national state borders"[18].

As opposed to the terms defined above, regionalisation, in its basic meaning, primarily signifies geographic regionalisation, which refers to the process of separation and differentiation of individual regions, or entities, taking into account physical-geography and economic-geography factors. Regionalisation is defined as "the process of creation of lower administrative and territorial units within a state and transfer of central authorities to these units. These administrative-territorial units are at the middle level of authority, between the central government and the municipalities"[19]. In other words, regionalisation implies "the setting up of a new level in the territorial organisation of states, the establishment of new institutions which can vary significantly in terms of authorities, responsibilities and power, but are always installed above the level of the existing local institutions"[20]. Referring to Mansfield and Solingen's influential attitudes on regionalism, Vuković and associates state further on that "while regionalism encircles intergovernmental (interstate) activities, "from the top to the bottom", as political and very often also highly institutionalised practice, regionalisation is a social process "from the bottom to the top", mostly economically motivated.[21] Consequently, regionalisation is a system of methods (actions) the application of which enables the recognition, revelation, modelling

[17] J. Komšić, 13.
[18] P. Maldini, 135.
[19] D. Vuković, A. Jovanović, Z. Grubišić, 35.
[20] O. Mirić, *Regionalna politika Evropske unije kao motor ekonomskog razvoja*, Evropski pokret u Srbiji, Beograd 2009, 15.
[21] E. D. Mansfield, E. Solingen, "Regionalism", *Annual Review of Political Science* 1/2010, 145-163.

and construction of complete territorial systems - regions, as typological categories and occurrences of unique character".[22]

The concepts of regionalism and regionalisation should be distinguished from the concept of EU regional policy (or EU cohesion policy, or investment policy, which are used as alternative terms for the same concept). Besides the EU regional policy concept, there is also the concept of national regional policy, with each individual state acting as its proponent. While regionalism and regionalisation are the choice of an individual national regional policy, the EU regional policy objective is to reduce economic and social differences between the EU member states by systematically and methodically fostering regional growth, in continuity. In other words, with a view to developing the member states and the EU region, EU cohesion policy is focused on promoting competitiveness of commercial entities and economic growth, providing employment to a larger number of people through stimulating job creation, the application of the sustainability concept in the field of ecology and ecological development, etc. As Mirić points out, "for that reason, when speaking about EU regional policy, we should bear in mind that it does not merely signify regional development in the narrow sense of the word, but also an endeavour to achieve connectedness at the EU level by reducing the existing differences in development levels between its regions"[23]. We should also draw parallels between the concept of EU regional policy and national regional policy. More specifically in the region of Serbia, the national regional policy is created and realised through a legal and institutional framework, as well as through development documents relating to the national regional policy, stipulated by article 14, paragraph 1, of the Law on Regional Development[24], which include the following: The National Regional Development Plan – which defines the key developmental priorities of regional development of the Republic of Serbia and the methods of their realisation, the Regional Development Strategy – which defines the main priorities for regional development and the ways to realise them, and the Regional Development Financing Programme – which includes an overview of projects for the region in question and the distribution of financial assets for the realisation of those projects for each region for one fiscal year. Although we can observe bigger or smaller differences between the EU regional policy concept and a concrete individual national regional policy, according to Mirić, EU regional policy has enabled "the recognition of regional dimensions by national institutions, thus making the region a sort of common institutional

[22] D. Vuković, A. Jovanović, Z. Grubišić, 36.
[23] O. Mirić, (2009), 16.
[24] The Law on Regional Development, *Official Gazette of RS*, No. 51/2009, 30/2010 and 89/2015 – other law.

reference point, despite the fact that the common European concept of "region" still does not exist".[25]

It is also interesting to mention some basic etiological factors of disproportion in regional development. Namely, after enabling the free flow of goods, capital, services and people, and ever more successful and intense business cooperation between the EU member states, differences between individual regions have gradually become more conspicuous. In analysing particular characteristic causes of the occurrence of disproportion in regional development, Majstorović points out that the laws of economic development have resulted in the setting apart of individual regions and concentrating industry in them.[26] The cause of occurrence of less developed regions is a continuous promotion of industrial production, especially some branches of industry, which have significantly led to unpreparedness (financial, organisational, legislative, etc.) of individual regions to adapt to expansive evolutionary tendencies in this area.

3. The objectives and importance of EU regional policy

EU regional (cohesion, investment) policy is the key investment instrument of the EU. Allocating funds for promoting economic and infrastructural development, the innovativeness and competitiveness of commercial entities, ecological sustainability and other aspects of development of all the member states, EU regional policy devotes special attention to the development of less developed regions, and in the spirit of the principle of solidarity between member states provides considerable funds for these purposes, at the same time encouraging national regional policies to co-finance projects of importance to particular regions.

Considering certain features and the purpose of EU regional policy, Međak and Majstorović state that since the very beginning cohesion policy has had a double role to play in European policies, which actually means that it was supposed to promote regional development and to be a kind, or source of additional funds to the member states.[27]

The objectives of EU cohesion policy for the period 2014-2020 are set out in A strategy for smart, sustainable and inclusive growth, under the title Europe 2020, which was adopted in 2010.[28] Analysing the priorities of Europe 2020 Strategy, Kronja distinguishes the following objectives of

[25] O. Mirić, (2009), 16.

[26] S. Majstorović, "EU Regional Policy and Structural Funds", in: *European Strategies and Policies in the Local Community* (eds. Nataša Vučković, Svetlana Vukomanović), Centar za demokratiju, Beograd 2006, 41.

[27] V. Međak, S. Majstorović, *Regionalna politika Evropske unije*, Kancelarija za pridruživanje Evropskoj uniji, Beograd 2004, 7.

[28] Europe 2020, A strategy for smart, sustainable and inclusive growth, *European Commission, Communication from the Commission COM(2010) 2020*, Brussels 2010.

the European Union regional policy: smart growth – the development of economy based on knowledge and innovations; sustainable growth – at the same time promoting competitiveness and production which is more efficient in relation to resources; inclusive growth – better participation in the labour market, fighting poverty and social cohesion.[29] In line with EU cohesion policy, the member states, each within its national regional policy, have defined the quantitative, interrelated and mutually dependent objectives they wish to achieve in a ten-year period.

The defined objectives and the established priorities point to the reasons for existence, which indicate the importance of EU regional policy. Some of them are as follows: the balancing of the living standards of all EU residents, following the principle of solidarity between the member states and a rational allocation of funds, the focusing and harmonisation of political interests, as an important factor of successful economic integration, economic justifiability determined by viewpoints taken by the leading economic theories, a reduction of migratory movement as an important consequence of uneven regional development, etc.

With a view to responding to challenges of economic and social cohesion, achieving the defined objectives and living up to expectations, the contemporary EU cohesion policy for the period 2014-2020 also defines the basic financial instruments.

4. The financial instruments of the European Union regional policy

As Mirić points out in one study, „practically speaking, EU regional policy includes the preparation and implementation of programmes and projects which are primarily financed from the cohesion and structural funds of the EU, and it must, therefore, be pointed out that preparations for managing this policy actually imply preparation for managing EU funds which are directed towards the realisation of strategic plans and priorities defined both at the EU level, and at the level of the member states".[30]

According to the information of the Directorate-General for Regional and Urban Policy of the European Commission[31], the corpus of European

[29] The starting points in drawing up the strategy were: the economic crisis exit plan; facing global challenges; continuity of implementation – continuation of the Lisbon Strategy; stronger financial aid; better coordination with other EU policies; better division of labour between the EU and member states' institutions; new more efficient mechanisms for implementing and strengthening competitiveness at the European level. J. Kronja, *Strategija Evropa 2020: četiri godine kasnije*, Evropski pokret u Srbiji, Beograd 2015, 20-21.

[30] O. Mirić, *Analiza uticaja procesa pristupanja Srbije Evropskoj uniji na lokalne samouprave - oblast regionalne (kohezione) politike Evropske unije*, Program „Podrška lokalnim samoupravama u Srbiji u procesu evropskih integracija", Stalna konferencija gradova i opština, Beograd 2014, 5.

[31] European Commission, Directorate-General for Regional and Urban Policy, Regional Policy, European Structural and Investment Funds, *http://ec.europa.eu/regional_policy/en/funding/,* last visited 10 November 2017.

structural and investment (ESI) funds consists of the following funds: European Regional Development Fund - ERDF; European Social Fund - ESF; Cohesion Fund - CF; European Agricultural Fund for Rural Development - EAFRD; European Maritime and Fisheries Fund - EMFF. According to statements of the European Commission, each EU region can benefit from ERDF and ESF. On the other hand, only less developed regions can gain support from the Cohesion Fund.

ERDF focuses on strengthening regional economic and social cohesion by investing in growth-promoting sectors in order to improve competitiveness and create new jobs. ERDF also finances cross-border cooperation projects. As quoted in the study of the Standing Conference of Towns and Municipalities, „ERDF focuses on the realisation of the following investment priorities: research, technological development and innovations, the promotion of ICT availability and quality, the promotion of competitiveness of small and medium enterprises, the development of low-carbon economy, adjustment to climate changes, the preservation and protection of the living environment, sustainable transport and infrastructure, sustainable employment and mobility of manpower, social inclusion, education, the development of institutional and administrative capacities of public administration".[32]

ESF invests in people and is particularly focused on improving employment and education opportunities. It is committed to helping people in unfavourable circumstances who are threatened by poverty or social exclusion. The study of the Standing Conference of Towns and Municipalities states that „ESF is committed to the realisation of the following investment priorities: employment and mobility of manpower with particular emphasis on young people and the long-term unemployed, self-employment and entrepreneurship, gender equality, adapting the manpower to labour market requirements, active ageing, the modernisation of labour market institutions, social inclusion, the integration of minority groups including the Roma, combating discrimination, the availability of social and medical services, social entrepreneurship, strategies developed at the local level, education and lifelong learning, etc.".[33]

CF invests in the so-called green growth and sustainable development and improves connectivity in the member states with the gross domestic product below 90% of the average of 27 EU member states. In analysing the objectives and importance of the Cohesion Fund, the study of the Standing

[32] O. Mirić, (2014), 10-11; V. European Commission, Directorate-General for Regional and Urban Policy, Regional Policy, European Regional Development Fund, *http://ec.europa.eu/regional_policy/en/funding/erdf/*, last visited 10 November 2017.

[33] O. Mirić, (2014), 11; V. European Commission, Directorate-General for Regional and Urban Policy, Regional Policy, European Social Fund, *http://ec.europa.eu/regional_policy/en/funding/social-fund/*, last visited 10 November 2017.

Conference of Towns and Municipalities states that this fund is „focused on the realisation of the following investment priorities: energy production and distribution from renewable sources, energy efficiency, smart distributive systems, the development of strategies to reduce harmful emissions, the development of efficient co-generation systems, adjustment to climate changes, the development of disaster prevention and management systems, investment into waste material and waste water management and processing, water supply, protection of biodiversity, etc.“.[34]

The objectives of the EAFRD are: improving the competitiveness of the agricultural and forestry sector, improving the environment and the countryside and improving the quality of life in rural areas and encouraging diversification of the rural economy,[35] while the objectives of the EMFF are: ecological, economic and social sustainability of fishing and aquaculture in the EU member states.[36]

5. Legislative support to regional development in Serbia with special emphasis on the importance of the IPA Programme for Serbia and AP Vojvodina

The successful implementation of regional policy, both at the EU level and the national level of individual states, primarily depends on the adoption and proper implementation of the adequate legislative framework, the financial and operational plan, and in particular on the responsible and effective use of all available financial resources.

Legislative support to the regional development policy in Serbia is a structural element of the stimulating regional development policy relating to the segment of regulating the realisation of investments and the realisation of projects of special importance to regional development in Serbia.

The legal framework of the regional development policy in Serbia consists of the Law on Regional Development, Directives, Regulations, Rules of Procedure, Orders, Decisions, Strategies, and the Republic of Serbia Constitution.[37]

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[34] O. Mirić, (2014), 12; V. European Commission, Directorate-General for Regional and Urban Policy, Regional Policy, Cohesion Fund, *http://ec.europa.eu/regional_policy/en/funding/cohesion-fund/*, 10 November 2017.

[35] See European Commission, Directorate-General for Regional and Urban Policy, Regional Policy, European Agricultural Fund for Rural Development, *https://ec.europa.eu/agriculture/rural-development-previous/2007-2013_en*, last visited 10 November 2017.

[36] See European Commission, Directorate-General for Regional and Urban Policy, Regional Policy, E European Maritime and Fisheries Fund, *https://ec.europa.eu/fisheries/cfp/*, last visited 10 November 2017.

[37] See Regionalni razvoj, Pravni okvir politike regionalnog razvoja, *http://www.regionalnirazvoj.gov.rs/Lat/ShowNARRFolder.aspx?mi=1,* last visited 12 November 2017.

The *lex generali* legal text regarding the regional development of Serbia is the Law on Regional Development. This Law defines the names of the regions and regulates the following: the manner of delineating the areas representing regions, and the manner of defining the local self-government units which constitute regions; indicators of the degree of development of regions and local self-government units; the classification of regions and local self-government units according to the degree of their development; development documents; regional development entities; measures and incentives and sources of financing for implementing regional development measures (art. 1).

The aims of promoting regional development are: the overall sustainable social-economic development; the reduction of regional and intra-regional disparities, in terms of degree of socio-economic development and living conditions, laying emphasis on fostering the development of insufficiently developed, devastated industrial and rural areas; the reduction of negative demographic trends; the development of economy based on knowledge, innovativeness, modern scientific-technological advances and organisation of management; the development of competitiveness at all levels; the establishment of a legal and institutional framework for planning, organising, coordinating and realising development activities; encouraging inter-municipal, inter-regional, cross-border and international cooperation regarding issues of common interest; a more efficient use of domestic natural resources and commodities, as well as foreign resources (art. 2).[38] On the other hand, the aims of promoting regional development are realised according to the regional development promotion principles, defined in art. 3.

In the context of the EU funds identified above, article 48, items 5 and 6 stipulate that the financing of regional development is, inter alia, realised from the following sources: the EU pre-accession funds, as well as from the non-refundable development aid of the international community and other European Community programmes. With regard to that, article 49 stipulates for the programmes and projects financed from the EU pre-accession funds to be implemented pursuant to provisions of the Law on Ratifying the Framework Agreement between the Republic of Serbia Government and the Commission of European Communities on the rules of cooperation which regard the European Community's financial aid to the Republic of Serbia in the context of providing aid according to IPA rules[39],

[38] For more information on the objectives and shortcomings of the statistic regionalisation of Serbia as an instrument of even regional development, see D. Golić, S. Počuča, Statistički regioni u Srbiji, *Kultura polisa*, 23/2014, 325-339.

[39] The Law on Ratifying the Framework Agreement between the Republic of Serbia Government and the Commission of European Communities on the rules of cooperation which regard the European Community's financial aid to the Republic of Serbia in the context of providing aid according to the Instrument for Pre-Accession Assistance – IPA rules, Official Gazette of the Republic of Serbia – International Agreements, No. 124/07.

as well as the documents the passage and adoption of which is stipulated by the aforesaid agreement.

An important characteristic of the fifth phase of EU regional policy (2007-2013) was the integration of pre-accession instruments of aid to potential member states. Pursuant to the Council of Europe Directive No. 1085/2006, which took effect in 2007, all the instruments valid at the time (PHARE, ISPA, SAPARD, CARDS) were replaced by one Instrument for Pre-Accession Assistance – IPA, which comprises 5 components and represents a framework for providing assistance to candidate and potential candidate states.[40] The aforesaid Framework Agreement defines in principle the general rules on IPA financial aid and consequently defines the approach to be taken by both state authorities at the central and provincial levels, and local self-government units. Principally, the purpose of implementation of the IPA Programme is to prepare the states for the use of structural and Cohesion funds on becoming members of the EU.

As quoted in the document AP Vojvodina Development Programme 2014-2020, the five components of the IPA Programme relating to which funds were allocated in the period up to 2013 are as follows: supporting transition and institution development, cross-border cooperation, regional development, human resource and rural development. In the past period, Serbia has not had an accredited decentralised system for EU funds management, which meant that it was not capable of managing the EU funds alone so that it could only use the first two IPA components.[41]

In the field of cross-border cooperation, the main objectives of which are directed towards promoting sustainable economic and social development, and cooperating on problem-solving in different areas, in the period 2007-2013 Serbia was given the opportunity to take part in six cross-border cooperation programmes with neighbouring states, and two transnational cooperation programmes – the IPA Adriatic Programme and South-East Europe Programme. Owing to its geographic position, the Autonomous Province of Vojvodina was able to take part in four cross-border cooperation programmes (with Hungary, Romania, Croatia and Bosnia Herzegovina) which were financed from IPA's second component.[42]

[40] See Regionalni razvoj, Politika regionalnog razvoja Evropske unije, *http://www.regionalnirazvoj.gov.rs/Lat/ShowNARRFolder.aspx?mi=27*, last visited 12 November 2017.

[41] A group of authors, Program razvoja AP Vojvodine 2014-2020, *http://programrazvoja.vojvodina.gov.rs/wp-content/uploads/2016/03/Program_razvoja_AP_Vojvodine_2014_2020_3891.pdf*, last visited 13 November 2017.

[42] During the three biddings to submit project proposals within the Programme of Cross-Border Cooperation with Hungary, entities from the territory of AP Vojvodina attracted around EUR 21,695,257. In two biddings for cooperation with Romania, entities from Vojvodina attracted around EUR 10,294,398, while in the first bidding with Croatia, entities from Vojvodina were granted EUR 1,301,754. In the programme with Bosnia Herzegovina, two projects from the territory of AP Vojvodina were approved in the first and second bidding, with the donation amounting to EUR 167,372. Quoted from: Group of authors, 196.

6. Instead of a conclusion – EU cohesion policy focus for the period 2014-2020 and the challenges and recommendations in the IPA II Programme implementation process

The current focus of EU cohesion policy, expressed in the Europe 2020 Strategy, emphasises the importance of this programme for the candidate states, as well as for the neighbouring countries, stating that the expansion of the area of application of EU rules will create new opportunities, both for EU and for its neighbours.

As stated in Europe 2020 Strategy, „two significant novelties in EU expansion policy and regional cooperation in South-East Europe connect the Western Balkan region, including Serbia as a candidate state for membership of the European Union, to the primary trends and objectives of Europe 2020 Strategy. They are a new economic approach of the EU for the Western Balkans and the South-East Europe 2020 Strategy. Within the new economic approach, the European Commission maintains close cooperation with international financial institutions, such as the International Monetary Fund, the World Bank, the European Investment Bank. The countries of the region, inspired by Europe 2020 Strategy, have defined South-East Europe 2020 Strategy, which is committed to the same objectives, but is a product of the need for reforms in the region, with a view to, in the long run, facilitating convergence in economic and social development of the countries of the region with the EU".[43]

On the other hand, as regards the pre-accession assistance area, after years of experience in using the available components of the IPA Programme, the programme framework for the development of the AP Vojvodina region distinguishes the following principal challenges for gaining the possibility of use of pre-accession assistance for the period 2014-2020 (IPA II): an insufficiently developed strategic framework, the unavailability of town-planning and project-technical documentation for infrastructure projects, unresolved property-legal relations, project pre-financing and co-financing, and the sustainability of administrative capacities.[44] The same document points to the essential nature of "recommendations relating to active participation in programming and monitoring international development assistance, the strengthening of human capacities, the preparation of town-planning and project-technical documentation, and the establishment of project co-financing and prefinancing mechanisms,"[45] as the key requirements for further use of international development assistance funds.

[43] J. Kronja, 41-43.
[44] See Group of authors, 202-203.
[45] *Ibid*., 203.

Prof. dr Milan Počuča
Redovni profesor, Pravni fakultet za privredu i pravosuđe, Univerzitet Privredna akademija u Novom Sadu
Prof. dr Jelena Matijašević-Obradović
Vanredni professor, Pravni fakultet za privredu i pravosuđe, Univerzitet Privredna akademija u Novom Sadu

CILJEVI I ZNAČAJ REGIONALNE POLITIKE EVROPSKE UNIJE, UZ OSVRT NA POLITIKU REGIONALNOG RAZVOJA SRBIJE

Rezime

Regionalna politika EU spada u red najvažnijih zajedničkih EU politika. Ciljevi kohezione politike EU za period 2014-2020. godina, predstavljeni su u Strategiji Evropa 2020, i odnose se na pametan, održivi i inkluzivni rast. Poseban značaj za Srbiju imaju finansijski instrumenti regionalne politike EU, a naročito Evropski fond za regionalni razvoj, koji, između ostalog, finansira i projekte prekogranične suradnje. Zakonom o regionalnom razvoju određeno je da se finansiranje regionalnog razvoja vrši, između ostalog, i iz pretpristupnih fondova EU, u kom kontekstu je u periodu 2007-2013. godina za Srbiju i region AP Vojvodina bio veoma značajan Instrument za predpristupnu pomoć – IPA, dok se za period 2014-2020. godina očekuje pretprisutna podrška programa IPA II. Konačno, aktuelno opredeljenje kohezione politike EU, iskazano u Strategiji Evropa 2020, ističe važnost ovog programa za države kandidate, kao i države susedstva, navodeći da će proširenje prostora na kojem se primenjuju pravila Evropske unije kreirati nove mogućnosti, kako za Evropsku uniju, tako i za njene susede.

Ključne reči: Regionalna politika EU, fondovi EU, Strategija Evropa 2020, IPA, IPA II.

Duško Glodić, PhD[1]

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LEGAL SAFEGUARDS OF PROFESSIONAL INDEPENDENCE OF INTERNATIONAL CIVIL SERVANTS –EXTERNAL AND INTERNAL DIMENSION

Abstract

This article explores legal safeguards of professional independence of international civil servants. The author identifies two dimensions of this issue – external and internal. The external dimension appears in therelation between the officials and the international organisation's secretariatand the national authorities of member States of an international organisation, whilst the internal dimension is related to the relations within the secretariat of the international organisation, particularly between an official and his hierarchical superiors. Following the analysis of relevant legal texts, establishing treaties and headquarters arrangements and staff regulations of some international organisations, the author concludes that legal safeguards to ensure independence of officials from the intrusion of national authorities are sufficiently well developed, on the one hand, whilst there is room for improvement of legal instruments protecting the international civil servants in relation to their hierarchical superiors within the secretariat of an international organisation, on the other hand.

Keywords: *international civil service, international organisation, professional independence, headquarters arrangements, functional necessity.*

1. Introduction

Any international organisation represents an independent entity of international law.[2] By the constituting treaty, the member States confer

[1]Programme Manager (Legal), Regional School of Public Administration (ReSPA), e-mail: *duskoglodic@yahoo.com.*

The views expressed in this article are the personal views of the author and not necessarily those of the organisation by which the author is employed.

[2] J. Klabers, *Introduction to International Institutional Law*, Cambridge University Press, Cambridge 2005, 46-47.

certain powers to the international organisation and define its objectives, competencies, means of functioning and operations.[3] The functioning of an international organisation is based on three factors. The first factor consists of the member states of an international organisation, who are masters of its constituent legal instrument and govern the organisation through the decision-making process. The international organisation itself, as an institutional framework and entity of the international law, appears as the second factor, offering the forum for intergovernmental co-operation and decision-making. And, last but not least, the third factor is officials employed by the international organisation, who represent its human resources working, in their professional capacity, for a given organisation.[4]

The officials compose a permanent professional body of an international organisation, most commonly referred to as a secretariat, which ensures administrative support to the governments' representatives and conducts professional, administrative and technical activities necessary for the discharge of the international organisation's functions, in the interest of the organisation and not in the interest of any particular Member State.[5] Therefore, independence and professionalism of the international civil service are among its most important characteristics. This quality is ensured by certain legal safeguards enshrined in the legal documents governing the status of officials in many international organisations. This article explores two dimensions of this type of independence and professionalism: the external one - towards the national authorities and internal one – protection against the abusive hierarchy within the organisation.

Several topics relevant to the main theme are analysed below. At the first place, the concept of professional independence of the international civil servants will be presented. Secondly, the relevant legal framework establishing safeguards of professional independence will be elaborated. Thirdly, prerequisites for the professionalism of international civil service are examined. Finally, two dimensions of safeguards will be demonstrated from a substantive point of view.

2. Professional independence of international civil service

The main responsibility of the secretariat is to ensure the continuity of the organisation's functioning and to enable the manifestation of its independent personality. The officials of international organisations are referred to as international civil servants in the relevant texts, albeit,

[3] I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford, 281.
[4] U.E. Udom, "The International Civil Service: Historical Development and Potential for the 21st Century," *Public Personnel Management*, Vol. 32, 1/2003, 100.
[5] M. Diez de Velasco Vallejo, *Les organisations internationales*, Economica, Paris 2002, 80- 81.

their status, employment terms and conditions, might significantly vary, given the differences existing among various international organisations.[6] Despite those differences, it is possible to find a general definition of the term of an international civil servant. An international civil servant might be defined as an individual appointed, by an international organisation's body, in accordance with an international legal act, to discharge functions in general interest of the organisation in a continued and exclusive manner.[7]

The issue of legal status of officials acquired certain attention during the establishment and institutionalisation of the first modern universal international organisations,[8] particularly the League of Nations and the International Labour Organisation.[9] The further development of international organisations has created certain basic rules and principles that defined the scope of rights, duties and privileges associated with the status of international civil servants. One of the main layers of their status is their professionalism and independence. The independence of international civil service is an old concept, born in the foundation days of the League of Nations. At that time, it was established that the officials should be exclusively responsible to the hierarchical superiors within their organisation and not to the national governments given the paramount importance of professionalism while discharging duties of officials.[10] In the same manner, the official that is free from the influence by any national authority should be also protected from any abusive attitude or requirement by his hierarchical superiors in order to ensure full independence in the performance of tasks related to his appointment within an international organisation.

None the less, the acceptance of the principle of independence was not that straightforward. Since the establishment of the first modern international organisations, two different attitudes related to the preferable connection between officials of an international organisation and their countries were displayed. One attitude was based on assumption that the officials, although working for international secretariats, owed allegiance and loyalty to their nation-states. On the contrary, the other attitude argued that the officials should be strictly independent from any sort of

[6] P. Daillier, M. Forteau, A. Pellet, *Droit International Public*, LGDJ, Paris, 2009, 696.
[7] M. Diez de Velasco Vallejo, 90.
[8] This statement does not mean that those are the first international organisations in general; it is well known that administrative unions were established as of the mid XIX century. However, the purpose of this statement is that a separate body of law started being developed with the establishment of the modern type of political universal organisations.
[9] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, Cambridge 2005, 272-273.
[10] H. Reymond, "Some Unresolved Problems of the International Civil Service," *Public Administration Review,* May/June 1970, 225.

national influence and their loyalty should be owed to their employer – the international organisation. The second type of attitude prevailed and is still the main principle governing the concept of international civil service and its independence.[11]

There are certain grounds justifying the independence of officials. This is due to the evolution of competences and mandates conferred to international organisations. Namely, when the first international organisations were established, the role of their secretariats would have been rather simple, the officials would be tasked to prepare minutes and documents for the meetings among States' delegations. However, over time, their assignments have been significantly upgraded and became more complex. The officials of many international organisations are nowadays expected to develop policies and propose solutions related to legal harmonisation, standards' elaboration, including occasionally also the exercise of administrative and even political powers over territories under international regime and many other tasks requiring high level of professionalism, technical and diplomatic competencies, but also professional attitude and independence from external political actors.[12] Therefore, the independence of international civil service becomes even more important in the times when the international legal order is expected to provide the framework for the governance-related responses by both nation states and international organisations to the challenges of contemporary global systems.[13]

The professionalism and independence would mean for the officials to be guided by the technical reasons and expertise when discharging their duties on behalf of an international organisation and representing the best interests of the international organisation. In order to give effect to this principle, relevant legal documents devoted significant attention to legal safeguards of both aspects of independence and protection of international officials.

3. Legal instruments protecting the independence of international civil servants

The thorough analysis of the legal status of officials requires the examination of all types of documents establishing their rights and

[11] R.S. Jordan, "The Fluctuating Fortunes of the United Nations International Civil Service: Hostage to Politics or Undeservedly Criticised?", *Public Administration Review*, July/August 1991, 51, No. 4, 353.

[12] Y. Kryvoi, "The Law Applied by International Administrative Tribunals: from Autonomy to Hierarchy," *George Washington International Law Review*,. 47/2015, 269.

[13] J.A.R. Nafziger, "The Future of International Law in Its Administrative Mode," *Denver Journal of International Law and Policy*, Vol. 40:1-3, 65-66.

duties pertaining to the conditions of the exercise of their functions. These issues are regulated by the international administrative law, which, being a branch of public international law, "*determines the rights and obligations of international civil servants in their dealings with public bodies, primarily intergovernmental organisations. The international administrative law imposes restraints on the exercise of power by international organisations vis-à-vis international civil servants providing accountability and legitimacy for the exercise of public power.*"[14]

Given the structural characteristics of international organisations, it is possible to identify two sets of instruments that lay down rules guarantying safeguard of independence of officials of international organisations. The constituent treaty and headquarters' arrangements represent the first group of instruments, whilst the internal regulations of the international organisation itself are the second set of legal documents.[15]

3.1. Constituent treaties and headquarters' arrangements

The primary source defining the basics of employment of international organisation's officials is the constituent treaty. The constituent treaty is a multilateral international agreement concluded by the founding members of an international organisation.[16] This instrument lays down main principles regarding the recruitment, appointment and status of officials of one organisation. Such provisions define the basic rules related to the employment and empower certain institutions within the international organisation to enact secondary legislation regulating the employment relations of officials. They also define the exclusively international character of service provided to the international organisation in question.[17]

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[14] Y. Kryvoi, 271-272.

[15] M. Diez de Velasco Vallejo, 92.

[16] M. Shaw, *International Law*, Cambridge University Press, Cambridge 2003, 1193.

[17] Refer to Article 101(1) of the UN Charter which reads as follows: "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly". M. Shaw, 1093. Also refer to Article 36.e-f of the Statute of the Council of Europe, European Treaty Series - No. 1, which similarly defines that "Every member of the staff of the Secretariat shall make a solemn declaration affirming that his duty is to the Council of Europe and that he will perform his duties conscientiously, uninfluenced by any national considerations, and that he will not seek or receive instructions in connexion with the performance of his duties from any government or any authority external to the Council and will refrain from any action which might reflect on his position as an international official responsible only to the Council. In the case of the Secretary General and the Deputy Secretary General this declaration shall be made before the Committee, and in the case of all other members of the staff, before the Secretary General. Every member shall respect the exclusively international character of the responsibilities of the Secretary General and the staff of the Secretariat and not seek to influence them in the discharge of their responsibilities."

The general principle of independence of the international organisation and its officials from any national authorities becomes even more interesting when it comes to the possible interference by the host State. The host State may *via facti* exercise the highest level of pressure, influence or interference with the work of an international organisation due to the reason that the seat of the secretariat is located in its territory. In order to ensure the independence of officials from any intrusion by the host State authorities, the headquarters' arrangements envisage certain facilities, privileges and immunities in favour of the organisation and its officials.[18] The immunities that are usually envisaged by this type of agreements relate to the following situations: the immunity from legal process of any kind in respect to the official acts, the immunity from seizure of personal and official baggage, the immunity from inspection of official baggage and personal baggage for some categories of officials. Furthermore, the officials enjoy a range of tax exemptions related to their income from the salaries and emoluments paid by the international organisation. There are also some facilities for the import of goods for personal use, VAT exemptions, exemption from the visa regime for officials and members of their households, etc.[19] As for the heads of international organisations and their deputies, the headquarters' arrangements envisage that these highest officials shall be accorded immunities, exemptions and facilities accorded to diplomatic envoys of comparable rank in accordance with international law.[20] The majority of the headquarters' arrangements contain similar provisions and establish similar regime regarding the status of an international organisation in a host State.

A prevailing standpoint is that the immunities accorded to the officials are not established for their personal benefits, but in the interest of their organisation. Some authors point out that "*the reason for the granting of immunities to international organisations was to enable them to pursue their functions more effectively and in particular to permit organisations*

[18] J. Klabbers, 133.

[19] Refer to: Section 37, Agreement between the Republic of Austria and United Nations regarding the Seat of the United Nations in Vienna of 29 November 1995, UN Treaty Series, Vol. 2023; Article 18, General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949, European Treaty Series, No. 2; Section 38(a), Article VI, Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the Headquarters of the International Atomic Energy Agency of 11 December 1957,INFCIRC/15, 1959; Article 17 and 18, Headquarters Agreement between the International Criminal Court and the Host State of 7 June 2007, *https://www.icc-cpi.int/NR/rdonlyres/99A82721-ED93-4088-B84D-7B8ADA4DD062/280775/ICCBD040108ENG1.pdf* , 10.5.2017.

[20] Article 16, General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949, European Treaty Series, No. 2; Section 38, Agreement between the Republic of Austria and United Nations regarding the Seat of the United Nations in Vienna of 29 November 1995, UN Treaty Series, Vol. 2023.

to operate free from unilateral control by a member State over their activities within its territory."[21] Therefore, due to the prevailing interest of the international organisation, as the basis of the immunities accorded to the officials, it is clear that the immunities are of functional nature and are justified by the theory of functional necessity.[22]

Although this theory seems logical, the practice may bring some questions as to what are the limits of immunities. The character of an act as official, i.e. being committed to the accomplishment of official duties, is something which is important for decision if certain act or behaviour is covered by the immunity. However, the practical difficulties related to the establishment of real nature of the act whose legality may be questioned may put in jeopardy the granted immunities if the national authorities initiate certain procedures. In this respect, Klebbers underlines that "*the point is that the determination of the legality of behaviour should not come before the courts of the host state because that might obstruct the organisation's work.*"[23] Exceptionally, if the interest of justice requires so, the competent institution of the international organisation may decide to waive the immunity of any official.[24]

3.2. Internal regulations of international organisations governing officials' employment

The secondary sources, which in more details define terms and conditions of employment of international civil servants, are being adopted by the relevant legislative body of an international organisation and are further developing the status of employees pursuant to the basic principles set out by the founding treaty. Such documents are most often denoted as the staff regulations.[25]

The secondary or derivative sources "*are made under powers assigned by the basic constitutional texts*".[26] The international practice has

[21] M. Shaw, 1207; Refer to: United States Court of Appeals, *Susana Mendaro, Appellant, v. The World Bank, a.k.a. International Bank for Reconstruction and Development*, 717 F.2d 610 (1983).
[22] In this vein Klabbers explains that "The idea … is that organisations enjoy such immunities as are necessary for their effective functioning: international organisations enjoy what is necessary for the exercise of their functions in the fulfilment of their purposes." J. Klabbers, 132.
[23] J. Klabbers, 135. Refer to Article 105(2) of the UN Charter which reads as follows: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."
[24] See for instance: Article 19, General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949, European Treaty Series, No. 2.
[25] C.F. Amerasinghe, 286; M. Diez de Velasco Vallejo, 113.
[26] C.F. Amerasinghe, 24.

confirmed the basic principle according to which the employment relations of officials should not be regulated by the national labour legislation but they should rather be governed by the internal acts of international organisations.[27] Notably, since the establishment of modern universal organisations, it was clearly assumed that the corps of officials employed within their secretariats, should not be subject to any set of national rules. Consequently, it has been practice since then, to regulate the employment relations by the acts adopted by the international organisation itself.[28] It is worth mentioning that certain aspects of the status of officials may also be further regulated by the tertiary acts enacted by the head of the secretariat of the organisation. These acts naturally have to be fully aligned with the staff regulations and not to override the delegated powers by the latter.[29]

The secondary and tertiary acts compose the internal law of international organisation. As Show emphasises, the internal law "*may, in reality, be seen as a specialised and particularised part of international law, since it is founded upon agreements that draw their validity and applicability from the principles of international law*."[30] This body of law also referred as the international administrative law, establishes legal relations that are directly binding officials, as private entities, and the international organisations, as their employer and an intergovernmental body, at the same time.[31]

As for the nature of legal regime governing the appointment and employment conditions of international civil servants, two different approaches have been identified. The first one, which is similar to the system of national civil service, is the statutory system. According to this system, the applicable terms and conditions of their employment are of the statutory nature.[32] The other possible regime is the contractual system where an employment contract is concluded between the international organisation and its official. These contracts stipulate terms and conditions of the employment and, as any contract, has two constituting moments – an offer for employment and an acceptance by the employee.[33] It is not possible to state that one of the two systems prevail, it is rather a combined system consisting of both contractual and statutory elements. Any employment contract has to be in line with the general staff rules and regulations, on the one hand, and the employment relations is covered by

[27] *Ibid.*, 280.
[28] Y. Kryvoi, 268; C.F. Amerasinghe, 276-277.
[29] C.F. Amerasinghe, 286-287.
[30] M. Shaw, 1199.
[31] Y. Kryvoi, 273.
[32] C.F. Amerasinghe, 280-281; M. Diez de Velasco Vallejo, 91 – 94.
[33] M. Diez de Velasco Vallejo, 91; C.F. Amerasinghe, 280-281.

all relevant provisions even though there are not explicitly stipulated in the employment contract.[34]

The staff regulations and connected rules establish the status of international civil servants. The employment rules, although internal to international organisations, are adopted by the intergovernmental bodies and some international character.[35]

4. Prerequisites for professionalism of international civil service

Although there are significant similarities among rules of different international organisations when it comes to the rules applicable to their officials, it would not be easy to uphold that there is a common set of rules that are applicable to any international organisation.[36] Over decades, a solid body of principles has been established and it is possible now to detect certain common principles governing the status and employment conditions of officials of international organisations, particularly those that are intended to ensure their professionalism and independence. Those principles relate to recruitment and remuneration of officials, international and professional character and exclusivity of their service.

Since the international organisations both embody and enable the international co-operation,[37] the necessary international character of their secretariats is ensured by the employees coming from different Member

[34] Y. Kryvoi, 281; C.F. Amerasinghe, 282. Regarding the legal nature of regime applicable to the relation between an official, as employee, and an international organisation, as employer, the United Nations Administrative Tribunal has maintained that: " [R]elations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature. Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of the staff, and consequently the right to change them. … notwithstanding the existence of contracts between the United Nations and staff members, the legal regulations governing the staff are established by the General Assembly. In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements … while the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members." United Nations Administrative Tribunal, Case No. 36, *Wallach v. The Secretary General of the United Nations*, Judgement No. 53 of 29 May 1954, § 3.

[35] Refer to: Staff Regulations and Rules of the United Nations, Secretary-General's bulletin, ST/SGB/2017/1; Staff Regulations and Staff Rules of the Organization for Security and Co-operation in Europe, *https://jobs.osce.org/resources/document/osce-staff-regulations-and-staff-rules*, 10.10.2017.; The Council of Europe Staff Regulations, *https://www.coe.int/T/AdministrativeTribunal/WCD/staff_en.asp*, 10.10.2017.

[36] O. Elias, M. Thomas, "Administrative Tribunals of International Organisations," in: *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (ed. Chiara Giorgetti), Martinus Nijhoff Publishers, Leiden 2012, 175.

[37] M. Kreća, *Međunarodno javno pravo,* Pravni fakultet u Beogradu, Beograd 2010, 487.

States. In addition, it should be composed of the best qualified candidates that would be offered employment at the secretariat.[38] Therefore, recruitment and appointment of officials represent the central instrument to ensure and preserve the international character of professional corps composing the secretariat. The specific rules should enable the recruitment of qualified individuals with the adequate representation of all nationals of the organisation within its secretariat. The further guarantee of international nature of the service is the appointing authority which should be allocated to the head of the secretariat and not to any intergovernmental body of the organisation.[39]

The international civil servants are expected to meet the highest standards of efficiency, integrity and skills and knowledge while performing their duties. In other terms, the international civil service is supposed to attract and recruit autonomous and first-class employees who would be exclusively devoted to their service and not subject to any national authority when discharging the official duties.[40] Their international allegiance and loyalty to the international organisation are enshrined in the core provisions of any staff regulations.[41] Some international organisations require their officials to sign a solemn declaration confirming their allegiance to the organisation and its core values.[42]

The quality of candidates is to be ensured by the merit-based recruitment. The merit-based recruitment is complemented by the principle of geographical distribution in order to ensure a truly international service. However, the principle of geographical distribution is supposed to remain a subordinate criterion to the professional qualities of candidates for positions within the international organisation's

[38] U.E. Udom, 100-102. It is worth citing that "the time has long passed for the world verdict on whether or not there should be an independent international civil service. There must be a multinational body of men and woman to play the parts in the international drama drawing together the purposes of all mankind" J.W. Macy, "Towards an International Civil Service," *Public Administration Review*, May/ June 1970, 258.

[39] H. Reymond, 227.

[40] T.G. Weiss, "The John W. Holmes Lecture: Reinvigorating the International Civil Service," *Global Governance,* 16/2010, 40.

[41] Refer to Article I, Regulation 1.1(a) of the Staff Regulations and Rules of the United Nations which reads as follows: "Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international."

[42] For instance, Article I, Regulation 1.1(b) of the Staff Regulations and Rules of the United Nations envisages that Staff members shall make the following written declaration: "I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization."

secretariat.[43] To this effect, recruitment procedure and selection of officials lays at the core of formation of a professional corps enabling normal functioning of one organisation. The selection process should ensure that the most qualified candidate will obtain position, on the one hand, and the appointing authority has to ensure that the principle of equal geographical representation is respected, which means that nationals of all members have access to the employment at the organisation and are represented within the corps of professionals, on the other hand.[44]

It is not sufficient to open employment to candidates who are nationals of all member States of an organisation. Since the professional engagement at one international organisation regularly implies the reallocation from the country of origin, it is important to offer significantly attractive remuneration package to the candidates, who are supposedly highly qualified and educated. This issue is usually resolved in accordance with the *Noblemaire Principle* which means that the amount of salaries paid to officials working for international organisations should be at the level of the highest paid civil service which is comparative with the concrete organisation. If it is applied to the United Nations, it would mean that the highest paid civil service of the world would be taken as a comparative basis, at the given moment, when the salary scales are being elaborated. This principle offers guarantees that the most qualified candidates might be interested to apply for and eventually accept positions at the international organisation. [45]

Besides the above mentioned concepts, the exclusivity of engagement of officials remains also a core element of their professional character of status. This exclusivity would mean that an official would not engage in any other profession except the one within the secretariat of the international organisation, or such an outside engagement would be subject to strict conditions laid down by the applicable staff regulations. This concept is justified by the need to ensure that the loyalty towards the international organisation would not be jeopardised by any external professional interests of officials having an outside engagement. However, this is not an absolute principle since, under strict conditions; an outside

[43] J.W. Macy, 260. Cf. Article 101(3) of the Charter of the United Nations: "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

[44] Article I, Regulation 1.1(d) of the Staff Regulations and Rules of the United Nations, Secretary-General's bulletin, ST/SGB/2017/1; Regulation 7, OECD Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, July 2017, *http://www.oecd.org/careers/Staff_Rules_July_2017_to_print.pdf*, 01.10.2017.

[45] U.E. Udom, 100-102; J.W. Macy, 261-262.

engagement of officials may be allowed by the administrative head of the international organisation.[46]

5. Independence *vis-à-vis* national authorities of the Member States

Independence towards national authorities has been identified as one of the essential characteristics of international civil service since the establishment of the League of Nations. The only authority to which the officials should be responsible is the administrative head of the organisation. This type of independence may be summarised as the prohibition for the head of the secretariat and officials to seek and to receive instructions from the Member States authorities, on the one hand, and as the obligation for the Member States authorities to respect the exclusive international character of the officials' responsibilities and refrain from any form of influence and intrusion, on the other hand.[47] In other words, explained, "*for individual staff members, independence means that they fully accept and practice primary loyalty to their organisation and its purposes*."[48]

The principle of independence and loyalty, from a theoretical perspective, may seem slightly difficult to be fully respected because one may assume that any individual, even though he/she is an international official, may be significantly attached to pursue what is in the best interest of its country of origin. People tend to seem closely attached to the

[46] Article I, Regulation 1.2(o) – (p), Staff Regulations and Rules of the United Nations, Secretary-General's bulletin, ST/SGB/2017/1;

[47] H. Reymond, 225. Refer to Article 100(1) of the Charter of the United Nations: "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization." and Article 100(2) of the Charter of the United Nations: "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities." For this issues, the provision of Article I, Regulation 1.1(d) of the Staff Regulations and Rules of the United Nations, Secretary-General's bulletin, ST/SGB/2017/1, seems also pertinent. Although these wording contains a clear provision protecting the independent character of UN officials, the practice has shown some examples when this principle was severely breached, such as the request by the USA authorities to conduct the security investigations for all its nationals serving the UN Secretariat, the attitude of some former communist countries who were opposing to independent recruitment system for their nationals, favouring nationals of some new member States in the recruitment process and thus undermining the principle of high professional standards to be met by candidates, etc. See further at R.S. Jordan, "The Fluctuating Fortunes of the United Nations International Civil Service: Hostage to Politics or Undeservedly Criticised?", *Public Administration Review*, July/August 1991, Vol. 51, No. 4, 353-354.

[48] H. Reymond, S. Mailick, "The International Civil Service Revisited," *Public Administration Review*, March/April 1986, 137.

preservation of the national sovereignty of their countries. Nevertheless, if this problem is perceived from a practical level, then it may be concluded that in their actual work and discharge of official duties, the international civil servants do not face the issues that may challenge their national loyalty. Namely, they mostly accomplish administrative tasks stemming from their job descriptions and their practical involvement into the processes that may have an impact on the interest of their home country may occur quite rarely, if not ever. This may be explained by the way in which the international organisations operate. The decisions sensible to have an impact on national interests are taken by the intergovernmental body, very often by unanimity or consensus, and decision-making procedures give enough room to the national representatives to rely on different tools for protection of their national interests. Consequently, there is no need for international civil servants to assume the role of keeper of national interests and to put into jeopardy its duty to be loyal to the employing organisation.[49]

The bottom line of this concept are exclusive responsibility and accountability of an official to the hierarchical head of the administrative body, but not to any single member State or its government. The practice of relevant international tribunals has demonstrated their readiness to protect the principle of independence of international civil servants from national authorities and legislation when it comes to the performance of official functions of the former.[50]

6. Protection of officials within hierarchical system of international organisations

The status of officials, their independence and professionalism are not only ensured by their protection from the national authorities, but also by the principle that the international civil servant should be also protected against any abuse that might be imposed by his hierarchical superiors.[51] Normally, the officials are supposed to the directions and instructions properly issued by the head of the secretariat and by their supervisors.[52]

This type of protection is ensured by existence of effective legal remedies at disposal of officials. These remedies represent the right to challenge decisions affecting their employment conditions, terms of appointment and career management.[53] Due to the immunity that the

[49] *Ibid.*, 137.
[50] C.F. Amerasinghe, 277 – 278.
[51] *Ibid.*, 278.
[52] Chapter I, Rule 1.2(a) of the Staff Regulations and Rules of the United Nations, Secretary-General's bulletin, ST/SGB/2017/1.
[53] M. Diez de Velasco Vallejo, 699.

international organisations enjoy, the officials are prevented from filing complaints against their international organisations as their employer or under national law. The officials consequently may use only those remedies that are available under the rules of the international organisation by which they are employed and can appeal or complain before the administrative tribunals of appellate bodies that are competent to take cognizance of their cases.[54] The international law does not know the unified system of appeals and judicial protection for officials as there is a number of different administrative tribunals established by international organisations to hear cases related to their employees. Despite different purposes and responsibilities of different organisations, the administrative tribunals, although not formally obliged, tend to look at each other's case law and ensure the respect of some common principles related to the international civil service.[55]

The protection from abusive administrative power within the organisation may be triggered in the cases when there is abuse of discretionary power of superiors, the most notably of the head of the secretariat of international organisation, then when it comes to the exercise of disciplinary powers and other managerial decisions within the scope of responsibility of the administrative superiors that were taken through the substantive or procedural irregularity.[56] In the case of discretionary power, the tribunals have clearly defined no-substitution principle. This principle basically means that they would not try to substitute its own decisions and judgments for those of the internal administrative instances responsible to decide on the matter. However, the tribunal would exercise the review over procedural and relevant substantive aspects of the discretionary decision, such as discrimination committed by hierarchy, breach of procedure etc.[57]

To conclude, the quality of legal regime protecting officials seems to be questionable, if it is compared with national legislation and existing remedies and adjudicating systems. The isolated international administrative legal systems cannot dispose of some established review mechanisms that exist in the national administrative systems.[58] One additional difficulty that may appear in this context is due to the lack of applicable law that would be outside the scope of influence of the political power within the organisation. This remains quite difficult to be achieved

[54] Y. Kryvoi, 272.
[55] B.M. de Vuyst, "The World Bank Administrative Tribunal," *Revue belge de droit international* 1/1981-1982, 82.
[56] C.F. Amerasinghe, 299 – 307; M. Diez de Velasco Vallejo, 702.
[57] C.F. Amerasinghe, 300-303.
[58] Y. Kryvoi, 276.

given the fact that the appellate bodies and administrative tribunals are established and their members appointed by the organisation's authorities. Therefore, the writings by scholars demonstrate that there is significant problem with the assurance of legitimacy and accountability.[59] The key paradox that has appeared in the practice is the fact that the international standards of employees' protection, including the International Labour Organisation conventions, may not be applied to the officials since these documents are not binding upon international organisations. Despite the fact that the international organisations are not parties to this type of conventions, it could be still upheld that the rules contained therein could be treated "*as evidence of general principles of law recognised by most countries in the world*" and thus become applied to the cases involving the rights and duties of international civil servants.[60]

The other facet of protection of officials is related to the amendments and alteration of their employment terms and conditions by the authorities of the international organisation. Those amendments may be brought both by deliberative organs or administrative head of the organisation. Generally, it is an established principle that the organisation may amend the staff regulations and other rules, based on the needs of the organisation, its economy and structural and functional needs.[61] However, it is also understood that those amendments cannot embrace the essential elements of appointments, i.e. those employment conditions that induced somebody to accept the employment within the organisation. Furthermore, the acquired rights and those rights of employees that accrued during the performance of the duty must not be suppressed by the amendments of internal rules.[62]

7. Concluding remarks

It is possible to conclude that the international civil servants enjoy two dimensions of professional independence and its protection – externally and internally. Firstly, they are protected from the interference

[59] *Ibid.*, 278.
[60] *Ibid.*, 290-291.
[61] "The reference in the Applicant's contract to the Service Code has the effect of subjecting the Applicant himself to rules which might be adopted by the Council in pursuance of the Chicago Convention; this power to adopt general provisions implies in principle the right to amend the rules established. But the Council itself can regulate its right of amendment and has in fact done so in several provisions. As long as these provisions concerning amendments are in force, they must be respected by the Council." United Nations Administrative Tribunal, Case No. 83, *Puvrez v. The Secretary General of the International Civil Aviation Organisation*, Judgement No. 82 of 4 December 1960, § 5.V.
[62] World Bank Administrative Tribunal, *De Merode et Alii v. The World Bank*, Decision No. 1(1981), § 20.

of representatives of national governments of member States and from the authorities of the host State. This type of protection from external powers is solidly enshrined in the constituent treaties of one organisation, on the one hand, and the headquarters' arrangements/agreements concluded between the international organisation and its host State, on the other hand. The international character of the corps of officials, their exclusive international loyalty, functional immunity and protection from the judicial prosecution for the acts committed in their official capacity, are grounded in the international law.

Secondly, when it comes to the internal dimension of protection, the assurance for their professional independence and protection for their rights stemming from the employment relations with the international organisation, this article has found that this type of safeguards is defined by the international administrative law, mostly contained in the internal regulations of the international organisation. These rules, although having significant legal force within the legal system of any particular international organisation, are not as developed as comparable rules related to national civil service existing at national levels. Namely, the system that should ensure the protection of officials in the cases against their hierarchical power, does not seem to be sufficiently developed nor complying with the standards and principles established in most of the national jurisdictions. Therefore, it is possible to conclude that the international law has developed effective safeguards when it comes to the professional independence of officials and their protection against national authorities of member States. On the contrary, there is enough room for improvement of internal dimension of protection of officials and improvement of existing legal safeguards and applicable rules.

Dr Duško Glodić
Rukovodilac programa (pravnik), Regionalna škola za javnu upravu (ReSPA)

MERE PRAVNE ZAŠTITE PROFESIONALNE NEZAVISNOSTI MEĐUNARODNIH SLUŽBENIKA – SPOLJNA I UNUTRAŠNJA DIMENZIJA

Rezime

U članku se razmatraju mere pravne zaštite profesionalne nezavisnosti međunarodnih službenika. Autor je uočio dvije dimenzije ovog pitanja – spoljnu i unutrašnju. Spoljna dimenzija se manifestuje u odnosima između vlasti država članica jedne međunarodne organizacije i njenog sekretarijata, dok se unutrašnja dimenzija tiče odnosa u okviru sekretarijata, posebno u pogledu hijerarhijskog odnosa između međunarodnih službenika i njihovih nadređenih. Na osnovu analize relevantnih pravnih akata – osnivačkih sporazuma, sporazuma sa državom sedišta i uredaba o radnim odnosima, autor zaključuje da su solidno razvijene mere pravne zaštite kojima se obezbeđuje nezavisnost službenih lica u odnosu na uplitanje državnih vlasti država članica, s jedne strane, te da je potrebno dodatno unaprediti one odredbe koje regulišu status i mogućnost zaštite međunarodnih službenika u odnosu na lica koja su im hijerarhijski nadređena unutar sekretarijata, s druge strane.

Ključne reči: međunarodna služba, međunarodne organizacije, profesionalna nezavisnost, sporazum sa državom sedišta, funkcionalna neophodnost.

Ana Batrićević, PhD[1]
Nikola Paunović, M.A.[2]

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WASTE DISPOSAL IN THE EUROPEAN UNION: NORMATIVE FRAMEWORK AND PRACTICE

Abstract

Waste disposal is a global challenge, particularly in the context of environmental pollution prevention and human health protection. That is the reason why the European Union has been adopting and applying a series of documents pertinent to this issue. The most relevant are: Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste. However, the reports of the European Commission and the practice of the Court of Justice of the European Union confirm that there are numerous disparities between the Member States regarding the implementation of standards of waste management in general and in particular, waste disposal. The Republic of Serbia has to make substantial improvements in the area of waste disposal, especially in the context of the upcoming opening of the Negotiation Chapter 27, dedicated to the environment and climate change. Therefore, the authors analyse legal sources of the European Union related to waste disposal, reports on their application and relevant practice of the Court of Justice of the European Union as potential directions and guidelines.

Key words: *waste, waste disposal, landfill, environmental protection, European Union.*

1. Introduction - General Waste Disposal Issues

In the past couple of decades, waste has been considered a serious global environmental issue and its management, including its prevention, recycling and disposal represents a challenge for experts from various fields including

[1] Research Fellow at the Institute of Criminological and Sociological Research, e-mail: *a.batricevic@yahoo.com.*
[2] Research Intern at the Institute of Criminological and Sociological Research and a PhD Candidate at University of Belgrade, Faculty of Law, e-mail: *dzoni925@gmail.com.*

international environmental law[3]. It was estimated that in the period between 1980 and 1997, municipal waste in OECD countries increased by around 40%. At the same time, the quantity of waste was predicted to grow by a further 40% by 2020[4]. European Environmental Agency underlined that the EU Member States produce around 1.3 billion tons of waste, of which 40 million tons is considered hazardous[5]. The most severe negative environmental impacts caused by the increase in waste production include the permanent loss of material and energy resources, the pressure to use new sites with the loss of that land use for housing, leisure or agriculture as well as air, water and soil pollution.[6]

These findings raised a growing concern about the problem of waste management in both developed and developing countries, including the Member States of the European Union (hereinafter: the EU), which initiated the adoption of national and international legislative and strategic frameworks dedicated to that issue. Waste has been at the centre of the EU environment policy in the last 30 years and substantial progress has been made in that area. In many EU countries, polluting landfills and incinerators are being cleaned up and innovative hazardous waste treatment techniques are being developed. Moreover, hazardous substances are being removed from vehicles and electrical and electronic equipment and the levels of dioxins and other emissions from incineration are being significantly reduced[7].

A comprehensive strategic and legislative framework is playing an important role in successful waste management at the EU level. But, in spite of generally positive trends in this area, practice confirms that there are still some substantial differences among the EU Member States when it comes to the implementation of waste management standards. This particularly refers to illegal waste disposal and irregular work of landfills

[3] For a more detailed analysis of international sources of environmental law see: V. Joldžić, A. Batrićević, V. Stanković, "Međunarodnopravni okviri transporta, čuvanja, prerade i odlaganja otpada", *Ecologica,* 84/2016, 854-858.

[4] The Organisation for Economic Cooperation and Development (OECD), *Environmental Outlook Report*, Paris 2001, 235, *http://dev.ulb.ac.be/ceese/CEESE/documents/ocde%20environment%20outlook.pdf,* 28.10.2017.

[5] D. Savić, "Evropske ekološke vrednosti za dobrobit građana Srbije, sa posebnim osvrtom na praksu postupanja sa otpadom", u: *Evropski standardi u Srbiji - zbornik radova* (ed. Jelena Milić), Beograd 2009, 67.

[6] A.M. King, S.C. Burgess, W. Ijomah, C.A. McMahon, "Reducing waste: repair, recondition, remanufacture or recycle?", *Sustainable Development*, 4/2006, 257-267.

[7] 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}, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0666&from=EN*, 27.10.2017

in some countries, such as Italy[8] and Greece[9], which brought them before Court of Justice of the European Union.

2. Strategic Approach to Waste Management in the EU

The Thematic Strategy on the Prevention and Recycling of Waste[10] was published in December 2005 by the European Commission. The Strategy emphasises that current EU waste policy is based on a concept known as the waste hierarchy. This concept is applied in most developed countries, in particular, European countries and Japan. It is based on the assumption that first of all, waste should be reduced, otherwise recycled, next incinerated and, only if there are no other available options, landfilled. Landfilling is considered the worst option because it consumes a lot of space and runs a high risk of unwanted leakages and emissions to air, water and soil [11].

The Strategy points out that landfill represents the most inconvenient option for the environment because it involves the loss of resources and causes pollution. In spite of differences among the Member States when it comes to waste management and various approaches to the management of different types of waste, it accentuates the importance of moving towards a recycling and recovery society and moving up the hierarchy, away from landfill and more and more to recycling and recovery [12].

The Strategy sets basic objectives of the current waste policy of the European Union: to prevent waste, to promote its re-use, recycling and recovery as well as to reduce its negative environmental impacts. Its long-term goal is to make the EU a recycling society, avoiding waste and using it as a resource.[13] In order to achieve these objectives, the following measures and activities are suggested: 1) full implementation of current legislation, 2) simplification and modernisation of existing legislation, 3) introduction of life-cycle thinking into waste policy, 4) promotion of more ambitious waste prevention policies, 5) better knowledge and information, 6) development

[8] Court of Justice of the European Union Press release No 163/14, Luxembourg, 2 December 2014, Judgment in Case C-196/13, Commission v Italy, *http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140163en.pdf,* 30.03.2017.

[9] Action brought on 21 December 2012 -European Commission v Hellenic Republic (Case C-600/12) (2013/C 63/19), *http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-07/cp140104en.pdf*, 30.03.2017.
European Commission - Press release Waste management: Commission refers Greece to the Court of Justice of the EU over illegal landfill, Brussels, 10 December 2015, *http://europa.eu/rapid/press-release_IP-15-6224_en.htm*, 30.03.2017.

[10] Strategy on the prevention and recycling of waste.

[11] E. Dijkgraaf, H. Vollebergh, "Burn or Bury? A Social Cost Comparison of Final Waste Disposal Methods", *Nota di Lavoro* 46/2003, 2.

[12] Strategy on the prevention and recycling of waste, 4.

[13] *Ibid*., 6.

of common reference standards for recycling and 7) further elaboration of the EU's recycling policy.[14]

The review of the progress towards the objectives set out in the Strategy was made in the Report on the Thematic Strategy on Waste Prevention and Recycling[15], adopted by the European Commission in January 2011. The Report confirmed that the Strategy had played an important role in regulatory policy development, as well as that progress, was made in the improvement and simplification of legislation, the establishment and diffusion of key concepts such as the waste hierarchy and life-cycle thinking, waste prevention, improving knowledge, and setting new European collection and recycling goals. According to the Report, the recycling rates improved, whereas the amount of waste disposed on landfill decreased. The use of hazardous substances was reduced, which led to a decrease of the relative environmental impacts per ton of waste treated. However, negative environmental impacts were still caused by the expected increase in waste generation.[16] Therefore, the Report suggested the application of the following measures: proper implementation and enforcement of the existing EU waste acquis, application of an optimal combination of economic and legal instruments, improving the competitiveness of EU recycling industries, developing the markets of secondary raw materials and strengthening their supply in the EU, improving stakeholders' participation, raising public awareness etc.[17]

Although the Strategy represents key strategic document in this area, it should be taken into consideration that the development and implementation of the EU waste policy and legislation, including the issue of waste disposal, is taking place within the perspective of several broader EU policies and programmes such as 1) Seventh Environment Action Programme[18], 2) Roadmap to a Resource Efficient Europe[19] and 3) Raw Materials Initiative[20].

[14] *Ibid*., 10.

[15] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Thematic Strategy on the Prevention and Recycling of Waste SEC(2011) 70 final, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0013&from=EN*, 27.10.2017.

[16] *Ibid*., 8.

[17] *Ibid*., 9.

[18] 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" (Text with EEA relevance), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN, 27.10.2017.

[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Roadmap to a Resource Efficient Europe" {SEC(2011) 1067 final} {SEC(2011) 1068 final}, Brussels, 20.9.2011 COM(2011) 571 final, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0571&from=EN*, 27.10.2017.

[20] Communication from the Commission to the European Parliament and the Council "The raw materials initiative — meeting our critical needs for growth and jobs in Europe" {SEC(2008) 2741}, Brussels, 4.11.2008 COM(2008) 699 final, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0699&from=EN*, 27.10.2017.

3. Key Directives Regulating Waste Disposal in the EU

Waste management has always been the focus of the EU environmental policy and it has adopted several legal documents pertinent to various waste management issues[21]. The first one, Council Directive 75/442/EEC on waste[22] was adopted in 1975 and is no longer in force. It recognised that the objective of provisions pertinent to waste disposal should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. Moreover, it proclaimed that the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources. The aforementioned and many other principles set by this Directive have been later re-affirmed in other EU legal sources dealing with the issue of waste.

The legal framework that current strategic approach to waste management in the EU is based upon includes horizontal legislation on waste management, accompanied by more detailed legislation regulating the waste treatment and disposal operations.[23] When it comes to regulation of waste disposal in the EU, the following legal sources can be singled out as the most relevant: 1) Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (the Waste Framework Directive)[24] and 2) Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste[25].

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[21] D. Prlja, D. Stepić, D. Savović, "Upravljanje otpadom - međunarodni propisi sa posebnim osvrtom na regulativu Evropske unije", in: *Ekologija i pravo* (eds. Aleksandra Čavoški, Aleksandra Knežević Bojović), *Institut za uporedno pravo,* Beograd 2012., 150-165.

[22] Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194, 25.7.1975., *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1975L0442:20031120:EN:PDF*, 29.10.2017.

[23] 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}, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0666&from=EN*, 27.10.2017.

[24] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (the Waste Framework Directive), OJ L 312, 22.11.2008., *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0098&from=EN*, 27.10.2017.

[25] Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste, OJ L 182, 16.7.1999., *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0031&from=en,* 29.10.2017.

3.1. Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste (the Waste Framework Directive)

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, also known as the Waste Framework Directive, sets the basic principles and definitions related to waste management. It lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use (Article 1).

According to the Directive, the term waste refers to any substance or object which the holder discards or intends or is required to discard (Article 3, Paragraph 1). Waste management comprises the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or broker (Article 3, Paragraph 9).

The Directive establishes fundamental waste management principles. It requires that waste is managed without endangering human health and harming the environment, and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest (Article 13). The Directive defines waste disposal as any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. A non-exhaustive list of disposal operations is set out in Annex I of the Directive (Article 3, Paragraph 19). It is suggested that waste legislation and policy of the EU Member States should apply the following waste management hierarchy: prevention, preparing for re-use, recycling, other recovery and disposal (Article 4, Paragraph 1). This means that waste disposal represents the least acceptable option that is supposed to be applied only of prevention, re-use, recycling or other recovery of waste is not possible. Such standpoint is expressed in the Introductory part of the Directive that prescribes that the Member States should support the use of recyclates, such as recovered paper, in line with the waste hierarchy and with the aim of a recycling society, and should not support the landfilling or incineration of such recyclates whenever it is possible.

3.2. Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste

Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste was adopted in accordance with Council Resolution of 7 May

1990 on Waste Policy[26] that invited the European Commission to propose criteria and standards for the disposal of waste by landfill. It is aimed to achieve the goal set by the Council Resolution of 9 December 1996 on waste policy[27], according to which in the future, only safe and controlled landfill activities should be carried out in the EU. The aim of the Directive is to provide for measures, procedures and guidance to prevent or reduce as far as possible, negative effects on the environment (in particular the pollution of surface water, groundwater, soil, air and the emission of greenhouse gasses) as well as any resulting risk to human health, from landfilling of waste, during the entire life-cycle of the landfill (Article 1).

The Directive is familiar with several types of waste: municipal, hazardous, non-hazardous inert, biodegradable and liquid (Article 2, Paragraph 1, Subparagraphs b, c, d, e, m and q). It defines landfill as a waste disposal site for the deposit of the waste onto or into the land (underground). These sites include internal waste disposal sites and permanent sites. Internal sites include landfills where a producer of waste is carrying out its own waste disposal at the place of production, whereas a permanent site is used for temporary storage of waste that lasts for more than one year. However, landfill does not include facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere, storage of waste prior to recovery or treatment for a period less than three years or storage of waste prior to disposal for a period less than one year (Article 3, Paragraph 1, Subparagraph g).

Some cases of waste disposal are not covered by the Directive: 1) the spreading of sludge, including sewage sludge and sludge resulting from dredging operations and similar matter on the soil the purpose of which is fertilisation or improvement; 2) the use of inert waste which is suitable for the redevelopment, restoration and filling in work or for construction purposes, in landfills; 3) the deposit of non-hazardous dredging sludge alongside small waterways that they have been dredged out from and non-hazardous sludge in surface water and 4) the deposit of unpolluted soil or of non-hazardous inert waste resulting from prospecting ant extraction, treatment and storage of mineral resources and operation of quarries (Article 3, Paragraph 2). According to the Directive, there are three classes of the landfill: 1) landfill for hazardous waste, 2) landfill for non-hazardous waste and 3) landfill for inert waste (Article 4).

[26] Council Resolution of 7 May 1990 on waste policy, OJ C 122, 18.5.1990, p. 2–4, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31990Y0518(01)&from=EN*, 29.10.2017.

[27] Resolution on the communication from the Commission on the review of the Community strategy for waste management and the draft Council resolution on waste policy (COM(96)0399 - C4-0453/96) OJ C 362, 2.12.1996, p. 241, *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1996:362:TOC*, 29.10.2017.

Article 5 of the Directive obliges the Member States to set up a national strategy that would facilitate the reduction of biodegradable waste going to landfills, within the terms set by the Directive and to inform the Commission about this strategy (Article 5, Paragraph 1 and Article 18, Paragraph 1). The Directive also obliges the Member States to take measures in order to avoid the disposal of some specific types of waste in a landfill. These include, for example, liquid waste, waste, which, in the conditions of the landfill is explosive, corrosive, oxidising, highly flammable or flammable, hospital and other clinical wastes arising from medical or veterinary establishments, which are infectious etc. (Article 5, Paragraph 3).

The Directive obliges member states to ensure that only waste that has been subject to treatment is landfilled. However, this does not refer to inert waste for which treatment is not technically feasible and to any other waste for which such treatment does not contribute to the goals of the Directive. Hazardous waste must fulfil special criteria set out in Annex II of the Directive in order to be disposed to a hazardous landfill. On the other hand, the non-hazardous landfill may only be used for: municipal waste, non-hazardous wastes of other origin and stable, non-reactive hazardous wastes that fulfil the criteria from Annex II of the Directive. Finally, it is highlighted that inert waste landfill sites may only be used for the disposal of inert waste (Article 6, Paragraph 1).

The Directive prescribes the fundamental elements that an application for a landfill permit must contain and obliges the Member States to take measures to ensure that these criteria are met (Article 7). It also enumerates the conditions that have to be met in order to obtain a landfill permit issued by the competent authority (Article 8). The minimal content of the landfill permit is also set out by the Directive (Article 9). Member States are obliged to take measures to ensure that all of the costs related to the setting up and operation of a landfill site and the estimated cost of its closure and aftercare for a period of at least 30 years are covered by the price that is charged by the operator for the disposal of waste in that site (Article 10).

Member States are expected to take measures to ensure that landfills that have been granted a permit or that are already functioning may not continue their operating unless several steps are accomplished as soon as possible or at least within time frames set by the Directive. These measures include, for example, presenting to the competent authorities a conditioning plan for the site, the decision-making by the competent authorities on the basis of the conditional plan, authorising the necessary work by the competent authorities and laying down a transitional period for the completion of the plan etc. (Article 14). Member States are obliged to send to the Commission a report on the implementation of the Directive at intervals of three years. Nine months after receiving the reports from

the Member States, the Commission has to publish a Community report on the implementation of the Directive (Article 15).

In order to ensure that their national normative frameworks are harmonised with the Directive, Member States have to adopt necessary laws, regulations and administrative provisions not later than two years after its entry into force. It is also underlined that the measures adopted by the Member States must contain a reference to the Directive or be accompanied by such reference on the occasion of their official publication. The texts of the provisions of national law adopted in the area covered by the Directive must be delivered to the Commission (Article 18).

4. The Implementation of the Landfill Directive in the EU Member States

The Landfill Directive entered into force on July 16th, 1999 and the Member States had to transpose its provisions into their national legislation by July 16th, 2001. As part of the transposition requirements of the Directive, Member States are asked to provide information on several issues related to waste disposal on landfill and to send information on the number of existing landfills.[28] The latest available Final Implementation Report for the Directive on the Landfill of Waste was published in 2015 and it represents a synopsis of the replies submitted by the Member States to the Implementation Questionnaire covering the Landfill Directive for the period between 2010 and 2012[29], in accordance with Commission Implementing Decision of November 17th, 2000.[30] Member States have transposed the Landfill Directive into national legislation.[31] They have taken measures to provide for collection, treatment and use of landfill gas. Some Member States, such as Finland, have increased their overall number of landfill collecting and treating gas, whereas others, such as the Netherlands and Sweden have decreased their number and its energy extraction and use[32].

All Member States, except for Estonia, have implemented measures to minimise nuisances and hazards arising from the landfill through emissions of odours and dust, wind-blown materials, noise and traffic, birds, vermin and insect, formation and aerosols and fires. These measures include

[28] *Ibid.*, 7.
[29] *Ibid.*, 8.
[30] Commission Decision 2000/738/EC of 17 November 2000 concerning a questionnaire for Member States on the implementation of Directive 1999/31/EC on the landfill of waste (OJ L 298/24 of 25.11.2000), *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000D0738&from=EN*, 30.10.2017.
[31] C. Tsiarta, J. Rodrigo, I. Puig, 18.
[32] *Ibid*., 25-26.

location requirements, treatment of waste before deposit, covering or fencing of landfills, a collection of gas and pest control. However, Member States mostly failed to adopt any new measures to minimise nuisances and hazards, with the exception of Latvia.[33] Member States have set lists or criteria for the acceptance or refusal of waste at each landfill class and that they have been communicating these to the Commission[34].

When it comes to their obligations related to biodegradable waste, Member States have developed their national strategies for the reduction of its quantity going to landfills and notified the Commission. Some of them presented their national definitions for biodegradable waste and municipal biodegradable waste and many have reported that they have established a list of biodegradable waste. The most common experiences reported with the application of the Strategy include: the reduction of organic waste going to landfill, but also experiences about separate collection and treatment, household composting and new treatment facilities such as composting plants, biogas plants, mechanical-biological treatment, and incineration with energy recovery. It is also worth mentioning that the amount of biodegradable waste going to the landfill was reduced in the majority of Member States in the period between 2010 and 2012.[35]

All Member States apart from Belgium, Bulgaria, the Czech Republic, Finland, Germany, Romania and the United Kingdom have reported that their hazardous waste landfills are fully complying with the Directive. Germany and particularly the UK have shown the worst performance in that area, whereas Cyprus, France, Ireland, Italy and Poland have not submitted a reply to this question.[36] Moreover, in 2014 the European Commission took legal action against Spain in this regard due to the fact that several Spanish landfills are still functioning in the manner that represents a violation of EU landfill legislation.[37]

Most Member States have reported that all of their non-hazardous waste landfills are complying with the Directive. This does not refer to Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, Germany, Romania, Slovenia, Spain and the United Kingdom. Bulgaria, Germany and especially Greece have had the worst performance in that area and there is no available information for France, Greece, Ireland, Italy, Malta and Poland.[38] A similar situation has been reported regarding the landfills for inert waste.[39]

[33] *Ibid*., 31.
[34] *Ibid*., 37.
[35] *Ibid*., 76.
[36] *Ibid*., 77.
[37] *Ibid*., 78.
[38] *Ibid.*
[39] *Ibid.,* 79.

All Member States have reported on the measures they designed to avoid negative environmental effects of the closed landfills. These measures most commonly include setting closure plans in the permit and verified by the competent authority and the continued responsibility of the operator for maintenance, monitoring, and controlling of the closed landfill to prevent any negative impacts to the environment and human health.[40] The reported practice of Belgium is particularly worth highlighting as an example of good practice. Namely, Belgium has reported that after a landfill had been definitively closed, the operator remained responsible for its maintenance, monitoring and control in the aftercare phase for as long as was required by the licensing authority, taking into account the time during which the landfill could present hazards.[41] Member States have undertaken technical measures provided to ensure the requirements of Annex I, Section 2 related to water control and leachate management. The most frequently applied measures include the collection of surface water and groundwater through drainage, the collection and treatment of leachate and cover and vertical sealing structures.[42]

5. Case law of the Court of Justice of the EU in the cases of Irregular Waste Disposal

The infringement procedure starts with a letter of formal notice, by which the Commission allows the Member State to present its views regarding the breach observed. If no reply to the letter of formal notice is received, or if the observations presented by the Member State in reply to that notice cannot be considered satisfactory, the Commission moves to the next stage of infringement procedure, which is the reasoned opinion; if necessary, the Commission then refers the case to the Court of Justice.[43]

More precisely, according to article 258 of The Treaty On The Functioning Of The European Union (hereinafter: TFEU) if the Commission[44] considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion

[40] *Ibid.,* 91.
[41] *Ibid.*, 86.
[42] *Ibid.*, 116.
[43] European Commission, Infringements proceedings, *https://ec.europa.eu/transport/media/media-corner/infringements-proceedings_en*, 03.11.2017.
[44] The Treaty On The Functioning Of The European Union, *Official Journal C 326 , 26/10/2012 P. 0001 – 0390*, *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT*, 03.11.2017.

within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union. Furthermore, according to article 260 of TFEU if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. Otherwise, if the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. Finally, if the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

In case of C-286/08 of 10 September 2009 Commission vs Greece, the Court has declared that by failing to draw up and adopt within a reasonable period a hazardous-waste management plan that accords with the requirements of the relevant Community legislation, and by failing to establish an integrated and adequate network of disposal installations for hazardous waste characterized by the most appropriate methods in order to ensure a high level of protection for the environment and public health, Greece has failed to fulfill its obligations under, first, Articles 1(2) and 6 of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, read in conjunction with Articles 5(1) and (2) and 7(1) of Directive 2006/12, second, Article 1(2) of Directive 91/689, read in conjunction with the provisions of Articles 4 and 8 of Directive 2006/12, and, third, Articles 3(1), 6 to 9, 13 and 14 of Directive 1999/31.[45]

Next example of irregular waste disposal concerns Spain. After having investigated a complaint, the Commission has decided to refer Spain to the Court of Justice for failing to close and rehabilitate an illegal landfill operation on La Gomera, one of the Canary Islands. The landfill at Punta Avalos handles the urban waste of San Sebastián de La Gomera, the capital of the island. It has been operating for many years and is located within an important nature conservation site. The key requirements for the safe and controlled handling of waste set out in the Waste Framework, Hazardous Waste and Landfill Directives have not been respected at Punta Avalos.[46] The Commission has decided to send a first written warning to Spain for not having executed a ruling of 28 April 2005 (Case 157/04). The Court condemned Spain for not

[45] Judgement of Court C-286/08, *http://curia.europa.eu/juris/liste.jsf?language=en&num=C-286/08#*, 03.11.2017.

[46] European Commission, Press releases database, *http://europa.eu/rapid/press-release_IP-03-1424_en.htm?locale=en*, 03.11.2017.

complying with EU legislation on waste in the case of the Punta de Avalos landfill, on La Gomera Island. This landfill is close to the sea and located on a site which is part of the EU-wide Natura 2000 network of protected areas, set up under the Habitats Directive. In May 2005, the Commission asked Spain to report on the measures it had adopted to execute the ruling of the ECJ. The answer by the Spanish authorities was not satisfactory. Although it appears that there are no more discharges of waste into this landfill, the area still needs to be restored to its original natural state. Moreover, the landfill has not been properly inspected and no management plan has been foreseen. The Commission, therefore, asks the Spanish authorities to take the appropriate measures in order to execute the judgment of the Court of Justice. [47] The Court has declared that the Kingdom of Spain has breached its obligations under Council Directive 75/442 / EEC of 15 July 1975 on waste, as amended by Council Directive 91/156 / EEC, of March 18, 1991, of Council Directive 91/689 / EEC of 12 December 1991 on hazardous waste and of Council Directive 1999/31 / EC of 26 April 1999, on the dumping of waste, by not having taken the necessary measures to ensure the application of Articles 4, 8, 9 and 13 of Directive 75/442, 2 of Directive 91/689 and 14 of Directive 1999/31, as regards the uncontrolled landfill located in the area of Punta de Avalos, on the island of La Gomera.[48]

Recent cases of breaching of the EU waste disposal standards concerns Slovenia, Italy and Romania. Slovenia has failed to take measures against 28 noncompliant landfills, as required by the EU Landfill Directive. As it has already been explained, the Directive obliges the Member States to recover and dispose of waste in a manner that does not endanger human health and the environment, prohibiting the abandonment, dumping or uncontrolled disposal of waste. Slovenia was obliged to close and rehabilitate its substandard municipal and industrial landfills by 16 July 2009. Due to insufficient progress in addressing the issue, the Commission sent an additional reasoned opinion in April 2016, urging the authorities to adequately deal with 35 uncontrolled sites, which (although not in operation) still posed a threat to human health and the environment. Some progress was made, but for 28 landfills the necessary measures – to clean them up and close them – had still not been completed by March 2017. In an effort to urge Slovenia to speed up the process, the Commission is bringing the Slovenian authorities before the Court of Justice of the EU.[49]

[47] European Commission, Press releases database, *http://europa.eu/rapid/press-release_IP-06-445_en.htm?locale=en*, 03.11.2017.

[48] Judgement of Court C-157/04, *http://curia.europa.eu/juris/document/document.jsf?text=&docid=58814&pageIndex=0&doclang=ES&mode=lst&dir=&occ=-first&part=1&cid=2696536*, 03.11.2017.

[49] European Commission, Press releases database, *http://europa.eu/rapid/press-release_IP-17-1048_en.htm*, 03.11.2017.

Despite earlier warnings by the Commission, Italy has also failed to take measures to rehabilitate or close 44 non-compliant landfills, as required by Article 14 of the Landfill Directive (Council Directive1999/31/EC). Like the other Member States, Italy was obliged, by 16 July 2009, to either rehabilitate landfills that had been granted a permit or which were already in operation before 16 July 2001 ("existing landfills"), bringing them to the safety standards set out in the Directive, or to close them. Due to insufficient progress in addressing the issue, the Commission sent an additional reasoned opinion in June 2015, urging Italy to adequately treat 50 sites, which still posed a threat to human health and the environment. In spite of some progress made, the necessary measures to upgrade or close 44 landfills have still not been completed by May 2017. In an effort to speed up the process, the Commission has decided to take Italy to the Court of Justice of the EU.[50]

Romania has failed to take measures against 68 noncompliant landfills, as required by EU Landfill Directive (Council Directive 1999/31/EC). Under the Directive, Member States must recover and dispose of waste in a manner that does not endanger human health and the environment, prohibiting the abandonment, dumping or uncontrolled disposal of waste. Romania was obliged to close and rehabilitate these substandard municipal and industrial landfills by 16 July 2009. Due to insufficient progress in addressing the issue, the Commission sent an additional reasoned opinion in September 2015, urging the Romanian authorities to adequately deal with 109 uncontrolled sites, which (although not in operation) still posed a threat to human health and the environment. Some progress was made, but for 68 landfills the necessary measures - to clean them up and close them - had still not been completed by December 2016. In an effort to urge Romania to speed up the process, the Commission is bringing the Romanian authorities before the Court of Justice of the EU.[51]

6. Conclusion

Since the Republic of Serbia is not an EU Member State, it is not officially obliged to implement the provisions of the aforementioned directives related to waste management and disposal.[52] But, establishing an integral system of waste management in accordance with the EU standards should be one of its priorities in the area of environmental

[50] European Commission, Press releases database, *http://europa.eu/rapid/press-release_IP-17-1283_en.htm*, 03.11.2017.

[51] European Commission, Press releases database, *http://europa.eu/rapid/press-release_IP-17-237_en.htm*, 03.11.2017.

[52] A. Batrićević, "Nepropisno odlaganje otpada u Srbiji – aktuelno stanje i kaznenopravna reakcija", *Zbornik Instituta za kriminološka i sociološka istraživanja*, 1/2017, 117.

protection and sustainable development[53]. That is the reason why the analysed provisions of EU directives pertinent to waste management and particularly its disposal should be taken into consideration as valuable guidelines on the road to opening the Negotiation Chapter 27, dedicated to environmental protection and climate change.[54]

Case law analysis of European court of justice has shown that some member states failed to implement properly the EU framework on waste management, hazardous waste and landfills. That is the reason why the European Commission has been forced to react by sending written warnings and reasoned opinions to those Member States that have violated the adopted EU standards. Furthermore, in some cases, the European Commission has decided to bring the case before the Court. Finally, in cases where the offending Member State failed to comply with a previous judgement of the Court, the European Commission asked the Court to impose a financial penalty on the Member State concerned.

Therefore, the main goal in the area of the landfill of waste in the next period must be setting out the most important criteria to ensure effective collection, treatment and use of waste on landfills which comply with the requirements of the EU Landfill Directive. Only in that way the objective of the Directive (defined as prevention or reducing as far as possible negative effects on the environment, in particular on surface water, groundwater, soil, air, and on human health from the landfilling of waste by introducing stringent technical requirements for waste and landfills) could be implemented. Furthermore, implementation of the aforementioned goal would contribute to reducing of landfilling to the necessary minimum and facilitate the accomplishment of other targets regarding waste management.

[53] Waste Management Strategy for the Period between 2010 and 2019, *Official Gazette of the Republic of Serbia,* No. 29/2010.

[54] Ministry of Agriculture and Environmental Protection of the Republic of Serbia, *Post Screening Document – draft version*, Ministry of Agriculture and Environmental Protection of the Republic of Serbia, Belgrade 2015, *http://www.kombeg.org.rs/Slike/CeTranIRazvojTehnologija/2015/jul/Post%20skrining%20dokument-%20poglavlje%2027.pdf,* 31.10.2017.

Dr Ana Batrićević
Naučni saradnik, Institut za kriminološka i sociološka istraživanja
Ma Nikola Paunović
Istraživač stipendista, Institut za kriminološka i sociološka istraživanja

ODLAGANJE OTPADA U EVROPSKOJ UNIJI: NORMATIVNI OKVIR I PRAKSA

Rezime

Odlaganje otpada na deponije predstavlja izazov na globalnom nivou, posebno u kontekstu sprečavanja zagađenja životne sredine i nastojanja da se očuva zdravlje ljudi i omogući opstanak biljnog i životinjskog sveta. Zbog toga je i Evropska unija tokom poslednjih nekoliko decenija usvajala i nastojala da primeni niz pravnih dokumenata, ali i strateških uputstava i smernica posvećenih toj problematici. Za odlaganje otpada među izvorima prava Evropske unije najveći značaj imaju sledeće aktuelne direktive: Direktiva 2008/98/EC o otpadu i Direktiva 1999/31/EC o deponijama otpada. Međutim, dostupni izveštaji Evropske komisije, kao i praksa Suda pravde Evropske unije potvrđuju da postoje mnogobrojne razlike između država članica kada je u pitanju upravljanje otpadom uopšte, a posebno u oblasti odlaganja otpada na deponije. Od država članica se u budućnosti očekuje da svoju praksu u toj oblasti izjednače, te da svoja zakonodavstva i praksu u potpunosti harmonizuju sa standardima Unije. Uprkos očiglednom napretku u oblasti pravnog regulisanja zaštite životne sredine, Republika Srbija treba da preduzme niz zakonodavnih i praktičnih mera u oblasti odlaganja otpada kako bi ispunila zahteve Evropske unije proistekle iz predstojećeg otvaranja pregovaračkog poglavlja 27, posvećenog zaštiti životne sredine i klimatskim promenama. Imajući to u vidu, autori analiziraju pravne izvore Evropske unije od značaja za regulisanje upravljanja otpadom a posebno njegovog odlaganja na deponije, izveštaje o njihovoj dosadašnjoj primeni od strane država članica Evropske unije i praksu Suda pravde Evropske unije u slučajevima kršenja navedenih odredbi, sagledavajući ih pre svega kao potencijalna uputstva i smernice za domaćeg zakonodavca.

Ključne reči: otpad, odlaganje otpada, deponije, zaštita životne sredine, Evropska unija.

Aleksandra Višekruna, M.A.[1]

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THE TREATMENT OF SECURITIES RELATED CLAIMS IN INSOLVENCY[2]

Abstract

The generally accepted rule in insolvency is that equity holders come last when distributing the assets of the debtor. During the life of the company, shareholders can assume numerous roles that don't have to be necessarily connected with their status as members. One of the situations that have emerged as fairly controversial concerns shareholders as a damaged party (especially in the domain of securities fraud). In this case, the controversy revolves around the question whether shareholders that suffered damage should be treated as tort claimants and ranked equally with other unsecured creditors, or should their claims be subordinated. These cases have shown the existence of the conflict between the rules of insolvency law and set of laws aimed at investor protection.

Keywords: *insolvency, shareholders, securities fraud, subordination, investor protection.*

1. Introductory remarks

The protection of creditors is seen as one of the most important issues in business law. Hence, the legal science and practice have developed many instruments in order to obtain this goal. The protection is necessary during the entire lifespan of the company and becomes especially important when financial difficulties emerge and the insolvency procedure is opened. In fact, the protection of creditors is recognised as the main goal of insolvency procedure. The entire procedure is developed in order to prevent the race for the debtor's assets.[3] Therefore, the legislators

[1] Research Associate, Institute of Comparative Law, Belgrade, e-mail: *avisekruna@gmail.com*.

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[3] D. Henry, "Subordinating Subordination: Worldcom and the Effect of Sarbanes-Oxley's Fair Funds Provision on Distributions in Bankruptcy", *Emory Bankruptcy Development Journal,* Vol. 21, 2004, 263.

established systems of classification of creditors in certain priority orders. This means that some creditors (those of higher rank) will receive a larger portion of assets than those of the lower rank who will receive less, or even nothing. Since this means a certain degree of discrimination and inequality among creditors, it is necessary to find a compelling policy reason for this legislative solution.[4]

Ladder of priorities mostly comprises of several groups of creditors – super-priority creditors, priority creditors, *pari passsu* creditors, subordinated creditors and expropriated creditors.[5] The group of subordinated creditors includes various claims – equity claims, creditors subordinated for misconduct (equitable subordination), post-insolvency interest, consensually subordinated creditors etc.[6] The subordinated creditors are somewhat neglected in the legal literature, but in practice, their treatment has shown to be of great importance. This is especially true for the shareholders who are accorded special treatment in insolvency on the grounds that they are insiders who have more information on business and finances of the debtor than other creditors and can use this information in order to secure an advantage over outside creditors.[7]

The general principle is that equity comes after the credit, but the practice has opened new perspectives on shareholder position in insolvency. The place of these claims in the ladder of priorities is important for shareholders because it determines which part (or whether any part) of debtor's assets will belong to them. Also, in some countries subordinated shareholders can be devoid of their voting rights in reorganization procedure.

This paper is focused on the question whether shareholders who acquired shares as a result of misleading conduct of the company should participate in insolvency proceedings as unsecured creditors for claims that arise out of that conduct, or their claims should be treated as any other equity-related claim and thus subordinated.

2. The new developments in insolvency priorities

For a long period of time banks, the bondholders and the trade had had the key claims against the debtor. However, today the structure of debt has changed and the debtors are faced with new types of claims - shareholder class action lawsuits, fraud claims and claims by securities regulators, indemnity claims by third-party co-defendants, and other

[4] P. Wood, *Principles of International Insolvency*, Sweet & Maxwell, London 2007[2], 238.
[5] *Ibid*.
[6] *Ibid*., 267-271.
[7] A. Cahn, „Equitable Subordination of Shareholder Loans?", *European Business Organization Law Review* 1/2006, 296, 298.

forms of equity-related claims.[8] This is a consequence of an enactment of a set of laws aimed at investors' protection that require the company to disclose information relevant for the value of the investment or that might influence the decisions of investors to buy, sell or retain their securities.[9]

In the light of the new developments, a tension was noted between remedies under securities law and insolvency law in respect of the treatment of these claims.[10] Namely, securities laws grant investors certain remedies that give rise to the question where should claims of investors be placed in the ladder of priorities in insolvency. In the ordinary course of events, on insolvency, creditors rank ahead of equity investors. However, a dilemma has emerged whether investor's claim for fraud damages should be subordinated on the grounds that the damages are related to an equity interest, or the claim should rank with unsecured creditors because the damages don't relate to the nature of the equity investment but rather to fraudulent conduct.[11] The new approach brought the idea of extending the concept of rateable (*pari passu*) distribution within the class of ordinary unsecured creditors to accommodate the interests of defrauded shareholders.[12] The problem is that the debtor's estate consists of a limited pool of assets and if the shareholders share *pro rata* with other creditors, the amount received by creditors would be reduced (zero-sum game—the more one claimant receives from the bankruptcy estate, the less the other claimants will receive).[13] On the other hand, shareholders which were misled into buying securities by defective market disclosure need the protection the most during company's insolvency.[14]

The financial crisis has shown that shareholders sue not only the company but also third parties such as auditors, underwriters and directors or officers, who then in return try to recover their losses by activating indemnification clauses. It was debated whether these claimants should rank *pari passu* with unsecured creditors, or they should be subordinated

[8] INSOL, "Update on Shareholder and Equity - Related Claims in Insolvency Proceedings", *Technical Series*, Issue No. 28, 2013, 1.
[9] J. Sarra, "From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings", *INSOL International Insolvency Review*, Vol. 16, 2007, 187.
[10] *Ibid.*, 186.
[11] *Ibid.*, 182.
[12] B. Mamutse, "Compensating defrauded shareholders in insolvency: is parity the answer?", *Northern Ireland Legal Quarterly*, Vol. 62, 1/2011, 75.
[13] Z. Christensen, "The Fair Funds for Investors Provision of Sarbanes-Oxley: Is It Unfair to the Creditors of a Bankrupt Debtor?", *University of Illinois Law Review*, 1/2005, 371; W. Wahler, A. Maza, D. Eshew, M. Wiles, "At the Crossroads: The Intersection of the Federal Securities Laws and the Bankruptcy Code, *The Business Lawyer*, Vol. 63, 2007, 138.
[14] A. Hargovan, J. Harris, „The Shifting Balance of Shareholders' Interests in Insolvency: Evolution or Revolution?", *Melbourne University Law Review*, Vol. 31, 2007, 593.

and bear all the cost of shareholders' claims.[15] The subordination of these claims is considered to be a positive development because the risks associated with securities law violations shift from the general creditors to those in the best position to assess the risks and prevent misrepresentations.[16] Subordinating gatekeepers' claims ensures that they will be diligent when providing their services and put an effort in reducing the risk of unlawful conduct and financial collapse of the company.[17]

3. Subordination of securities-related claims – *pro et contra*

These new occurrences have raised the question whether the subordination of these claims is justified. The justifications of subordination can broadly be categorised as being based on contract, creditor reliance and equity.[18] Justifications based on contract are related to the capital maintenance doctrine and stem from the fact that shareholder undertakes the obligation to contribute to the assets of the debtor.[19] Reliance rationale considers the subordination necessary in order to protect the creditor's expectations that his claim will have the seniority over shareholders' claims.[20] From the perspective of achieving equity, subordination prevents that creditors bear the economic burden of shareholder fraud remedies.[21]

From a practical point of view, one of the major problems is that without the subordination an enhanced risk of class action suits would exist.[22] Also, the there are concerns that the removal of the subordination rule will dilute the returns to unsecured creditors, which in return would increase the cost of lending to reflect the higher risk of non-return that creditors face.[23] This flood of claims would complicate the insolvency procedure, as their adjudication is time- and cost-consuming.[24] Those in favour of subordinating the claims also focus on the specific position of shareholders. Namely, shareholders have the most to gain from company's

[15] R. Baulke, L. Nicholson, The Treatment of Third Party Indemnity Claims in Canadian Restructurings,*https://www.insolvency.ca/en/resourcesGeneral/IIC_LawStudentAward-2013-1ThirdPartyIndemnityClaimsInCanadianRestructurings_Nicholson_Baulke.pdf* , 3.
[16] *Ibid.*, 4.
[17] *Ibid.*, 13.
[18] B. Mamutse, 76.
[19] *Ibid.*
[20] K. B. Davis, "The status of defrauded securityholders in corporate bankruptcy", *Duke Law Journal*, 1/1983, 19.
[21] B. Mamutse, 76.
[22] K. B. Davis, 22.
[23] K. B. Davis, 25; R. Gengatharen, "Sons of Gwalia: defrauded shareholders claims in insolvency", *International Insolvency Revie*w, Vol. 17, 1/2008, 6-7.
[24] R. Gengatharen, 8.

success, unlike the creditors that have claims limited to the amount of their debt.[25] Also, shareholders have the right to receive information from the company, attend and vote at company meetings, vote for or against directors, and take action under a statutory derivative action.[26]

However, some point out that the circumstances of creditors and shareholders in current times have changed, which has to be reflected in the legal solutions, or otherwise, the realities of the commerce would be completely ignored.[27] This new standing point is based on the fact that the position of modern shareholders can be compared to that of unsecured creditors – they are mostly outsiders with limited knowledge regarding business activities of the company.[28] This is especially true for shareholders in public companies who are dispersed and without any real power and influence on the business of the company.[29] They mostly receive the information through reports presented on shareholders meetings or through the financial reports disclosed to the public. On the other hand, growing number of creditors are large financial institutions who can contract right to demand additional information.[30]

4. State of the affairs in selected countries

Study of the subject has shown that the most distinguished common law countries faced great challenges in developing an adequate legislative policy on how to allocate the risks between creditors and shareholders in insolvency. Even though they share similar cultural and legal background, their approaches towards the subject differ to a certain extent. It was determined that, on the one hand, Australia and the UK and, on the other hand, the US and Canada were harbouring similar approach to the matter.[31]

4.1.1. Canada

Until the last decade, Canadian insolvency law didn't contain any specific norms about the position of shareholders' securities claims in insolvency, but the general rule that shareholder claims come last in the ladder of priorities was applied. The main problem was the ever-changing nature of the securities which gradually received the hybrid forms,

[25] INSOL, 6. Similar J. Sarra, 188.
[26] A. Hargovan, J. Harris (2007a), 606.
[27] B. Mamutse, 86-87.
[28] *Ibid.*, 97.
[29] K. B. Davis, 28, 44; J. Sarra, 222.
[30] K. B. Davis, 67. Opposite R. Gengatharen, 10.
[31] R. Gengatharen, 6.

combining both elements of debt and equity.[32] Recognizing the problem, Supreme Court of Canada instructed courts to look to the substance of the particular transaction and decide on the nature of the claim by determining the intention of the parties.[33] Nevertheless, even with this guiding principle, results were not consistent.[34]

Before the legislative reform in 2009, there were several suggestions on how to solve this issue – grant only the new shareholders (purchasers) the equal footing with unsecured creditors, grant securities regulator enhanced powers (i.e. disgorgement funds), rank all shareholders' claims with unsecured creditors or subordinate all equity-related claims.[35] However, after the amendments, a clear intent to subordinate shareholders' claims was shown through a broad definition of equity interests and equity claims and statutory prohibitions on voting and distributions for these claimants unless all non-equity claims had been satisfied in full.[36]

Amendments expanded the definition of equity claim to envelop the indemnity claims of third parties (directors, officers, auditors, underwriters) on the grounds that equity claims are underlying in these types of claims and that they in fact represent "a shareholder claim for loss of investment".[37] Before the amendments the courts allowed third-party indemnities to rank *pari passu* with creditors, focusing only on the contractual nature of the relationship between these parties and the debtor.[38] *National Bank of Canada v Merit Energy* is the only case prior to the 2009 amendments that directly addressed this question. The court held that indemnity claims of directors, officers, auditors and underwriters arising from a shareholder lawsuit were unsecured claims, because the indemnity was contractual and distinct from a claim for a return on equity. The decision in *Re Sino-Forest* was the first to apply the amended provisions and the court established that third-party indemnity claims should be treated as equity claims and subordinated where the underlying primary claim is an equity claim.

This new approach concerning the treatment of securities-related claims is seen as overly rigid and it was stated it undermines investor

[32] S. Ben-Ishai, "Debt or Equity? A Puzzle for Canadian Bankruptcy Law", *Canadian Business Law Journal,* Vol. 53, 3/2013, 417. Prominent examples of hybrid investments include redeemable preferred shares, convertible debentures, debentures which have their interest rate tied to the performance of one or more equities, income securities, and debentures with attached warrants, among many other variations.
[33] S. Ben- Ishai, 420.
[34] INSOL, 6; S. Ben-Ishai, 422-423.
[35] J. Sarra, 222-224.
[36] INSOL, 8.
[37] *Ibid.*, 10. In *Re Sino-Forest*, the Court of Appeal subordinated a $9.2 billion indemnification claim advanced by auditors and underwriters.
[38] R. Baulke, L. Nicholson, 4.

protection regime by passing the entire risk of securities law violation to shareholders.[39] This strict regime can incentivise the debtors to forum shop and argue that the centre of main interests of a Canadian company is elsewhere when cross-border issues arise.[40]

4.1.2. The USA

A fundamental rule governing the distribution of a bankruptcy estate in the US is so-called absolute priority rule. Section 510(b) of the United States Bankruptcy Code[41] expressly provides for the mandatory subordination of a broad array of claims that arise from equity interests.[42] This legislative solution is mostly based on the argumentation expressed in a seminal article from professors Slain and Kripke who advocated the subordination of shareholders' claims.[43] This article influenced a great deal the reform of the bankruptcy system in 1978 because the Congress strongly relied on its rationales for giving priority to creditors over shareholders – dissimilar risk and return expectations and the reliance of creditors on equity cushion/pool. Until the enactment of Bankruptcy Code in 1978, the courts followed the path established in *Oppenheimer* case – there was no subordination of claims of defrauded shareholders.[44]

This legislative policy of blanket subordination was severely criticized on the grounds that it would likely jeopardize consumer and investors' protection. It was considered it would "hinder the preventive and compensatory role of disclosure law", and would "make companies judgement-proof in respect of securities claims and would increase the risk of moral hazard".[45] On the other side, parity of shareholders with creditors would give them the best of both worlds – gains if company prospers and the participation with creditors if it fails.[46]

[39] A. Harmes, Standing up for shareholders: treatment of shareholders and equity claims in Canadian corporate insolvency proceedings, https://www.insolvency.ca/en/whatwedo/resources/StandingUpforShareholders-TreatmentofShareholdersandEquityClaimsinCanadianCorporateInsolvencyProceedings.pdf, 1, 11, last visited November, 14, 2017.

[40] J. Sarra, 209.

[41] 11 U.S.C. § 101 et seq.

[42] Section 510(b) applies to three distinct categories of claims: (1) a claim arising from rescission of a purchase or sale of a security of the debtor; (2) a claim for damages arising from the purchase or sale of a security of the debtor; and (3) a claim for reimbursement or contribution on account of either of the first two.

[43] J. Slain, H. Kripke, "The Interface between Securities Regulation and Bankruptcy-Allocating the Risk of Illegal Securities Issuance between Securityholders and the Issuer's Creditors, *N.Y.U. L. Rev*, Vol. 48, 1973, 261-300.

[44] D. Henry, 274.

[45] A. Hargovan, J. Harris (2007a), 615 – 616.

[46] A. Hargovan, J. Harris (2007a), 616.

During its existence, the rule from section 510 (b) faced two great challenges. The first one was determining the scope of the subordination, i.e. how to interpret the notion "arising from purchase or sale of securities". Namely, the question was whether this only relates to buying the securities or it envelops the situations in which the shareholder was induced to retain them.[47] A narrow interpretation of article 510 (b) would relate only to the misconduct at the time of purchase or sale of the shares, whereas the claims arising from misconduct after the issuance of shares would be subordinated only if the wider interpretation is applied.[48] It was noticed that the earlier case law was in favour of the narrow interpretation of the norm, but that eventually a trend of a broader interpretation of section 510 (b) prevailed.[49]

The court in case *In re Mid-American Waste Systems* expressed the view that Congress intended to subordinate the claims of other parties (officers, directors and underwriters) who played a role in the purchase and sale transactions which give rise to the securities law claims. This was based on the fact that these people are in a better position to evaluate the risk of the issuance of securities – even if they do not hold the securities themselves – and they cannot shift the risk to the company's creditors.[50] The decision to include indemnity claims in the scope of the norm of Section 510 (b) took a long time to be reached but now it has the widest possible interpretation.[51] It was concluded that the aim of the provision was not only to prevent recovery of shareholders before creditors but also to shift the risk of securities law claims to the parties most informed about the claims.[52]

The debate on securities claims in insolvency has intensified with the enactment of Sarbanes-Oxley Act (SOX) in 2002 and the cases of *Worldcom* and *Adelphia*.[53] Since then, the latent conflict between the article 510(b) of Bankruptcy Act and section 308(a) of SOX (Fair funds for investors) has been noted, which proved to be the second great challenge the institute of subordination faced. The enactment of SOX called into question the traditional theories of the creditor and shareholder relationship in bankruptcy.[54] The source

[47] D. Henry, 279.
[48] Z. Christensen, 361.
[49] A. Hargovan, J. Harris, "Sons of Gwalia and Statutory Debt Subordination: An Appraisal of the North American Experience", *http://ssrn.com/abstract=1001567*, 18-19, last visited October 4, 2017. The authors see the cases of *Telegroup* and *Geneva Steele* as turning point in the judicial reasoning. Also, Christensen cited as an example of narrow interpretation case *In Re Montgomery Ward Holding Corp* and as examples of broader interpretation cases *In Re Geneva Steel Co.* and *In Re Granite Partners, L.P*. See Z. Christensen, 364
[50] INSOL, 16.
[51] R. Baulke, L. Nicholson, 8.
[52] *Ibid*., 7.
[53] *SEC v Worldcom, Inc*, 273 F. Supp. 2d 431, 431 (S.D.N.Y. 2003) and *In Re Adelphia Communications Corp*., 327 B.R. 143 (Bankr. S.D.N.Y. 2005).
[54] D. Henry, 260.

of the conflict is the fact that § 510(b) subordinates the claims of defrauded shareholders granting them payment only after unsecured creditors were paid in full, while the SOX provisions allow them to have the same priority as unsecured creditors. SOX allows the Securities Exchange Commission (SEC) to return funds recovered from civil penalties to investors affected by the violation of securities law, treating them equivalently to tort victims and granting them a greater priority than it would have otherwise been the case.[55] This is because monetary damages obtained by the SEC in a civil action for a securities law violation are in a superior position to monetary damages obtained by a shareholder in a private action on the same grounds.[56] In this way shareholders can recover as unsecured creditors indirectly through the SEC's actions, bypassing the absolute priority rule.[57] The problem is that the Congress didn't explicitly state the intention to grant shareholders greater priority in insolvency, i.e. to bypass the absolute priority rule.[58] Some authors see these new legislative solutions as an appropriate response to the evolving financial markets and current situation.[59] For some, this new development is defensible on the grounds that it does not interfere with the equal treatment of creditors *per se*, as the disbursements are not being made from funds that they would otherwise be entitled to.[60] Also, it is stated that solution from section 308 (a) of SOX, relates only to a limited segment of claims, i.e. only those brought by SEC and should not be equated with shareholder-creditor parity in insolvency.[61]

4.1.3. Australia

Australian law has had a long-standing norm that shareholder claims in a corporate liquidation are subordinated to those of creditors, but the rationale behind the article 563A was not sought for a very long time.[62] Unlike the clear rules in the US law, Australian law under the view of the judiciary didn't contain clear legislative policy on securities-related claims in its norm in section 563A of Corporations Act.[63]

[55] K. B. Davis, 299.
[56] Z. Christensen, 353.
[57] Z. Christensen, 342; B. Mamutse, 79; J. Sarra, 192-193; W. Wahler *et al.*, 132.
[58] Z. Christensen, 370; B. Mamutse, 81.
[59] D. Henry, 262.
[60] B. Mamutse, 89.
[61] A. Hargovan, J. Harris (2007b), 29.
[62] Hargovan and Harris recognize this tendency in the first modern corporate law statute from 1862. A. Hargovan, J. Harris (2007a), 613.
[63] Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied.

High Court's decision in case *Sons of Gwalia v Margaretic*[64] shook the Australian legal circles to the core and raised many controversies regarding the status of shareholders' claims in insolvency. The case concerned Mr Margaretic who bought the shares of a mining company Sons of Gwalia, but shortly after the company suffered a financial collapse. Mr Margaretic claimed the company didn't honour its disclosure obligations. The main question was whether the shareholder's claim in this case was in his capacity as a member or in some other capacity. The High Court found in favour of the claimant, finding that this claim was not raised in his capacity as a member, because the claim stemmed from a consumer protection laws and isn't related to the membership in the company. The main criterion the court applied was the nature of the debt, rather than the identity of a claimant.[65] Up until this decision, most of the shareholder-related cases relied on the ruling in case *Houldsworth* which prevents a shareholder from claiming damages for misrepresentation inducing the purchase of shares in the company whilst the shareholder remains on the share register.

After the ruling was made, a serious debate over the implications of the decision was started. It was pointed to the adverse impact it could have on the efficiency of the procedure – possible floodgate of shareholder claims and practical difficulties for the insolvency administrators in adjudicating the shareholders' claims.[66] It was also recognized that successful shareholder claims could dilute the assets available to non-shareholder creditors.[67] The fact that this new-found status of shareholders can affect the process of corporate rehabilitation was seen as a potentially large problem. Namely, the shareholders would have the right to vote along with other creditors on the future of the company and could significantly influence the outcome of the process. The problem might arise if they had diverging interests from other creditors, as well as, among themselves.[68] Also, worries were expressed that the apparent change in priorities in corporate liquidations would act as a barrier to Australian companies obtaining loans, particularly from the

[64] *Sons of Gwalia Ltd v Margaretic; ING Investment Management LLC v Margaretic* [2007] HCA 1.
[65] B. Mamutse, 84.
[66] A. Hargovan, J. Harris (2007b), 12. However, it was stated that this new-found solution has a limited range. Firstly, because a great deal of insolvencies occurs because of business misfortune that is not related to deceptive practices. Secondly, the decision was based on the application of disclosure obligations that relate only to public companies, which are rarely subjects of insolvency procedures. A. Hargovan, J. Harris (2007a), 611.
[67] A. Hargovan, J. Harris (2007b), 12.
[68] A. Hargovan, "Aggrieved Shareholders as Creditors: An Unmapped Coordinate in the Cartography of Australian Insolvency Law", in: *International Insolvency Law: Reforms and Challenges* (ed. P. J. Omar), Routledge, New York 2016, 154; J. Sarra, 218.

United States.[69] However, it was pointed out that this decision might not be relevant to a lot of companies, because many insolvencies are unrelated to unfair business practices and because the disclosure obligations apply only to public companies.[70]

The case indicated the need to draw the line between shareholders' and creditors' interests in insolvency. A question was posed which model is the most viable for the position of these types of claims in insolvency. One of the proposed solutions was to adopt a model similar to the US law, subordinating all shareholder claims.[71] There were also efforts to develop a model that would recognize legitimate rights of creditors, but also accommodate the shareholder protection rights (limited subordination rule).[72] This proposal was based on the idea that existing shareholders have an informational advantage over creditors and potential investors and therefore their claims for misrepresentation should be subordinated, unlike the claims of new shareholders.[73] This model was criticized on the grounds that it creates an unnecessary divide between the shareholders, especially having in mind that existing shareholders also have limited power over the management.[74] In the end, the legislative reform overturned the decision in *Sons Gwalia*. In 2010, the section 536A of Corporations Act was amended and established that claims in relation to the buying, selling, holding or otherwise dealing in shares are to be paid after satisfaction of all creditors' claims.

4.1.4. The UK

English law derives its expression of the principle of shareholder subordination from the section 74(2)(f) of the Insolvency Act 1986.[75] However, section 655 of the Companies Act 2006 provides that a shareholder's claim against the company for damages or other compensation is not barred by the mere fact of ownership of (or entitlement to) shares in the company. The principle is not that 'members come last',

[69] K. Kendall, "Subordination of Shareholder Claims in Australia: A Comparison with the United Kingdom post-Sons of Gwalia", *Legal studies working paper series paper*, number 2009/2, 2. The reason for the fear was the fact that US law subordinates all securities related shareholder claims.
[70] A. Hargovan, J. Harris (2007a), 611.
[71] R. Gengatharen, 12.
[72] A. Hargovan, J. Harris (2007b), 32.
[73] *Ibid*., 34.
[74] R. Gengatharen, 12.
[75] "A sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."

but rather that the 'rights of members as members come last' - rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors.[76]

For the treatment of shareholders' claims in insolvency in the UK law, the most relevant case is considered to be *Soden*.[77] In this case, the parent company claimed damages for negligent misrepresentation on the grounds that it was induced by its subsidiary to purchase the shares of the said entity. House of Lords was asked to decide whether the claim belonged to the parent company in its 'character of a member'. The court found that the claims were not claims of a member since they were not based on a statutory contract, but on an independent contract for transfer of shares. The case made a clear distinction between claims deriving from a shareholding and those with their origins in a member's separate, parallel relationship with the company.[78] Also a rule was established that only the claims of transferee shareholders (i.e. those who bought the securities on the market) are not to be subordinated, unlike those of subscribing shareholders (i.e. those who bought the securities directly from the company).[79]

5. Concluding remarks

The recent events in the financial market have shown the existence of the conflict between the underlying values of two important sets of laws. On the one hand, there are securities laws aimed at market discipline, prescribing sanctions for those who breach the rules and on the other hand, insolvency law aimed at providing certainty in respect of ranking of creditors' claims in case of insolvency, which directly affects the availability and price of the credit.

In this context, an especially significant question is the position of shareholders who were induced by the fraudulent conduct of company to buy or retain their securities. A certain dichotomy in the approach regarding the position of defrauded shareholders is observed. Jurisdictions are, on the one hand, enhancing the remedies available to securities holders for corporate misconduct and on the other hand, the claims arising from those types of situations are completely subordinated to other interests in the firm.[80]

The analysis of several legal systems has shown that despite the initial willingness to grant favourable treatment to defrauded shareholders,

[76] J. Sarra, 215.
[77] Soden v British & Commonwealth Holdings Plc [1998] A.C. 298.
[78] B. Mamutse, 76.
[79] J. Sarra, 215; A. Hargovan, J. Harris (2007b), 7.
[80] J. Sarra, 224.

there is a gradual expansion of the scope of subordination norm in order to envelop all shareholders' claims regardless of their origin. This development can be seen as an emanation of principle that unsecured non-member creditors are the focal point of the protection.

Aleksandra Višekruna, master
Istraživač saradnik, Institut za uporedno pravo, Beograd

PRAVNI TRETMAN POTRAŽIVANJA VEZANIH ZA HARTIJE OD VREDNOSTI U STEČAJU

Rezime

Opšteprihvaćeno pravilo u stečaju je da se potraživanja vlasnika kapitala nalaze na poslednjem mestu prilikom deobe imovine stečajnog dužnika. Tokom postojanja kompanije, akcionari se mogu naći u mnogim ulogama koje ne moraju nužno da budu povezane sa njihovim članskim statusom. Jedan od tih slučajeva, koji se pokazao kao relativno sporan, odnosi se na položaj akcionara kao oštećenih od strane kompanije (posebno u kontekstu prevara u vezi sa hartijama od vrednosti). U ovom slučaj sporno je da li oštećeni akcionari treba da se tretiraju kao bilo koje drugo oštećeno lice i rangiraju se sa neobezbeđenim poveriocima ili njihova potraživanja treba da budu subordinirana potraživanjima ostalih poverilaca. Ovi slučajevi ukazuju na postojanje konflikta između pravila stečajnog prava i seta zakona koji su usmereni ka zaštiti investitora.

Ključne reči: stečaj, akcionari, prevare u vezi sa hartijama od vrednosti, subordinacija, zaštita investitora.

Marina Matić Bošković, PhD[1]

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VETTING OF JUDICIARY IN TRANSITIONAL COUNTRIES – SUCCESSFUL TOOL OR ENTRY POINT FOR POLITICAL INFLUENCE[2]

Abstract

The author analyzes experience in the vetting of the judiciary as a tool used to regain trust in the justice system. Special focus is put on Serbia and Albania experience. The comparative experience and practice do not show a clear link between vetting process and public trust in the judiciary. The author analyzed the importance of a common understanding of reasons for vetting process as well as preparatory activities for its implementation – Constitutional ground, selection of proper institution, including the establishment of ad hoc bodies, proper timeframe and administrative capacities to implement the whole process. In addition, communication with the public and professional community is of utmost importance to ensure support throughout vetting. The author provides an overview of the comparative practices related to the models of vetting conducted in Serbia in 2009 and ongoing vetting process in Albania. Although there are delays in implementation in Albania, it is obvious that Albania legislators learned from Serbian experience and included tools to ensure transparency of the vetting.

***Keywords**: vetting of judges and prosecutors, integrity, public trust in judiciary, corruption, vetting criteria*

1. Introduction

The judiciary is an important component of the rule of law in any country. Problems in the functioning of the judiciary could lead to insecurity and recourse to private justice. The inability of the judiciary to deal fairly among citizens contributes to a culture of impunity where citizen voices are denied.

[1] Research Assoicate, Institute of Comparative Law, Belgrade, e-mail: *maticmarina77@yahoo.com*.

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Several international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), guarantees rule of law. The Covenant enjoins State parties to ensure equal treatment of persons before judicial tribunals and to a fair and public hearing by competent, independent and impartial tribunals established by law.[3] The United Nations Human Rights Committee has further declared that the right to be tried by an independent and impartial tribunal is an absolute right for which there should be no exception.[4] The UN Basic Principles on the Independence of the Judiciary,[5] and the UN Guidelines on the Role of Prosecutors[6] are major documents that have set out the universal standards on the role of judiciary institutions.

Integrity is essential for the proper discharge of the judicial office. In addition, the public trust is essential for the justice system. When there is a lack of public trust in the justice system and/or lack of integrity in the judiciary, countries try to resolve problems applying different judicial reforms. Reform efforts can vary from increasing competences of the judiciary (establishment of training institution and specialization of judges/ prosecutors) to the introduction of legal safeguards for independence (constitutional guarantees, amendments to legislation related to the appointment and disciplinary procedures). However, these reforms usually have not been sufficient to bring the change that is needed to transform the judiciary into the strong and independent institution.

In countries emerging from periods of armed conflict or authoritarian rule, efforts to address the legacies of massive human rights abuses have taken many different forms. Vetting public employees is one of the measures that has been used in post-authoritarian countries.[7] However, this measure is also used in some countries as a last resource to regain public trust in the justice system.

The term "vetting" is used in the article to refer to processes for assessing an individual's integrity as a means of determining his or her suitability for public employment.[8] However, little systematic attention has been paid to the topic.

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[3] Article 14(1) of the ICCPR.

[4] Communication No 263/1987, M Gonzalez del Rio v Peru (Views adopted on 28.10.1992), UN Doc CCPR/ C/46/D/263/1987 at para 5.2.

[5] Article 7(1) of the Charter.

[6] Adopted by consensus by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 later endorsed by the UN General Assembly in resolution 40/32 (29.11.1985) and welcomed by the UN General Assembly in resolution 40/146 (13.12.1985).

[7] Vetting Public Employees in Post-conflict Settings – Operational Guidelines, UNDP, Bureau for Crisis Prevention and Recovery, 2006.

[8] P. Grieff, A. Mayer-Reiff, Justice as Prevention: Vetting Public Employees in Transitional Societies, Social Science Research Council, New York, 2007, 17.

2. Comparative experience in vetting process

An important question for any vetting process is what misconduct is assessed.[9] The criteria of a vetting effort are the specific types of misconduct that vetting authorities look for in an individual's past. Each vetting process operates on the basis of certain criteria.

The determination of vetting criteria is often controversial and politically challenged.[10] In the article, we will assess vetting of the judiciary in Serbia and Albania. Albania reasoning for vetting process is clearly articulated and there is a consensus among citizens, international community and state on reasons for vetting. The situation in Serbia in 2009 was not so clear. The official reasoning for vetting process was differently justified from lustration to fight against corruption. Case studies of Serbia and Albania present experience how lack of common understanding of vetting process influence on its success. Although Albania experience is ongoing, it already has started to produce results with more than one hundred judges and prosecutors resigning from the office in order to find an escape from the re-evaluation process.[11]

2.1. Albania vetting process

Reasoning and relevance of the vetting of the judiciary in Albania are expressed in the Venice Commission Opinion CDL-AD(2016)009 as *the extraordinary measures ... necessary for Albania to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system*.

Constitution of Albania in article 179/b describes the process of vetting as a guarantee of the proper functioning of rule of law and true independence of the judicial system. The main principles of the vetting process are fair trial and respect of the fundamental right of the assessee.

Following amendments of Constitution in 2016, Albania adopted legislation on vetting procedure in the judiciary. Law No 84/2016 on a transitional re-evaluation of judges and prosecutors in the Republic of Albania was adopted in 2016 with the aim to restore citizens trust in the judicial system and to ensure independence.

To carry out the vetting process, two special institutions have been established as *ad hoc* bodies with the special mandate of vetting and deciding on appeals. Vetting process will be under the responsibility of Independent Commission of Qualification in the first instance, meanwhile,

[9] *Ibid., 22*.

[10] In post-communist Eastern Europe, authorities often vetted for evidence of nonviolent actions that constituted violations of public trust, such as past collaboration with secret service institutions.

[11] B. Maxhuni, U. Cucchi, *An Analysis of the Vetting Process in Albania*, Group for Legal and Political Studies, Prishtina 2017, 3.

the appeals filed by the assessee or from the Public Commissioner that will represent the public interest will be examined by the Appeal Chamber, specialized chamber of the Constitutional Court. The mandate of the members of the Independent Commission of Qualification and Public Commissioner is 5 years while the mandate of the members of the Appeal Chamber is 9 years. After the dissemination of the Commission, the ongoing cases on the vetting of judges will be examined by the High Judiciary Council, according to the law, while the ongoing cases on the vetting of prosecutors will be examined by the High Prosecutorial Council. If there is evidence of corruption, the cases will be transferred to the Head of Special Prosecution on Anticorruption.

To make vetting a fair process, the Law on Vetting provides a number of requirements for members of the re-evaluation of institutions. To be eligible, the selected individual should not have been a member, collaborator nor favoured by the State Security services before 1990.

In order to ensure transparency and monitoring over the whole process, the International Monitoring Operations is set up, composed of judges and prosecutors selected by EU member states. Its duties will be an exercise in accordance with the international agreement and will include:

a) Providing recommendations to the Parliament regarding the qualifications and selections of the candidates for the position of the member of the Independent Commission of Qualification, Public Commissioner and Appeal Chamber;
b) Submitting findings or opinions for the cases that will be examined by the vetting' structures, and contribution to the vetting of integrity. According to these findings, the international observer might request from the vetting structure to examine proofs or to represent proofs ensured by the public state, foreign or private ones, in accordance with the law;
c) Addressing the Public Commissioners, recommendations to file an appeal. In case when the Public Commissioner does not implement such recommendations, it should prepare a written report reasoning the grounds for refusing it;
d) Accessing all the information, immediately, for the data of the persons and necessary documents, in order to monitor the vetting in all its stages.

In Albania, the subject of vetting will be all judges and prosecutors, including judges of the Constitutional Court, General prosecutor and all inspectors of the High Council of Judges and legal advisors in Constitutional Court, High Court, Administrative courts, General Office Prosecutors.[12]

[12] Council of Europe (2016), "Law on the transitional Re-Evaluation of Judges and Prosecutors, Albania",*http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e.*

The vetting process will be applied also to the former judges, former prosecutors and legal advisors to Constitutional Court and High Court who have worked in these positions for at least three years, upon their individual request, if they want to be returned in the Justice System.

The Vetting Law provides that the vetting is based on three main criteria[13]:

a) asset assessment - Anyone under assessment must be able to justify his/her assets based on legitimate sources (i.e. income and tax declarations). The assessee in addition to the declaration of assets shall submit all the necessary documents necessary to justify the veracity and legitimacy of his or her statements. If the declared wealth happens to be twice as big as his/her legitimate income, the assessee is considered guilty and is dismissed from the office if not able to prove the contrary.[14] Asset assessment will be conducted by High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest (HIDACCI);
b) background assessment as integrity check - The background assessment consists in the verification of the assesses' declarations and other data aiming at identifying links with individuals involved in organized crime. If the assessee, upon verification, is found guilty of having clear links with figures from the organized crime, he/she is dismissed from office if he/she is not able to prove the contrary. The Albanian National Security Authority is responsible for performing background assessment of judges and prosecutors and its role is controversial in the whole process.
c) proficiency assessment as a check of professional skills - The proficiency assessment makes sure that each subject will undergo evaluation skills. In the case of judges, they will be evaluated over their judging skills, while in the case of prosecutors; they will be evaluated upon their ability to conduct an investigation.

During the procedures before the Vetting Structures, the subject enjoys the right determined in the Code of Administrative Procedure. The Commission invites the subject of vetting in a hearing session, in compliance with the Code of Administrative Procedure. The hearing session is public and is held in compliance with the law on administrative courts. At the end of the process, the Commission might decide to re-confirm the subject in his/her duty; to suspend him/her for a period of 1 year with the obligation to follow the training programs, according to the curricula approved by the School of Magistrates; and to dismiss him/her.

[13] Article 4 of the Law on Vetting.

[14] Council of Europe (2016), "Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ", Adopted by the Venice Commission, *http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e*.

The Law on Vetting also envisages institute of "justice collaborator" in article 54. The justice collaborator is any person who was involved in the corruption case with judge or prosecutor and who reports to the prosecution office case and provide evidence. The justice collaborator is exempted from prosecution. This institute opens space for reporting of corruption among judiciary without fear of prosecution for participation in the crime.

The complex structure of *ad hoc* vetting bodies and regular institutions that are obliged to assess some of the indicators should prevent political involvement in the whole process, however, it could slow down the process and minimize effects of the Law.

Public expectation of the whole process is very positive and there is a need to manage these expectations having in mind that majority of vetting processes failed to achieve expected results. Also, international community perceives the whole process as a positive example that could serve as a template for the organization of vetting process in other countries. Time will show if this optimism was justified.

Although Serbian experience and context were different, Albanian colleagues and members of ad hoc bodies and monitoring institutions could learn from it.

2.2 Serbian experience in reappointment of judges and prosecutors

In May 2006, the National Assembly adopted the first National Judicial Reform Strategy 2006-2011, which was described by many as an affirmation of faith in Serbia's future. The strategy's framework focused on improving the independence, transparency, accountability, and efficiency of the judiciary.

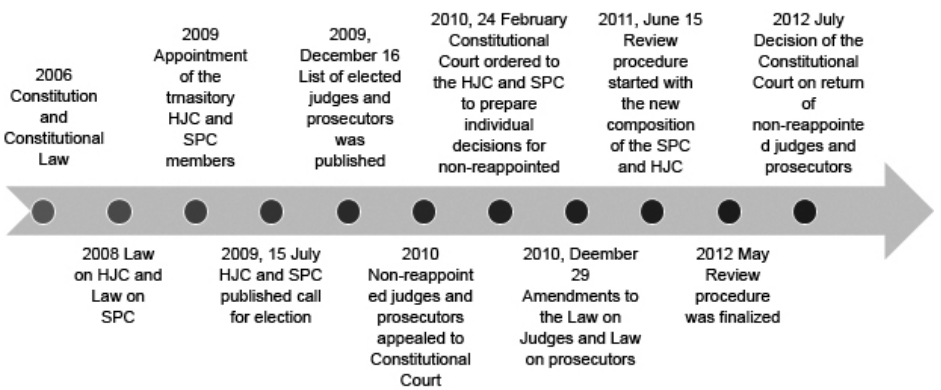
Serbia adopted new Constitution in 2006 with the intention to establish judicial independence and an autonomous public prosecutorial service.[15] The 2006 Constitution incorporated many of the strategy's recommendations, including changes to the role and powers of the High Judicial Council (HJC), and the creation of the State Prosecutorial Council (SPC).

The Constitutional Law on Implementation of Constitution envisaged reappointment of all judges and public prosecutors by the transitory composition of the High Judicial Council and State Prosecutorial Council.

[15] Opinion of the Venice Commission CDL-AD(2007)004 - "60.The chapter on courts in the draft Constitution of the Republic of Serbia approved by the Government of Serbia in 2004 was already commented upon by the Venice Commission (CDLAD(2005)023). The Constitution as adopted indeed no longer contains some provisions which were particularly criticised by the Commission, such as the election to judicial office of judges following the probationary period. On the other hand, the technical quality of the text seems poorer than in the previous draft and the overall impression of an excessive influence of parliament on the judiciary remains.
61. This impression is strengthened by the Constitutional Law on the Implementation of the Constitution which provides that all sitting judges within the Republic of Serbia have to be reappointed following the entry into force of the new Constitution. This means that the first High Judicial Council elected following the entry into force of the Constitution will be extremely powerful."

Under the reappointment procedure, the overall number of judges and prosecutors was reduced by 30 percent, and more than 800 of 3,000 sitting judges were not reappointed.[16] Around 170 prosecutors and deputy public prosecutors were not reappointed. Many judges and prosecutors who were not reappointed appealed to the Constitutional Court (1,500 such appeals were lodged).[17] The legislative amendments were adopted in December 2010 that transferred the cases back from the Constitutional Court to the Councils for further proceedings (reviewing procedure). The second round of decisions by Councils followed, and 109 judges and 29 prosecutors were reappointed. Non-reappointed judges and prosecutors filed another appeal with the Constitutional Court, which ruled that review of the reappointment decisions had not corrected the shortcomings of the reappointment process.

The Constitutional Court ruled in 2012 that the HJC and SPC had not applied objective criteria for reappointment; that judges and prosecutors had not been adequately heard during the procedure; and that Councils had not provided adequate explanations for reappointment decisions. The Constitutional Court ordered the reinstatement of all judges and prosecutors who had appealed for their non-reappointment. This 2012 Constitutional Court decision led to the reintegration of some 800 judges and 120 public prosecutors and deputies. The Councils met the 60-day deadline set by the Constitutional Court for the returning of the non-reappointed judges and prosecutors in the system.



[16] The 3,000 figure includes misdemeanor judges: until 2010, misdemeanor judges were not part of the judicial system, so the reappointment process considered whether these judges should become part of the judiciary. See, below.

[17] The Constitutional Court received around 1,500 appeals and constitutional complaints, filed by around 800 judges and prosecutors who were not elected. This represented a heavy burden for this Court (around 1,500 cases among a total of 5,500 cases in the court), which tries to find ways to handle these cases in a proper way and without excessive delays. A large majority of the non-(re-)elected judges and prosecutors filed two complaints: one against the decision not to elect them, and another one against their termination of their office. The Constitutional Court dedicated several sessions to try to find a modus operandi for handling the cases.

The Government media campaign resulted in the support of the society and international community for reappointment process. The whole procedure was presented as "lustration" of judges and prosecutors in the period following the fall of Milosevic's regime and as an aspect of the modernization of an insufficiently efficient judiciary system. It was also explained that process will ensure dismissal of judges and prosecutors that were corrupted or unworthy. The civil society was not involved in government campaign.

International community perceived as objectives of the re-appointment process "lustration" and an attempt at achieving greater efficiency of the judiciary as well as the fight against corruption within the justice system. Over the time this perception was changed. In that respect, it is interesting to mention the minutes from a meeting with the rapporteurs of the Venice Commission of February 21, 2008 (CDL-AD(2009)023). In the course of the meeting, the rapporteurs said they feared the re-appointment of existing judges could lead to a possible termination of the office of judges who committed no criminal offence.[18]

2.2.1. Main reasons for failure of the reappointment

Question of Constitutionality of the Re-appointment

The issue of the Constitutionality of the reappointment put the shadow on the procedure.[19] At the time the 2006 Constitution entered into force, all judges in Serbia were appointed for an indefinite tenure, therefore their function was permanent, and hence this function could not have been terminated if they were not re-appointed to the same court, since all courts, except for the Administrative Court, the courts of appeal and misdemeanor courts had existed before, irrespective of the title assigned to them by the Constitution. Therefore, in Article 148, paragraph 1, the Constitution includes a guarantee and barrier against possible abuse by the legislator.

The reason of changing the names of courts, the provision of article 7 of the Constitutional Act for the Implementation of the Constitution,

[18] As representatives of the Serbian state explained, the corruption issue was raised with respect to certain judges who had been appointed during the former regime. In that regard, the rapporteurs assessed the proposed reform as inadequate.

[19] 2006 Constitution declared legal continuity with previous Constitution from 1990. All judges were elected on the permanent tenure according to 1990 Constitution, so the 2006 Constitution could not terminate their function. Only possibility for termination could be dismissal. Criteria for dismissal are strict. In the re-election procedure, there were more candidates for position and less positions than there were judges in the moment of announcement of re-election. It was obvious that significant number of judges (even if they fulfill all criteria) could not be re-elected since number of positions were decreased.

in fact, envisaged the re-appointment of all judges and prosecutors in Serbia, which implies the collective termination of the capacity of a judge/prosecutors for all judges and prosecutors in Serbia.

Venice Commission in its Opinion on the Constitution of Serbia[20] concludes it is not justified to base Constitutional Law on the principle of discontinuity between the institutions functioning under the previous Constitution and those provided for in the present Constitutions since the provisions of the previous Constitution were followed during the adoption of the 2006 Constitution.[21] Venice Commission did not want to discuss motivations for the reappointment procedure and its justification.[22]

Criteria for re-election

In an Opinion of 2009,[23] the experts of the Venice Commission expressed their concern that the proposed procedure regarding the re-appointment of existing judges would leave the door open for removing judges who had not been guilty of any misconduct.

A decision on establishing the criteria and norms for assessing the competence, capacity and worthiness for the appointment of judges and court presidents[24] is the most important source of substantive law in the procedure for the appointment and re-appointment of judges (prosecutors). The Venice Commission welcomed the draft criteria and standards for the election of judges which had been submitted to an opinion, and stated that their previous concern mentioned above was partly addressed by these draft criteria. For example, the presumption – mentioned in the draft - that judges already appointed fulfil the criteria was deemed encouraging. However, the experts noted that this presumption might be overturned, and recommended that, in this respect, great caution must be applied.

Implementation of Criteria in practice was a challenge since some indicators were not put into full context and data environment was not automated.

[20] Opinion on the Constitution of Serbia, adopted at the 70th Plenary session, 17-18 March, 2007, CDL-AD(2007)004.

[21] Paragraph 70 of the Opinion.

[22] "72. By contrast, the need for a reappointment process as provided for in the Constitutional Law with respect to all judges and prosecutors is not at all obvious. It may be motivated by the wish to get rid of judges who have compromised themselves with previous regimes or who are corrupt. The Venice Commission is not in a position to evaluate whether such reasons exist with respect to a large number of judges. A comprehensive and quick reappointment process is bound to be extremely difficult and there is no guarantee that in the end better judges and prosecutors will be appointed. One may therefore have doubts whether the decision to undertake such a process was wise."

[23] CDL-AD(2009)023, *www.venice.coe.int.*

[24] Same act was adopted for prosecutors and deputy prosecutors.

According to the HJC decision delivered on July 15, 2009, criteria for re-appointment procedure were: competence, capacity and worthiness of judges and prosecutors. Capacity was understood as qualification and quality of work and was estimated based on following indicators: duration of studies, average mark, success at the Bar exam, subsequent additional education, published papers, number of overruled and reversed decisions. Competence was understood as efficiency in work and was estimated based on following indicators: number of cases solved and the relation between that number and the estimated norm. Related to the worthiness the Decision envisaged that those who are already judges/prosecutors are presumed to be worthy.

Criteria established assumption that a judge who was elected in line with previous regulations, who was in office at the moment of the election, and submitted a request to be elected to a same type of court and for the same level position, meets the criteria and norms determined by this decision. This presumption can be rejected only if there are reasons for a "doubt" (a problematic concept from the aspect of rebutting a presumption) that the candidate meets the criteria and norms identified in this decision due to his failure to demonstrate qualification, competence and worthiness needed for the performance of a judge's work. It is considered that the candidate failed to demonstrate the appropriate level of qualification if they had a certain number of annulled decisions in the last year which is higher than the average in the court in which they work. It is considered that the candidate failed to demonstrate appropriate competence if they failed to resolve a specific number of cases defined by the norms for the assessment of minimal performance efficiency in the last three years, or if the expiry of limitations of the proceedings can be attributed to an obvious mistake made by the candidate.

Methodology for estimation of capacity was challenged. It was interpreted that number of overruled and reveres decision is not sufficient indicator for estimation on judge/prosecutor quality of work. The Venice Commission insists on in particular: "The fact that a judge has been overruled on a number of occasions is not necessarily followed by the claim that the judge has not acted in a competent or professional manner. It is, however, reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question."

Competence (efficiency) of the judges/prosecutors was difficult to assessed only on the number of resolved cases without any case weighting rules. In the assessment of the workload of the judges, the Venice Commission insists on assessment of individual cases: "where a judge has concluded a lesser number of cases than required by the orientation norm, or where criminal cases have had to be abandoned due to delays the judge is responsible for."

No Legal Remedy

Possibility for an appeal to an independent court is one of the preconditions for reappointment procedure stressed in the opinion of the Venice Commission.[25] However, the legislation initially did not envisage any legal remedy against the High Judicial Council and State Prosecutorial Council decision on non-reappointment. Only in the reviewing process, the legal remedy was introduced.

Procedural failures

In its opinion on the 2006 Constitution, the Venice commission insisted on the fair procedure of re-appointment – "The procedure has to be fair, carried out by an independent and impartial body and ensure a fair hearing for all concerned".

Constitutional Court of Serbia stressed need to guarantee fair trial standards and issue reasoned individual decisions for each appointed and non-reappointed judge/prosecutor - "the appellant should have been ensured to have all procedural guarantees covered by the right to a fair trial, inter alia, to have a reasoned, individual decision of the High Judicial Council on the termination of his office be adopted, and have the decision include the individualized reasons for his non-appointment, based on the requirements for the appointment of judges prescribed in Article 45 of the Judges' Act and regulated in more detail in the Decision on the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents, and on data and opinions obtained pursuant to this decision". [26]

However, the State Prosecutorial Council and High Judicial Council violated all standards of fair procedure, transparency, equality of arms, contradictory procedure. The European Commission stressed in its 2010 report "Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, have not been applied. Judges and prosecutors were not heard during the procedure and did not receive adequate explanations for the decisions.".

The HJC made a decision without following transparency principle and inclusion of the profession.[27] According to the Rules of Procedure of the HJC from 2010, the institution sits behind closed doors. Neither members of the

[25] Paragraph 73 of the Opinion.

[26] Position was published at the Constitutional Court of Serbia website, http://www.ustavni.sud.rs, September 1, 2012.

[27] Now Rules of procedures of the HJC and SPC are amended and transparency is included as obligation in their work.

general public nor judges were allowed to participate in the meetings. The Council did not consider this as a lack of transparency. According to their position from that period, transparency is realized through press conferences, the issuance of public statements and announcements on the Council's website.

Capacities of Council to Implement

The HJC/SPC lacked proper experience and human resources to function properly. The Law on HJC and Law on SPC envisaged transfer of personnel and materials needed to execute the jurisdictions established by the law. However, the necessary steps to put in place operational Administrative offices that will support work of Councils had not been taken on time (plan for transfer, hiring decisions, etc.). This is of concern due to its importance relating to the capacity of the HJC administrative office to perform its functions properly. Human resources were a real problem with direct impact on the efficient functioning of the HJC/SPC.

Due to the insufficient capacities of the HJC/SPC the basic administrative activities related to the judiciary were very much linked to the Ministry of Justice, instead to the HJC/SPC Administrative office.

The HJC/SPC had a very short deadline to implement re-election procedure. According to the Law, judges, prosecutors and court presidents shall be appointed within one year from the day of the constitution of the High Judicial Council/State Prosecutorial Council.

Insufficient time and lack of administrative capacities of the HJC/SPC resulted in the appointment of a deceased judge, the appointment of the same judge for two positions, the appointment of the person as a judge and prosecutor at the same time, etc.[28]

In addition, the HJC/SPC published only the list of the re-elected judges and prosecutors, since they did not have enough time and capacity to prepare reasonings.

The lack of capacities resulted in the delay in exercising of many obligations. The proposal to the position of court president, to be elected in Parliament was delayed for more than a year. As a result, each court in Serbia, except for the Supreme Cassation Court, was led by an "acting president". Adoption of relevant bylaws also was delayed (rules on disciplinary procedure, evaluation and promotion of judges, etc.).

[28] Some non-reelected judges submitted criminal charges against some members of the Council but without any effect. Dismissal procedure of the council member is almost impossible according to legislation. Reason for that is need to guarantee Council members independence from any political influence. However, this solution in practice was a problem.

2.2.2. The main challenges and difficulties for Serbia in Law implementation

Assess realistic deadline/timeframe

In practice, it became clear that assessment of realistic timeframe is a big challenge. On the one hand, it is necessary to conduct the whole process in the shortest possible time to ensure legal certainty, on the other hand, it is important to properly collect and review data for each judge/prosecutor in the re-appointment procedure.

Assessment of the realistic deadline should be based on the availability of the data on judges/prosecutors' performance and work. In the system in which exists accurate and comprehensive case management system, as well as regular evaluation of judges/prosecutors' re-election procedure, could be implemented in a relatively short period of time. However, in the systems in which data on judges/prosecutors' performance are collected manually, the institution will need more time and human resources available to conduct the whole process of re-election (vetting).

The legal requirement to finalize reappointment procedure in a one-year period from the appointment of the HJC and SPC members is a short period of time having in mind administrative capacities of Councils and availability of data. The short deadline was defined to avoid legal uncertainty; however, it was not feasible to collect and aggregate all statistical data on the performance of judges and prosecutors.

Selection of adequate institution

Selection of institution that can act independently and impartially is one of the biggest challenges for each country that is planning to organize vetting of judges and prosecutors. According to the Venice Commission opinion, the re-election procedure requires a Council composed of independent and credible personalities and not of political appointees.

The Venice Commission in its opinion stated that for Serbian circumstances the High Judicial Council completely dependent on Parliament would not be a suitable body for carrying out such a procedure.[29]

In Serbian circumstances, the delegation of the reelection procedure to the Councils did not ensure independence and impartiality of the procedure. Participation of the minister of justice and president of Parliamentary Committee for Judicial Affairs, as *ex officio* members of the Councils, in

[29] The National Assembly appoints the eight from eleven members, six of whom should be judges (prosecutors) and two jurists (one university professor of law and one attorney-at-law).

the whole process ensure political influence on the process as well as the procedure for election of other members by the Parliament.

Support of profession

Lack of support of professional association was the main challenge for Serbian authorities. Serbian judicial associations were involved in the justice reform at the beginning; however, Government neglected inclusion of the associations after mid-2007.[30] Exclusion of the associations causes later problems in the re-appointment process.

Both Associations were heavily involved in raising awareness of European associations and professional bodies on the situation in justice reform in Serbia. As a consequence, the Consultative Council of European Judges (CCJE) issued a declaration on the reform of the judiciary in Serbia.[31] According to the CCJE, a re-appointment process with respect to all judges in a country is not at all obvious, and the termination of office of Serbian judges violated the principle of irremovability of judges and international standards. The CCJE requested that those judges who were not re-elected be informed in writing of the specific reasons for which their office has been terminated, and be granted an effective remedy before an independent body. In addition, the CCJE recommended that, pending the review of the decisions of termination, the judges who had been removed be provided sufficient means to cover their living expenses. The CCJE also requested that international bodies such as the Venice Commission and the CCJE, as well as international and national judges' associations, be associated to this independent instance as observers. In addition, MEDEL (European Association of judges and prosecutors for democracy and freedom) issued an Audit report on the situation in Serbia, European Parliament raised concerns on the re-appointment process in Serbia, etc.

[30] The representatives of both associations were involved in the process of the justice reform at the very beginning, when the Strategy Implementation Commission (SIC) was set up in 2006. The ten-member SIC was meant to be the leading body in the implementation of the goals and activities envisaged in the NJRS and the Action Plan (2006-2011). SIC members were representatives of the Ministry of Justice, the Supreme Court, the National Assembly Judiciary Committee, the Public Prosecutor's Office, the Judges' Association, the Prosecutors' Association, the Bar, the Judicial Training Centre, the Belgrade University Law Faculty and the Ministry of Finance. The Members of the Commission were elected by the Government of Serbia on 22 June 2006.
However, after the new government of Serbia took office in April 2007, the SIC practically ceased to exist. Representatives of the Association of Judges had a meeting with the Minister of Justice on 26 December 2007, who reassured them that the SIC would start operating as from the beginning of 2008. However, this did not happen, and on the contrary the Ministry of Justice took over all the SIC's competences. As a result, of the different approaches of the Ministry of Justice, on one hand, and the associations, on the other, towards the issue of general (re)-election, both associations were not initially involved in the process.

[31] CCJE (2010)1 adopted in Strasbourg 20 April 2010.

Assessment of worthiness

It was not clearly defined how worthiness will be assessed. When it comes to *worthiness*, a notion that the HJC/SPC should have specified in each individual case, the Criteria and Standards envisage that *those who are already judges/prosecutors are presumed to be worthy.* How did the HJC/SPC contest the presumption of worthiness, and the basis of which criteria cannot be seen from the re-appointment decisions?

Even after the whole process, it is not clear how worthiness was assessed. Neither the candidates nor the general public has learned how the HJC defined the standard of worthiness for performing the judicial office, nor what evidence was supplied and demonstrated in order to refute this presumption. The statements made by certain HJC members refer to judge's personal file as the source of data for assessing worthiness.

The main concern for the public was the usage of Intelligence service data without legal ground, especially for assessing worthiness. Commissioner for Free Access to data and Protection of Personal Data conducted an inspection to check if SPC and HJC used intelligence data.

2.2.3. Other reasons that contributed to the non-success of this process in your country

Naming the process with right term

"General election" was the term used in legislation instead of re-election, reappointment or vetting procedure. In line with the used term, the procedure was not regulated as a dismissal of judges/prosecutors who had lifetime tenure.

However, the Constitutional Court emphasized that wording cannot change nature of the re-appointment process. In a statement of 25 March 2010, the President of the Constitutional Court informed the public that her court considers the non-election of judges as a case of "termination of office". The statement mentioned that the non-elected judges should have been provided with individual and reasoned decisions. The same applies to the prosecutors who lost their jobs following the general election and brought their case before the Constitutional Court.

Transitory composition of the Councils

The composition of this transitory body was controversial in legislative terms. First, because judge-members were nominated by the former High

Council of the Judiciary, not by judges and prosecutors themselves. Second, because these judge-members were guaranteed a promotion to the higher court once they complete their task, which is a provision of highly corruptible nature.[32]

The candidates for the HJC and SPC transitory composition were nominated by the existing High Council of the Judiciary, *which means that the procedure was completely exempted from the competence of judges as holders of judicial power.* The transitory HJC/SPC composition was entrusted with an extraordinary and a capital task – to nominate candidates in the procedure of re-appointment of judges/prosecutors appointed for the first time and to re-appoint all existing judges/prosecutors, appointed for a permanent tenure pursuant to the 1990 Constitution.

The European Commission expressed in the 2009 Progress Report: the re-appointment was conducted by bodies (HJC and State Prosecutors Council) in illegal compositions,[33] since their composition was transitory; their composition was incomplete; and the representation of the profession, i.e. the judges and the prosecutors in these bodies was *not in conformity with European standards*.

2.2.4. Attempts for improvement

Reviewing procedure

A review procedure of the non-appointed judges and prosecutors was implemented due to the pressure from European instances. The procedure was launched in June of 2011 and lasted until the end of May 2012.

Standard, where no one can decide in the second instance on the case he already decided in the first instance, was violated. According to legislation the permanent composition of the High Judicial Council and State Prosecutorial Council shall review the decision of the transitory composition of the HJC and the SPC on termination of judicial office of judges/prosecutors in accordance with the criteria and standards for assessing the qualification, competence

[32] In addition, when it comes to the first HJC composition and its concrete composition in personal terms, it should be noted that one of the judge-members had conducted one enforcement procedure unjustifiably long, and as a result Serbia was convicted before the European Court of Human Rights for violation of the right to trial within reasonable time.

[33] According to the Serbia 2009 Progress Report of the EU Commission, stated that the transitory composition: *"… contains major weaknesses. As an exception to the general rule, the members representing judges in the first composition of the new High Judicial Council were nominated by the previous High Judicial Council which was not bound by the proposals from the courts. This appointment procedure does not provide for sufficient participation by the judiciary and leaves room for political influence."*

and worthiness, which shall be adopted by the HJC permanent composition.[34] The second-instance process is based on the premise that a different body is deciding since the partially personal composition is changed.[35] In order to eliminate the possibility of the entire process being compromised, the Rules envisage for the possibility (but not an obligation) to have the HJC members who have participated in the adoption of the initial decision refraining from voting or fully exempted from the procedure or parts thereof.[36]

Application of retroactivity principle causes legal uncertainty. The Law on Judges changes the character of appeals submitted to the Constitutional Court. *Ex lege* all proceedings upon the judge's appeals to the Constitutional Court were terminated and the cases were transferred to the HJC and those appeals were considered as petitions to the HJC.[37]

Similar is the opinion of the Venice Commission emphasized in its opinion CDL-AD(2011)015, that this procedure of prequalification and successive exclusion of appeals pending before the Constitutional Court has raised "doubts with respect to the principle of the separation of powers."

The fair procedure was better protected in the review procedure. Positive novelties were: right to inspect case file, the accompanying documents and the course of procedure, as well as to orally present own case before the HJC/SPC permanent composition.

Transparency was not significantly improved. The audio recording of the sessions promised in order to ensure citizen control was not allowed.[38] The principle of the public procedure was not respected during the plenary sessions of the State Prosecutorial Council, because of alleged lack of space. In the case of HJC which respected the principles of public procedure.

Obligations of the HJC/SPC permanent composition were clearly identified. The bylaw envisaged that the decision of the HJC/SPC permanent composition should be reasoned. The bylaw envisaged only appeal to the Constitutional Court as a legal remedy against the decisions of the HJC/SPC from the review procedure.

Monitoring by the PAS

The Association of Public Prosecutors and Deputy Public Prosecutors of the Republic of Serbia was awarded the status of a "special monitor",

[34] Article 101 paragraph 1 of the Judge' Act (RS Official Herald 116/08, 58/09 – decision of the CC and 104/09).

[35] Minister of Justice, Member of Parliament, Representative of Bar Association and representative of Law faculties remain the same, while six representatives of judges and prosecutors were changed.

[36] In practice, the minutes from the HJC sessions, show that this indeed was not the case.

[37] Non-reappointed judges/prosecutors who did not submit appeal to the Constitutional Court had additional 30 days deadline to submit petition to the HJC/SPC.

[38] MEDEL Audit report.

with the right to ask questions directed at the petitioners and the right to object to the minutes and the procedure as such.[39] In addition to exercising competences from the rules on review procedure, the PAS used possibilities from the Law on free access to information.[40] In addition to the Association of Public Prosecutors, the status of monitors (without the mentioned rights) was granted to the monitors of the European Union Delegation to Serbia, the OSCE and the Council of Europe.[41]

The Association of Public Prosecutors provided Report on the process of monitoring which influenced official documents of the EU. The Report was submitted to the European Delegation, European Commission, OSCE and individual embassies. The conclusions from the Report became part of the 2011 European Progress report for Serbia "As regards prosecutors, certain procedural shortcomings occurred and remaining doubts on the observance of the guidelines will have to be dispelled by the written decisions."

In communication with the public the PAS included international professional association. Colleagues from MEDEL and IAP to assess whole re-election and review process and give media statements. Activities of the PAS were crucial for changing of public perception, especially among the professional public.

3. Conclusions

Vetting of the judiciary should regain trust and strengthen rule of law in the country. However, experience from Western Balkan countries (Bosnia and Herzegovina, Kosovo and Serbia) does not give positive examples and good practice. Learning from mistakes could also help other countries to prevent problems.

Reasons for failure of Serbian vetting process are numerous, from lack of the proper legal ground for termination of function to the challenges in implementation (lack of administrative capacities and short deadlines). In addition, the whole process lacked a clear understanding of reasons for vetting. One of the main results of vetting in Serbia is fear among judges and prosecutors that their position is not permanent and that any new Government and the political majority could use the opportunity of amendments of the Constitution to conduct vetting. This is not in line with rule of law standards and jeopardizes impartiality and integrity of judges and prosecutors.

[39] The PAS monitored only review procedure and only part of interviews with non-reelected prosecutors. PAS monitors used check list to be sure that commission followed all procedural steps. Decision making was behind closed doors so PAS monitors could not monitor this process.
[40] The Commissioner for free access to information exercise his powers based on the PAS initiative and checked if the Councils used intelligence data in decision making.
[41] Article 5 of the Rulebook.

Contrary to Serbian example, Albania vetting process is organized based on the common understanding that it should result in regaining the trust in the judiciary and fight against corruption among judges and prosecutors. In addition, Albania ensured ground for the process in the Constitution and established a comprehensive structure to implement vetting. These steps showed that Albania learned from Serbian mistakes, however, the assessment of criteria in the practice could result in challenges. The coming period will show if it is possible to achieve expected results.

Dr Marina Matić Bošković
Istraživač saradnik, Institut za uporedno pravo, Beograd

REIZBOR NOSILACA PRAVOSUDNIH FUNKCIJA U ZEMLJAMA U TRANZICJI – USPEŠAN INSTRUMENT ILI TAČKA POLITIČKOG UTICAJA

Rezime

Autor u radu analizira iskustva u reizboru nosilaca pravosudnih funkcija kao mehanizma za vraćanje poverenja građana u pravosudni sistem. Posebna pažnja posvećena je iskustvima u Srbiji i Albaniji. Uporedna iskustva i praksa ne pokazuju jasnu vezu između procesa reizbora i poverenja građana u pravosuđe. Autor u radu analizira značaj saglasnosti oko razloga za reizbor, kao i značaj pripremnih aktivnosti za sprovođenje reizbora – postojanje osnova u Ustavu, izbor odgovarajuće institucije koja će sprovoditi proces, uključujući osnivanje ad hoc tela, procena potrebnog vremena i administrativni kapaciteti za sprovođenje celokupnog procesa. Takođe, komunikacija sa opštom i profesionalnom javnošću je od ključnog značaja za obezbeđenje podrške tokom čitavog procesa reizbora. Autor u radu daje pregled uporednih praksi, odnosno modela reizbora sprovedenog u Srbiji 2009. godine i tekućeg reizbora u Albaniji. Iako postoje kašnjenja u sprovođenju reizbora u Albaniji, očigledno je da je zakonodavac zasnovao rešenja na iskustvu iz Srbije i uključio mehanizme kojima će se obezbediti transparentnost celokupnog procesa.

Ključne reči: reizbor sudija i tužilaca, integritet, poverenje u pravosudni sistem, korupcija, kriterijumi za reizbor.

Valentina Ranaldi[1]

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INSURANCE AGAINST ACCIDENTS AT WORK AND OCCUPATIONAL DISEASES: THE EU REGULATION AND CASE LAW[2]

Abstract

The matter of accidents at work and occupational diseases, as the subject of insurance protection, falls within the aims of various EU rules. This is part of a more general interest of the European Union's legislator and judges for safety and health in the workplace. In this regard, the present paper aims at analyzing the capacity for the implementation and development of an occupational safety and health management approach in the European Union. The analysis is conducted through the examination of the European legal framework governing the matter, as well as the most recent and relevant case law of the Court of Justice of the European Union on insurance and compensation of damages for accidents at work and occupational diseases. From this research an effort emerges, at the European level, to ensure safety and health standards. However, such efforts are inadequate with respect to a constantly changing labour market, characterized by less and less stable employment relationships, new working patterns and an ageing workforce. Nor are all the people concerned by those changes adequately covered by the existing health, safety and insurance legislation, as well as the increasing number of temporary workers and workers with atypical contracts.

Key words: *European Union; Health and Safety at Work; Accidents at Work; Occupational Diseases; Compensation of Damage; Insurance; Court of Justice of the European Union.*

[1] Ph.D. in International Legal Order and Human Rights, University of Rome «La Sapienza», Department of Political Science; Professor (charged) of International Law and European Union Law, eCampus University, e-mail: *ranaldi.v@gmail.com.*

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1. Introduction

The issues of work and social security, including the aspects related to health and safety at work, have been the subject of the European Union's attention for a long time. This fits into the historical interest of the European Community -and, then, in that of the European Union- for social security as a functional matter to the free movement of workers. The Community regulations on the free movement of workers, in fact, have played a historic role in the European Union's labour law system, given its instrumental nature to the creation of the Community market.

In fact, the right to free movement has always been a cornerstone of the whole European construction, because the objective of implementing the internal market was strictly associated to the full realization of the four fundamental freedoms (free movement of goods, capital and services, alongside with free movement of workers) provided for in Article 3 c of the original TCEE.

As for the secondary EU law, what emerges from the evolution of the right of free movement through the Community regulations governing it (referred to below) is, apart from the specific amendments, the constant importance attributed by the Community legislator to the construction of the single European market, of which the free movement is a key element.

However, the issue of free movement of workers could not be fully disciplined without taking into account the related features of social security. Hence the importance of the regulations, passed in the 1970s and updated several times (as it will be said later), which govern the subject of social security.

The legal framework designed by these regulations is closely linked to the right to free movement of persons, as functional to it. In fact, it seeks to ensure the effectiveness of the right to freedom of movement by eliminating those social security constraints which might restrict it. To this end, it is ensured that workers who have worked in different States are not prejudiced compared to those who have worked in one state.

What is to be highlighted in the analysis of the EU framework for the free movement of workers and social security is an essential element of European legislation: the prevalence that has always been given, in the hierarchy of priorities, to the achievement of the free market and the free competition over social and labour rights. It is with this aim that this legislation (which regulates security and social security in the relations between the countries of the European Union and the European Economic Area and between the countries of the European Union and Switzerland) has been introduced.

Nonetheless, although at a first stage the law -primary and secondary law- of the European Community has dealt with work and social security

almost exclusively with the goal to create a European market, it cannot be denied that the Community legislator has, over time, also produced some relevant social results.

In this context, different EU directives and regulations, relevant to the subject dealt with in this paper, are included. They are, in particular, the directives based on Article 118a of the Treaty of Rome, introduced by the Single European Act of 1986. Around the heart constituted by the Directive No. 89/391/EC, regarding the protection of health and safety in the workplace, a series of minor directives (directives with a sectoral or categorical protection) have been adopted. Moreover, some important directives were implemented, such as that on the protection of pregnant or maternity workers (Directive No. 92/85/EC, connected with the problem of the equal treatment for men and women in matters of social security, as derived from the Directive 79/7/EEC) or on the organization of the working time (Directive No. 93/104/EC, transposed in the codification directive No. 2003/88/EC), which will be recalled in the following paragraph.

2. The EU legal framework on safety and health at work, related accidents and diseases and the procedure to be followed by an EU worker

The matter of accidents at work and occupational diseases, which is the subject of insurance protection, falls within the aims of the various EU rules mentioned above, both at primary and secondary level. However, it is important to note, first and foremost, that it is not only the European Union's law to apply to the matter. Indeed, within the different possible applicable systems, a primary role is played by national legislation and the social security scheme of each Member State. Different aspects are governed by international, European or national law and there are interactions with other compensation schemes[3].

In particular, the role of the national government should be to lay down the overall structure of the scheme and to make sure that the legal

[3] For an overview of the legal framework on safety and health at work see, *inter alia*, J.M. Stellman, *Encyclopaedia of occupational health and safety*, International Labour Office, Geneva 1998; S. C. Lonergan, "Human Security, Environmental Security and Sustainable Development. Environment and Security" (eds. M. Lowi, B. Shaw), MacMillan, London 2000; F. Murie, "Building Safety—An International Perspective", *International Journal of Occupational and Environmental Health*, 1/2007, 5-11; L.S. Robson, J.A. Clarke, K. Cullen, A. Bielecky, C. Severin, P. L. Bigelowa, Irvin, E., A. Culyer, Q. Mahood, "The effectiveness of occupational health and safety management system interventions: A systematic review", *Safety Science*, 3/2007, 329–353; J. Ridley, J. Channing, *Safety at Work*, Routledge, London 2008; D. Walters, *The Role of Worker Representation and Consultation in Managing Health and Safety in the Construction Industry*, International Labour Organization, Geneva 2010, 1-48.

framework and the obligations, in general, are respected. This includes the responsibility for setting or controlling the premiums, the level of claims reserves held by insurers or the whole area of prevention.

The national social security plays an active part in claims handling or in organizing rehabilitation and is responsible for taking recourse against the insurer. The costs of this intervention should be covered by a contribution from the workers' compensation scheme.

So, to sum up, the legal obligations are set at a national level and at a European level through competition law, standards for prevention and safety at work and other relevant standards for the protection of workers against discriminations.

Besides the national and European level, the International Labour Organisation (ILO) has also adopted a certain number of principles on who should be covered in these cases by the insurance system; the definition of a "work accident; the areas for compensation and the overall organization of a workers' compensation scheme.

In practice, the procedure -resulting from interactions between the different regulatory levels- that a worker should follow if he lives and is insured in an EU country (but also in Iceland, Liechtenstein, Norway and Switzerland) and if he suffers from an accident at work or from an occupational disease can be summarized as follows.

The said worker should inform his own insurance institution when the accident at work occurs or when the professional disease is diagnosed for the first time. As each country has different rules, the insurance institution should provide the worker with all the necessary information about the steps to take.

About the responsibility for the healthcare, the country responsible is the country where the worker resides. It is this country that is responsible for providing all benefits like healthcare and medicines. If the worker is not insured there, he is requested to ask his insurance institution for a document giving details of the accident or the disease. This document has to be presented to the competent institution of the country where the worker is living or staying, in order to receive the benefits there.

About the country that should pay the worker's cash benefits, it is important to remember that it is the country where the worker is insured to be always responsible for paying the cash benefits in respect of an accident at work or an occupational disease.

Having briefly outlined the procedure that the worker has to follow in the European Union, as the result of the interaction between different levels of regulation, some regulations and directives relating to the matter should be mentioned. Also, the Court of Justice refers to them in its pronouncements about insurance and compensation of damages for accidents at work and occupational diseases.

In particular, we have to recall the Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and the Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community[4].

The discipline so traced ruled the matter until the entry into force of the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems[5]. In fact, with this Regulation repealed Regulation (EEC) No 1408/71 from the date of entry into force of the new implementing Regulation, No 987/2009 of 16 September 2009[6].

The 2009 implementing Regulation has, in turn, replaced the previous implementing Regulation (EEC) n. 574/72, although some of its provisions remain in place to guarantee the legal certainty of certain acts concerning non-Community nationals, whose coordination rules have been extended by Regulation (EC) No 859/2003[7].

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[4] Respectively in OJ L 149, 5.7.1971, p. 2–50 and in OJ L 74, 27.3.1972, p. 1–83. In the vast bibliography on social security in the European Union law, see, among the others: A. Sinagra, "Competenza e normativa della CEE in tema di sicurezza sociale con particolare riguardo agli infortuni sul lavoro", *Rivista di diritto europeo* 2/1983, 101-128; G. Arrigo, *Principi, fonti, libera circolazione e sicurezza sociale dei lavoratori*, Giuffrè, Milano 1998; S. Giubboni, "Libertà di circolazione e protezione sociale nell'Unione europea", *Giornale di diritto del lavoro e delle relazioni industriali* 1/1998, 87; R. White, *Workers, Establishment, and Services in the European Union*, Oxford University Press, Oxford 2004; M. Cinelli-S. Giubboni, *Il diritto della sicurezza sociale in trasformazione*, Giappichelli, Torino 2005; V. Paskalia, *Free Movement, Social Security and Gender in the EU*, Hart publishing, Oxford-Portland 2007; G. Arrigo, "La sicurezza sociale nel diritto comunitario", in: *I diritti sociali degli stranieri* (ed. A. Di Stasi), Roma 2008, 19; G. Caggiano, "Il coordinamento comunitario delle politiche nazionali per la creazione del modello sociale europeo", in: *Studi in onore di Vincenzo Starace*, Editoriale Scientifica, Napoli 2008, v. II, 909; F. Pennings, *European Social Security Law*, Intersentia, Antwerpen 2010; L. Idot, D. Simon, A. Rigaux, "Libre circulation des travailleurs", *Europe*, 2011, 24.

[5] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (text with relevance for the EEA and for Switzerland), in OJ L 166, 30.4.2004, p. 1. For an analysis of the Regulation see, among others, F. Marongiu Buonaiuti, "La legge applicabile alle prestazioni di sicurezza sociale nel regolamento CE n. 883/2004", in *Rivista del diritto della sicurezza sociale* 2010, 537.

[6] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, in OJ L 284/1, 30.10.2009, 1.

[7] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, in OJ L 124, 20.05.2003, 1-3.

Also, the Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security has to be mentioned[8].

As for the period following the adoption of the Single European Act, we shall recall the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work[9], but also the Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding[10].

Some of these normative acts of the EU Institutions have been quoted by the Court of Justice of the European Union about the compensation of damages for accidents at work and occupational diseases, as it will be said below.

3. Relevant case law of the Court of Justice of the European Union on insurance and compensation of damages for accidents at work and occupational diseases

The interpretation, within the EU, of the matter of insurance and compensation of damages for accidents at work and occupational diseases, is based on some historical judgments of the European Court of Justice, which we are going to briefly trace back to arrive at some recent important pronouncements.

One of the problematic issues posed at the attention of the Court was the interpretation of the provisions of Article 90(2) of the Treaty (then Article 86(2) EC and 106, TFEU), and if they may be relied on by individuals before national courts in order to obtain review of compliance with the conditions which they lay down. This problem was solved by the Court in a Judgment of 22 January 2002 in Case *Cisal* v. *INAIL - Istituto Nazionale per Assicurazioni contro gli infortuni sul lavori*[11].

Another problem faced up by the Court in that Judgment was the concept of an undertaking, within the meaning of Articles 85 and 86 of the EC Treaty (then Articles 81 EC and 82 EC and 101-102 TFEU). According to the Court, this concept does not cover a body which is entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases, where the amount of benefits and the amount of contributions are subject to supervision by the State and

[8] In OJ L 6, 10.1.1979, 24- 25.
[9] In OJ L 183, 29.6.1989, 1- 8.
[10] In OJ L 348, 28.11.1992, 1- 7.
[11] Judgment of the Court of 22 January 2002 in Case C-218/00, in *Reports of Cases* 2002 I-00691.

the compulsory affiliation which characterizes such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them. Such a body fulfils an exclusively social function. Accordingly, its activity is not an economic activity for the purposes of competition law[12].

In the particular case, it was the Tribunale di Vicenza that referred to the Court for a preliminary ruling under Article 234 EC the two questions on the interpretation of Articles 85, 86 and 90 of the EC Treaty[13].

The Court answered by underlining that, according to settled case-law, Community law does not affect the power of the Member States to organize their social security systems[14].

In particular, the covering of risks of accidents at work and occupational diseases has for a long time been part of the social protection which the Member States afford to all or part of their population.

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[15], contains specific provisions for coordinating national schemes on accidents at work and occupational diseases, for the application of which, in the case of the Italian Republic, the INAIL is expressly designated as the competent institution, within the meaning of Article 1(o) of that regulation.

In summary, the Court states that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterizes such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them[16].

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[12] See paragraphs 44-46 and operative part of the Judgement.

[13] The questions have been raised in proceedings between Cisal di Battistello Venanzio & C. Sas (hereinafter Cisal) and the *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (National Institute for Insurance against Accidents at Work - INAIL), concerning an order to pay the sum of ITL 6 606 890 representing insurance contributions not paid by Cisal.

[14] See, in particular, Case C-158/96 Kohll [1998] ECR I-1931, paragraph 17, and Case C-157/99 Smits and Peerbooms [2001] ECR I-5473, paragraph 44. For an historical perspective of the Italian situation see, among the others, G. Assennato, V. Navarro, "Workers' participation and control in Italy: the case of occupational medicine", International Journal of Health Services 10(2)/1980, 217-232.

[15] Modified and updated, at the time of the Judgement, by Council Regulation (EC) No 118/97 of 2 December 1996, in OJ 1997 L 28, 1.

[16] Conclusions of the Court, paragraph 44.

So, with regard to that specific case, the Court concluded in the sense that in participating in this way in the management of one of the traditional branches of social security (in this case insurance against accidents at work and occupational diseases) the INAIL fulfils an exclusively social function. It follows that "its activity is not an economic activity for the purposes of competition law and that this body does not, therefore, constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty"[17].

Finally, in answer to the questions submitted to it by the Tribunale di Vicenza, the Court ruled that the concept of undertaking, within the meaning of Articles 85 and 86 of the Treaty, does not cover a body entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases, such as the INAIL[18].

Later, with the Judgment of the Court of 3 September 2014 the *Korkein hallinto-oikeus* (Supreme Administrative Court of Finland), the Court of Justice ruled on some important themes such as the equal treatment for men and women in matters of social security, as derived from the Directive 79/7/EEC[19]; the accident insurance for workers; the amount of a lump-sum compensation for permanent incapacity; the actuarial calculation based on average life expectancy by sex of the recipient of that compensation; the concept of "sufficiently serious infringement of EU law"[20].

In this Case, the request for a preliminary ruling (under Article 267 TFEU) was made in a dispute between X and the Finnish Ministry of Social Affairs and Health concerning the grant of lump-sum compensation paid following an accident at work. In particular, the request concerned the interpretation of Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The Directive, that applies to statutory schemes which provide protection against the risks, *inter alia*, of

[17] Conclusions of the Court, paragraph 45.

[18] Conclusions of the Court, paragraph 46.

[19] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in OJ 1979 L 6, p. 24.

[20] Judgment of the Court of 3 September 2014, case C-318/13, published in OJ C 233 of 10.8.2013. This case originated from a letter sent by X, on 13 October 2008, to the Finnish Ministry of Social Affairs and Health. In this letter X claimed that the lump sum paid to him as compensation for his long-term disability had been determined in disregard of the provisions of EU law on equal treatment of men and women. X therefore claimed an amount that corresponded to the difference between the compensation received by X and that payable to a woman of the same age and in a comparable situation. On 27 May 2009, the Ministry refused to pay the sum claimed. On 17 June 2009, X brought an action before the Helsinki Administrative Court, seeking an order that the Finnish State pay him the sum in question. By a decision of 2 December 2010, this Court declared that action inadmissible on the ground that it did not have jurisdiction. X then brought an appeal against that decision before the Supreme Administrative Court which, on 28 November 2012, set aside the decision of the previous Court.

accidents at work[21], states, under article 4, paragraph 1, that: "the principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes and the conditions of access to them; the obligation to contribute and the calculation of contributions; the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits".

As for the Finnish law, the implementation of the accident insurance is a public management task which, in Finland, is carried out by private insurance companies. Employers, in order to satisfy their obligation to provide for their workers' safety as regards accidents at work, are required to take out insurance with an insurance company approved to insure the risks covered by the Law on accident insurance of 1992 ('the Law on accident insurance'). The costs of the statutory accident insurance are covered by the insurance premiums paid by the employers[22].

In deciding on the matter, the Court ruled that the article 4, paragraph 1, of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation[23].

Furthermore, the Court of Justice of the European Union ruled that it is for the referring court to assess whether the conditions for the Member State to be deemed liable are met[24].

Similarly, as regards whether the national legislation at issue in the main proceedings constitutes a 'sufficiently serious' infringement of EU law, that court will have to take into consideration the fact that the Court has not yet ruled on the legality of taking into account a factor based on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system and falling within the scope of the Directive 79/7. The national court will also have to take into account

[21] Council Directive 79/7/EEC, art. 3.1.a.

[22] Paragraph 14(1)(1) of that law provides for the payment, in particular, of compensation for an injury or illness caused by an accident at work.

[8] In particular, the paragraph 18b(1) of the Law of 1992 provides that compensation is paid either as a lump sum or continuously. Under Paragraph 18b(3), the lump sum compensation is calculated in the form of capital corresponding to the value of the disability allowance, taking into account the employee's age according to criteria approved by the Ministry.

[23] Conclusions of the Court, paragraph 40.

[24] Conclusions of the Court, paragraph 51.

the right granted to the Member States by the EU legislature, set out in Article 5, paragraph 2 of the Council Directive 2004/113/EC[25], and Article 9, paragraph 1, letter h, of the Directive 2006/54/EC[26].

In reaching such a decision, the Court confirms its previous case-law, where it had held that the first of those provisions is invalid since it infringes the principle of equal treatment between men and women[27].

In a recent Judgment of 1 February 2017, the Court was requested for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 29 July 2015, received at the Court on 5 August 2015, in the proceedings *Secretary of State for Work and Pensions* v. *Tolley*[28].

The request for a preliminary ruling concerned the interpretation of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (abovementioned).

The request had been made in proceedings between the Secretary of State for Work and Pensions ('the Secretary of State') and Mrs. Tolley, who died on 10 May 2011 and was acting in the main proceedings by her husband as her personal representative, concerning the withdrawal of her entitlement to the care component of disability living allowance ('DLA') on the ground that she no longer satisfied the conditions as to residence and presence in Great Britain.

On the grounds of a deep analysis of the Council Regulation (EEC) No 1408/71, the Court ruled, first of all, that "a benefit such as the care component of disability living allowance is a sickness benefit for the purposes of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999"[29].

Second of all, according to the Court, article 13(2)(f) of Regulation No 1408/71 (in the version amended and updated by Regulation No 118/97, as amended by Regulation No 307/1999), must be interpreted as meaning that the fact that a person has acquired rights to an old-age pension by virtue of

[25] Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[26] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[27] Judgment of the Court of 1 March 2011, case C-236/09.

[28] Judgment of the Court of 1 February 2017, case C-430/15.

[29] Conclusions of the Court.

the contributions paid during a given period to the social security scheme of a Member State does not preclude the legislation of that Member State from subsequently ceasing to be applicable to that person. It is for the national court to determine, in the light of the circumstances of the case before it and of the provisions of the applicable national law, when that legislation ceased to be applicable to that person.

Third of all, article 22(1)(b) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 307/1999, must be interpreted as preventing legislation of the competent State from making entitlement to an allowance such as that at issue in the main proceedings subject to a condition as to residence and presence on the territory of that Member State.

4. Concluding remarks

From all the foregoing it emerges an effort, both at the European legislation and case law level, to ensure safety and health standards through important instruments against accidents at work and occupational diseases.

However, many problems remain, and they are indeed accentuated by a labour market constantly changing. In fact, new challenges arise for health and safety at work from less stable employment relationships, new working patterns and an ageing workforce. Nor are all the people concerned by those changes adequately covered by the existing health, safety and insurance legislation. The increasing numbers of temporary workers and of atypical contracts raise concerns on the degree of coverage of health and safety provisions. Many workers report that they are not well informed about health and safety risks related to their jobs, with a higher share in small and medium-sized workplaces[30].

Furthermore, even if the EU minimum requirements have contributed to deeply focus on the risk management cycle at the national level, the application of the rules varies significantly from one Member State to another, entailing different levels of workers' health protection.

Thus it remains, among the European States, an unbalanced implementation of the European Union legislation in the field of health and safety at work. Moreover, the protection offered by the different national regulations, as well as the effectiveness and efficiency of the related control systems and the imposition of penalties, remains strongly differentiated.

[30] Oh this issues see C. Mayhew, M. Quintanb, R. Ferrisc, "The effects of subcontracting/ outsourcing on occupational health and safety", *Safety Science*, 1–3/1997, 163–178; G. Papadopoulos, P. Georgiadou, C. Papazoglou, K. Michaliou, "Occupational and public health and safety in a changing work environment: An integrated approach for risk assessment and prevention", *Safety Science*, 8/2010, 943–949.

Dr Valentina Ranaldi
Odsek za političke nauke, Univerzitet La Sapienza, Rim
Profesor (ugovor) međunarodnog prava i prava Evropske unije,
eCampus University

OSIGURANJE OD POVREDA NA RADU I PROFESIONALNIH BOLESTI: REGULATIVA I PRAKSA EU

Rezime

Pitanje nesreća na radu i profesionalnih bolesti, kao predmet zaštite u oblasti prava osiguranja, deo je ciljeva nekoliko evropskih propisa. Ovo pitanje je deo opštijeg interesa zakonodavca na nivou Unije i sudije za bezbednost i zdravlje na radu. U tom smislu, ovaj rad nastoji da analizira sposobnost za implementaciju i razvoj pristupa upravljanja rizicima bezbednosti i zdravlja na radu na nivou EU. Analiza se sprovodi kroz ispitivanje pravnog okvira EU koji uređuje ovo pitanje, kao i najnovijih i najrelevantnijih slučajeva Suda pravde Evropske unije u pogledu osiguranja i naknade štete za povrede na radu i profesionalne bolesti. Iz ovog istraživanja se može videti nastojanje da se na evropskom nivou obezbedi postojanje bezbednosnih i zdravstvenih standarda. Međutim, ti napori su neadekvatni u pogledu tržišta rada koje se stalno menja, a koje karakterišu sve manje stabilni radni odnosi, novi oblici angažovanja i sve starija radna snaga. Svi oni kojih se ove promene tiču nisu pokriveni postojećim zakonodavstvom u oblasti zdravlja, bezbednosti i osiguranja, a ono se ne odnosi ni na sve veći broj onih koji su privremeno angažovani ili su angažovani kroz netipične ugovore.

Ključne reči: Evropska unija, bezbednost i zdravlje na radu, nesreće na radu, profesionalne bolesti, naknada štete, osiguranje, Sud pravde Evropske unije.

Dragana Petrović, PhD[1]

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"MERCY KILLING" IN COMPARATIVE LEGISLATION[2]

Abstract

The issue of euthanasia is regulated in a different way in each country and legislation. However, the last word has not been spoken, and this is the message of extensive arguments and grave concern. The theme is large in scale, as is the dimension of a human being and the world itself. Difficult and strong, too. As the author points out, behind each question related to euthanasia lies a preceding question of the actual need for its legalization. The author adds: here it is good to hear a different opinion, shed some light on the problem from another perspective and offer new solutions to complex, but important dilemmas which arise in relation to the subject matter.

Keywords: *'mercy killing', ordinary or privileged, the motive of the executor or the request of the victim, legalization.*

1. Introduction

It is obvious that contemporary criminal law in various countries shows considerable oscillations in regulating the issue of mercy killing. In other words, the international scene today witnesses a grave division in relation to the issue of this type of the "right to life". Even a glance at various criminal laws reveals that some of the adopted provisions are diverse and mutually contradictory while some are conceptually similar, even identical. Starting from this, we will further explore the issues that cause considerable dilemma with a note that with such an approach we have attempted to get closer, as much as possible, to the principal goal of this thematic field - to analyze the adopted legal solutions in various countries with all their differences in order to find the most acceptable forms of regulating this type of human action, that is to present a comparative overview as a starting point for better understanding and

[1] Research Fellow, Institute of comparative law, Belgrade, e-mail: *d.petrovic@iup.rs*.

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comprehension of this complex problem in order to receive interesting and applicable solutions that may be used for further research.

For the purpose of our research of comparative law on euthanasia, first, we have to acknowledge that, although in almost all legislations murder is the most serious crime, there are certain life circumstances which may, to a certain extent, mitigate the heinous nature of this act and criminal responsibility of the perpetrator, which makes such killing a privileged and less punishable act. As already pointed out, these are specific subjective and objective circumstances of various importance that affect the character and degree of harmfulness of a certain act and its criminal qualification. Following this brief lesson applied to a concrete case, we will start discussing the exceptional circumstances which point to the need of an exception that is the privileged treatment of this criminal act. However, a comprehensive overview of the issue of punishment of euthanasia cannot be made without mentioning some other stands and solutions related to this issue. Thus, the legislative concepts in a number of countries treat this kind of ending of a human being's life as an ordinary murder, while the legislation in some other countries reflects the need to treat this criminal act in a privileged way. Moreover, in some countries euthanasia is legalized, that is the criminal liability for this act is excluded.

Research into alternative solutions aimed at finding the adequate normative regulation of this kind of ending a person's life starts with the elaboration of the first case – euthanasia as an act from the catalogue of lighter or privileged murder crimes.

What are these exceptional, privileged circumstances which constitute the bases of this act that is which specific circumstances point to the criminal and political justification of such a privileged treatment of murder crime? Is there a need to emphasize (again) that these quite exceptional circumstances essentially mitigate the intensity of the crime and its social harmfulness, due to which it cannot be compared with an ordinary murder?

As a response, one fact above all others, appears as an inevitable conclusion: a large number of contemporary legislators (for example, majority of criminal codes in continental Europe, most of US states ...) foresee punishment for euthanasia executors, but during sentencing take into account the executor's motive and the request of the victim to be killed. Thus, this motive and the request appear here as circumstances which decisively shape this criminal act towards a lighter incrimination. For example, the Commission for legal reform in Canada proposed in 1984 that active euthanasia should not be legalized, but suggested that obligatory conviction for this murder crime should be cancelled empowering judges to take into account the motive of the executor and the consent of the victim as mitigating

circumstances.[3] To be more precise: murder at the request or appeal, or today more popular terms: mercy killing, euthanasia or assisted suicide has been present for a long time in criminal laws of certain countries [4] which, in one way or another regulate various forms of privileged homicides surrounded by described circumstances which justify their privileged treatment.[5] Just to illustrate: German and Swiss criminal codes take into account the motive of the executor as a privileged element in a sense that this motive reflects the character and profile of the perpetrator, that is that it essentially and decisively depicts the executor's character and personality. Honorable motives belong to a group of already mentioned mitigated circumstances. In this scope, the motive of mercifulness is considered to be one of the honorable motives. In the light of the presented fact, German and Swiss legislations regulate „homicide upon request" by a separate provision; Germany incriminates „killing at the request of the victim" by paragraph 216 in the following way: if someone commits a murder at the explicit and earnest request of the person killed, shall be punished with the imprisonment between six months and 5 years. An attempt shall be punishable". In the same spirit, Article 113 of Swiss criminal code punishes the euthanasia executors: „If someone kills a person at his serious and persistent request shall be punished with five-year imprisonment". As in the previous case, judges have discretionary power to impose a lighter sentence based on the motive involved. [6]

The Criminal code of Denmark follows the similar path, taking into account the explicit request of the victim as the mitigating circumstance leading to a lighter sentence of three year imprisonment. In Italy (Article 579), homicide with „the victim's personal consent" is punishable with the imprisonment between six and fifteen years.[7]

Moreover, there is also an approach that, given the fact that this criminal act is qualified by special mitigating circumstances, acknowledges that besides already mentioned alleviating circumstances, there are some others which have not been included in the existing incriminations of privileged homicide and which need to be treated as mitigating due to humane and equitable reasons. Thus, some legislation includes a wider scope of incriminations under the name – homicide in especially mitigating circumstances (for ex. criminal codes of Serbia, Slovenia, Sweden...)[8]

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[3] V. Klajn-Tatić, "Allowing and forbidding euthanasia based on the type of execution", in: *Contemporary legal problems in medicine* (eds. M. Draškić *et al*), Belgrade, 1996, 141.

[4] For ex. Criminal Code of Croatia, Criminal Code of FRY Macedonia, Criminal Code of Italy, Norway, Austria, Germany.

[5] M. Babić, "Pravo na život i privilegovana ubistva", *Pravni život* 9/1997, 85.

[6] V. Klajn-Tatić, 142.

[7] *Ibid*, 142-143.

[8] M. Babić, I. Marković, *Krivično pravo Posebni deo*, Banja Luka 2005, 35.

Contrary to these examples, French criminal code does not foresee a lighter sentence for mercy killing. This criminal act manifests two legal elements of crime: taking the life of a human being and the intent to cause a death. Therefore, when determining the level of criminal liability and type of punishment, the victim's consent and merciful motive, which cannot be objectively assessed, are not taken into account. However, it is interesting fact that the court practice in these countries noted a few cases of direct deviation from this standard approach when courts passed decisions exonerating medical doctors from criminal liability, setting them free from any guilt.

In order to demonstrate the relative nature of the legal treatment of euthanasia, we will discuss the corresponding laws of China, Australia, some US states, Columbia, Netherlands and Belgium which legalized assisted homicide, while some other countries of Western Europe (Germany, Great Britain, Denmark) also witness an increasing number of cases in which euthanasia executors are punished with lighter sentences. For the purpose of illustration, some of these laws will be discussed here.

2. The Netherlands

Euthanasia was forbidden in the Netherlands until 1973. That particular year a doctor was arrested for killing her seriously ill mother with morphine. She was taken to court which suspended her medical licence and sentenced her to one week in prison and one year of suspended sentence.

In 1984, Royal Dutch Medical Association published the Guidelines of conduct for euthanasia. Following these guidelines, a doctor needs to inform the patient on his medical condition, consult with his close relatives (unless the patient objects), consult at least one other doctor, keep the records of the history of the disease, and in case the patient is a child, seeks a consent of the parents or the legal guardian.

In 1985 the court refused to pronounce a young girl suffering from multiple sclerosis a dying patient. Her disease was really incurable; however, there was not a single reason why she should not live (on the contrary, in another recent case, a woman who was completely physically healthy but suffered from a serious case of depression was euthanized at her request).

Until the 1980's, there was a practice that babies born with a grave handicap, such as Down syndrome, *spina bifida*, (a birth defect of the spine), etc, were euthanized.

Three sisters form Amsterdam assisted in the homicide of a few comatose patients without obtaining their consent. They were found guilty, but not for mercy killing, but for not consulting with the doctor.

In 1990 Dutch doctors helped 11 800 patients to end their lives, which makes 9% of the total number of deaths in this country. Half of

this number were the cases marked as "active involuntary euthanasia", which means that the patient was killed without a consent.

In 1993 Dutch Parliament included the court decisions on legal provisions.[9] Thus, in 1993 the Netherlands legalized the practice of euthanasia by the decision passed by its parliament.

3. Great Britain

The concern that this country may follow the Netherlands in increasing practice of euthanasia reached its climax in May 1998 when one of the members of Parliament, that is of the House of Lords, and a renowned British surgeon, stated that there was an evidence that in the Netherlands "the current practice of euthanasia got out of control" and that in Great Britain the proponents of the "right to die" often look on the Netherlands as a role model where a doctor may assist a dying patient with voluntary euthanasia excluding the possibility of potential abuse of this practice. However, he further pointed out that the system which regulated this matter in the Netherlands did not work well and that there was a possibility that Great Britain would be treading on the dangerous ground should it decide to change the law and adopt the same practice as the Netherlands.

The church leaders also expressed their concern in relation to the growing number of cases of voluntary euthanasia in Great Britain. There was fear that courts would pass civil law and that the Parliament could adopt it allowing doctors to assist in mercy killing of mentally disabled patients.

The campaign for the legalization of euthanasia was supported by Voluntary Euthanasia Society under the condition that the types of doctor's treatment of dying patients are precisely defined. On this occasion, the above mentioned member of Parliament expressed his concern stating:" How can we be sure that what is today happening in the Netherlands will not happen to us one day?" who wondered whether to introduce the institute of "living wills " that would explicitly define the kind of treatment a person wants in case he becomes seriously ill.[10]

On the other side, British doctors refuse proposals for euthanasia: *Edinburg (CWN)* - 3. VII 1997 Doctors from Great Britain refused the proposition from their colleagues to seek the change of the law allowing euthanasia and assisted suicide. The members of British Medical

[9] B. D. Onwuteaka-Philipsen, M. T. Muller, G. Wal, J. T. M. Eijk, M. W. Ribbe, "Active Voluntary Euthanasia or Physician-Assisted Suicide?", *Journal of the American Geriatrics Society*, Vol. 45, 10/1997, 1208-1213.

[10] E. Jackson, J. Keown, *Debating Euthanasia*, Hart Publishing, Oxford-Portland 2012, 37 39. T.E. Quill, "Legal regulation of physician-assisted death –the latest report cards", *The New England Journal of Medicine*, 356(19)/2007, 1911.

Association voted against this proposal after a long debate. Only about 20 doctors wanted the change of the law". "The rest of us view the problem from the right angle; we save lives, we do not invite death. We do not want to do anything that would betray the trust in our principal, vital function", said the representative of MBA, Sandy Macara.

4. Columbia

The nation terrorized by crimes connected to drugs and violent guerrilla groups are now facing a new threat to life – euthanasia which was confirmed as a legal action by Columbian Supreme Court. "The decision of the Court came as lighting out of blue sky", said a Chief of the Center for research and popular education.

"To me, it does not make sense. It is black humour that a nation with the highest rate of murder crimes approves such a thing."

With six for and three against votes, Columbian Supreme Court passed on May 20, 1994, a decision that "no person shall be held criminally liable for taking the life of a dying patient expressing a clear consent for this act!" According to *Washington Post,* the Court defined as seriously ill or dying patients those suffering from cancer, AIDS, kidney and liver failures". The Court refused to authorize euthanasia for patients suffering from degenerative diseases, such as Alzheimer, Parkinson and Lou Gehrig. Columbia was the first state in which euthanasia was legalized by the decision of Supreme Court.[11]

5. Australia

The similar situation is in Australia which regulates this matter according to the Law on the rights of incurable patients (came into effect on June 1st, 1996).[12] Just for the record, before passing this Law a special brochure was published with detailed description how to execute painless death. The brochure was handed out with the telephone number of a service provider whom you could contact for free advice. That is, the contact telephone ran a two-minute recorded message informing the callers that they may leave

[11] J. M. Mendoza-Villa, L. A. Herrera-Morales, "Reflections on euthanasia in Colombia", *Colombian Journal of Anesthesiology*, 44(4)/2016, 324-329.

[12] South Australia Voluntary Euthanasia Society (SAVES).This Law was prepared by the Parliamentary Council according to the instructions of Hon. Anne Levy and MLC and presented to the Legislative Council (The Upper House of South Australia Parliament) on November 8, 1996. It is interesting to note that this Law was cancelled before the election on 11. X 1997. *https://theconversation.com/right-time-to-die-why-rational-suicide-should-be-legalised-13208*, last visited 10.10. 2017.

their phone numbers and addresses in order to receive additional brochures related to new law. „If you are incurably ill and this causes intolerable pain or suffering and if medical treatment of keeping you alive is a no longer acceptable solution, you may ask from your doctor to assist you in ending your life" – a paragraph from the brochure. There is also a set of questions and answers which mark the conditions that a patient needs to fulfil.

The patient must be over 18. Two doctors, one of them being a specialist, must confirm the diagnosis of an incurable disease, while a psychiatrist issues a certificate that the patient is not suffering from curable clinical depression. "You have to take into account possible effects of your decision on your family members", is written in the brochure. "Your doctor will apply the treatment with the minimum pain involved rendering a dignified and peaceful death. Family and friends may be present".[13]

Just one year later, in 1997, the Federal Government of Australia terminated assisted suicide which was legalized in the northern territory of this country.[14]

6. Japan

For the purpose of clarifying the essence of the problem that surrounds euthanasia, and for its final reframing, it is significant to note the principles formulated by the Supreme Court of Japan in 1963 setting the right example to be followed by other countries worldwide.

This Court defined the principles in the form of directives - recommendations which contained general criteria, that is minimum conditions for making a difference between punishable murder offence and euthanasia, regardless it is a passive or active one, voluntary or involuntary. The Court .believed that the following six conditions must be met in order to make euthanasia legal: 1) the victim must be suffering from a disease that cannot be cured by modern medicine, 2) the victim must be suffering from intolerable pain noticeable to an ordinary observer, 3) the goal of the doctor must be to relieve the pain, 4) the victim must

[13] D. Petrović, "Krivičnopravni aspekt eutanazije", *Pravo i medicina (dodirne tačke sporna pitanja*) (ed. Đ. Lazin), Beograd 1997, 29-30.

[14] The termination of this Law was preceded by a heated discussion on euthanasia related to the case of ending life of Lizet Nego, an Australian woman, retired university employee of good physical and mental health, who, at the beginning of her 90s wanted to die „before things get worse". She was the follower of the ideas of doctor Philip Nitschke, so called „the angel of death", the founder of pro-euthanasia group propagating „the right to dignified death". She attended one of his „farewell workshops" – preparatory sessions for voluntary departure to another world („exit workshop"). „The angel of death" even announced that he was starting the production of plastic suicide bags which will help the patients „to end their lives quickly, easily and painlessly". *https://theconversation.com/why-australia-hesitates-to-legalise-euthanasia-47867*, last visited 18.08.2017.

be of clear mind and has to express an earnest request for a mercy killing, 5) whenever possible, the substances used for inducing death must be administered by a doctor, 6) finally, the method used for inducing death must be morally acceptable.[15]

7. The United States of America

The criminal legislation of most of US states treats assisted suicide as a crime[16]: Arizona, Arkansas, California, Connecticut, Colorado, Florida, Georgia, Hawaii, Illinois,[17] Indiana, Iowa, Kansas, Kentucky, Louisiana, Mane, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, Wisconsin.

Nine US states through common law foresee that mercy killing is a criminal offence: Alabama, Idaho, Maryland, Massachusetts, Michigan, Nevada, South Carolina, Vermont, and West Virginia.

Three US States apply only common law and have no laws which foresee that assisted suicide is a criminal offence: North Carolina, Utah and Wyoming.

Since 1992, several draft versions of the laws on the legalization of the increasing practice of assisted suicide, or euthanasia, has marked the beginning of the actual process of their legalization in Alaska, Arizona, Colorado, New Hampshire, New Mexico, Oregon, Rhode Island, Michigan Nebraska and Washington. Two of these states, Oregon and Washington, have already passed the laws officially legalizing „the right to dignified death. Moreover, in Montana, a district court judge has recently ruled that „mentally healthy

[15] In Japan, Yokohama District Court established in March of 1995 that euthanasia is legal for dying patients who could not resort to alternative treatments and who clearly state that they want to end their life. However, a survey that was conducted among doctors shows that most of theme still against euthanasia, as reported by *France Press.*

[16] In the United States, as in many other developed countries, human life span has extended, so, for example, people in the United States today live 25 years longer than their ancestors. This extension is predominantly the result of advancement of medical and technical sciences. But longer life does not mean a better life. According to some unofficial, but reliable estimates, some 11 000 patients are currently in comatose or vegetative conditions. I. Keilitz, J. Bilzor, T. Hafemeister, V. Brown, D. Dudyshyn, "Decisionmaking in authorizing and withholding life sustaining medical treatment: from Quinlan to Cruzan", *Mental and Physical Disability Law Reporter*, vol. 13, no. 5/1989, 482-493. Scientific achievements enabling the extension of human life span in almost all US states are welcome, but they do not give an answer to the question: Do we really need this? This question changes the meaning of life preserving, and life extension - while it should be quenched according to God's will – the arguments from : "quality of life" to "right to die". N. Finkel, M. Hurabiell, K. Hughes, "Right to Die, Euthanasia, and Community Sentiment: Crossing the Public/Private Boundary", Law *and Human Behavior*, Vol. 17, 5/1993, 487-506.

[17] J. Sanders, "None Dare Call it Murder", *The Journal of Criminal Law, Criminology and Police Science* 3/1969, 351-359.

person who is incurably ill has the right to a dignified death".

Although from various reasons, it cannot be expected that such an approach of legal regulation of euthanasia will become a dominant model in all American states; the solutions that have been offered so far will certainly have a positive impact on their adoption in other states. In order to demonstrate their relevance in legal practice related to euthanasia , it is interesting to note that in a number of cases court decisions directly opposed the existing legal stands - these decisions exonerated the doctors who assisted their patients end their life from any criminal liability in Michigan, Ohio, Virginia, Florida, Washington and New York...).[18]

8. Canada

From the legal and professional point of view, euthanasia or assisted suicide is prohibited. Article 241 (b) of Canadian Criminal Law foresees maximum penalty of 14 years imprisonment for assisting in suicide. Euthanasia or mercy killing is treated as a murder crime – the punishment is the same for the executor of this crime as for an executor of a common murder. The reason for such an approach lies in Article 14 of Canadian Criminal Law which from the beginning denies the right to the patient to defend himself against homicide charges.

Despite the fact that harsh punishment is foreseen for this kind of ending life, it has been noticed that some doctors, from time to time, make a medical decision to, nevertheless, help seriously ill or dying patients. In other words, regardless this legal prohibition, doctors occasionally openly assist in patients' suicide, or in some other way for the purpose support euthanasia.[19]

For the purposes of offering the wider scope and better understanding of the situation in Canada, we would like to draw your attention to the study of Monti be Association of Rights and Liberties (MARL), which was made by collecting and using the answers on 33 essential questions. They have been analyzed and explained using scientific literature and research, medical consultations and advice of the experts in this field. These questions include:

a) Ethical questions related to MDEL
b) Pain management
c) Political opinion
d) Percentage of doctors which participate in assisting in patient's suicide.

[18] J. Deigh, "Physician-Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences", *The Journal of Criminal Law and Criminology,* Vol. 88, No. 3 (Spring, 1998), 1155-1165.

[19] A. Schadenberg, "Canada: Assisted dying report goes beyond scope, ignores evidence",*http://www.noeuthanasia.org.au/canada_assisted_dying_report_goes_beyond_scope_ignores_evidence,* last visited 15.10.2017.

Based on this study, assisted suicide assumes a situation when a doctor undertakes certain measures and procedures at the patient's request with the aim to end her or his life (the term which is often used to describe this situation is "active voluntary euthanasia".[20]

9. Israel

The first officially announced case of euthanasia in Israel took place on 4.10.1998 in Hadassah hospital in Jerusalem, at Neurology Unit, reported Israeli journal "Haarec".Itai Arad, (49) a former fighter pilot suffered from a degenerative muscle disease (Lou Gehrig's disease that is ALS). Incurably ill, Arad fought for his right to die without suffering. Professor Avinoam Rehes from Hadassah hospital, also the member of Israeli Institute of Medicine, Ethics and Law, injected a larger amount of anaesthetic in his patient and disconnected the ventilator. Professor Avionam Rehes performed this procedure having obtained the approval from the ethical committee which, before that, had turned to court to get the formal consent to honor the final wish of Itai Arad. This case of euthanasia was recorded on the videotape. It was performed without seeking the approval from, only informing Israeli healthcare community.[21]

10. The Republic of Serbia

The criminal codes of the post-war (WWII) period in the Republic of Serbia [22] did not record any historical advancement in regulating the issue of „mercy killing". In other words, our previous criminal codes did not foresee a special treatment of this act but rather treated it as an ordinary murder crime (Article 47 of Serbian Criminal Code and Article 39 of Montenegrin Criminal Code). However, the circumstance that the murder was executed out of mercy was the subject of the court's assessment along

[20] J. T. Landry, T. Foreman, M. Kekewich, "Ethical considerations in the regulation of euthanasia and physician-assisted death in Canada", *Health Policy,* Vol. 119, 11/ 2015, 1490-1498.

[21] D. A. Frenkel, "Euthanasia in Israeli law", *Forensic Science International*, Vol. 113, 1–3/2000, 501-504.

[22] It is common knowledge that the development of criminal law in Yugoslavia in the period 1945-1991 was marked by the frequent changes and amendments – in 1951, 1959, 1962, 1965, 1967, 1973 and 1977. We will not discuss in detail any of them, except the Criminal Code from 1977, only mentioning that the Criminal Code from 1951 did not include any separate provision on euthanasia, but rather treated it as a criminal act of committing a murder with premeditation (Article 135. par. 1 of the Code). However, there was a provision in Article 38 which spoke about taking into account the mitigating and aggravating circumstances when establishing the executor's liability and deciding on his sentence, which means that in cases of assisted suicide it was expected that the court would assess the motives for executing this act.

with other circumstances surrounding the murder case and was usually taken as a mitigating circumstance in establishing the executor's sentence.

The Criminal Code of the Republic of Serbia (passed in September 2005, came into effect on January 1st, 2006)[23] for the first time recognized mercy killing as a privileged type of murder crime and in that sense marked a big step forward in regulating this matter reflecting modern tendencies in the legal regulation of assisted suicide.[24]

10. Conclusion

In explaining the phenomenon of euthanasia, we have to take into account that, due to an increasing number of these cases, assisted suicide has become an unavoidable subject of criminal law theoreticians, as well as of social interest. It attracts our attention with its complex and provocative nature, as well as with diversity of its forms and with possibilities for significant abuse. Reviewing a spectrum of distinct theoretical streams, as well as studying and interpreting the manifestation of this phenomenon in practice, the following conclusion can be made. The current tendencies in the legal regulation of euthanasia do not follow a developmental pattern, but rather reflect a chaotic and erratic path. There are a large number of separate and contradictory stands, usually representing a mere facade, or just an illusion of ideal solutions. Unfortunately, this situation is unacceptable and we urgently need a general framework that could offer answers to open questions that modern society imposes on its citizens.

[23] *Službeni glasnik RS*, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, recent changes 94/2016 came into force on 1 June 2017, with the exception of Article 24, 27 and 35-38 Mem, which shall enter into force on 1 March 2018, respectively.

[24] This new form of privileged murder crime, or as the legislator put it - "ending life out of mercy" (changed phrase – from time to time some modifications in terminology are made), was not recognized by previous criminal legislation in socialist Yugoslavia. However, it existed, in a slightly different form, in the Criminal Code of Yugoslavia of 1929. Unfortunately, the negative attitude towards this type of privileged offence remained without justification until the adoption of the existing Criminal Code. Z. Stojanović, *KZ RS iz Uvodnih objašnjenja,* Beograd 2005, 29.

Dr Dragana Petrović
Naučni saradnik, Institut za uporedno pravo, Beograd

"UBISTVO IZ SAMILOSTI" U UPOREDNOM ZAKONODAVSTVU

Rezime

Pitanje eutanazije je regulisano na različite načine u svakoj zemlji i zakonodavstvu. Međutim, još uvek nije sve rečeno, i još postoje brojni argumenati i povodi za ozbiljnu zabrinutost. Tema je široka, kao i same dimenzije ljudskog bića i samog sveta. Teška i snažna, takođe. Kako autor ističe, iza svakog pitanja povezanog sa eutanazijom leži prethodno pitanje stvarne potrebe njene legalizacije. Autor dodaje: ovde je dobro čuti drugačije mišljenje, osvetliti problem iz druge perspektive i ponuditi nova rešenja za složene, ali važne dileme koje nastaju u vezi sa ovim pitanjem.

Ključne reči: "ubistvo iz samilosti", obično ili privilegovano, motiv egzekutora ili zahtev žrtve, legalizacija.

Miroslav Đorđević, LL.M.[1]

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CONSTITUTIONAL DETERMINATION OF THE ELECTORAL SYSTEM AND THE COUNTRIES OF FORMER YUGOSLAVIA[2]

Abstract

The author analyses the constitutional determination of the electoral system, its different manifestations and consequences, hence questions if they should find their place within materia constitutionis. Comparative constitutional examples show both theoretical and practical flaws of such determination, as both explicit and implicit prediction has more drawbacks than advantages. After explanation and differentiation of related key-concepts with comparative examples, the author focuses on former Yugoslav countries that display a variety of possible solutions. Inter alia, he finds that the Serbian constitution implicitly determines the proportional electoral system and advocates future revision of the norms in question, since the present solution can be considered as the least favourable.

Keywords: *electoral system, constitution, proportional system, countries of former Yugoslavia, constitutional determination, constitutional law.*

1. Introduction

Elections belong to the group of the most sensitive and important topics of a democratic society and state. They are defined as "a specific form of political decision-making of citizens, who, by the manifestation of their will, elect individuals and establish bodies of decision-making powers of general social significance"[3]. Elections are carried out within the legal framework of the electoral system - "an institutional modus in which voters express their political preferences in the form of votes and

[1] Research Associate, Institute of Comparative Law, Belgrade, e-mail: *miroslav.djordjevic@yahoo.com*.

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[3] M. Jovanović, *Izborni sistemi – izbori u Srbiji 1990-1996*, Institut za geopolitičke studije, Službeni glasnik, Beograd 1997, 11.

within which voters' votes are converted into mandates"[4]. The electoral system, which is sometimes described in the literature as possibly "the most manipulative element of the institutional design"[5] is legally determined and protected by electoral laws and the constitution.

Modern constitutions, by rule, determine the most important electoral aspects that include the definition of active and passive voting rights, the number of members of the parliament (MPs), the length and nature of their mandates and, sometimes, their parliamentary incompatibility.[6] Constitutions also often determine the type of the electoral system and therefore raise the issue of its selection to the constitutional level.[7] In such countries, as well as others, detailed regulations of the way how the electoral system should look like are left to electoral laws, but the constitutional determination of the electoral system sets the highest limits for major electoral reforms which leads to the following questions: What are the consequences of such determination and should it have its place within the constitution? Is there a difference between electoral systems when this issue is in question? What do the comparative constitutional experiences show, and finally, how is that matter regulated in Serbia and the other countries of former Yugoslavia?

2. Electoral systems and *materia constitutionis*

2.1. Short differentiation of electoral systems

There are only two fundamental electoral systems: proportional (election by list[8]) and majority (sometimes called "plurality" or "majoritarian" [9])

[4] M. Kasapović, *Izborni leksikon*, Politička kultura, Zagreb 2003, 160.

[5] M. Jovanović, „Institucije i konsolidacija demokratije – dve decenije tranzicije u Srbiji", *Dve decenije višestranačja u Republici Srbiji – Ustavi, izbori i nosioci vlasti 1990-2010*, Službeni glasnik, 2011, 15.

[6] D. Simović, V. Petrov, *Ustavno pravo*, Kriminalističko-policijska akademija, Beograd 2014, 156.

[7] D. Nohlen, *Wahlrecht und Parteinsystem – Zur Theorie und Empirie der Wahlsysteme*, Verlag Barbara Budrich, Opladen&Farmington Hills (MI), 2009, 145. Some authors however consider these countries to be exceptions from the rule that electoral determination is left to the respective laws: D. Simović, V. Petrov, 156; M. Pajvančić, *Parlamentarno pravo*, Fondacija Konrad Adenauer, Beograd 2008, 16.

[8] Proportional representation system (or system of election by list) is "the type of electoral system based on the principle of fair political representation of the electorate and distribution of seats in the representative body according to the rules of proportionality of votes and mandates"- M. Kasapović, 321.

[9] Majority electoral system is "the type of electoral system in which the winner is chosen by the relative or absolute majority of voters". The main purpose of such systems is "not the fair political representation of social groups and political parties, but the creation of an effective and responsible government"- M. Kasapović, 353.

representation systems, which both have their subdivisions.[10] Although literature sometimes clearly (or vaguely) suggests that there is also a third, separate system, we share the opinion that there is no such thing as a separate "mixed system", but only majority and proportional systems that more or less correspond to the "pure form" of the respective principles.[11] In other words, it is either the combination of the two, with the prevailing elements of one of them, or simply the use of both systems together.[12] The latter can be, for example, found in Germany, where half of the representatives are elected by the majority system and half by election by the list. The two principles of proportional and majority systems cannot be mixed together because they are antithetically opposed.[13] The German example, as well as similar systems, could, however, be addressed as "combined systems"[14], indicating that the two existing systems "work together" in some correlation, and not that "the merger" has created some new system with its own logic, rules and repercussions. The disambiguation of the "mixed system" as nothing more than the combination of the two major systems is important from the standpoint of its possible unconstitutionality (if proportionality is explicitly determined by the constitution).

2.2. Content of *materia constitutionis*

The Constitution, being the foundational legal act, should regulate the basics of the state and social order, ideally all the basics, but at the same time - only the basics.[15] Introduction of norms that do not necessarily belong to *materia constitutionis* is often done on purpose in order to secure the highest legal protection for the norms in question (because of the present political or some other interest). This should be avoided,

[10] One of the more influential typologies in literature divides both the majority and the proportional electoral systems into five subdivisions each. For more see: D. Nohlen, M. Kasapović, *Wahlsysteme und Systemwechsel in Osteuropa*, Springer Fachmedien, Wiesbaden 1996, 28-32. The mandate distribution method, number of constituencies and selection of the particular model of the electoral list are within the most important criteria for the classification of proportional systems. Just the choice of the electoral list could substantially alter the visage of the concrete electoral system and should therefore be always seriously considered. See: M. Đorđević, „Zašto je izborna lista značajna za izborni sistem", *Pravni život*, 12/2016, 649-663.

[11] Also: M. Jovanović, (1997), 81; D. Simović, V. Petrov, 153; Đ. de Vergotini, *Uporedno ustavno pravo*, Službeni glasnik, Beograd 2015, 404-407; etc.

[12] The so called mixed electoral system should present some sort of "new alchemy synthesis of the proportional and majority systems, but lacks the general, systematic determination to be a system on its own." – S. Manojlović, "Izborna reforma u Srbiji – kako i zašto?", *Reforma izbornog sistema u Srbiji*, Centar za javno pravo, Sarajevo 2015, 34 – 35.

[13] „*Sie stehen sich (...) antithetisch gegenüber*" – D. Nohlen, 144.

[14] D. Nohlen, M. Kasapović, 32.

[15] M. Jovičić, „O ustavu", *Ustav i ustavnost*, Službeni glasnik, 2006, 149.

not only because the constitutional text should not be too extensive and consequentially possibly overburdened and disorganized, but also because such solutions can backfire with serious consequences. If it turns out that the norm, wrongfully put in the constitutional text, suddenly does not meet to the requirements of changed social circumstances, the result will be the instability of the constitution and the need for its change, all of which could have been avoided if the relevant norm was simply determined by law.[16]

From the standpoint of the traditional, doctrinal understanding of *materia constitutionis* as the relation between the government and its citizens (*gouvernants et gouvernés*)[17] the question immediately emerges whether the constitutional determination of the electoral system should belong to this group or not. On one hand, it is reasonable to claim that in a modern democratic society electoral systems present one of the most crucial aspects of the relation between the government and its citizens because it is the very citizens who partially give up their sovereignty through elections to form the government. It can also be claimed that the possible abusive change of the electoral system sets it high on the list of values that should be firmly protected. On the other hand, the combined importance and delicate nature of electoral systems and its consequences, as well as the fact that they require more flexibility than most constitutional norms (in order to be able to respond and adapt if necessary to the ever-changing requirements of the political system), have as a consequence the fact that such "firm protection" by the constitution could be a double-edged sword. If the political situation, for whatever reason, at one point demands the change of the electoral system, that would consequentially lead to the necessity of constitutional revision, which is, as a rule, far more difficult than the procedure required for the change of laws. Also, since the proportional and majority electoral systems have many subtypes (sometimes combined), a general constitutional determination of the electoral system creates the constant need for interpreting every significant change within the electoral system, because of the danger that the change in question could be contradictory with a constitutionally proclaimed principle and therefore – unconstitutional.

2.3. Constitutional options

Most constitutions do not determine the type of the electoral system, but a significant number does, out of which almost all do it explicitly and very few implicitly. If the electoral system is constitutionally determined, it is usually done within the section dedicated to the national assembly.

[16] *Ibid*, 150-151.

[17] M. Jovičić, „Putevi i stranputice jugoslovenske ustavnosti", *Srbija na prelomu vekova*, Službeni glasnik, 2006, 98.

There is simply an article stating that the "members of the parliament will be elected according to the proportional principle", or some other similar formulation. By rule, if the constitution openly declares the type of electoral system, it is the proportional one. Hence the question – why isn't that the case with the majority or some combined systems as well? The answer can be widely discussed, just like the "eternal" debate about the advantages of both systems, but it seems reasonable that the answer lies in the very nature of the proportional system. Briefly put, it is obvious that the system of election by list represents the sovereign people more accurately than the majority system and therefore better fulfils the ideal of semi – representative democracy.[18] That fact can interfere with the ideas of some prevailing political parties and elites who could benefit more from the majority systems since they produce overrepresentation, hence further strengthening of power. That is why constitutions sometimes determine the proportional system, to exclude the other (the majority system is easier to get misused), and ensure better representation of parties as well as minorities. With such action, the choice of the electoral model is elevated into the rank of the highest values (along with, for example, human rights) and is given the highest possible legal protection.

2.4. Explicit determination

If the constitution makers decide that the determination of the electoral system has to find its place in the constitution, it is definitely much better to achieve that by clear, explicit norm, then implicitly. However, even such determining, sharp-cut norms can be, depending on the legal system, susceptible to diverse interpretations which lead to interesting practical and theoretical conclusions.

Austria, for example, is one of the countries that have constitutionally, explicitly adopted the proportional principle. Art, 26 par. 1 of the Austrian Constitution says: "The National Council is elected by the Federal people in accordance with the principles of proportional representation on the basis of equal, direct, personal, free and secret suffrage by men and women who have completed their sixteenth year of life on the day of election". What at first glance seems quite clear can be, however, analytically disputed. Markus Andreas Haller in his PhD thesis „*Das Mehrheitswahlrecht und seine Vereinbarkeit mit der österreichischen Bundesverfassung*" uses various methods of interpretation to question the limits of such determination. He finds that, although the majority vote is obviously incompatible with the constitutionally proclaimed proportionality, the aforementioned article,

[18] M. Đorđević, 658- 660.

literally analyzed, does not require the "pure" form of the proportional electoral system[19], while the constitutional principles of equal voting and the democratic principle[20] would not necessarily be incompatible with a majority vote. Possible contradictions between the determined proportionality and the other constitutional norms (on parliamentary fragmentation, constituencies etc…) are also exposed.[21]

The Austrian constitution predicts two different procedures for its change, depending on the content of the norm.[22] A complicated procedure that requires a compulsory referendum applies when the provisions relating to democracy, rule of law and the federal principle (with the addition of the separation of powers and the liberal principle[23]) need to be changed. In his work Haller concludes that the introduction of the majority electoral system in Austria would not have to trigger this constitutional revision mechanism, but rather a simple, constitutionally determined procedure for an amendment, because of the fact that the choice of the electoral system does not violate or affect any of the aforementioned fundamental principles and values of the Constitution.[24] This conclusion can be considered as another argument in favour of the claim that the choice of the electoral system does not belong to the traditionally understood *materia constitutionis*. It is also a good example that the simple constitutional prediction of the electoral principle, that at first glance seems to be crystal clear and assuring, can actually introduce an element of uncertainty, as well as being restraining.

2.5. Implicit determination

Finally, there are some constitutions that determine the electoral system implicitly, either by norms directly unrelated to the electoral matter (that assume and require a certain electoral system for their application), or "by the spirit of the constitution" leading to the conclusion that a certain electoral type must be applied. The first situation can be the consequence either of the constitution-maker's intention to determine the electoral system "undercover"[25], which would be unethical and unacceptable or – just a plain mistake, still with severe consequences as if it has been done intentionally. One of the countries with the implicit constitutional determination of the electoral system is, as we

[19] M. A. Haller, *Das Mehrheitswahlrecht und seine Vereinbarkeit mit der österreichischen Bundesverfassung*, Dissertation, Rechtswissenschaftliche Fakultät Wien, 2013, 81.
[20] *Ibid*, 200.
[21] *Ibid*, 82, 86, etc.
[22] Austrian constitution, art. 44.
[23] Interpretation of the Constitutional Court.
[24] M. A. Haller, 211.
[25] In which case the deceptive intention cannot be ruled out, since the electoral determination could have been done explicitly, if it was not intended underhandedly.

shall see, the Republic of Serbia. The second situation, where the constitution does not either directly or indirectly norm the electoral system type, but such conclusion derives from the constitutional logic, is very rare but still can be found. For example, the widespread public debate has been going on in Canada since the last year because of the wish for a change of the electoral system (from the present majority to the proportional one) and the possible unconstitutionality of such action.[26] Although the present first-past-the-post (majority) electoral system is not even mentioned in the constitutional text, the Supreme Court interprets electoral changes as altering the "constitutional architecture", which is unconstitutional and consequently in need for a constitutional amendment.[27] Canada, therefore, presents an exception on two accounts – it has a (possible) implicit constitutional determination, and that determination establishes the majority system. Out of all the possibilities, it seems that Canadian example, at least theoretically, can be considered as the least desirable, as it sets vague and loose lines, susceptible to (un)deliberate (mis) interpretation.

2.6. Lists of European countries

However, unlike Canada, most constitutions whose makers had decided to determine the electoral system, opted for the proportional one, and by rule – explicitly. Dieter Nohlen, in his famous work „*Wahlsysteme und Parteiensystem – zur Theorie und Empirie der Wahlsysteme*", gives a list of eighteen Western European countries that do or do not have the constitutional determination of the electoral system.[28]

Countries whose constitutions proclaim the (proportional) electoral system are Belgium, Denmark, Ireland, Island, Luxembourg, The Netherlands, Austria, Portugal, Switzerland and Spain. This list has been quoted and expanded by Eckhard Jesse, who adds Estonia, Latvia, Malta, Poland and the Czech Republic, with the intention of covering all the EU member states at that time (2008) with the list.[29] Countries that leave the determination of the electoral system to the electoral laws are Germany,

[26] "Proportional representation may require Constitution change", http://www.cbc.ca/news/politics/electoral-reform-constitutional-change-1.3433335, last visited November 4, 2017.

[27] Y. Dawood, „Is a constitutional amendment required for electoral reform?", *Policy Options*,http://policyoptions.irpp.org/magazines/june-2016/is-a-constitutional-amendment-required-for-electoral-reform/, last visited November 4, 2017.

[28] D. Nohlen, 145. It is interesting to note that since the first edition of Nohlan's book in 1986 nothing has changed in the respective countries on this matter, apart from the fact that Belgium's and Ireland's constitutions determine the proportional system in the same manner, just in a different article (because of constitutional changes that have in the meantime occurred).

[29] E. Jesse, "Wahlsysteme und Wahlrecht", *Die EU Staaten im Vergleich – Strukturen, Prozesse, Politikinhalte*, Wiesbaden 2008, 302.

Finland, France, Greece, the United Kingdom, Italy and Sweden[30], and in addition – Bulgaria, Lithuania, Romania, Slovakia, Hungary and Cyprus.[31] Russia and Croatia belong to this group as well. Jesse mistakenly puts Slovenia in the second group, although it has, as we shall see, determined the proportional system constitutionally by amendment in 2000.

Each one of the countries that have the proportional electoral system determined by the constitution needs some sort of constitutional reform in order to introduce either the majority system or some form of a combined system whose majoritarian elements could violate the principle of proportionality. Countries that leave this regulation to respective laws, however, often try to find the balance between protection of this important and vulnerable political institute and its flexibility through the required qualified parliamentary majority for the passing of electoral laws.

Countries that emerged after the breakup of Yugoslavia offer illustrative and diverse examples of constitutional and legislative frameworks that deal with this issue.

3. Former Yugoslav countries whose constitutions determine the type of the electoral system

3.1. The Republic of Slovenia

Slovenia is the only former Yugoslav country that explicitly determines the proportional electoral system in its constitution. The country has an incomplete bicameral parliament[32] which consists of the National Assembly (*Državni zbor*) and the National Council (*Državni svet*). The upper chamber, the National Council, presents „the representative body for social, economic, professional and local interests"[33], and its election is left to the respective law. However, for the lower chamber which is the main holder of the legislative function, the National Assembly, the Constitution

[30] D. Nohlen, 145.
[31] E. Jesse, 302.
[32] Constitutional Court of the Republic of Slovenia, U-I-295/07.
[33] Slovenian constitution, Art. 96. Slovenian parliamentarism could be therefore considered as a type of "social-economic bicameralism (*bicaméralisme socio-économique*)". This model of bicameralism "…is achieved by the representation of political interests of the people in the first, lower house, represented by individuals through political parties, whereas in the second, upper house, individuals are represented as performers of a particular profession or as participants in a particular economic activity, in other words, the economic and professional interests of the same people are represented by deputies elected by the church, academy, university, commercial, industrial and craftsmen chambers, farmer associations and other cultural and economic communities." - Spektorsky, Evgeni Vasilevich, quoted by: R. Marković, *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2014, 294.

itself norms the principle of proportionality: "Deputies, except for the deputies of the national communities, are elected according to the principle of proportional representation with a four-percent threshold required for election to the National Assembly, with due consideration that voters have a decisive influence on the allocation of seats to the candidates".[34]

It is interesting that Slovenia has introduced this solution with the constitutional amendment in 2000, contrary to the prevailing opinion of the people. It is often emphasized that citizens of Slovenia prefer the majority electoral system over the proportional one because the latter is "very non-personalized".[35] Public debate on the choice of the electoral model ended up with a referendum on the issue, which took place in 1996. The voters could choose between three electoral system types, and the proposal for the majority system won with a relative majority of votes but failed to receive the prescribed majority to be valid.[36] However, two years later, the Constitutional court declared that the referendum was nevertheless successful and that the majority electoral system had won[37], but that the result of the referendum (in later opinion, which was also the opinion of the Venice Commission) does not prevent the constitutional introduction of a different electoral system, in accordance with the requirements of the constitutional revision procedure.[38]

With the constitutional amendment in 2000, the proportional principle was introduced. The idea was to achieve some sort of compromise with those who were strongly advising against the proportional system (because of its assumed depersonalization), hence the part "with due consideration that voters have a decisive influence on the allocation of seats to the candidates" was added to the typical determination that can be found in the other countries. This "addition" was supposed to aid the prevention of depersonalization (through the use of preferential vote and other instruments) but has also opened up space for different interpretations. There are opinions, for example, that because of that part it would not be unconstitutional to introduce the German combined model.[39] We, however, are more prone not share the opinion that the constitutional breach would not occur if the German model was introduced since it has distinctive

[34] Slovenian constitution, Art. 80 par. 5.
[35] Z. Božić, Prekletstvo večinskega volilnega sistema, https://www.portalplus.si/2394/vecinski-volilni-sistem/, last visited November 4, 2017.
[36] C. Ribičić, *From the Electoral System Referendum to Constitutional Changes in Slovenia (1996-2000)*, Venice Commission, 2004, 8, *http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2004)008-e*, last visited November 4, 2017.
[37] *Ibid*.
[38] C. Ribičić, "Primerjava prednosti in slabosti volilnih sistemov", *Zbornik znanstvenih razprav*, 2013, 59-60.
[39] C. Ribičić (2004), 10.

majoritarian elements that would clearly be in conflict with declared proportionality. The essence of the problem is that the determining norm is too open for confronting interpretations and most likely self-contradictory. It is certain that any confusion and possible self-contradiction within the constitutional text is highly undesirable, and Art. 80 par. 5 of the Slovenian constitution presents one such inconsistency. Slovenia can, therefore, be considered as a country with the explicit determination of the proportional electoral system, which could have been formulated more clearly in order to prevent misinterpretation and possible misuse.

3.2. The Republic of Serbia

The Serbian constitution implicitly determines proportional elections for the Parliament (*Народна скупштина*), hence any change of the electoral law which would introduce some combined or majority system would require a constitutional revision. Such a conclusion derives from two articles of the Constitution: Art. 102 par. 2 (which arranges the status of MPs), and Art. 112 par. 1 pt. 3 (on the competences of the President of the Republic).

Art. 102 par. 2 says that: "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal to the political party which proposed him or her to be elected a deputy". Constitution-makers were led by intention to prevent MPs from "changing the will of voters" by leaving the political party through which he or she had got the mandate and joining some other party, consequently changing the relation of power in the parliament compared to the electoral results ("defectors"). This provision has practically abolished the free mandate of MPs, contradictory to the fact that it is a constitutionally declared principle.[40] It has been widely criticized by experts and the general public in Serbia[41], as well as the Venice Commission, and was finally put out of power in 2010 (four years after the enacting of the constitution) by the decision of the Constitutional court that has practically disabled the enaction of the law to empower the norm in practice.[42] However, although the application of the norm has been blocked, it still stands witness to the fact that the constitution makers have opted for the proportional electoral system. If the majority system was introduced, neither would the practical application of the norm be possible since the party to whom the mandate has been "given back" could not simply assign the mandate to someone

[40] M. Pajvančić, *Komentar Ustava Republike Srbij*e, Fondacija Konrad Adenauer, Beograd 2009, 128–129.

[41] See: M. Stanić, „Problem pravne prirode poslaničkog mandata u Republici Srbiji", *Reforma izbornog sistema u Srbiji*, Centar za javno pravo, Sarajevo 2015, 259 – 283.

[42] Constitutional court decision IUz-52/2008 – *Official Gazette of the Republic of Serbia* 34/2010.

else (to nominate him or her after the finished elections), nor would the repetition of elections fulfill the goal of the norm, because it is uncertain if the later nominated candidate would win the election at all.[43]

The majority of Serbian scholars support the claim that this constitutional norm implicitly determines the proportional electoral system, but some reach this conclusion through what seems to be questionable argumentation. Irena Pejić, for example, after referring to Art. 102 par. 2 and the statement that the Constitution implicitly norms the model of proportional representation, says: "Since the system of proportional elections is based on the assumption of party candidacy according to the model of the electoral list, the constitutional provision implies proportional elections as an electoral model. If majority elections were applied, there would be a problem within the system in which sovereignty belongs to the citizens: only party candidates could enjoy "freedom" to make their mandate available to the political party, and this would not apply to the so-called independent candidates or candidates of a group of citizens, which would ultimately lead to the double nature of the parliamentary mandate. "[44] There are three key points here to draw attention to. First, the claim that proportional elections "are based on the assumption of a party candidacy according to the model of the electoral list" seems to be arguable, because the Law on the Election of MPs (Art. 4 and Art. 40) provides for three categories of electoral lists: registered political parties, party coalitions and groups of citizens. Although it is without any doubt that parties have a central place in the electoral process and political life in general, groups of citizens are also very present and visible. Second, the claim how in the case of the implementation of the majority system, the problem would be that only the party candidates would have the "freedom" to make their mandate available to the party, the major problem, as we explained above, would be both a practical and theoretical impossibility to apply this norm in the majority system in the first place. It would not even be possible to come to this discriminating situation at all. Finally, the third argument about inequality between party and other list proposers undoubtedly stands, but relates not only to the hypothetical situation with the majority system, but to the proportional system as well.[45]

Milan Jovanović, concludes quoting the same article and paragraph that the Serbian constitution implicitly predicts the proportional model and says: "This constitutional norm has transformed the free mandate of a

[43] M. Đorđević, 652 – 654.
[44] I. Pejić, "Izborna lista u srazmernom predstavništvu – iskustvo Srbije", *Izbori u domaćem i stranom pravu*, Institut za uporedno pravo, Beograd 2012, 79.
[45] V. Đurić, „Dileme slobodnog mandata: između volje naroda i vlasti stranaka", *Nova srpska politička misao* 1-2/2012, 196-197.

representative into a kind of bound, party mandate. In addition, explaining that the vacant seats of the deputies are filled in the order of the electoral list, the Constitution implicitly constitutes a proportional model of the electoral system, thus reinforcing the criteria for change, i.e. blocking it."[46] The claim that the paragraph in question establishes a certain kind of bound, party mandate certainly stands, but the rest of the argument is questionable, since the mentioned filling of seat vacancy is not regulated by the Constitution itself, but by the Law on the election of MPs (Art. 92). The Constitution only states that "the election, termination of office and the position of deputies are regulated by law"[47].

On the other hand, there are some authors who generally reject the conclusion that the constitutional electoral determination can be drawn out of Art. 102. par. 2. Vladimir Mikić finds the norm in question to be neutral in the sense of this analysis because it's "content is limited to the determination of the procedural aspects of MPs (the mechanism of calling for parliamentary elections, constituting parliamentary convening, immunity and incompatibility of MPs, etc.)"[48]. He also suggests that the explicit determination of the electoral system should find its place in the future constitutional revision.[49] Although this kind of restrictive systematic interpretation presents a reasonable standpoint, we are still prone to conclude, using primarily verbal and logical interpretation methods, that art. 102 par. 2 of the Serbian constitution is sufficient to claim that proportional electoral system is determined constitutionally.

Art. 112 par. 1 pt. 3 in our view strengthens this opinion and removes any doubts that the Serbian constitution determines the proportional system. It says that "the President of the Republic shall (…) propose to the National Assembly a candidate for Prime Minister, after considering views of representatives of elected lists of candidates". This norm is, just like the first one, not directly related to the electoral system, but would be inapplicable if any other but the proportional system was introduced. It completely excludes majority systems and surely most combined ones (actually it is difficult to think of any other system but the proportional one, which would not be vulnerable to unconstitutionality because of this norm).

Analysis of these two articles shows that the constitution makers have indeed implicitly determined the proportional electoral system within

[46] M. Jovanović, "Izborni sistemi Srbije – da li , šta i kako menjati?", *Reforma izbornog zakonodavstva u Srbiji*, Centar za javno pravo, Sarajevo 2015, 21.
[47] Serbian Constitution, Art. 102. par. 4.
[48] V. Mikić, „Reforma izbornog sistema u Srbiji – predlozi za dostizanje veće reprezentativnosti narodnih poslanika", *Reforma izbornog sistema u Srbiji*, Centar za javno pravo, Sarajevo 2015, 121.
[49] *Ibid*.

the Constitution.[50] It is difficult to assume what was the intention of the constitution maker for such action. Art. 102 par. 2 was probably motivated by daily politics and suspension of unwanted parliamentary praxis, hence the electoral system determination could be considered as "collateral damage" of an unsuccessful and inadequate attempt to stop such praxis. Once this norm was introduced, the formulation of art. 112 par. 1 pt. 3 was not important anymore – it could have also been just an oversight. It remains unclear why the explicit determination was not introduced, instead of this least favourable solution. What seems to be certain is the fact that because of this implicit determination of the proportional electoral system, any future change of the proportional principle in parliamentary electoral legislation would require constitutional revision and referendum, since both determining norms belong to the parts of the Constitution for whose revision referendum is mandatory.[51]

4. Explicit determination of the electoral system on the entity level – Bosnia and Herzegovina

Bosnia and Herzegovina (BiH) is a specific, complex state, consisting of two entities, Republic of Srpska and Federation of Bosnia and Herzegovina, while the district Brčko has special status. Elections in BiH are constitutionally regulated by Annex 4 of the Dayton peace agreement (Constitution of BiH), Constitution of Republic of Srpska, and Constitution of the Federation of BiH.[52] Before the enaction of the Electoral Law by the Parliamentary Assembly of BiH in 2001, Annex 3 of the Dayton peace agreement ("On the elections") along with accompanying sub-constitutional norms, was in power, although it was just intended to help establish the initial institutions after the end of the war, i.e. only set the temporary electoral system of BiH.[53] The electoral system is not constitutionally determined for elections of the lower chamber of the bicameral parliament of BiH (*Predstavnički dom*), as well as the parliament of Republika Srpska (*Narodna skupština*)[54].

[50] Simović and Petrov share this opinion: D. Simović, V. Petrov, 157.

[51] Serbian constitution, art. 203 par. 7: "The National Assembly shall be obliged to put forward the act on amending the Constitution in the republic referendum to have it endorsed, in cases when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, proclamation of the state of war and emergency, derogation from human and minority rights in the state of emergency or war, or the proceedings of amending the Constitution."

[52] Annex 3 of the Dayton peace agreement ("On the elections") was introduced to help establish the initial institutions after the end of the war.

[53] M. Sahadžić, „The Electoral System of Bosnia and Herzegovina", *Suvremene teme*, 2009/1, 65 – 67.

[54] Constitution of the Republic of Srpska, Art. 71 par. 4 : „Election and cessation of MP's mandate and formation of constituencys is determined by law".

However, the constitution of the Federation of BiH explicitly determines the proportional principle for the House of Representatives of the Federation of BiH (*Zastupnički dom*). In art. 3 par. 2 of section 4 of the Constitution ("The House of Representatives of the Federation") it is clearly stated that before every election, each registered party announces its electoral list of the candidates. Elected MPs in the Parliament are persons starting from the top of the electoral list, according to the number of votes received. Replacements of MPs are made with respect to the order of remaining candidates from the list. This regulation, which is usually left to the respective law, clearly determines the proportional principle.[55]

Although BiH, as a member of the UN and internationally recognized country, doesn't constitutionally determine the type of the electoral system on state level, because of its complexity and the fact that the entities have their own constitutions and the elements of statehood, it was worth mentioning that one of the entities, the Federation of BiH, explicitly determines the proportional system within its constitution.

5. Former Yugoslav countries whose constitutions do not determine the type of the electoral system – the Republic of Croatia, Republic of Macedonia and Montenegro

Slovenian and Serbian constitutions explicitly and implicitly predict their electoral systems. In Bosnia and Herzegovina, it is explicitly predicted in the constitution of one entity. All the other former Yugoslav countries, however, do not have such determination; therefore the change of the electoral system does not trigger any need for constitutional revision.

The Croatian constitution regulates the election of MPs in art. 72 in which it says that "the Croatian Parliament (*Hrvatski Sabor*) shall have no less than 100 and no more than 160 members, elected on the basis of direct universal and equal suffrage by secret ballot". Next article simply states that "the number of members of the Croatian Parliament, and the conditions and procedures for their election, shall be regulated by law"[56]. The decision of the Croatian constitution makers not to specify the number of MPs, but only set the limits and leave that matter to the respective law is doctrinally considered to be exceptional[57], but paradoxically two out of the six former Yugoslav countries utilize this principle: Croatia and Macedonia. Croatian Electoral law enjoys special constitutional protection since the constitution sets it within the group of laws for whose revision a qualified majority is

[55] N. Ademović, J. Marko, G. Marković, *Ustavno pravo Bosne i Hercegovine*, Fondacija Konrad Adenauer, Sarajevo 2012, 342.
[56] Croatian constitution, art. 73 par. 2.
[57] V. Petrov, *Parlamentarno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2010, 52.

required.[58] If the Serbian norm on presidential competences (one of two that determine proportionality) is set beside to the analog Croatian one – a small, but very important difference can be noted: "The President of the Republic shall (…) confide the mandate to form the Government to the person who, upon the distribution of the seats in the Croatian Parliament and consultations held, enjoys confidence of the majority of its members"[59]. Unlike the Serbian norm, the Croatian one does not give any clues that would implicate the application or need for exclusion of any electoral system type. Croatia has changed a couple of electoral models (including combined ones)[60] under the present constitution and has never had to revise its text on that matter.

The same principles can be found in Macedonia as well. The constitution states that "the Assembly of the Republic of Macedonia (*Собрание на Република Македонија*) is composed of 120 to 140 Representatives. The Representatives are elected at general, direct and free elections and by secret ballot."[61] The rest of the regulation is left to the law.[62] Just like in Croatia, the constitution sets only the range for the number of MPs and, also like in Croatia, votes of the majority of all the MPs are necessary for the revision of the Electoral law. There are no norms in the Constitution that would suggest the application of a particular electoral system type.

The constitution of Montenegro also does not determine the type of the electoral system and leaves this matter to the respective law.[63] Article 83 says that "the Parliament (*Скупштина Црне Горе*) shall consist of the Members of the Parliament elected directly on the basis of the general and equal electoral right and by secret ballot". Revision of the Electoral law is constitutionally placed on a higher rank compared to Croatia and Macedonia since the qualified majority of 2/3 of all the MPs is required.[64] Norms on the presidential competences contain nothing that would indicate the application of a certain electoral type.[65]

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[58] Croatian constitution, art. 83 par. 2.
[59] *Ibid*. art. 98 par. 1 pt. 3.
[60] M. Stanić, „Raspodela mandata u evropskim postkomunističkim zemljama na primerima Poljske, Bugarske, Hrvatske i Makedonije", *Strani pravni život*, 2013/3, 320 – 322.
[61] Macedonian constitution, art. 62.
[62] *Ibid*.
[63] M. Šuković, *Ustavno pravo – univerzalna ustavna tematika i ustavno pravo Crne Gore*, Cid, Podgorica 2009, 345.
[64] Montenegro constitution, art. 91 par. 3
[65] „The President of Montenegro (...) proposes to the Parliament: the Prime Minister-Designate for composition of the Government after the completion of the discussions with the representatives of political parties represented in the Parliament..." – Montenegro constitution, art. 95 par. 1 pt. 5.

6. Conclusion

Constitutional determination of the electoral system type is not the best way to protect the electoral system from its possible misuse. The constitution has to protect the highest values of society, but at the same time allow undisturbed functioning of the state. Although the countries whose constitution makers have opted for this solution, almost always predict the proportional electoral system (which we find to be the most democratic), such determination could possibly jam the political system and endanger normal functioning of the state, hence the protection and exercise of other important rights. The state should serve the constitution, but the constitution should also serve the state and society, therefore a certain flexibility of constitutional legal solutions is desirable due to unforeseen social and political circumstances. For this reason, it seems that *materia constitutionis* should be set restrictively, since the extensive normative leads either to rather frequent constitutional revision (which we consider to be unfavourable) or to the rigidity of the system that could hinder progress.

Comparative analyses show that countries with the constitutional determination of the electoral system are prone to have problems if in need of electoral system changes. Even if the prediction is explicit, it is by rule rudimentary and can be vulnerable to various interpretations. An implicit determination is even less desirable since it produces more uncertainty and possible misapplication. Former Yugoslav countries display all the possible solutions of this issue: the absence of constitutional determination (Croatia, Macedonia and Montenegro), the explicit (Slovenia) and the implicit one (Serbia), and even the "partial determination" (Bosnia and Herzegovina). In the case of Serbia, it is clear that the two norms of the Constitution indirectly stipulate the proportional system. Although Serbia was one of the first countries in history to introduce the proportional system[66] and its application should undoubtedly remain, its constitutional determination presents the least favourable solution. Therefore, we would strongly advise that this is taken into consideration within the announced, upcoming revisions of the Constitution. Any determination of the electoral system should be left out of the Constitution and this matter should be arranged within the Electoral law, which would require a qualified majority for its enacting and revision, thus ensuring adequate protection.

[66] M. Đorđević, "Istorijat izbora u Kneževini i Kraljevini Srbiji", *Izbori u domaćem i stranom pravu*, Institut za uporedno pravo, Beograd 2012, 284.

Miroslav Đorđević, master pravnik
Istraživač saradnik, Institut za uporedno pravo, Beograd

USTAVNO ODREĐENJE MODELA IZBORNOG SISTEMA I ZEMLJE BIVŠE JUGOSLAVIJE

Rezime

Zakonodavac se u određenom broju zemalja odlučio da eksplicitno ili implicitno samim ustavom propiše model izbornog sistema i na taj način mu, kao jednoj od najvišoj vrednosti, pruži najjaču pravnu zaštitu. Iako su ovakva rešenja najčešće motivisana sprečavanjem zloupotrebe izmene izbornog sistema, što predstavlja veoma osetljivo pitanje, na osnovu teorijskih razmatranja i uporednopravnih primera se može zaključiti da ovakvo ustavno predviđanje po pravilu donosi više štete nego koristi, te da se efikasnija zaštita može postići na druge načine. Implicitno određenje izbornog sistema predstavlja najnepoželjnije rešenje, jer dovodi do nesigurnosti i otvara prostor za najrazličitija tumačenja, što ne znači, kako primeri pokazuju, da su na to imuni ustavi koji eksplicitno determinišu model izbornog sistema. Na primeru ustava nekadašnjih jugoslovenskih država mogu se videti gotovo svi, različiti pristupi ovom pitanju. Hrvatska, Makedonija i Crna Gora uopšte ne poznaju ustavno određenje modela izbornog sistema, Slovenija poznaje pak eksplicitno, Bosna i Hercegovina delimično (samo za jedan entitet), a Srbija implicitno ustavno određenje modela izbornog sistema, koje bi u budućoj reviziji ustava trebalo promeniti, tj. ukloniti. U traženju prave mere *materiae constitutionis* treba nastupiti restriktivno, uz uvažavanje potrebe za elastičnim rešenjima kada odnosno pitanje to nalaže. Kako odabir izbornog modela spada u jedno od takvih pitanja, njegovo određenje je najbolje ostaviti relevantnom zakonu, a zaštitu obezbediti traženjem kvalifikovane većine za njegovo donošenje i izmenu.

Ključne reči: izborni sistem, ustav, proporcionalni sistem, države bivše Jugoslavije, ustavno određenje, ustavno pravo.

Prof. Radosav Risimović, PhD[1]

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SEIZURE OR TAXATION OF ILLEGAL INCOME – EXAMPLE OF DRUG TRAFFICKING[2],[3]

Abstract

The criminal offence of tax evasion is most frequently perpetrated by giving false data on the acquired income and failure to report acquired incomes, as defined in our criminal legislation. A linguistic analysis of the Criminal Code provision which defines this offence can lead to a conclusion that the income subject to taxation can be obtained either lawfully or unlawfully since the legislator does not take a stand regarding this issue. Namely, the 2016 amendments to the Criminal Code deleted the term 'legal' from the legal description of the criminal offence of tax evasion. However, this does not mean that the incomes acquired unlawfully can be subject to taxation, as the paper elaborates in detail. The author explores jurisprudence regarding the imposition of the security measure of the seizure of objects and the measure of seizure material gains in criminal matters related to the criminal offence of illegal production and circulation of narcotic as per Article 246 of the CC. In this way, we shall establish whether these measures are effectively implemented and whether they allow for seizing the incomes obtained from drug trafficking. A portion of this paper will be dedicated to the reasons for and against taxation of illegally obtained revenues. In addressing this problem, the author shall rely on the US practice, wherein proceeds from unlawful sources are subject to taxation.

***Keywords**: illegal income, legal income, tax evasion, drug trafficking.*

[1] Academy of Criminalistic and Police Studies, Belgrade, e- mail: *radosav.risimovic@kpa.edu.rs.*

[2] The paper has resulted from the scientific research projects financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia: *The Development of institutional capacities, standards and procedures for combating organized crime and terrorism in the context of international integrations* (no. 179045), realized by the Academy of Criminalistic and Police Studies in Belgrade 2011-2014 (headed by Prof. Saša Mijalković, PhD) and by the Ministry of the Interior of the Republic of Serbia: *Criminality in Serbia and instruments of state response*, also realized by the Academy of Criminalistic and Police Studies in Belgrade 2015-2019 (headed by Prof Dragana Kolarić, PhD).

[3] NARCO-MAP; HOME/2015/ISFP/AG/TDFX/8742; Improving knowledge on NPS and opiates trafficking in Europe; Project developed with the financial support of the European Commission – Transnational initiatives to fight trafficking in drugs and firearms – DG Justice/ DG Migrations and Home Affairs.

1. Introduction

There can be no doubt that the functioning of any state depends, among other things, on proper taxation, since the taxes provide funds for financing education, health services, social welfare, army, and other activities in the public interest. Taxpayers are obliged to pay various taxes: individual income taxes, taxes on corporal profits, value added tax, excise, property taxes, etc. [4] When we speak about taxes on the revenues that the taxpayers have gained lawfully, there is no doubt as to whether there is an obligation to pay these taxes. On the other hand, the question arises whether taxation of illegal proceeds is also necessary and whether it is in accordance with the existing national legislation in our country. It is essential to find a solution to this dilemma for a number of reasons. A great part of the economic activity – and not only in our country – unfolds within the so-called grey area. Regarding this, the question arises whether the proceeds gained in that way can be taxed. Besides, certain criminal acts are perpetrated for gain and their perpetration can secure proceeds for the perpetrators or other persons which may amount to enormous sums of money. Can these proceeds be taxed or should they be seized from the perpetrators?

2. Tax evasion and illegal income in the national criminal legislation

The basic form of the criminal offence of tax evasion is defined in Article 229 paragraph 1 of the Criminal Code of the Republic of Serbia (hereinafter: CC): "Whoever with intent to fully or partially avoid payment of taxes, contributions or other statutory dues, gives false information on legal income, objects and other facts relevant to determination of such obligations, or who with same intent, in case of mandatory reporting (filing of returns) fails to report lawful income, objects and other facts relevant to determination of such obligations or who with same intent conceals information relevant for determination of aforementioned obligations, and the amount of obligation whose payment is avoided exceeds five hundred thousand dinars, shall be punished by imprisonment of six months to five years and fined (paragraph 1)."[5] Until this year the legal description of the criminal offence of tax evasion implied that only lawfully obtained incomes could be taxed. The legislator incriminated giving false information on legal income in Article 229 of the CC along

[4] N. Jeremić, "Mesto i uloga poreza na dohodak građana u strukturi savremenih poreskih sistema, *Ekonomski pogledi"*, 1/2011, 37.

[5] Law on Amendments and Additions to the Criminal Code *Official Gazette of the Republic of Serbia* no. 94/2016.

with failing to report lawful income in case of mandatory reporting.[6] However, the Law on Amendments to the Criminal Code of 23 November 2016 deleted the term 'legal' from the legal description of the criminal offence of tax evasion. Does this imply that it is possible to tax unlawfully obtained income in accordance with the existing legal regulations? In other words, is it possible to secure the substance of the criminal offence of tax evasion by giving false information on unlawful income and by failing to report unlawfully obtained income?

We shall commence the elaboration of this issue by analyzing the heretofore valid legal provision which brought about some dilemmas in court practice and in the theory of criminal law. Given that the legislator stipulated that the offender commits the alternatively envisaged criminal activity by giving false information on *legally* acquired income and by failing to report *legally* acquired income, a conclusion could be drawn that - according to the existing provision - tax evasion was possible only with respect to lawfully acquired income. However, in theory, and practice of criminal law, this standpoint is not universally accepted. According to one opinion, tax evasion does not exist in case of giving false information on unlawfully obtained income and failing to report unlawfully acquired income because in this way offenders would be required to report the crimes they have committed themselves.[7] This view is acceptable, as in our country there is no regulation that would be a legal basis of the duty of any person to act against their own interest, i.e. to incriminate oneself, either directly or indirectly, of having committed a criminal act. In this respect it should be pointed out that "the right against self-incrimination

[6] Criminal Code *Official Gazette of the Republic of Serbia* no. 85/2005, 88/2005 – correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.
J. Lazarević, M. Škulić, "Osnovne planirane novele Krivičnog zakonika Srbije", *Bilten Vrhovnog kasacionog suda*, 2/2015, Beograd, 56; See also: The decision of the Appelate Court in Kragujevac, Kž. 3111/2012 of 27 September 2013 („For the substance of the given criminal offence it is vital that the income in question is legal or else the citizens would be bound to report for taxation their unlawful revenues, thereby incriminating themselves for the acquisition of these unlawful revenues, although there is no legal obligation whatsoever for anyone to report themselves for a criminal offence or any other act sanctioned by law."); E. Finestone, "Eliminating the Tax on Embezzled Funds: a Call for Reform", *Review of Banking & Financial Law*, 2/2014-2015, 739.

[7] J. Lazarević, M. Škulić, "Osnovne planirane novele Krivičnog zakonika Srbije", *Bilten Vrhovnog kasacionog suda*, 2/2015, Beograd, 56; See also: The decision of the Appelate Court in Kragujevac, Kž. 3111/2012 of 27 September 2013 („For the substance of the given criminal offence it is vital that the income in question is legal or else the citizens would be bound to report for taxation their unlawful revenues, thereby incriminating themselves for the acquisition of these unlawful revenues, although there is no legal obligation whatsoever for anyone to report themselves for a criminal offence or any other act sanctioned by law."); E. Finestone, "Eliminating the Tax on Embezzled Funds: a Call for Reform", *Review of Banking & Financial Law*, 2/2014-2015, 739.

is the right which belongs not only to the suspect but also to other subjects in criminal proceedings (e.g. witnesses), although it is not explicitly provided for in Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, set as an international standard and it represents a basis for the right to a fair trial."[8]

On the other hand, the implementation of this provision reduced efficiency in the administration of justice because it was necessary to establish, in any given case, that the offender had given false information on lawfully acquired income or failed to report lawfully acquired proceeds. This task was not simple so it resulted in lengthening proceeding and reducing the efficiency of the judicial system.

Clearly, it is not always easy to establish whether the income in the specific criminal case has been acquired in a lawful way. For instance, the judicial practice has been faced with the question whether lawful income includes proceeds from lawful sales of goods supplied in an unlawful way. Given that the income was acquired through lawful sales of goods, it could be concluded that it constituted legal income. However, it should be borne in mind that the said goods were supplied unlawfully. This fact influenced the court decision, according to which illegally purchased goods could not be legally sold. Hence the income was unlawful.[9]

On the other hand, part of the literature on criminal law raises the question of what should be regarded as illegal income. An opinion argues that distinction should be made between two types of illegal income: 1) incomes from "a permitted activity for which permission is required" and 2) proceeds from crime. The advocates of this opinion find that all incomes from category one should be taxed, i.e. all the incomes from activities for which permissions of relevant authorities are required. They find that taxpayers are obliged to report for taxation all revenues, even the incomes gained by violating legal regulations provided that they have not committed criminal acts.[10] In our opinion, this view is unacceptable because it would, among other things, allow for legalization of incomes gained in unlawful ways (through infringements).

Accordingly, the rationale of each court decision convicting an offender of the criminal act of tax evasion must list reasons which indicate whether the incomes of the taxpayer on which tax has not been paid was gained lawfully, as implied in the decision of the Court of Appeal in Niš: "It is rather unclear why the trial court has accepted withdrawing money from the current account without reserve as lawful income and even

[8] A. Bošković, *Radnje policije u prethodnom krivičnom postupku i njihova dokazna vrednost*, Beograd 2015, 102.
[9] The decision of the Court of Appeal in Novi Sad, Kž. 3392/2011 of 22 November 2012.
[10] M. Vuković, *Poreska utaja u policijskoj i sudskoj praksi*, Beograd 2009, 160.

more unclear why it finds that there were two types of income involved. Regarding the money for the purchase of firewood, the trial court finds that it falls among all other revenues as per Article 85 of the Individual Income Tax Law on which the tax is 20%. Regarding the withdrawal of cash amounting to 816 550.00 dinars for the alleged material expenses, it is unclear why the court now accepts that it is lawful capital gain, the taking from the assets of the company as per Article 61 para. 1 item 4 of the Individual Income Tax Law on which there is also the tax rate of 20%. Any given income has to be lawful in order to be taxed. The first-instance court, therefore, had to establish whether the withdrawal of ready money from the current account of the company was legitimate. Article 61 para. 1 item 4 of the Individual Income Tax Law provides that taking from the assets of a commercial society by the owner of the commercial society for their private use must be performed in accordance with the law if it is to be regarded as taxable capital gain. In the given case, it was obvious that the accused performed cash withdrawals from the company's account within the specified period, which he admitted, but tried to make it appear lawful by representing it as the purchase of firewood, i.e. as the material expenditure. Therefore the trial court was required to establish whether the cash withdrawal was the defendant's lawful income bearing in mind the provisions of the Companies Law and based on the established facts."[11]

The view of the court should be accepted because the legal description of the criminal offence of tax evasion valid at the time of making the decision required that the commission, as a special element of the offence, is undertaken by giving false data on legally acquired income. This means that the commission of tax evasion was not undertaken if the offender gave false information on incomes which were acquired unlawfully. It follows that the courts could not have proceeded from the assumption that the incomes were earned in a legal way but had to prove in each specific case that there was a legally earned income. For example, according to the case law: "if the income is lawful but adequate taxes have not been paid, then we can speak about the criminal offence of tax evasion as per Article 229 of the Criminal Code, whereas if the income was not lawful, it would constitute another criminal offence, in which case the income cannot be taxed but rather confiscated."[12] Hence the revenues from the sale of drugs or 'sales in the black market' cannot be regarded as lawfully earned

[11] The decision of the Court of Appeal in Niš, Kž. 431/10 and the ruling of the decision of the Municipal Court in Niš K. 2 768/07, *Bilten Apelacionog suda u Nišu*, 1/2010, 30. See also: The ruling of the Court of Appleal in Kragujevac, Kž. 362/2013 of 6 February 2014.

[12] The decision of the Court of Appeal in Niš, Kž. 431/10 and the ruling of the Municipal Court in Niš K. 2 768/ 07, *Bilten Apelacionog suda u Nišu*, 1/2010, 30.

income and cannot be taxed: „for the criminal offence of tax evasion to occur, the income must be lawfully acquired and false information given in order to avoid paying taxes; as it was established in the course of the legal proceedings that there was an instance of the so-called 'sale on the black market', i.e. proceeds from crime, there can be no discussion about tax evasion or tax offence, and the actions of the defendant were properly qualified as criminal offence of abuse of official position."[13]

Regarding the unlawful sale of goods, the appellate court has taken the view that tax evasion is present where a taxpayer purchases goods in a legal way and thereafter proceeds to commit a criminal offence. In the given case, the defendants sent the invoices that were not followed commodities. It follows that the proceeds gained in this way were not lawful, i.e. that there was no criminal offence of tax evasion.[14] Therefore, the essence of the criminal law provision which was valid until recently for the criminal offence of avoiding payment of taxes was that it provided for the duty to pay taxes on lawfully acquired income. On the other hand, proceeds from crime have to be seized, provided that criminal proceedings result in a final court decision and prove that these were acquired from the commission of criminal acts.

In support of the viewpoint which prevails in the national literature on criminal law, it should be pointed out that the payment of taxes on income acquired in an unlawful manner would legalize those revenues. This would be convenient for offenders, as they would, by paying the taxes, legalize the wealth they have acquired through criminal activities.

To eliminate dilemmas in case law and the literature on criminal law and to ensure that the judicial proceedings are more efficient, the legislator introduced amendments to the Criminal Code which erased the word 'legal' from the legal description of the offence. Accordingly, the alternatively prescribed action of the commission of this criminal offence can, according to our positive law, be perpetrated, inter alia, by giving false data on the earned income and by failing to report earned income. This raises a question as to whether unlawful proceeds can be taxed since the legislator no longer insists on the lawfulness of income on which false data are given and/or which remains unreported. In our opinion, following the specified amendments to the national criminal legislation, the offender has no obligation to report illegal income. However, we believe that the introduced changes to the legislation are justifiable because they will

[13] The ruling of the Serbian Supreme Court Kž. 283/2007 of 20 May 2010, *Bilten sudske prakse Okružnog suda u Nišu*, 28/2008, 50. See also: The decision of the Court of Appeal in Belgrade Kž. 1564/2011 of 23 May 2011.

[14] The ruling of the Court of Appeal in Belgrade Kž. 4/2011 of 10 June 2011. See also: The decision of the Court of Appeal in Belgrade Kž. 684/2013 of 2 July 2013.

allow for greater efficiency of criminal prosecution. Deleting the term 'legal' from the legal description of tax evasion means that the courts will no longer be bound to establish for each specific criminal case whether the revenues falsely reported or unreported have been legally acquired. On the other hand, this does not mean that taxpayers are obliged to report the illegal income and that the taxation of illegal income is possible. The view on the unacceptability of taxation of illegal revenues has already been explained above. In short, no one is obliged to incriminate themselves by reporting unlawful income; the taxation of illegal income would allow for their tacit legalization.

3. Illegal income from drug trafficking

Certainly, this does not mean that the offender is entitled to withhold the income earned in an unlawful manner. Income earned by illegal means may be seized through the implementation of the provisions of the CC.[15] Proceeds from crime can also be seized based on the provisions of the Law on Seizure of the Proceeds from Crime.[16] The paper does not aim to offer an analysis of provisions of the said law, but it should be noted that this law specifies the conditions, procedures and authorities responsible for detection, seizure and management of proceeds from criminal offences listed in the statute. The authorities in charge of detecting, seizing and managing the proceeds from criminal acts include the public prosecutor, the court, the Financial Investigation Unit, and the Directorate for Seized Property Management. The Financial Investigation Unit is a specialized organizational unit within the Ministry of the Interior which detects assets derived from criminal acts *ex officio* or based on a warrant issued at the behest of the public prosecutor or the court.[17]

The security measure of object seizure allows for the confiscation of object intended or used for the perpetration of an offence or resulting from the commission of a criminal offence. Items resulting from the criminal

[15] The security measure of object seizure from Article 87 of the CC and the measure of seizure material gains from Articles 91-93 of the CC (Article 92 paragraph 1 of the CC provides that: „Money, items of value and all other material gains obtained by a criminal offence shall be seized from the offender, and if such seizure should not be possible, the offender shall be obligated to hand over other assets corresponding to the value of assets obtained through commission of criminal offence or deriving there from or to pay a pecuniary amount commensurate with obtained material gain.").

[16] Law on Seizure of the Proceeds from Crime *Official Gazette of the Republic of Serbia* no. 32/2013 and 94/16. The provisions of this Law apply, inter alia, to the criminal offences of organized crime and illegal production and circulation of narcotic (Article 246 paragraphs 1-3 of the CC).

[17] M. Milošević, T. Kesić, A. Bošković, *Policija u krivičnom postupku*, Beograd 2016, 76.

offences are the ones "that are the result of an undertaken criminal offence, brought about by the commission of the criminal action."[18] However, the author advocating this opinion finds it unacceptable that the part of judicial practice according to which the items resulting through the commission of criminal acts should be regarded as items obtained from the commission of a criminal act and therefore represent the proceeds from crime. Accordingly, the measure of seizure of material gain should be applied in respect of the items obtained through the commission of criminal acts. This view is accepted in solving the criminal cases relating to the offence of illegal production and circulation of narcotic as per Article 246 of the CC.[19]

By contrast, the courts have, in certain cases, seized, for instance, the money resulting from drug trafficking and stated in the rationale of their decision that it constituted "the money and objects used for or resulting from the commission of a criminal offence."[20] It is questionable whether the money obtained by drug trafficking can be regarded as the object for which there is a danger that it may be reused for the commission of a criminal act. The quoted ruling of the Higher Court in Čačak K.2/2016 illustrates how the Court emphasized, in the rationale of the imposed security measure of object seizure that, among other things, "there is a danger that these objects could be used again for the commission of a criminal act." [21]

In our opinion the view of the Court can be accepted as the convict admitted that he had sold drugs and that "he needed the money to subsequently buy drugs for himself". Although the defendant stated that he would buy the drugs for himself from the money earned by pushing narcotic drugs, it can be assumed that he would sell drugs again, as he had done in the past and as established in this decision. Accordingly, there was a risk that the money would be used again for the commission of a criminal offence in terms of Article 87, paragraph 1 of the CC. However, this does not mean that the courts can automatically, in any given case, seize the money found on the offender because there is a danger that it will be used for the commission of a criminal offence. The seizure of money based on the implementation of the security measure of seizure of objects from offenders of criminal acts related to illegal drugs is possible

[18] Z. Stojanović, *Krivično pravo – opšti deo*, Beograd 2011, 312.
[19] The ruling of the Higher Court of Čačak K. 15/2013 of 22 May 2013.
[20] The ruling of the Higher Court of Čačak K. 2/2016 of 24 May 2016.
[21] Article 87 paragraph 1 of the CC: „The security measure of seizure of objects may be imposed with regard to an object which was intended for or used in the commission of a criminal offence or which resulted therefrom when there is a danger that a certain object may be reused to commit a criminal offence or when it is so required for the purpose of ensuring public safety or for moral reasons."

only where there are reasons which – as in the aforementioned case – indicate that it would be justified. We believe that these reasons should be explicitly stated in the part of the court decision which justifies the imposition of the sentence of security measure of object seizure, which was not the case in the aforementioned ruling. However, the question that arises here is why the court did not permanently seizure the money from the defendant, applying the provisions of the criminal legislation pertaining to seizure of material gain (Article 91-93 of the CC). In our opinion, the priority in similar cases should be given to the provisions on the seizure of material gain if there is evidence that the money has been obtained by selling illegal drugs.

However, this does not mean that the implementation of the security measure of the seizure of objects should be excluded with respect to money related to the criminal offence of unlawful production and circulation of narcotic drugs (Article 246 of the CC). The imposition of the security measure is justified where the offender has lawfully secured (e.g. as revenue or gift) a certain sum of money which he intends to use for purchasing illegal drugs for further sale. If police officers arrest such an offender while trying to buy drugs, the money could be seized through the implementation of the security measure of object seizure because there is a danger that the money will be used to commit a criminal offence. The seizure of money, in this case, would not be possible by the implementation of the measure of seizing material gains (Articles 91-93 of the CC) because the money would not be obtained through the commission of a criminal offence.

In some rulings, the imposition of the security measure of seizure of objects (money – 10 euro) from the perpetrators of the criminal offence of illegal production and circulation of narcotic (Article 246 of the CC) is explained in the following way: "it is the money obtained through the commission of a criminal offence and it is so required for the purpose of ensuring public security and for moral reasons in terms of Article 87 paragraph 1 of the CC." [22] It has already been explained that the view of the author here is that the items obtained by the perpetration of criminal acts should be seized by imposing the measure of the seizure of material gain (Articles 91-93 of the CC), rather than the security measure of object seizure (Article 87 of the CC). In addition to this, it is true that the interests of public security and moral reasons are grounds for the imposition of the seizure of objects according to Article 87 paragraph 1 of the CC. On the other hand, we are of the opinion that this provision cannot be broadly interpreted in the way the Court does in the decision

[22] The ruling of the Higher Court of Čačak K. 31/2014 of 11 September 2014.

regarding this criminal matter. Protection of public security and moral reasons are inherently vague concepts. Besides, we find that the money obtained by drug trafficking does not directly jeopardize public security and ethics in our society. It is indisputable that it should be seized, but only by imposing the measure of the seizure of material gain (Articles 91-93 of the CC).

Finally, we conclude that our jurisprudence is not uniform when it comes to confiscation of money obtained by selling drugs, which does not contribute to legal certainty. We also suggest that the courts include in the rationale of their decisions the reasons which indicate why it is justifiable to seize the money by imposing the security measure of the seizure of objects (Article 87 of the CC) or by imposing the measure seizure of material gain (Articles 91-93 CC). At this point, we shall mention a commendable example from judicial practice which should be used as a model: "Pursuant to Articles 91-92 of the CC, the money amounting to the total of 385 euro and 48,200 dinars, which was found in his jacket on the critical occasion, was seized from the defendant, because the aforementioned legal provisions stipulate that no one may keep material gains obtained by a criminal offence and that, inter alia, the money obtained through criminal offences shall be seized; the submitted evidence proved that the defendant was unemployed, that in the relevant period his income consisted of the monthly rent of 75 euro and the money that his parents gave him, amounting to 50 to 100 euro per month, which did not correspond to the total money found on his person. This implies that the seized money actually represented the material gain from the illegal sale of narcotic drugs."[23] Similarly the Higher Court in Belgrade stated in the rationale of its decision that the sum of money found on the defendant was disproportionate to his monthly income, which is why the measure of seizure of material gain was imposed to seize 4000 euro, as "the Court found no doubt that the money came from previously sold narcotic drugs".[24] Sometimes the location in which money is found can also indicate that it originates from drug trafficking. In one case, money was found next to a precision weighing device used to measure drugs and it was seized in keeping with the measure of the seizure of material gains obtained by criminal offences as per Articles 91-93 of the CC.[25] Money can be seized by imposing this measure where the convict confesses that it was acquired by selling drugs.[26]

Analyzing judicial practice, we have found 48 sentences imposed on 50 individuals by the Higher Court in Čačak in connection with the

[23] The ruling of the Higher Court of Čačak K. 61/2013 of 6 March 2014. Similarly, The ruling of the Higher Court of Belgrade K. 112/12 of 4 July 2012.
[24] The ruling of the Higher Court of Belgrade K. 334/12 of 28 September 2012.
[25] The ruling of the Higher Court of Belgrade K. 444/12 of 29 August 2012.
[26] The ruling of the Higher Court of Belgrade K. 677/11 of 14 September 2012.

illegal production and circulation of narcotics (Article 246 of the CC)[27]. The money from illegal trafficking of drugs was seized only from three convicted persons. According to Article 87 of the CC, the Court in one case imposed the security measure of the seizure of objects (350 euros)[28] from the offender. In the other case, the money (250 euro) was seized from the convicted person based on Articles 91-93 of the Criminal Code[29] providing the seizure of material gain. In the third case, 10 euro was taken from the offender based on Article 87 of the CC which regulates the seizure of objects.[30] The paper has already explained our opinion with regard to the courts' decisions in these cases.

It may be concluded that the seizure of illegal income from offenders who have committed the offence provided for in Article 246 of the CC in our judicial practice is an exception rather than a rule. In this connection, it must be pointed out that neither of the mentioned measures has been imposed on 47 individuals from our study. Furthermore, the value of the confiscated profit in the mentioned cases is so trifling that it makes the effects of the imposed measures, the seizure of the objects (Article 87 of the CC) and seizure of material gain (Articles 91-93 of the CC), insignificant. The paper also tries to explain why national courts do not seizure more substantial gain obtained in illegal ways, primarily by drug trafficking from the individuals committing offences provided for in Article 246 of the CC.

First and foremost it should be emphasized that in particular cases courts do not obtain information on the offenders' financial standing from independent sources (e.g. Tax Administration) but from the statements made by the offenders themselves. As expected, knowing that bad financial standing may be taken as a mitigating factor, the offenders stated that they were unemployed and that their monthly income was rather low. Thirty-one out of fifty offenders from our study stated that they were unemployed. It would be interesting to find out who those persons depended on if they were unemployed. Once, an offender stated that he supported his multimember family from occasional jobs. The court did not try to check the fact in any way.[31] On the other hand, 681g of marihuana were seized from the

[27] K. 1/13; K. 2/16; K. 2/13; K. 3/13; K. 3/15; K. 3/14; K. 5/13; K. 5/15; K. 6/15; K. 12/16; K. 13/16; K. 13/12; K. 14/13; K. 15/13; K. 20/14; K. 21/12; K. 21/14; K. 23/12; K. 24/13; K. 26/13; K. 26/15; K. 30/15; K. 31/14 (two convicted persons); K. 31/15; K. 32/14; K. 34/15; K. 35/11; K. 36/14 (two convicted persons); K. 39/13; K. 41/12; K. 45/14; K. 45/13; K. 46/14; K. 48/13; K. 48/14; K. 49/14; K. 50/14; K. 50/13; K. 52/12; K. 53/14; K. 53/12; K. 55/13; K. 55/14; K. 57/12; K. 57/14; K. 58/12; K. 60/12; K. 60/14.

[28] K. 2/16.

[29] K. 15/13.

[30] K. 31/14.

[31] The ruling of the Higher Court of Čačak K. 3/15 of 20 April 2015. Likewise: The ruling of the Higher Court of Belgrade K. 529/10 од 30. May 2012.

offender, thus clearly indicating his intention to gain significant profit by drug trafficking. The question to which the court did not reply is whether the offender gained illegal profit by selling drugs that should be confiscated.

In one case when the offender stated that he depended on his mother the court did not try to find out whether his mother was alive, i.e. whether she (if alive) was employed, how much she earned and whether she supported her son.[32] Since a significant amount of drug (125 g of heroin) was seized from the offender, the question is whether he obtained illegal profit by selling drug which should be seized in compliance with the law.

While giving personal data, offenders also state real property which is an important detail if illegal income obtained by drug trafficking is considered. Notwithstanding, this important detail was not checked from independent sources by courts. Only one convicted person from our study stated that he owned property in his name. According to his statement, he supported himself from occasional jobs and two houses he owned. The court did not establish relevant facts in order to find out whether the houses had been bought or built by the money obtained by drug trafficking, the value of houses, a time when they had been bought or built, etc.[33] It cannot be denied that persons convicted of illegal production and circulation of narcotics based on Article 246 of the CC could own legal property (e.g. inherited property, gift property, or property purchased from legal income). However, we are of the opinion that the source of such property should be investigated, especially if certain circumstances should require so.

In one case the defendant declared that he was living in a 247m² house owned by his wife.[34] The court did not check whether the house was entirely owned by the defendant's wife, when and how the house was purchased, its value or the wife's income and other relevant details. It must be pointed out that 18 000g of marihuana were seized from the defendant. Accordingly, the defendant's financial standing should have been carefully investigated in order to establish illegally obtained income that was to be seized. Similarly, in another case, the defendant declared that he supported himself by the sub-lease of the licensed premises owned by his grandparents.[35]

The defendants declaring to be employed mostly had incomes of several thousand dinars. However, one of them declared that his average

[32] The ruling of the Higher Court of Čačak K. 13/12 of 24 December 2012. Likewise: The ruling of the Higher Court of Belgrade K. 14/2012 of 10 September 2012; The ruling of the Higher Court of Belgrade K. 467/12 of 24 October 2012.
[33] The ruling of the Higher Court of Čačak K. 31/14 of 11 September 2014.
[34] The ruling of the Higher Court of Čačak K. 6/15 of 24 December 2015.
[35] The ruling of the Higher Court of Čačak K. 12/16 of 8 September 2016.

income in the hospitality industry was 1000 euro.[36] 30g of cocaine hidden in the car was seized from a defendant. The same defendant was prosecuted for another criminal offence provided for in Article 246 of the CC, illegal production and circulation of narcotics. Nevertheless, these circumstances were not enough for the court to check the defendant's financial standing and establish whether there was any illegal income that should be seized.

Similarly, 75g of cocaine hidden in Audi A6 were seized from a defendant.[37] According to the defendant's statement, he earned around 400 euro a month from a joint ownership in a coffee shop. The court neither received a confirmation from an independent source that the defendant was a joint owner of the coffee shop nor the record of his monthly income. Moreover, the sentence stated neither the value of the defendant's car nor how he came into possession of it, which was a relevant fact for the potential seizure of illegal income.

Interestingly, courts do not take other defendants' data but those referring to their real property. The part of the sentence regarding a defendant's personal data states that "the defendant does not possess any real property in his name".[38] Courts do not establish whether defendants possess any property in the name of their close relatives. Additionally, courts do not establish whether defendants possess any personal property, such as cars, gold, papers (effects), works of art, etc. that may be more valuable than real property.

4. Taxation of illegal income in the United States

The USA has a long tradition of taxing illegal income. For instance, income obtained from illegal drug trafficking is taxed. Thus, the tax collection becomes a supplementary means for property seizure from offenders after being convicted.[39]

The USA is not the only country taxing illegal income. The South African Republic, for instance, has also been facing the problems relating

[36] The ruling of the Higher Court of Čačak K. 2/13 of 14 May 2012. Likewise: The ruling of the Higher Court of Belgrade K. 181/12 of 27 November 2012. (In this case, the defendant declared that his monthly income was 1000 euro and that he was the owner of a private business. Although 6098g of marihuana were seized from him, the court did not check his financial standing.).

[37] The ruling of the Higher Court of Čačak K. 5/13 of 11 March 2012.

[38] The ruling of the Higher Court of Belgrade K. 456/12 of 17 October 2012. The ruling of the Higher Court of Čačak K. 57/12 of 12 March 2013. The ruling of the Higher Court of Belgrade K. 263/12 of September 2012.

[39] J. A. Goldstein, "Taxing Legalized Marijuana: How Courts Should Treat Drug Tax Statutes in Light of the Fifth Amendments Self-Incrimination Clause and Executive Non-Enforcement of the Controlled Substances Act", *Cardozo Law Review*, 2/2015, 802.

to the taxation of illegal income.[40] The basis for taxing illegal income in the USA is the Sixteenth Amendment to the Constitution enacted in 1913 providing that the Congress had the power to regulate and collect taxes on income regardless of their source. A separate law provided the taxation of income from various sources including legal businesses. However, three years later the Congress removed the word 'legal' from the law regulating tax collection without explaining what the modification meant.[41] Thus courts used to sentence offenders for tax evasion on the profit gained from illegal selling of alcohol. Yet, convictions in certain cases were critical toward such legal solutions since by taxing illegal income, the state thus became 'a silent partner' of defendants and legalized illegally obtained income.[42] As mentioned before, tax collection on illegal income obtained by selling drugs or bribery results in the legalization of such practice. In other words, instead of punishing offenders for their crimes and seizing their illegally obtained proceeds, the state legalizes illegal activities.

The connection between taxing illegal income and the Fifth Amendment to the USA Constitution has been analyzed both in the US theory and judicial practice. If citizens are obliged to declare illegal income, it means that they are obliged to report themselves which is directly opposite to the Fifth Amendment to the USA Constitution protecting a person from being compelled to be a witness against themselves in a criminal case.[43] The question is what should have advantage efficient tax collection or protection of civil rights and freedoms.

Both the US theory and judicial practice have dealt with the issue of tax computation on citizens' income and whether the tax basis should include expenses of illegal businesses. Namely, income tax is paid only on net profit, i.e. establishment charges should be deducted from gross income.[44] According to judicial practice (*Commissioner v. Tellier*, 383 U.S. 687, 691 (1996)), the tax basis on income tax may be reduced for the expenses of illegal businesses.[45] In this case, the offender claimed the current year tax basis to be reduced for the defence costs ($23 000). The Internal Revenue Service denied his claim, but the Court of Appeals reversed the judgment.

[40] L.G. Classen, "Legality and income tax - is SARS 'entitled to' levy income tax on illegal amounts 'received by' a taxpayer", *SA Mercantile Law Journal*, 4/2007, 534.
[41] B. I. Bittker, "Taxing Income from Unlawful Activities", *Case Western Reserve Law Review*, 1/1974, 131; S. M. Wolfe, "Recovery from Halper: The Pain from Additions to Tax is Not the Sting of Punishment", *Hofstra Law Review*, 1/1996, 174.
[42] *Steinberg v. United States*, 14 F.2d 564, 569 (2dCir. 1926).
[43] B. I. Bittker, 132; J.A. Goldstein, 802.
[44] D. H. Gordon, "The Public Policy Limitation on Deductions from Gross Income: A Conceptual Analysis", *Indiana Law Journal*, 2/1968, 408.
[45] D. A. Kahn, H. Bromberg, "The Tax Provisions Denying a Deduction for Illegal Expenses and Expenses of Illegal Businesses Should be Repealed", *Florida Tax Review*, 5/2016, 217.

Eventually, the Higher Court confirmed the judgment of the Court of Appeals and ruled that income tax referred only to net income, not a criminal sanction.[46] In other words, the aim of tax regulations is to collect tax on net income and not to punish individuals for breaching them. At first sight, the Court's decision is unacceptable since the incurred expenses are not in connection with taxing net income but with defence costs of the offender in the criminal procedure. However, it must be taken into account that paying defence costs is in accordance with law although it is the result of the offender's illegal activities.

It is important to say that the Court's attitude, in this case, is that income from illegal activities should be taxed at the same rate as legal income. Accordingly, taxing income from illegal activities may bring about a range of problematical legal issues which is one more reason in favour of the opinion that only legal income should be taxed. For instance, there is no single opinion in the USA whether tax basis on net income should be reduced because of the marihuana growing expenses. The problem arises from the fact that in some US states marihuana is legalized for medical use. Notwithstanding, under the US Federal Tax Law regulating income tax, tax basis reduction is not allowed to taxpayers who deal with the sale of controlled substances prohibited by federal or state law in which the sale takes place.[47]

The advocates of taxing illegal income are of the opinion that individuals who obtain profit by illegal activities should pay tax on such profit as those who pay it on their legal income.[48] Taxpayers who pay tax on their legal income should not be discriminated, because a hundred illegally obtained dollars can buy as much as a hundred legally earned dollars.[49] Even though such reasoning has its weight, it is unacceptable. Namely, while analyzing this issue, we should not only take into account the common good and equity but legal solution, i.e. linguistic interpretation of the law as well. The problem becomes bigger if the legislator does not give its view as in the aforementioned latest modifications to the Criminal Code of the Republic of Serbia. Moreover, it is wrong to compare an embezzler or a drug dealer with a taxpayer who legally earns his income. Straightforwardly, in accordance with criminal justice regulations, illegally obtained profit will be seized from the offender and relinquished to its owner, if possible, while a taxpayer will keep legally earned income.[50] Eugene James, prosecuted for tax

[46] D. H. Gordon, 410.
[47] Internal Revenue Code, 280E – Expenditures in connection with the illegal sale of drugs.
[48] D. A. Kahn, H. Bromberg, 223; S. M. Wolfe, 176.
[49] E. Finestone, 731.
[50] J. B. Libin, G. R. Haydon, "Embezzled Funds as Taxable Income: A Study in Judicial Footwork", *Michigan Law Review*, 3/1963, 440.

evasion because he embezzled $738000 belonging to the union funds, used the same argument. Notwithstanding, he was sentenced to three years' imprisonment. The Supreme Court took a stand that embezzled money was taxable although it would be seized from the offender and relinquished to the owner in accordance with criminal justice regulations (*James v. the United States*, 366 U.S. 213, 219 (1961)).[51]

Judicial practice standpoint on this issue has evolved, i.e. there is no generally accepted opinion with regard to taxing illegally obtained income. In Wilcox case, for instance, the Court dismissed the possibility of taxing embezzled money (*Commissioner v. Wilcox*, 327 U.S. 404, 407, 410 (1946)).[52] Wilcox embezzled the money of the company he worked for and gambled it away. He was convicted of embezzlement. The Court was not influenced by the fact that the embezzler gambled the money away. The Court was of the opinion that the relation embezzler – the damaged party can be compared with the relation debtor-creditor. Consequently, as a debtor's insolvency cannot constitute an obligation to tax his credit, so the gambled money, as in this case, cannot be taxed. It is interesting that Eugene James in his defence referred to the Wilcox case, but that fact did not influence the Supreme Court's decision in this case.

Nonetheless, this problem cannot be easily solved. For instance, in the case of embezzlement the question is: 1) whether embezzled money which technically does not belong to the offender should be taxed or 2) whether the offender should not be taxed, thus enabling him to keep illegally obtained income.[53] The starting point of the US theory and judicial practice, while considering tax basis of illegal income, is the definition given by the Supreme Court in several cases: 1. income is any gain whether from capital or employment or the combination of both (*Eisner v. Macomber*, 252 U.S. 189, 207 (1920)); 2. income is any gain completely controlled by a taxpayer (James v. the United States, 366 U.S. 213, 219 (1961)).[54] Both definitions enable taxation of illegal income obtained by embezzlement since such income is capital gain in case of embezzled money. On the other hand, the wrongdoer has complete control over the embezzled money.

The James case is a significant precedent for taxation of illegal income in the USA. However, we are of the opinion that the Court's standpoint, in this case, is unacceptable because the offender had to repay the embezzled money and to pay tax on that money although he could not keep it. Does

[51] J. B. Libin, G. R. Haydon, 426.
[52] D. D. Eckhardt, "Illegal income as a Defense in Criminal Tax Prosecution", *Marquette Law Review*, 4/1955, 266; E. Finestone, 717.
[53] E. Finestone, 714.
[54] *Ibid.*, 714-715.

it mean that the offender will be sentenced twice for the same offence? This solution is wrong both for the offender and the injured party because the offender may use part of the stolen money to pay tax, thus reducing the possibility of repaying the money to the injured party. Additionally, the USA Internal Revenue Service takes priority over an injured party when taxing illegal income is in question.[55] Oppositely, Serbian national legislation gives priority to an injured party with regard to the seizure of material gain (Article 93 of the CC), which is a fair solution.

However, in case the offender cannot relinquish the money for any reason (e.g. he spent or gambled it away), arguments in favour of taxing proceeds obtained from crime gain significance. One of the possible solutions is to tax the spent money, while the amount relinquished to the injured party would not be included in tax basis. Moreover, the advocates of taxing illegal income may argue that in case of drug trafficking, there is no injured party to whom the money should be relinquished, which is one more reason for taxing income acquired by unlawful activities.

5. Conclusion

Illegal income from selling drugs or other criminal offences cannot be taxed according to the existing law. In other words, the criminal offence of tax evasion does not exist if the offender gives false data on illegally acquired income or does not report illegal acquired income. If taxpayers were obliged to report illegally acquired income, it would mean that they should report themselves as lawbreakers. This is unacceptable since no provision of national legislation provides for the obligation of citizens to act against their own best interests. On the other hand, paying tax on illegally acquired income would imply the legalization of such income, which is unacceptable as well.

Current modifications of the Criminal Code (cancellation of the word 'lawfully' from the legal description of tax evasion) have as an objective more efficient criminal procedure. Hitherto, courts in each case had to establish that taxed income was lawful, thus diminishing criminal procedure efficiency.

According to the Serbian Criminal Code, illegal income is seized based on Article 87 of the CC providing seizure of objects as well as Articles 91-93 of the CC providing seizure of material gain and provisions of the Law on Seizure of the Proceeds from Crime. Our research has analyzed the effects of the aforementioned measures on illegal income obtained by a criminal offence of illegal production and circulation of

[55] S. M. Wolfe, 174.

narcotics provided for in Article 246 of the CC. The results of the research show that enforcement of these measures is not an effective means for the seizure of illegal income. Therefore, it must be pointed out that the court by legal duty must establish the existence of material gain obtained by a criminal offence (Article 538 of the CPC).[56] Although a number of examples from judicial practice indicated that a potential causation link between the commission of a criminal offence and obtained of material gain by an offender had to be established, courts did not respond adequately. Apparently, it is necessary to improve the cooperation and the share of information among police, public prosecution and courts on one side and the Tax Administration and other state organs on the other side (customs, real estate register, the Business Registers Agency, etc.). These state organs are key actors assisting the state to seize illegally acquired income from offenders. Prerequisite for the cooperation among these state organs is existence and updating of the citizens' income and real property database in the Tax Administration. Additionally, an international cooperation as regards gathering data on material gain obtained by a criminal offence is of crucial importance. The cooperation among neighbouring countries based on signed agreements, as well as the cooperation with international organizations (INTERPOL, EUROPOL) is also of utmost importance.

The USA experience shows that taxation of illegal income is not an adequate solution which may ensure efficient seizure of material gain obtained by a criminal offence. Accordingly, a number of complex legal issues are opened to which judicial practice in this country does not have an answer. Moreover, state organs should above all see that an injured party is redressed for the damage caused by a criminal offence and not to worsen their situation by taxing an offender for illegally obtained income. Additionally, taxing illegal income is not fairly for the offender, because they would thus be "twice punished" for the same offence. We are of the opinion that illegal income can be seized by efficient enforcement of existing provisions of Criminal Code and Law on Seizure of the Proceeds from Crime, which make taxation of illegal income unnecessary.

The paper does not analyze the provisions of the Law on Seizure of the Proceeds from Crime since they were not applied in criminal cases included in this research. According to Article 16a of this Law, when the police file criminal information to the public prosecutor for an offence provided for in Article 2 of this Law, they must submit relevant data on the suspect's and third party's property which were gathered in the course of

[56] The Criminal Procedure Code (*Official Gazette of the Republic of Serbia* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014).

the preliminary investigation. Bearing in mind that paragraph 6 of Article 2 of this Law sets forth illegal production and circulation of narcotics (provided for in paragraph 1 of Article 246 of the CC) as criminal offence referred to by provisions of this Law, the question is whether the police submit all relevant information to the public prosecutor with regards to the suspect's property. If they do, then why do courts take statements from the defendants?

The Law on Seizure of the Proceeds from Crime empowers state organs since paragraph 2 of Article 3 of this Law provides that: „Proceeds from crime shall denote assets of an accused being manifestly disproportionate to his/her lawful income". Basically, this means that it is possible to seize proceeds not obtained from crime even if it is disproportionate to his/her lawful income. Oppositely, seizure of material gain is a measure that is possible only if the decision of the court has determined commission of a criminal offence (paragraph 2 of Article 91 of the CC).

prof. dr Radosav Risimović
Kriminalističko-policijska akademija, Beograd

ODUZIMANJE ILI OPOREZIVANJE NEZAKONITO STEČENIH PRIHODA – PRIMER PRODAJE DROGE

Rezime

Krivično delo poreska utaja se najčešće ostvaruje davanjem lažnih podataka o stečenim prihodima i neprijavljivanjem stečenih prihoda, proizlazi iz našeg krivičnog zakonodavstva. Gramatičkim tumačenjem odredbe krivičnog zakonika koja propisuje ovo krivično delo može se zaključiti da prihodi koji se oporezuju mogu biti stečeni na zakonit i nezakonit način, jer se zakonodavac ne izjašnjava u pogledu ovog problema. Naime, izmenama i dopunama krivičnog zakonodavstva iz 2016. godine iz zakonskog opisa krivičnog dela poreska utaja brisana je reč „zakonito". Međutim, to ne znači da se mogu oporezovati nezakonito stečeni prihodi, što će u radu biti detaljno obrazloženo. Izvršićemo istraživanje sudske prakse u pogledu izricanja mere bezbednosti oduzimanje predmeta i mere oduzimanja imovinske koristi u krivičnim stvarima koje se odnose na krivično delo neovlašćena proizvodnja i stavljanje u promet opojnih droga iz člana 246 KZ. Na taj način ćemo

utvrditi da li se efikasno primenjuju ove mere i da li se ovim merama mogu oduzeti prihodi koji su stečeni prodajom droge. Deo rada biće posvećen razlozima koji govore u prilog i protiv oporezivanja nezakonito stečenih prihoda. U razmatranju ovog problema autor će se osloniti na iskustva SAD koje oporezuju nezakonito stečene prihode.

Ključne reči: nezakonito stečeni prihodi, zakonito stečeni prihodi, poreska utaja, prodaja droge.

Nikola Vujičić, M.A.[1]

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PHENOMENOLOGICAL AND ETIOLOGICAL CHARACTERISTICS OF JUVENILE CRIME IN SERBIA - COMPARATIVE ANALYSIS[2]

Abstract

The paper analyzed the general characteristics of juvenile crime, with special emphasis on the situation in the Republic of Serbia. The research is based on statistical data, comparative analyses and on a review of general theoretical concepts that attempt to explain the problem of juvenile crime. In the first part of the paper are listed the general terminology notes. Based on the analysis of statistical data, in the second part are presented the data about this type of crime in the Republic of Serbia in the period from 2005 to 2014, with emphasis on the general tendencies in other European countries - Phenomenological dimension. The etiological dimension of crime is dedicated to the third part of the work, which points to the basic theoretical approaches that seek to explain why juveniles committing criminal offences and what are the factors that most often affect the occurrence of the undesirable behaviour. Findings about Juveniles Crime in Serbia, are listed in the last part of paper, based on available data, and regarding this two dimensions - Phenomonological and Etiological.

Keywords: *criminality, juveniles, phenomenology, etiology, Serbia, Europe*

1. Introduction

The issue of juvenile crime is a serious problem nowadays, which is not possible to find a simple, concrete solution to. How to deal with minors who violate the norms of criminal law, and how to navigate the field of general prevention in order to prevent the exercise of unwanted behaviour by juveniles, are the basic questions that criminology, as well as other law-

[1] Assistant Researcher, Institute of Criminological and Sociological Research, Belgrade, Serbia, e-mail: *nikola.vujicic.law@gmail.com*.

[2] This paper won first place at the 3rd Methodology Competition, organized by Max Planck Partner Group for Balkan Criminology.

related and non-law-related disciplines, try to give an adequate answer to.

In order for a society to properly respond to juvenile crime, needless to say, there are questions that precede such a reaction and that are necessary to be answered in order for Juvenile Criminal Law (material, procedural and executive) to be the reflection of the needs of the community where it is implemented in the most comprehensive way. Some of these questions are: What is a juvenile crime? Which specific crimes are in question? Can some trends in the structure of the crimes be identified over a longer period of time? Why young people break the law? and so on.[3]

In theory, different definitions of juvenile delinquency are used, therefore sometimes it is not entirely clear what is meant by this term, although perhaps the largest number of theorists agrees that what is meant by the term is primarily an unadjusted behaviour of young people.[4] At this point it should be noted that this paper will present the data pertaining only to the delinquency of minors which includes "the totality of crimes in the given time and space dimensions"[5] – i.e. a violation of the norms of criminal law, and not the data concerning other forms of unwanted behavior of juveniles, such as misdemeanors, economic offences, and disciplinary offences of juveniles.[6]

If crime is viewed in the context of the violation of the norms of criminal law, it is necessary to make a distinction between the concepts of a minor, a child and a juvenile, which is done in most criminal codes, and within the legislation of the Republic of Serbia by the adoption of the Criminal Code (hereinafter: CC RS) [7] it is stipulated as follows: a minor is the widest term and encompasses the term a child - a person who has not reached fourteen years of age and who cannot be held criminally liable and the term a juvenile which entails a person who has attained fourteen years of age and has not attained eighteen years of age and who is subject to criminal responsibility.[8]

In the field of juvenile criminal law which represents "a part of the corpus of criminal justice disciplines with which it is closely related and upon which it relies on achieving its basic function – combating juvenile crime and providing criminal protection of minors"[9] the Law on Juvenile Offenders and

[3] Đ. Ignjatović, „Kriminalitet maloletnika: stara tema i nove dileme" - in: *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja* (ed. I. Stevanović), Beograd 2015, 19.

[4] M, Ljubičić, *Porodica i delinkvencija*, Beograd 2011, 21.

[5] Đ. Ignjatović, *Kriminologija*, Beograd 2015, 23.

[6] In criminological literature it is rightly pointed to the necessity of distinguishing between "juvenile delinquency" and "juvenile crime", since the terms "delinquency" and "crime" are not synonyms. V. Đ. Ignjatović (2015a), 20.

[7] Criminal Code of the Republic of Serbia - CC RS, *Official Gazette of RS*, Nos. 85/2005, 88/2005, 107/2005, 111/2009, 121/2012, 104/2013 and 108/2014.

[8] Article 112 Item 8, 9 and 10 CC RS.

[9] Lj. Radulović, *Maloletničko krivično pravo*, Beograd 2010, 3.

Criminal Protection of Juveniles adopted in 2005 (hereinafter: LJO)[10] is of particular importance and represents *lex specialis* in this field. In regard to CC RS, LJO makes a distinction between younger and older juveniles. *A younger juvenile* is a person who at the time of the commission of the criminal offence has attained fourteen and is under sixteen years of age, whereas an *older juvenile* is a person who at the time of the commission of the criminal offence has attained sixteen and is under eighteen years of age.[11]

The main purpose of this paper is, starting from the given introductory remarks, to point to the phenomenological and etiological dimension of juvenile crime in the Republic of Serbia, in the period of a decade since the adoption of the above mentioned *lex specialis*. The phenomenological dimension is firstly considered through the outline and processing of statistical data published by the Statistics Office of the Republic of Serbia (SORS) for the period from 2005 to 2014, and secondly through a comparative analysis of data on juvenile crime in the framework of European states and on the basis of international studies dealing with this issue. In this regard, it should be noted that the analysis included data about the reported and the convicted, but not the accused minors, as the latter represent a transitional category. Regarding the etiologic dimension, the paper provides an overview of the basic theoretical concepts with special emphasis on longitudinal studies that have been carried out in the USA in recent decades, as well as on new approaches in terms of explanations of certain forms of juvenile crime.

2. Phenomenological Dimension

The Statistical Office of the Republic of Serbia (SORS) published information about juvenile delinquency in the middle of July 2015, which comprised the analysis of data pertinent to reported, accused and convicted juvenile perpetrators of criminal offences between 2005 and 2014 (hereinafter referred to as *the Bulletin*). Since the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (LJO) is being applied for a decade, this information are significant for keeping up with the registered criminality of underage persons in the Republic of Serbia.

Nevertheless, similarly to other forms of criminality, in the case of juvenile delinquency modern criminology insists on the application of

[10] The Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles - LJO, *Official Gazette of RS*, Nos. 85/2005.
[11] Article 3 Paragraph 2 and 3 LJO.

comparative method[12] primarily due to the fact that juvenile criminal law is built upon more or less the same foundations in all European countries. Unlike to some earlier periods, when the access to certain data on criminality was restricted or almost impossible, this issue has been relativized in the past couple of decades, because many countries participate in projects aimed to facilitate the insight into the state of criminality through the accessibility of information and comparative analysis. When it comes to European countries, one of the most comprehensive publications providing the insight into the state of criminality is *the European Sourcebook of Crime and Criminal Justice Statistics* (hereinafter referred to as *the European Sourcebook*). The latest (fifth) edition of the European Sourcebook, published in 2014, comprises the data from the majority of European countries, and the observed period ranges between 2007 and 2011. Therefore, this publication will be used in some parts of the paper for the purpose of making a comparison with juvenile delinquency in Europe.

2.1. Statistics about reported juvenile crime

Between 2005 and 2014, the average number of reported juvenile perpetrators of criminal offences was 3594 and the smallest number of reports was registered in 2005 (2945), whereas the largest was registered in 2011 (4323). If we observe the entire population of reported offenders in the territory of the Republic of Serbia, the persons between the age of 14 and 18 comprise around 3,7% of the entire number of reported perpetrators with the lowest percentage in 2005 (2,8%) and the highest in 2010 (4,8%). In the last five years of the observed period, this percentage was around 4,2%, with the exception of 2014, when a significantly lower percentage of juvenile delinquents was registered in the entire population of reported perpetrators of criminal offences (3,3%). Although an increase of around 1%[13] has been evidenced lately, in comparison to the beginning of the 21st century, when the participation of almost 2,5% was registered, the Republic of Serbia still represents one of the European countries where juveniles, conditionally speaking, do not represent a serious problem. According to the data from the European Sourcebook, an average percentage of juveniles participating in the population of offenders is 9,3%, being the highest in France (18,5%) and the lowest in the European part of Russia (2,8%).

[12] At the beginning of the last century, a renowned American criminologist *Glueck*, strongly supported the comparative approach to the studies of crime, arguing that without its application neither could the similarities and differences between the effects of the factors leading to crime be understood nor could the predictive factors and the effects of preventive and treatment programs be observed . V. S. Glueck, Wanted: A Comparative Criminology - in: *Ventures in Criminology: Selected Recent Papers* (Glueck S. and E., Eds.) Cambridge, 1920.

[13] Đ. Ignjatović (2015a), 21.

2.1.1. Statistics about criminal offences and criminal procedure

Territorial distribution - According to the latest systematization applied in the Bulletin, the distribution of reported criminality is observed within the following arrangement: *the North:* (includes the city of Belgrade and Vojvodina) and *the South* (includes Šumadija and Western Serbia on one side and Southern and Eastern Serbia on the other). Since 1999 and Resolution UN no 1244, there have been no data for Kosovo. The observation of these criteria suggests that the participation of 44% was registered in the statistical unit of North (in Belgrade 9,6%, and in Vojvodina around 34,5%), the participation of 56% (Sumadija and Western Serbia 26%, Southern and Eastern Serbia 30%) was noted whereas in the statistical unit of South.

The structure of reported juvenile crime - If the average percentage for a ten years' period is observed, juveniles in the Republic of Serbia have most frequently been committing criminal offences against property (60,8%), life and physical integrity (12,7%), public order and peace and legal instruments (9,4%), road traffic safety (4,3%) and human health (3,7%).

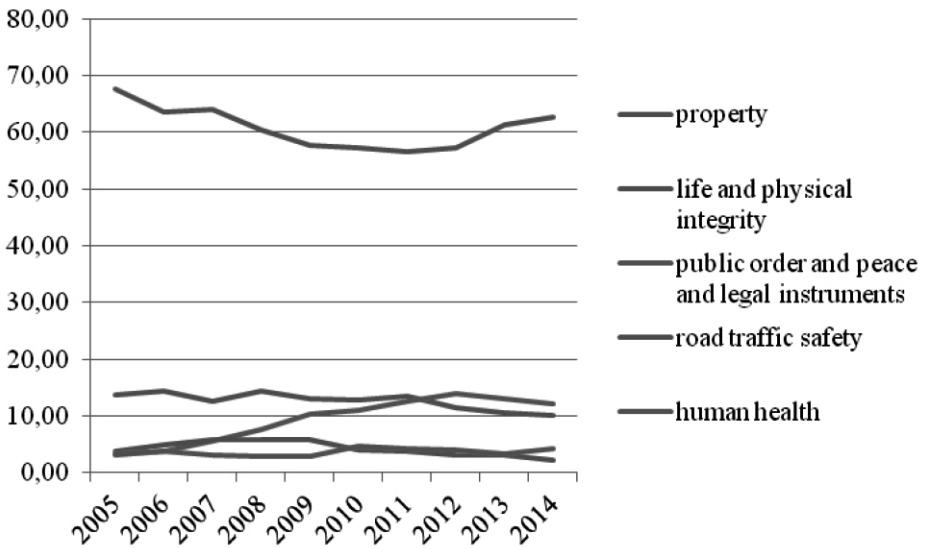

Figure 1. The structure of reported juvenile crime (source: SORS)

The data presented in figure 1 show that the largest, and at the same time constant, the increase has been registered in the percentage of criminal offences against public peace and order and against legal instruments, with a slight decrease in the past two years (in 2014 it was 12,1%). When it comes to other groups of criminal offences, as it has been mentioned previously, juveniles in the Republic of Serbia most frequently

commit criminal offences against property, the participation of which in the entire structure of criminality significantly decreased in 2011 (the lowest participation of 56,7% was registered in 2011). In 2012 this trend changed, and the increase was registered in that period, whereas in 2014 the participation of 62,8% was noted. A slight increase was registered in the percentage of criminal offences against human health (4,2% in 2014), whereas the percentage of criminal offences against life and physical integrity and against road traffic safety decreased.

If we observe individual criminal offences in this context, in comparison to juveniles from other European countries, juveniles from the Republic of Serbia tend to commit a smaller number of criminal offences against road traffic safety, theft of motor vehicles, burglary and fraud, whereas the number of sexual assaults they have committed tends to remain within the European average (*this primarily refers to prohibited sexual acts from Article 182 of CC RS)* as well as light bodily injury. The statistics that could be considered alarming refer to violent criminal offences, which, according to the data from the European Sourcebook, are more frequently committed by the juveniles from the Republic of Serbia than by their peers from other European countries. For example, the European average for intentional homicide is 6,1% (in RS 8,6%), for aggravated bodily injury 10,4% (in RS 12,6%) for rape 12,1% (in RS 17%), for sexual abuse of child 21,9% (in RS 25,6%) etc.

Other statistics - The data presented in the Bulletin indicate that from 3110 reports in 2014, the police submitted altogether 2808 (around 90,3%), whereas the damaged party did so in 205 cases (around 6,6%). When it comes to the types of decisions made between 2005 and 2014, around 60% submitted reports were converted into the proposal for imposing criminal sanctions in later phases of criminal procedure, in 29,5% cases the procedure was not initiated, whereas the preparatory procedure was terminated in more than 10% of cases. Custody was imposed in 1,2% of cases, whereas the measure of temporary accommodation and surveillance, as a specific alternative to custodial measures was applied in 3,9% of cases.

2.1.2. Statistics about the perpetrators

Age of juveniles is relevant since, as it has already been mentioned, LJO makes a difference between younger and older juveniles, which reflects on the type of penal measures that can be imposed on the aforementioned categories of juveniles. In 2014, there was a balance between the percentages of reported juvenile offenders: in 49% of cases reports were submitted against younger juvenile offenders, whereas in 51% of cases, they were submitted against older juveniles

Gender structure: In the last observed year, from the total number of reported juveniles, a bit more than 8% were female, which represents one percent more than the average percentage for the past couple of years[14]. However, like in other European countries, female juvenile delinquents comprise a smaller part of the total amount of reported juvenile offenders and there have not been any significant variances from the European average.

Other statistics: When the *educational process* is concerned, it should be mentioned that the Bulletin for 2014 does not provide information about education for altogether 1000 juveniles, which makes around 32% from the total amount of juveniles reported in that year. Other available data show that around 55% juveniles participate in some kind of educational process (either regular or extraordinary), whereas around 13% of juveniles are not included in the educational process. *Family circumstances* - for 31% of juveniles there are no available data on this subject, whereas the others most commonly live with both parents - 49%, around 10% live only with their mother and less than 5% live with their father (others live in foster families or in social welfare institutions etc.).

2.2. Statistics about convicted juveniles

In a ten years' period analyzed in this paper, the average number of convicted juvenile offenders is 2034 (5,8% of the total amount of convicted persons) and the lowest percentage of convicted juveniles was noted in 2006 (1566 convicted juveniles, which makes 3,6% of the total number of convicted persons), whereas the highest percentage was registered in 2013 (2648 convicted juveniles, which makes 7,6% of the total number of convicted persons). Between 2010 and 2013, a sudden increase in the percentage of juveniles participating in the total amount of convicted persons was identified (around 7,1%), but that trend changed in 2014 when a sudden decrease to around 5,5% was registered.[15] The data published in the European Sourcebook show that average participation of juveniles in the structure of convicted persons goes around 6%. The lowest rate was registered in Poland 0,2%, and the highest in Denmark 23,1%. The participation of juveniles in the total amount of convicted persons in the Republic of Serbia is at the level that is average in European countries, and, when other countries in this region are concerned, a bit higher participation in comparison to the European average was registered

[14] Compare: Đ. Ignjatović (2015a), 23.

[15] The phenomenon of "losing criminality", which is present in crime statistics and refers to the fact that the number of persons appearing in each next step of criminal procedure decreases, can be noticed in juvenile crime as well. In 2014, 81 % of the total number of reported juveniles were accused and 65,40% were convicted.

in Bulgaria (7%) and Albania (8,1%), while it is much lower in Croatia (3,4%). It should be emphasized that some countries such as Great Britain, Slovenia, Cyprus, Czech Republic and Greece failed to deliver data about convicted persons, which, in a certain manner, relativizes the actual picture i.e. comparative approach in this field.

The structure of criminal offences for which the juveniles have been convicted does not differ significantly from the general structure of reported criminality. In 61,7% of cases, they were convicted for criminal offences against property, against life and physical integrity in 12,6%, against public order and peace and legal instruments in 9,3% and against road traffic safety in 3,3% of cases. The only noticeable difference refers to criminal offences against human health, where the percentage of convicted juveniles is higher than the percentage of the reported ones (the proportion: 5,4% - 3,3%).

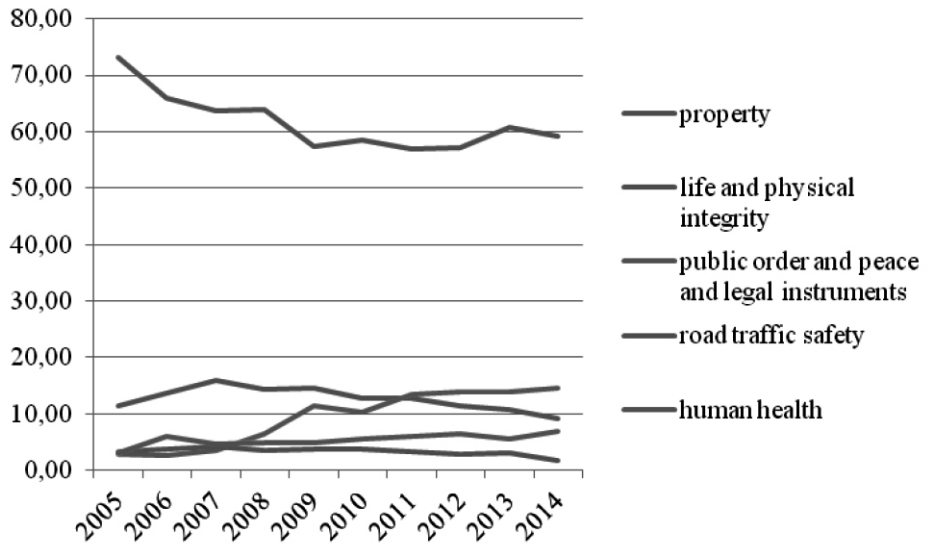

Figure 2. The structure of adjudicated juvenile crime cases (source: SORS)

As figure 2 shows, similarly to the cases of reported juvenile delinquency, the highest average increase in the number of convicted juvenile offenders in the analyzed period refers to criminal offences against public order and peace and against legal instruments. The increase also affected criminal offences against human health, the maximum number of which was noted in 2014, including 6,9%. When it comes to other criminal offences (against property, life and physical integrity and road traffic safety) a trend of decrease is noticed.

Statistics about the victims of juvenile crime: the Bulletin for 2014 provides data for only 398 victims, 65,5% of which are male and, when it

comes to age, in the observed year the majority of them were adults - 55,8%, whereas juveniles comprise 37,7% and children 6,5% of victims. But, in 2013 the data from the Bulletin showed a completely different picture about the victims of criminal offences. To be more exact, in that period, the majority of victims were male (96,8%) and, when it comes to the age of victims, in most cases, criminal offences were committed against juveniles - 60%. Such enormous difference between the observed two years could be the consequence of the collected data (in 2013 the statistics were available for 228 victims and in 2014 for 398). For that reason, general conclusions about the victims of juvenile perpetrators of criminal offences should not yet be drawn (which is sometimes done in Serbian victimology literature) at least until the information about a much larger number of victims is published in the Bulletins and made available. Also, it is noticeable that juveniles more often tend to commit violent criminal offences against their peers, whereas adults are more frequently the victims of criminal offences against property committed by juveniles (around 79%). Sexual offences represent the only group of criminal offences the victims of which are predominantly female (81%)[16] and a large number of which have been committed against children or juveniles (77%).[17]

Other statistics: Juveniles are more likely to commit criminal offences in a group (complicity) than adult offenders - in almost 2/3 of cases. Adults in RS acts as accomplices in around 1/4 of cases.[18] In 2014, some form of complicity existed in 65% of convictions (co-perpetration, incitement or aiding). The accomplices of juveniles were usually other juveniles – in about 70% of cases, adults in 15,2%, whereas in 7,5% of cases the accomplices were adults and juveniles and in the remaining 7% of cases, the accomplices were children. About 16,5% of juveniles have re-offended (i.e. been *previously convicted*).

When it comes to *age*, in 2014, from the total number of convicted juveniles, 59% belonged to the category of older juveniles. When *gender structure* is concerned, around 7% of them were female. *Educational level* of the juveniles is the following: 67% finished elementary school, 16% did not complete elementary education, 9% finished high school and 2,8% juveniles

[16] Researches show that the victims of sexual violence are still more frequently female and, according to the statistics of World Health Organization, about 25% of the entire world's female population have been subjected to some form of sexual abuse. V. K. Custers, J.V. Bulck, „The Cultivation of Fear of Sexual violence in Women: Processes and Moderators of the Relationship between Television and Fear", *Communication Research* 2013*,* 96.

[17] The research conducted in 37 different cultural backgrounds has confirmed that young persons, children and adolescents are most common victims of this form of violence, either because of their attractiveness or due to their helplessness. V. D.M. Buss, „Sex differences in human mate preferences: Evolutionary hypotheses tested in 37 cultures", *Behavioral and Brain Sciences* 1989, 12.

[18] Đ. Ignjatović (2015a), 24.

have not attended elementary school (there are not any available data for 4,6% of juveniles). About 66,7% of juveniles participate in the educational process, about 21% do not, whereas there are no data for about 12%. *Family circumstances*: the majority of convicted juveniles lived with: both parents (56,5%), mother (23%) or father (9,5%). When it comes to *nationality,* data presented the Bulletin show that the majority of juvenile offenders are Serbian.

Although the penal reaction is not the subject of this paper, it is important to mention that courts in the Republic of Serbia seldom impose the punishment of juvenile imprisonment (the average for a ten years' period is 1% of all sanctions imposed on juveniles). On the other hand, the data published in the European Sourcebook confirm that the Republic of Serbia is among the countries that most commonly choose non-custodial measures (in 96,1% of cases), which represents the second important characteristic of our penal policy. The European average regarding non-custodial measures is 54,9%, maximum of which was registered in Slovenia (97,9%). Apart from Slovenia and Serbia, non-custodial measures are also often imposed in Great Britain, Greece, Poland and Croatia. When it comes to the unconditional prison sentence, the European average is 11,6%, and the highest rate of 61,2% was registered in Lithuania.

3. Etiological Dimension

3.1. General Theories on Juvenile Crime

In modern criminology, there is a number of theories that seek to explain criminal behaviour in general or its particular types. Criminologists have always paid special attention to juvenile crime, and in addition to theoretical concepts, such as labeling theory or defiance theory, which in their basic form are nowadays mostly abandoned, in recent decades there is more importance given to developmental concepts, differential association and social control theories, as well as risk and protective factors theories which are all essentially integrative theories. In this regard, Robinson states: "true integrative theories are interdisciplinary, which means that they try to integrate the contributions of all empirical academic disciplines. With the interdisciplinary approach, criminological theory can more efficiently explain antisocial behaviour and delinquency for it is based on empirical research of a wider spectrum of academic disciplines".[19]

While talking about **the labelling process** Wheeler and Cottrell suggest that "a label has an important effect on how others treat an

[19] M. Robinson, „The Integrated Systems Theory of Antisocial Behavior", in: *Teorije u kriminologiji* (ed. Đ. Ignjatović), Beograd 2009, 483.

individual". These authors focus especially on juvenile offenders, expressing a standpoint according to which there should be more effort put in the development of new forms of control of unacceptable conduct of a juvenile, i.e. that the police and the courts should not be involved in every case, but that schools and child care institutions need to develop specific programs that would help 'rehabilitate' such children. In these cases, the aim would be to avoid premature labeling of a young person as deviant or delinquent, and at the very end, the authors state that "the wisest policy is to refrain from implicating children in the delinquency control apparatus in so far as possible and to invoke the apparatus only when it is clear that the conduct of the juvenile in question requires it for the protection of the community".[20]

Negative effects occur when an offender is treated in an unfair and disrespectful way by the agencies of formal social control, i.e. a kind of defiance occurs that affects future criminal behaviour, as Sherman states in his **defiance theory**.[21] According to this author without paying attention to the characteristics of the formal social control agencies' treatment of young people from the streets, punishing them will more likely have defying than intimidating effect; in other words – it will be counterproductive.

Developmental concepts in criminology are developed on the basis of empirical observations of continuity in criminal behaviour: crime in early adolescence is a predictor of crime in late adolescence and adulthood. From the perspective of developmental concepts, conduct disorder usually starts at preschool age, and typically as an oppositional defiant disorder, for it to develop, with a certain number of children, into an antisocial personality disorder in adulthood. Today special attention is paid to the developmental theory which was established by Moffitt and which distinguishes between life-course-persistent antisocial behavior - a smaller group; minors who begin offending in early childhood and continue into adulthood and adolescence-limited antisocial behavior - a bigger group, in which certain forms of antisocial behavior manifest only during the indicated stage of life.[22]

Unlike developmental concepts, **interactionist developmental model**, whose most prominent representative is Patterson, proceeds from the standpoint that many children in conflict with the law in early

[20] S. Wheeler, L. Cottrell, „Juvenile Delinquency Its Prevention and Control", in: *Teorije u kriminologiji* (ed. Đ. Ignjatović), Beograd 2009, 330, 332.

[21] L. Sherman, „Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction", *Journal of Research in Crime and Delinquency*, 1993, 445-473.

[22] T. Moffitt, „Adolescent Limited and Life-course Persistent Antisocial Behavior: A Developmental Taxonomy", *Psyhological Review*, Vol. 100, 1993, 674-701.

adolescence do not develop criminal careers. This author, together with his associates, identifies dysfunctional families, i.e. disruptions that occur in a family during a minor's early childhood and prepare him/her to enter deviant peer groups as the main problem. The conducted research shows that stronger family cohesion can protect children from the influence of deviant peers, especially when such a change is visible through success at school and through independent comparison of a young people with their peers.[23]

Hirschi's **Social Control Theory** is based on bridging the link between individuals and conventional social institutions in order to explain delinquent behaviour. He argued that a strong social bond to social institutions, such as schools, promotes conformity to conventional norms. Individuals who possess weak or broken social bonds to conventional institutions are more likely to engage in deviant behaviour. According to Hirschi, an individual's bond to social institutions consists of four elements:

- emotional attachment to parents, peers, and conventional institutions, such as school and work;
- commitment to long-term educational, occupational, or other conventional goals;
- involvement in conventional activities such as work, homework, hobbies;
- belief in the moral validity of the law.[24]

Church with a group of authors established a regularity and that is that the majority of theories, both social control and differential association theory, seek the causes for juvenile crime mainly in the family and the social environment of young people. For this reason, at the beginning of the 21st century, they conducted a study in which they tried to explain how family connections, stressors that exist within the family, the way young people perceive the importance of relationships outside the family, as well as the way young people perceive themselves, and contacts with delinquent peers influence young people to become delinquents. By examining three basic variables - stressors that occur within the family, family coherence and the importance of relationships outside the family - they came to the conclusion that only stressors that occur within the

[23] G. R. Patterson, B. D. DeBaryshe, E. Ramsey, „A developmental perspective on antisocial behavior", *American Psychologist* 1989, 333-334.
[24] See A. A. Peguero *et al*. „Social Control Theory and School Misbehavior: Examining the Role of Race and Ethnicity'', *Youth Violence and Juvenile Justice*, 9 (3)/2011, 260.

family are the variable that has a direct impact on delinquency.[25] In other words, these authors confirmed the claim presented by Patterson and that is the problem of juvenile delinquency should be sought in dysfunctional families. Apart from the already mentioned variables, these authors examined the influence of race (belonging to a particular race) as a potential factor in the development of juvenile delinquency. Interestingly, the study found that race is not a significant predictor of the occurrence of crime, which in some way destroys prejudices that exist regarding, for example, negroid race.[26]

Life-course theories deal with resolving certain important etiological dilemmas in criminology. One of these major dilemmas involves the question of gender differences concerning the inclination to delinquency and persistence of offending, while the other dilemma concerns the effects of the criminal justice system on crime rates.[27] The presented statistics on juvenile crime in the Republic of Serbia in the period from 2005 to 2014 confirm the baselines of longitudinal studies which stated that there is a far greater share of males within the overall juvenile crime structure.

Integrative-systemic theory of antisocial behaviour, set up by Robinson, associates risk factors with antisocial behaviour (the presence of appropriate factors increases the likelihood of an antisocial behaviour, but it should not be forgotten that there are also protective factors that can prevent the effects of risk factors). Also, he states the four main periods of an individual's life in which certain factors that may have greater or lesser influence on the occurrence of antisocial behaviour and crime operate. The first period is the period before birth and immediately after birth, the second period represents the early childhood, the third is the period of adolescence, and finally, the fourth period is the period of early adulthood.[28]

In the area of juvenile crime prevention in recent years, there has been more and more discussion about **risk and protective (resistance) factors**. As well as the integrated systems theory of antisocial behaviour, these theories also instead of 'the causes' as direct generators of the criminal behaviour deal more with the factors that increase the risk of occurrence of such conduct. DeMateo and Marczyk define risk factors as "external or internal influences or conditions that *are associated*

[25] W.T. Church, T. Wharton, J.K. Taylor, „An Examination of Differential Association and Social Control Theory - Family Systems and Delinquency", *Youth Violence and Juvenile Justice*, 7 (1)/2009, 12.
[26] *Ibid.,* 13.
[27] B. Simeunović-Patić, *Kriminalitet maloletnika u Republici Srbiji i savremena društvena reakcija*, PhD disertation, Pravni fakultet Univerziteta u Kragujevcu, 2009, 47-48.
[28] M. Robinson, 491-492.

with or predictive of a negative outcome", while protective factors are defined conversely as "external or internal influences and conditions that *decrease the likelihood of a negative outcome or enhance the likelihood of a positive outcome"*.[29] What some authors criticize about this division is the fact that the protective factors are not well examined; i. e. the bulk of research is dedicated to the influence of risk factors on the occurrence of crime and therefore conclusions should not be easily made that protective factors, which are often enumerated in criminological literature, really lead to juvenile crime prevention.[30] A research carried out by Stouthamer-Loeber and her associates showed that certain protective factors do not always lead to protection (prevention) and that they can have main effects on the occurrence of juvenile delinquency (and thus of juvenile crime), i. e. that certain factors cannot be determined as solely "protective factors" or as solely "risk factors".[31]

The study, which was dedicated to the prevention of violence - *Reducing Risk and Increasing Capacity Project: Children, Youth and Families At Risk* (Haugen 2000) again pointed out that there are four groups of risk factors that occur in connection with the violence of minors:

- *Individual Factors* - Alcohol abuse, Illicit drug use, Central nervous system dysfunction, Early aggression and antisocial behaviour, Oppositional and conduct disorders, Attention deficit and hyperactivity disorder, Individual temperament, Biological deficits that can complicate or interfere with bonding and teaching of prosocial values and norms, Bias, racism, prejudice etc.;
- *Family* - Parental involvement in violence or crime, Poor attachment to parents, Poor parental supervision, Inconsistent and harsh discipline, Disruptions in caregiving, Child abuse, Weak family bonding, Exposure to and reinforcement of violence in the home, Absence of social bonds and controls etc.;
- *Neighborhood and Community* - Absence of any effective social or cultural organization in neighborhoods, which is connected to high rates of crime, No effective means of resisting violent activity - no cohesion, Living in impoverished, high-crime areas, Lack of accessible services, Lack of recreational space and activities, Feeling unsafe, need for self-defense, Bias, racism, prejudice, Gang membership based on a need to belong etc.;

[29] B. Simeunović-Patić, 61.
[30] J.C. Howell, A. Egley, „Moving Risk Factors into Developmental Theories of Gang Membership", *Youth Violence and Juvenile Justice,* 3 (4)/2005, 335.
[31] M. Stouthamer-Loeber *et al*., „Desistance from persistent serious delinquency in the transition to adulthood", *Development and Psychopathology*, 2004, 16, 898.

- *School and Peers* - Associations with delinquent and drug-using peers, Gang membership, No prosocial peers, Peer rejection, Poor success in school, Low attachment to teachers, Dropping out of school, Low educational goals, Feeling unsafe, need for self-defense, Bias, racism, prejudice, In the case of gang violence, the need to belong and for self-protection etc.[32]

The most important protective factors to which the literature indicates are: the presence of care and support by an important person in a young person's life; high expectations and positive belief that activate innate vitality and self-rectifying capacity of adolescents and finally, last but not least, the possibility of participation of minors in those activities that require of them to show a certain level of responsibility.[33]

3.2. Some Forms of Juvenile Crime

In addition to these general theories, the literature often points to two specific forms of juveniles crime: peer violence that happens in schools and the phenomenon of juvenile gangs.

Violence in schools - despite declining of crime rate, remains a serious problem. The study, which was conducted in 2009 in the US, shows that there are many forms of violence at school. But, one of the most common is physical fighting. In 2009, almost 6% of high school students reported having been in a physical fight at school. Also, *National Crime Victimization Survey* shows that in the US during the 2009 school year, almost two-thirds of public schools reported at least one violent incident and 16% reported one or more incidents of serious violence.[34]

Youth gangs are a special form of organizing of young people with the aim of carrying out activities that have characteristics of minor or serious crimes. At the end of the 1990s, there was a sudden increased interest in studying of this form of juvenile crime, which mostly originated in the developmental theories, interactionist theories and the already mentioned risk and protective factors. The developmental path of gangs is characterized by:

1. First, risk factors for gang membership span all five of the risk factor domains: family, peer group, school, individual characteristics and

[32] H. Haugen, *Prevention of Youth Violence*, New York 2000, 7-8.
[33] O. Pavićević, I. Stevanović, „Rizična ponašanja dece i mladih - rizik i otpornosti", in: *Maloletnici kao učinioci i kao* žrtve *krivičnih dela i prekršaja* (ed. I. Stevanović), Beograd 2015, 300.
[34] K. James, J. Bunch, J. Clay-Warner, „Perceived Injustice and School Violence: An Application of General Strain Theory", *Youth Violence and Juvenile Justice,* 13 (2)/2015, 169.

community conditions. In a longitudinal study, which was conducted at the end of the twentieth century in Seattle (USA), risk factors measured at ages 10 to 12 in each of the five domains predicted gang joining at ages 13 to 18.[35]

2. Second, risk factors have a cumulative effect; that is, the greater the numbers of risk factors experienced by the youth, the greater the likelihood of gang involvement. In the previously mentioned study in Seattle, youth who possessing seven or more risk factors were 13 times more likely to join a gang than were children with no risk factor indicators or only one risk factor indicator.[36]
3. Third, the presence of risk factors in multiple developmental domains appears to further enhance the likelihood of gang membership. *Rochester* study shows that a majority (61%) of the boys and 40% of the girls who exhibited elevated risk in all domains self-reported gang membership. In contrast, only one-third of the boys and one-fourth of the girls who experienced risk in a simple majority of the domains joined a gang.[37]

Thornberry and colleagues', starting from the theory of interaction, set the three basic premise when it comes to juvenile - male gangs, which may have an impact on the construction of criminal careers during the life of the individual, namely:

1. First, their theory adopts a developmental or life-course perspective that posits that the causes of behaviour are not set or determined in childhood. Rather, "*behaviour patterns continue to unfold and change across the person's life, in part because of the consequences of earlier patterns of behaviour*";
2. Second, their theory emphasizes behavioural interactions and bidirectional causality: "*Behavior patterns emerge from interactions between the person and his or her environment and not simply from the environment acting upon the individual*";
3. Third, their theory incorporates the effect of both social structural influences and social-psychological processes, whereby the former "*influences and to some extent determines the initial values of process variables at early stages in the life course*".[38]

[35] K.G. Hill *et al*., „Childhood risk factors for adolescent gang membership: Results from the Seattle Social Development Project", *Journal of Research in Crime and Delinquency,* 36(3)/1999, 301.
[36] *Ibid*.
[37] T.P. Thornberry *et al*. „Causes and consequences of delinquency: Findings from the Rochester Youth Development Study" - in *Taking stock of delinquency: An overview of findings from contemporary longitudinal studies* (eds. T. P. Thornberry, M. D. Krohn), New York 2003, 12.
[38] *Ibid*., 13-14.

4. Conclusion and discussion

Juvenile crime is a phenomenon that has in recent decades deserved special attention of criminologists. After the statistical data are examined, the following question can be asked: is it really necessary to have so many theoretical concepts that attempt to explain why young people commit crimes? In short, taking all the above mentioned into consideration, but also what has not found its place within the framework of a paper, the affirmative answer should be given in reply to this question. The fact that something is not a dramatic issue when compared with something else that is is not enough of a reason in itself not to think about such an issue and for society not to react adequately. The absence of a response of any kind (or more precisely: the absence of an adequate response) can be a stimulus to a young person to further commit criminal offences, i.e. it can be an incentive to pursue a criminal career throughout his/her life.

Theories in criminology should provide basic guidelines for resolving the issue of juvenile crime. As stated within specific theoretical concepts, mechanisms (apart from the activation of the criminal justice apparatus of a country) which act preventively to potential juvenile offenders should be found. The principle according to which the criminal law is *ultima ratio* comes to the fore with this category of offenders.

If there is a need to incline towards a certain theory, a slight advantage should be given to the integrative approach. The reasons for this are manifold but the most important reason is that not one phenomenon in modern society can be viewed in isolation from other phenomena. It is difficult to find the culprit only in the individual, or only in the company, one keeps, and not take into account factors related to school, peer relations and the so-called environmental factors. The advantage given to the integrative approach, namely to the theories that deal with risk and protective factors, is not absolute, which implies that it would be beneficial to use the achievements of some earlier theories.

Concerning juvenile crime in the Republic of Serbia, within the observed ten-year period, we can state the following:

- The share of minors (persons between the age of 14 and 18) in the overall crime structure is relatively low, and it amounts to 3.7% in comparison with the total number of reported persons;
- Compared to the period before the adoption of LJO, i.e. compared to the beginning of the 21st century, when the average share of minors in the overall crime structure amounted to 2.5%, in the observed period there was a marked increase by a somewhat more than 1%, which is most often explained by the period of transition Serbian society has been experiencing in the last 15 years;

- As the average share of minors in the overall crime structure in the region of Europe, according to the data presented in the last issue of European Sourcebook, amounts to 9.3% it can be ascertained that minors in the Republic of Serbia commit crimes more rarely than their peers from other European countries;
- When it comes to gender structure there has been an increase in the share of females in the overall juvenile crime structure in the observed period by around 1% (the multi-year average amounts to around 7%);
- Reported juvenile crime structure: ranges within the multi-year averages, i.e. minors in Serbia most often commit property crimes (the average: 60%) while it should be noted that there has been a constant decrease in this group of offenses in the period from 2005 to 2011 (the lowest share was recorded in 2011 and it amounted to 56.7%) with a considerable increase in the share of offenses against public order and safety and legal instruments. In the period from 2012 to 2014 an increase in the share of property crimes in the overall reported juvenile crime structure was recorded again;
- Although minors in the Republic of Serbia most often commit property crimes the data that is worrying is that they considerably more often than their peers in other European countries commit crimes with the elements of violence, such as murder, grievous bodily harm or rape - the fact of the matter that has earlier been pointed out by Serbian academic community.
- Victimization: Since the data on persons who are victimized by minors varies considerably in each observed year (the paper gives examples for 2013 and 2014), which is a result of poor availability of data recorded for statistical materials, general conclusions about the victims of juvenile offenders should not be made, as such tendency can sometimes be perceived in domestic literature on victimology.

The literature on criminal justice and criminology in Serbia abounds in papers which deal with the issue of juvenile crime but, above all, in the context of society's reaction to this form of crime. It seems that it is still necessary to consider the etiological dimension as well, since the logical sequence of actions requires that reasons for, i.e. causes of the occurrence of unwanted behaviour in young people are established first, and only then find mechanisms to be implemented in order to fight crime. This should be particularly so because the draft of a new juvenile criminal justice system has already been presented, and which was not preceded by a more serious analysis of the current situation in Serbia.

The paper refers to some basic theoretical concepts indicated in the literature on criminology, but also to more recent, mostly longitudinal research. The example of a longitudinal research carried out by Karl Hill and

his associates, or so-called the *Rochester* study, could serve as a model for carrying out a research which should answer the question why minors in the Republic of Serbia in 2/3 of cases commit crimes in groups, i.e. why in 70% of cases other minors appear to be accomplices to crimes.

Future criminological research should both move in the direction of finding adequate solutions, and giving as accurate answers as possible concerning the reasons why young people engage in unwanted conduct, whereby the attitude towards juvenile offenders should not be exclusively "protective" because he/she did commit a crime, with all its objective and subjective elements. In other words, the perpetrator is not the victim, and in addition to the ubiquitous "gentle approach" to this issue, we should also think about a different kind of society's reaction when it comes to those categories of minors who commit the most serious crimes.

Nikola Vujičić
Istraživač pripravnik, Institut za kriminološka i sociološka istraživanja, Beograd

FENOMENOLOŠKE I ETIOLOŠKE KARAKTERISTIKE KRIMINALITETA MALOLETNIKA U SRBIJI - KOMPARATIVNA ANALIZA

Rezime

U radu su analizirane osnovne karakteristike kriminaliteta maloletnika u Republici Srbiji u periodu od 2005. do 2014. godine, sa posebnim osvrtom na komparaciju kriminaliteta u okvirima evropskih država. Ukoliko se sagleda zvanična statistika, ovaj tip kriminaliteta u Srbiji ne predstavlja veliki problem, budući da učešće maloletnika u ukupnoj strukturi kriminaliteta iznosi 3,7% (evropski prosek je 9,3%). I mada maloletnici najčešće vrše krivična dela protiv imovine, u posmatranom periodu je zabeležen porast vršenja krivičnih dela sa elementima nasilja, pre svega se misli na krivična dela protiv života i tela, pri čemu su stope u Srbiji znatno više u odnosu na prosečnu evropsku stopu. Kada je reč o kaznenoj politici, Srbija se uz Sloveniju, Veliku Britaniju, Poljsku i Hrvatsku, ubraja u one zemlje koje kaznu maloletničkog zatvora vide kao krajnju meru, odnosno sudovi se najčešće opredeljuju za izricanje vanzavodskih mera i sankcija.

Ključne reči: kriminalitet, maloletnici, fenomenološka dimenzija, etiološka dimenzija, Srbija, Evropa.

Aleksa Radonjić LL.M.[1]

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UNFAIR CONTRACT TERMS AND SMEs IN BW AND DRAFT CC OF SERBIA

Abstract

This article is inspired by the ever-growing literature on the protection of weaker parties to contractual relations emphasizing that consumers are not the only weaker parties which should be protected. It is submitted that SMEs lack the bargaining power, expertise or suffer from information asymmetry in contractual relations in the same way as consumers do. In this article, the author chose to analyze the position of SMEs when it comes to policing of unfair standard contract terms, as it is repeated that the protection against unfair contract terms is a paradigm of weaker party protection. The article compares the way in which the control of unfair contract terms is regulated in the BW and in the DGZ. The pros and cons regarding the categorical protection of SMEs against unfair terms were explored, and two conclusions were reached. First, the benefits of categorical protection of SMEs outnumber the drawbacks. Second, BW is more in line with the arguments that are given for the protection of SMEs than DGZ, and DGZ could draw some inspiration in this area from BW.

Keywords: *SMEs, unfair contract terms, weaker party protection, civil code.*

1. Introduction

This article is inspired by the ever-growing literature on the protection of weaker parties to contractual relations emphasizing that consumers are not the only weaker parties which should be protected. In fact, there are more and more voices claiming that certain businesses deserve the same or similar kind of protection as consumers. For example, it is stated that "consumers have no exclusive title to legal protection against market asymmetries that create inequality of bargaining power between

[1] Teaching assistant at the Union University Faculty of Law, e-mail: *aleksa.radonjic@pravnifakultet.rs*.

a weaker and a stronger party to a business contract…"[2] This is because the typical reasons for the protection of consumers may be used to justify the protection of micro, small and medium-size enterprises (SMEs) too. It is submitted that SMEs lack the bargaining power, expertise or suffer from information asymmetry in contractual relations in the same way as consumers do.[3] Therefore, in order to treat like cases alike and different cases according to those differences, it is stated that kind of protection afforded to consumers should be extended to SMEs or at least to the smallest of SMEs.[4] Hence, the SMEs deserve to be considered the weaker parties to contracts and should be able to rely on the weaker party protection mechanisms. After all "the policing of unfair terms (especially limitation clauses) and doctrines like *Wegfall der Geschäftsgrundlage* (frustration of contract) were first developed in business-to-business (b2b), not in business-to-consumer (b2c) relationships."[5]

In this article, the author choose to analyze the position of SMEs when it comes to policing of unfair standard contract terms, as it is repeated that the protection against unfair contract terms is a paradigm of weaker party protection[6] and that it is "one of the most obvious ways to foster contractual justice".[7] Furthermore, it was compared the way in which the control of unfair contract terms is regulated in the Civil Code of the Netherlands (*Burgerlijk Wetboek* or BW)[8] and in the Draft Civil Code of Serbia (DGZ)[9]. The author opted for the BW considering that the Commission which made the DGZ had paid special attention to the

[2] V. Roppo, "From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?", *European Review of Contract Law* 3/2009, 311.

[3] M. W. Hesselink, "SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis", *Centre for the Study of European Contract Law Working Paper Series 2007/03(CSECL Working Paper Series)*, 14.

[4] M. W. Hesselink, "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", *2009/06(CSECL Working Paper Series)*, 6.

[5] M. Hesselink, "Post - Private Law?", in: *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (eds. Kai Purnhagen, Peter Rott), Springer 2014, 35.

[6] J. G. Klijnsma, *Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law (PhD Thesis)*, Amsterdam Law School University of Amsterdam, Amsterdam 2014, 139, *https://dare.uva.nl/search?identifier=436e5079-6363-4ac3-a207-5b0dd002f33f*, last visited December 11, 2017.

[7] H. Beal *et al.*, *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford and Portland 2010., 757.

[8] Burgerlijk Wetboek, *http://www.dutchcivillaw.com/civilcodegeneral.htm* , last visited December 11, 2017.

[9] Građanski zakonik Republike Srbije. Radni tekst pripremljen za javnu raspravu sa alternativnim predlozima – DGZ, 2015.

BW[10] and because of the Dutch courts in the past and the legislator in the present provided (to a certain extent) the protection of SMEs when it comes to standard contract terms.[11] DGZ is chosen because we wished to see where it stands against the background described in this introduction and compared to the BW which recognizes SMEs to an extent as weaker contracting parties. Of course it would have been even better to include other codes but that would exceed the scope of this article by far.

Considering the above said first the article will show how the matter of standard contract terms is regulated under BW (2) and DGZ (3). Afterwards the solutions offered in the codes will be compared (4). Then the pros and cons for the protection of SMEs will be addressed (5) and finally, some conclusions will be drawn (6).

2. The Civil Code of the Netherlands

The Dutch legislator dedicated seventeen articles of BW to standard contract terms.[12] Such a big number is owed, in part, to the fact that the Netherlands decided to integrate the whole of contract law into BW, thus to include the consumer contract law as well. However, this is not the only reason. A great number of articles dealing with standard contract terms is also owed to the fact that the Dutch legislator paid the attention to certain details some of which shall be mentioned here.

Article 6:231 (a) BW defines standard terms and conditions as "one or more contractual provisions or stipulations, drafted to be included in a number of contracts", not including the "provisions and stipulations that indicate the essence of the performance under the obligation" unless the latter is defined ambiguously or unclearly, which should imply that in such cases they too are susceptible to the judicial review.

Article 6:233 BW declares voidable standard terms if:

a) they are "unreasonably burdensome for the counterparty, having regard to the nature and content of the contract, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case";
b) "if the user has not given his counterparty a reasonable opportunity to take knowledge of the content of the applicable standard terms and conditions."

In addition to the aforementioned unfairness test, BW gives clarifications as to what "a reasonable opportunity to take knowledge"

[10] Komisija za izradu Građanskog Zakonika, *Rad na izradi Građanskog Zakonika Republike Srbije. Izveštaj o otvorenim pitanjima*, 2007, 18.
[11] M. W. Hesselink (2009), 156.
[12] Art. 6:231-6:247 BW.

actually means in different situations.[13] Finally, BW prescribes that once a particular standard term is nullified by the court, that particular term is voidable should the user use this term in his standard terms and conditions again in any other contract he concludes.[14]

What is interesting about BW regarding the policing of standard terms and conditions is a personal scope of these provisions. Namely, the drafters of the BW decided for the nuanced approach by which only small businesses with less than 50 employees and consumers may rely on the articles 6:233 and 6:234.[15] Consumers additionally benefit from the black and grey lists of unfair terms and conditions, one containing the terms and conditions which are "always unreasonably burdensome for consumers"[16] and the other containing those which are "presumed to be unreasonably burdensome for consumers"[17]. Businesses with 50 or more employees may rely solely on the general requirement of good faith.[18] However, there is one very important provision of BW regarding standard terms and conditions which is applicable to businesses regardless their size. It is the norm which protects the contracting parties which find themselves in the middle of a distribution chain. Namely, article 6:244 BW provides protection to a business who has used standard terms which have been nullified in relation to his customer but is bound by the same or similar terms in relation to his supplier, by preventing that supplier to invoke those terms and conditions in relation to the said business. As I already stated, this article protects all the business parties in the chain regardless their status and size.[19]

Last but not the least, the black and grey lists provided for in articles 6:237 and 6:238 BW respectively although directly applicable to consumer contracts only have *Indizwirkung*, meaning they may serve as "indicative of what is to be considered unfair under the more general open norm, which… applies also to B2B situations."[20] This can be read out of the explanatory commentaries to the draft BW which imply that the fact that a contract term is listed in the black or the grey list may indicate that it is unreasonably onerous to the other party.[21]

[13] See art. 6:234 BW.
[14] See art. 6:243 BW.
[15] M. W. Hesselink, (2009), 33 fn. 156.
[16] See art. 6:237 BW.
[17] See art. 2:238 BW.
[18] M. W. Hesselink, (2009), 33 fn. 156.
[19] see comment to the art. 6:244 BW
[20] J. G. Klijnsma,2014., 135.
[21] H. Beal *et al.* (2010), 796.

3. The Draft Civil Code of Serbia

At present in Serbia, like in e.g. Austria, Greece or France[22], the consumer contract law is separated from the rest of the contract law and it is regulated in a special statue. The rest of contract law in Serbia is governed by the Law on Obligations (ZOO)[23]. Consequently, there are two sets of rules governing standard contract terms, and needless to say that these sets of rules treat this topic differently. The way in which the rules governing the standard terms and conditions are formulated in the DGZ is almost word-for-word taken from the current ZOO[24], with the addition of one new article in the DGZ which is not crucial for the topic at hand. In addition, the drafters decided to keep the consumer contract law out of the Code. Therefore, once the Code is adopted there will be no significant change in this area of law compared to the present state.

And what is the present state (and quite likely the future too)? ZOO like DGZ defines standard terms and conditions as predetermined by the user of those terms regardless of whether they are only referred to in the contract or are made part of the contract.[25] Furthermore, the user of the terms is bound to "make them public in a usual way".[26] Finally, if there is discord between the negotiated and standard terms, the former will prevail.[27]

The unfairness test prescribed by ZOO (and DGZ) is twofold. Namely, in art.143(1) ZOO (284(1) DGZ) it is stated that standard terms which are contrary to the goal of the contract or to good business practices are null and void even when approved by the public authority. Therefore, the goal of the contract and good business practices are the points of reference when testing the fairness of standard contract terms, and the nullity is the sanction should there be any discord between the terms and the goal of the contract or the good business practices. On the other hand, article 143(2) ZOO (284(2) DGZ) states that courts MAY (emphasis added) refuse to apply standard terms and conditions should they prevent the contracting party to rely on certain remedies, rights etc., or are generally unfair or particularly onerous for that party. The wording of article 143 (2) ZOO, same as of the article 284 (2) DGZ, suggests that the court has a choice, a freedom to decide whether to apply or not to apply a term which

[22] B. Lurger, "The 'Social' Side of Contract Law and the New Principle of Regard and Fairness", in: *Towards a European Civil Code* (eds. Arthur Hartkamp *et. al.*), Nijmegen 2004[3], 276.
[23] Zakon o oblgacionim odnosima – ZOO, "*Sl. list SFRJ"*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *"Sl. list SRJ"*, br. 31/93 i *"Sl. list SCG"*, br. 1/2003 – Ustavna povelja.
[24] Compare ars. 142-143 ZOO and ars. 283-284 DGZ.
[25] Art. 142 (1) ZOO.
[26] Art. 142 (2) ZOO.
[27] Art. 142 (4) ZOO.

is onerous or unfair to the other party, or prevents her to use certain rights and remedies. It suggests that even an unfair term could be upheld by the court which is rather strange and unfortunate phrasing. Finally, these provisions do not discriminate between the types of businesses and are thus applicable both to contracts between large companies, and contracts between large companies and SMEs.

Unlike ZOO or DGZ, Consumer Protection Act (ZOZP)[28] provides a much clearer standard of unfairness stating that any contract term which contrary to good faith and fair dealing as a consequence has a significant disproportion in rights and duties between the contracting parties to the detriment of the consumer is null and void.[29] The Act also states the criteria which are relevant for the assessment of the unfairness of a term.[30] It also provides for a *contra proferentem* rule and declares black and grey lists of contract terms.[31] The former means that any ambiguity of a contract term will be interpreted to the benefit of a consumer, and the later lists provide for terms that are irrefutably and refutably respectively deemed unfair. This is the obvious influence of Unfair Terms Directive, which is no surprise since Serbia transposed consumer *acquis* into its ZOZP.

4. Comparative conclusions

A number of provisions BW dedicates to standard contract terms, seventeen articles, compared to only three articles in DGZ was the first and staggering difference between the two texts I noticed. Like I already said, BW unlike the draft of his counterpart in Serbia regulates the consumer law too. Although only two articles (black and gray lists) are reserved for consumers only, the more detailed regulation of the unfairness test compared to the rather laconic style of DGZ, the clarifications of certain standards like what it means to give reasonable opportunity to the other party to take knowledge of the content of standard terms and conditions etc. corresponds to the way in which standard contract terms are regulated in ZOZP. Therefore one might say that the quantity of articles regulating unfair contract terms in BW is owed to the integration of consumer law into the code after all. I would rather say that it is a consequence of the understanding that policing of unfair contract terms is meant for the protection of weaker parties to contracts, and that consumers are not the only weaker parties on the market. Thus BW extended part of the protection to some SMEs, while the rest of the businesses may rely on the general

[28] Zakon o zaštiti potrošača – ZOZP, *Sl. glasnik RS*, br. 62/2014 i 6/2016 – dr. zakon.
[29] Art. 43 (1)(2)ZOZP.
[30] Art. 43(3) ZOZP.
[31] Ars 44 and 45 ZOZP.

duty of good faith. This corresponds to the argumentation that "large and most medium sized businesses may be expected to structure their organisation to ensure that their decisions are economically rational."[32] Whereas small businesses and individual entrepreneurs cannot afford such structuring of their organization or their "cognitive limitations" do not disappear just because they act not as consumers but as business subjects in a particular situation, they are the same person regardless the capacity in which they act.[33] In contrast, DGZ offers protection to all the subjects, be they big businesses, medium size or small enterprises. This may be questionable since big companies typically do not need the same level of protection as some SMEs do.

Another difference is that BW recognizes the specific situation in which the businesses in the middle of the supply chain may find themselves when a standard term they use is annulled by their customer, but they themselves are a party to a contract against whom the same term is used, and provides protection to such businesses in a way described above. The drafters of the DGZ did not dedicate a single norm to such situations.

Furthermore, under BW the unfair terms are voidable which means that the court does not sanction these terms on its own motion and that according to article 3:51 BW the right of a counterparty to nullify unfair terms and conditions is prescribed after the lapse of time determined by the Code. On the other hand, according to DGZ terms and conditions contrary to the goal of the contract or the good business practices are null and void[34] which means that the court should nullify these terms on its own motion[35] which is a stricter sanction than the voidability is. However, the formulation of article 284 (2) leaves it unclear whether the terms which prevent the other party to rely on particular rights and remedies or are unjust or overly onerous to that party are null and void or just voidable because it states that court may refuse to apply such terms. If the sanction is nullity the court would not have the choice as to the application of the term if the term would be qualified as unfair according to article 284 (2). If the sanction is voidability the court again should not have a choice whether to apply it or not if it would be determined, on the motion of a contracting party, that the term is unfair according to article 284 (2).

From the comparison conducted here, not many normative conclusions can be made, except for those of more technical nature such as that the phrasing of article 284 (2) DGZ should be clearer. Everything else may be assessed only against particular viewpoint. The viewpoint

[32] M. W. Hesselink (2009), 34.
[33] *Ibid.*, 34-35.
[34] Art. 284 (1) DGZ.
[35] Art. 247(1) DGZ.

whether there should be the protection of SMEs against unfair terms, and whether that protection should be wider for small businesses than for the big ones. I have briefly mentioned some of the reasons for the protection in the introduction, but I feel I should discuss these in more detail before I reach any conclusions about the regulation of unfair terms under the codes at hand.

5. To protect or not to protect?

The type of protection I am discussing here is categorical protection, meaning the protection of certain category of subjects against (in this case) unfair contract terms. As was seen above such protection is afforded to the category of consumers. Consumers are defined as natural persons acting outside their business or professional capacity.[36] Therefore any natural person falling within the definition of consumer is granted the protection regardless of his or her personal skills and characteristics. There are several reasons to afford such protection to consumers. First, it is said that consumers lack the bargaining power and thus are in a take-it-or-leave-it situation when contracting with businesses.[37] Second, consumers suffer from the information asymmetry, which means that they have insufficient information about the product or service they acquire and insufficient knowledge and experience about contract terms and negotiation compared to businesses who engage in such transactions regularly.[38] Therefore, they are less likely to make an informed decision and are susceptible to error.[39] Furthermore, consumers are single natural persons not having a team behind them able to assess the decisions and to correct the influence of limited rationality, exhaustion, lack of knowledge, emotion etc.[40] Third, and different type of argument says that businesses are on the market competing for profit and that bad decisions lead to the 'natural' selection making only good enterprises to survive and resulting in capital being invested in the right businesses.[41] Such argument does not stand for the individuals acquiring goods and services not for profit but for their needs and pleasure in their lives.[42]

The question is: are there any similarities between consumers and SMEs that would give way to extending the protection afforded to the consumer

[36] See art. 6:238 BW or art. 5 ZOZP.
[37] J. G. Klijnsma, 102.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.* 103.
[42] *Ibid.*

to SMEs? When it comes to bargaining power and the ability to negotiate contractual terms, small businesses, especially individual entrepreneurs, are in the same position as consumers.[43] Let's imagine a small family enterprise producing hand-made chocolate. Would they really be able to negotiate the terms of a contract with a big retailer company owning a chain of supermarkets? Or imagine a professional freelancer journalist buying a laptop for work – is there any difference between him and a consumer, and does it really matter that the former is acting within his profession when neither of them cannot influence the contract for a laptop?[44] The second reason, the information asymmetry and limited rationality of individuals, is also applicable to SMEs. They are also, typically unable to organize their business process so that they mitigate these asymmetries and influence of the bound rationality.[45] This is true of sole entrepreneurs and small businesses while most of the medium-size businesses are able to deal with information asymmetries just as big companies are.[46] The third argument would be applicable to SMEs if they were in an equal position as large companies which are able to hire lawyers or employ persons with special skills in order to make sure that decisions made are correct.[47] However, most of the SMEs are not able to do that hence it is not that they are bad businesses not worthy of participating on the market. The problem is that they lack skill, time and economic power to influence the content of the contract terms when dealing with large companies. Like for consumers, it is irrational for SMEs to try to inspect and change contracting terms when they have no power to change them.[48] Which is more, since the terms will not be challenged, at least not effectively, buy the counterparties, there is no incentive for large companies to compete by offering better terms and conditions than their competitors, which means that the invisible hand of the market will not mend this market failure, so it is up to the contract law mechanism of policing the unfair contract terms to mend it.[49] Considering everything said here, it seems that all the justifications for the protection of consumers against unfair contract terms are applicable to SMEs as well.

Now, it would be useful to check the downsides of categorical protection of SMEs against unfair terms. The first problem is the definition of SMEs. This problem seems to be overstated since there are useful definitions. For instance, one could rely on the Recommendation

[43] M. W. Hesselink, (2009), 33.
[44] J. G. Klijnsma.
[45] M. W. Hesselink (2009), 34-35.
[46] *Ibid.*
[47] J. G. Klijnsma, 139.
[48] *Ibid.*
[49] *Ibid.* 138 – 139.

of the European Commission as to the definition of SMEs.[50] Article 2 of this Recommendation reads as follows:

Staff headcount and financial ceilings determining enterprise categories

1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

3. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

The Dutch legislator relied on the number of employees as criteria too. So there is a way to make a distinction between SMEs and large businesses and to divide SMEs into subcategories too. The drawback of this manner of definition is that it is a bit arbitrary because one employee can make all the difference when in reality a business with 49 employees and the one with 50 employees may not be in a different position after all.[51] The second danger of this approach is to get stuck with purely formal disputes about the number of employees instead of the questions pertaining to the content of the contract and whether the need for protection really exists or not.[52]

However, these two shortcomings are inherent to any categorical protection.[53] When a category covers a great number of subjects a level of arbitrariness is expected. Just like in case of SMEs, there are consumers who are not in need of any protection in particular contracts. Imagine the owner of Coca-Cola Company buying a soda on a food stand. I doubt that a person who has built such a big company lacks the knowledge in negotiation, and lacks the bargaining power. The same is when Rupert Murdoch, owner of one of the largest news companies in the world,

[50] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC.
[51] M. W. Hesselink (2007), 17.
[52] *Ibid.*
[53] *Ibid.*

buys a copy of newspapers.[54] There is no information asymmetry when a computer specialist buys a lap-top even outside his professional capacity, at least not regarding the quality of the product. Nevertheless, in these situations these persons are consumers. It is also possible that a particular minor is mature as if he is of age, still, he will be a minor in the eyes of the law. The point is that a category is designed to protect the typical member of the category, not the exceptional one. This is necessary for the sake of legal certainty and because it would be impossible to write a law that would cover all the possible situations one by one. Although it is true that criteria proposed to determine whether a business falls within the category of SMEs may seem a bit more arbitrary than the criteria to determine who is minor or who is a consumer.[55] This could lead to situations where subjects not in need of protection are protected.[56] However, the example of DGZ shows that businesses not in need of protection get protection precisely because there is no category of SMEs defined. Furthermore, as was noted above this kind of protection removes a market failure and gives better chances to SMEs. This has an economic importance as well since 2/3 of all employees in 2015 in Serbia worked in SMEs, and SMEs generated 32% of Serbia's GDP in the same year.[57] Finally, considering the comparison between consumers and some SMEs it becomes a matter of coherence to protect against unfair terms those SMEs which are in the same position as consumers.[58]

Therefore, being aware of the shortcomings of the definition of the SMEs, I am convinced that at least the smallest of SMEs deserve the protection against unfair contract terms when dealing with businesses larger than themselves. I believe that the benefits of this approach outnumber the drawbacks. It is against this stance that I conclude that the regulation of unfair contract terms in DGZ needs amendment. The ambiguity of article 284 (2) DGZ needs to be removed. The drafters should consider referring to black and grey lists from ZOZP at least as indicators of the unfairness of the terms in b2B contracts too. They should define SMEs and afford them a greater level of protection against unfair terms than to big businesses. They should look up to BW and regulate the position of the businesses in the middle of the supply chain regarding the unfair contract terms. The question is should they copy the Dutch approach? The BW is not completely coherent since it does not afford exactly the same level of

[54] *Ibid.*, 15.
[55] *Ibid.*,17.
[56] *Ibid.*
[57] Privredna komora Srbije, Mala i srednja privredna društva, http://www.pks.rs/PrivredaSrbije.aspx?id=20&idjezik=1, last visited December 20, 2017.
[58] M. W. Hesselink (2007), 19.

protection to SMEs as it does to consumers. However, this might be the answer to the bigger arbitrariness of the criteria used to determine which business are SMEs. What is certain is that, considering all the arguments for the protection of SMEs and all the arguments referring to the similarity of the position of consumers and SMEs, BW is more in line with these arguments and that DGZ has a lot to learn from it.

6. Conclusion

There more and more voices claiming that protection of weaker parties to contracts must not stop at the protection of consumers. It is submitted that they are not the only weaker parties. There are other categories of subjects in similar or same position as consumers, notably the SMEs. It argued that the same reasons employed to justify consumer protection can be used to justify the protection of SMEs when dealing with large businesses. One, and paradigmatic instrument of protection is policing of unfair contract terms.

Having in mind this background, I analyzed the way in which BW and DGZ regulate the matter of unfair contract terms. I explored the pros and cons regarding the categorical protection of SMEs against unfair terms, and I reached the two conclusions. First, that the benefits of categorical protection of SMEs outnumber the drawbacks. Second, that BW is more in line with the arguments given for the protection of SMEs than DGZ, and that DGZ could draw some inspiration in this area from BW.

Aleksa Radonjić, LLM
Asistent, Pravni fakultet Univerziteta Union u Beogradu

NEPOŠTENE UGOVORNE ODREDBE I MSP U BW-u I NACRTU GZ-a SRBIJE

Rezime

Ovaj članak je inspirisan argumentima iznetim u literaturi da se zaštita slabije strane u ugovornim odnosima ne sme svesti na zaštitu potrošača. Naročito je interesantna tvrdnja da i određeni poslovni subjekti, tačnije mala i srednja preduzeća i preduzetnici (MSP) predstavljaju slabiju stranu u ugovornim odnosima. Šta više, iznosi se ubedljiva

argumentacija da razlozi kojima se opravdava zaštita potrošača važe i za MSP. Autor je odlučio da proveri na koji način su MSP zaštićeni u Građanskom zakoniku Holandije i Nacrtu Građanskog zakonika Srbije kada su u pitanju nepoštene ugovorne odredbe budući da se zaštita od takvih odredbi smatra paradigmatičnom kada se govori o zaštiti slabije ugovorne strane. Dalje, razmatrane su prednosti i mane takve kategoričke zaštite MSP i na osnovu svega toga je izveden zaključak da prednosti takve zaštite prevladavaju, da postoje dobri razlozi da se takva zaštita pruža MSP i da bi mnogo toga u tom smislu moglo da se popravi u Nacrtu GZ-a, a da dobar uzor može da bude Građanski zakonik Holandije.

Ključne reči: MSP, nepravične odredbe ugovora, zaštita slabije strane, građanski zakonik.

Igor Popović[1]

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LAWS ON ENFORCEMENT PROCEDURE IN BOSNIA AND HERZEGOVINA: COMPLIANCE WITH THE EUROPEAN HUMAN RIGHTS STANDARDS

Abstract

Laws on enforcement of Republika Srpska and Federacija BiH limit or completely prohibit enforcement against the state debt. It should be noted that the notion of the state for the purpose of this paper includes not only federal or federal unit authorities but also local self-government, public institutions and state-owned (controlled) enterprises. These limitations on enforcement concern every object of enforcement. I argue that such rules of enforcement limitation do not fulfill the requirement of lawfulness developed by the European Court of Human Rights, because they are vague and non-predictable and they put an excessive burden on enforcement creditor within the meaning of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, I argue that it is necessary to harmonize the terminology within the legislation; to give more specific guidelines for determining whether some property can be the object of enforcement; to clearly stipulate that the only competent authority to determine whether or not certain enforcement can be carried out is the court. The aim of the proposed solutions is to harmonize national legislation with the ECHR and to reduce the possibility of state abuse of rights.

Keywords*: enforcement procedure, lawfulness principle, quality of law, Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights.*

[1] LL.M., teaching assistant at the University of Banjaluka, Faculty of Law, e-mail: *igor.popovic@pf.unibl.org*. The following paper is based on the one part of my unpublished LL.M. thesis, which I completed at the Faculty of Law of University of Belgrade.

1. Introduction

Enforcement Procedure Act of Republika Srpska[2] (hereinafter: EPA RS) and Enforcement Procedure Act of Federation of Bosnia and Herzegovina[3] (hereinafter: EPA FBiH) favour the state and entities related to it as enforcement debtors because they prohibit or limit enforcement on every object of enforcement.[4] Thus, a collection of state debts can be hindered not only by refusing to pay the debt voluntarily but also through an enforcement procedure.

The paper will examine whether the restrictive provisions of EPA RS and EPA FBiH are clear and precise enough and sufficiently predictable and therefore in accordance with the *lawfulness* principle developed by the European Court of Human Rights (hereinafter: ECtHR). Thus, first, it needs to be explained which are the requirements that need to be fulfilled in order for a domestic law to be considered as law in the context of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). Subsequently, certain restrictive provisions of EPA RS and EPA FBiH will be analyzed and I will try to come to the conclusion whether they are in accordance with the ECtHR's lawfulness concept. My assumption is that the contested provisions do not meet the requirement of mentioned concept and impose a disproportionate burden on enforcement creditors. On this point, I have to say that I have not been able to find any scholar publications or case-law[5] regarding this problem. Thus, I will suggest how the enforcement legislation should be amended in order to be in line with the human rights standards within the Council of Europe (hereinafter: CoE).

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[2] *Official Gazzette of RS* [*Službeni glasnik RS*], no. 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13, 98/14, 5/17.

[3] *Official Gazzette of FBiH* [*Služben novine FBiH*], no. 32/03, 33/06, 39/06, 39/09, 35/12, 46/16.

[4] State structure of the Bosnia and Herzegovina (BiH) is complex. It is consisted out of two *sui generis* federal units ("entities") *Republika Srpska* and *Federacija Bosne i Hercegovine* and one administrative unit *Brčko District*. The District is jointly administered by entities. Competencies and jurisdictions between the BiH, entities and the District are divided. Therefore, in addition to the laws on enforcement of entities, two other laws on enforcement exist in BiH: Law on Enforcement Procedure before the Court of Bosnia and Herzegovina and Enforcement Procedure Act of Brčko District. These two acts do not contain such limitations on enforcement against the state and therefore, shall not be the subject of this paper.

[5] ECtHR is of the opinion that if some vague provision is clarified by the case-law, than the requirement of lawfulness is satisfied. See the case of *Cantoni v. France*, no. 17862/91, judgment of November 11, 1996, §§ 29-36, especially § 32 in which it is stated that the ECtHR must "ascertain whether in the present case the text of the statutory rule read in the light of the accompanying interpretive case-law satisfied this test at the relevant time".

2. Law quality according to the Strasbourg court's case-law

Legal rules should govern our behaviour and our rights and duties should be based on laws in order to avoid the state arbitrariness. This is the fundamental principle of the rule of law. Not only should our behaviour be regulated by law, but such a law should be of a certain quality. This is the view of the ECtHR and it has established certain conditions that every national law should fulfil. We should bear in mind that *law* refers to all types of legal rules: statutes, acts, bylaws, customary rules and even rules derived from a case-law can be regarded as a law.[6]

I will briefly explain these conditions. At first, the law should be accessible.[7] Second, law should be clear enough, i.e. legal rules should be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"[8]. Naturally, an absolute clarity is not possible, because legal standards[9] are unavoidable, but in that case, there should be certain guidelines for the application of the law in question.[10] The third quality concerns the non-arbitrariness. Namely, it is possible that law provides a broad range of powers for state authorities, which can lead to arbitrary actions. The ECtHR concluded that "domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention"[11]. Thus, if a domestic law provides certain discretion for authorities, at the same time, it "must indicate the scope of any such discretion conferred on the competent authorities"[12].

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[6] Cf. S.Greer, *The margine of appreciation: interpretation and discretion under the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg 2000, 16. Cited according to the V.Beširević *et al.*, *Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda*, Službeni glasnik, Beograd 2017., 230, fn. 979; Д.Поповић, *Европско право људских права*, Службени Гасник, Београд 2012., 282; D.Harris *et al.*, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, Oxford University Press, Oxford 2014., 506.

[7] *Sunday Times v. United Kingdom*, no. 6538/74, judgment of April 26, 1979, § 49. This rquirement is in the vast majority of cases satisfied, since acts and statues are being published in official gazettes of the states.

[8] Ibid.

[9] Legal standard implies a concept which appears in certain legal rule and changes its own meaning depending on each specific case. It does not provide for a complete freedom to the entity which is obliged to apply it, i.e. it does not imply arbitrariness. The entity has to apply legal standards in accordance with objective criteria. Cf. *Pravna enciklopedija* (gl. redaktor Borislav T. Blagojević), Savremena administracija, Beograd 1979., 1050-1051.

[10] See more in D.Harris *et al.*, 507-508.

[11] *Liu Liu v. Russia*, no. 42086/05, judgment of December 6, 2007, § 56.

[12] Ibid. See, also D.Harris *et al.*, 508.

3. Legal framework of the limitation of enforcement against the state

Several articles of the EPA FBiH and the EPA RS limit or forbid enforcement against the state or an entity controlled or financed by the state. Those articles are 79a, 117a, 137a, 138 (3) – (6), 187a of the EPA FBiH and articles 7 (3), 166 (7) of the EPA RS.

By simply looking at mentioned articles, we can conclude that the limitations relate to every method and object of enforcement. The purpose of such limitations is (or should be) to enable the state and all state-related entities to carry out public interest activities. Essentially, there are two interests at stake – the interest of an individual (enforcement creditor) and the public (general) interest. Priority is given to the public interest by providing the higher degree of protection to the judgment debtor (the state). Otherwise, it might be impossible or extremely difficult for the state to perform public interest tasks and there would be the instability of public finances.[13]

Abovementioned provisions did not exist at the time of enactment of the EPA RS and the EPA FBiH in 2003. They have been created through the legislative amendments.[14] Apparently, over the time, the legislators' opinion changed and they concluded it is needed to set restrictions on enforcement against the state. The protection of the state as enforcement debtor is not *per se* disputable. Protection of private persons as enforcement debtors to a certain degree is common in European legal systems.[15] Nevertheless, as it will be seen, it is disputable whether such protection of the state is solely intended to preserve the unhindered performance of the public interest tasks and the maintenance of financial stability or to preserve the state's comfort.

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[13] Cf. decisions of the Constitutional Court of Bosnia and Herzegovina, no. AP-2110/08, § 50; no. AP-1879/16, § 38.

[14] Enforcement limitations against the state debt are not completely new in out legal tradition. Enforcement procedure legislation during the time of the SFRY stipulated some similar limitations. See A. Daupović *et al.*, *Komentari zakona o izvršnom postupku u Federaciji Bosne i Hercegovine i Republici Srpskoj*, Savjet Evrope, Evropska komisija EU, Sarajevo 2005., 24-28; B. Poznić, *Građansko procesno pravo*, Savremena administracija, Beograd 1980., 440-443; S. Triva, V. Belajec, M. Dika, *Sudsko izvršno pravo – opći dio*, Informator, Zagreb 1984., 171-177; B. Popović, V. Ristić, *Priručnik za praktičnu primenu Zakona o izvršnom postupku sa komentarom, sudskom praksom, obrascima i registrom pojmova*, Privredna štampa, Beograd 1981., 176-192; N. Srećković, D. Lukić, *Priručnik sudskog izvršnog postupka*, Pravno ekonomski centar, Beograd 1986., 305-319.

[15] Cf. Н.Бодирога, *Теорија извршног поступка*, Правни факултет Универзитета у Београду, Београд 2012.,211-221.

4. Limitation on enforcement against the state according to the EPA FBiH

4.1. Limitation on enforcement against monetary funds on bank accounts of FBiH, cantons and local self-government

One of the curiosities of the Bosnian legal system is Art. 138 (3) – (6) of the EPA FBiH. It limits the enforcement against monetary funds on bank accounts owned by FBiH, cantons and local self-government. State debt can be enforced by this method only to the amount envisaged by the budget for a certain year. Amendments of EPA FBiH from 2016 stipulate that minimal amount of money needed for this purpose shall not be under 0,3% of the whole budget.

Since I wrote about this enforcement limitation in details in one of the earlier publications[16], the following text will only briefly outline the essence of the problem. First of all, the state has not calculated its total debt for the purpose of enforcement proceedings.[17] This implies that we do not have a reliable statistics whether the enforcement against the state would endanger the public finances.[18] Despite that, the state has decided to which amount the enforcement against its' monetary funds on bank accounts can be done. This means that the legislator in FBiH envisaged the minimum amount of 0,3% of the budget arbitrarily. It is therefore important to calculate the total debt, precisely because the amount of the debt will be crucial for deciding whether there is a public interest in limitation of enforcement against the state and to what extent the limitation is necessary.

Furthermore, the current rules do not provide information when could creditors collect their claims, and they can only to speculate when they will realize their rights. This unpredictability is contrary to the aforementioned lawfulness principle.[19] Therefore, the state should provide every creditor with the information on the state debt and on the number of all creditors in other enforcement procedures, in order for a creditor to be able to foresee when his/her/its claim will be discharged.

It can be concluded that Art. 166 (3) – (6) is not in accordance with the ECHR because it does not possess one of the required qualities of law – the predictability.

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[16] I.Popović, Ograničenje naplate u izvršnom postupku na teret budžeta u BiH, *Sveske za javno pravo*, br. 28, 2017, 62-72.

[17] Cf. decisions of the Constitutional Court of Bosnia and Herzegovina, no. AP-2110/08, § 54; no. AP-1879/16, § 42; no. AP-1473/16, § 23.

[18] I.Popović, 65.

[19] *Ibid*, 66. See in particular the case of *Amat G Ltd and Others v. Georgia*, no. 2507/03, judgment of September 27, 2005, §§ 61-63.

4.2. Enforcement limitations on real and movable property owned by FBiH, cantons or local self-government

EPA FBiH prohibits enforcement on real property owned by entities, cantons, local self-government or public funds (*javni fondovi*) regardless of the purpose of such real property.[20] I argue that if some real property is not used to perform public interest tasks or is not used primarily for this purpose, there is no reason why would it be exempt from enforcement. For instance, even today, certain state-owned residential facilities are rented or being used by employees and, therefore, not used for performing public interest tasks. This kind of real property should not be treated the same as a real property which is used for public functions (e.g. headquarter of the ministry of interior affairs).[21]

Since the state owns a lot of real property, current legal framework excessively favors the state as the enforcement debtor in relation to other judgment debtors and places excessive burden on the enforcement creditor within the meaning of Art. 1 of Protocol 1 to the ECHR[22], because it additionally and unjustly makes the debt recovery more difficult. Therefore, these provisions should be amended in a way that they limit enforcement only on the real property which is *necessary* for performing activities of public interest, because of the essence of enforcement limitation, as said before, is to preserve the public functions, not the comfort of the state and its' employees.

It should also be noted that it is stipulated that the court will decide in each case on the prohibition of enforcement on the described real properties.[23] Nevertheless, the court does not have much to decide, because the prohibition refers to all real property. Thus, the role of the court is minimized and its decision will be purely declarative.

The situation is slightly different when it comes to the movable property because enforcement is prohibited "only" on capital assets (*stalna sredstva za rad*) of the FBiH, cantons, local self-government and public funds.[24] What exactly, the capital assets are is not, unfortunately, elaborated and it is an example of another vague notion within the EPA FBiH. Case-law has not

[20] Art. 79a of the EPA FBiH.

[21] It was considered that the state owned residential facilities were not exempted from enforcement during the SFRY. See in B.Popović, V.Ristić, 178.

[22] Assessment of an excessive burden is the part of proportionality test, which the ECtHR uses to determine whether the right to property was violated. Cf. V.Beširević *et al.*, 652-653; P. van Dijk, G.J.H. van Hoof, *Teorija i praksa Evropske konvencije o ljudskim pravima,* Müller, Saraejvo 2001., 595-598; C.Harland, R.Roche, E.Strauss, *Komentar Evropske konvencije o ljudskim pravima prema praksi u Bosni i Hercegovini i Strasbourgu*, Sarajevo 2003., 358-364.

[23] Art. 79b of the EPA FBiH.

[24] Art. 117a (1) of the EPA FBiH.

decided upon this issue and therefore, it cannot help us to clarify this notion. The concept of capital assets is primarily an economic concept. It includes *all* property and rights (not just movable property) which are being used for a longer period of time by an enterprise for its business (e.g. buildings, cars, all kinds of tools and machines).[25] Thus, it is illogical to use this concept for stipulating the enforcement limitation on movable property. Further on, this implies that enforcement is prohibited on all movable property which is *used* for a longer period of time by the state and state-related entities for their work, not the movable property which is *necessary* for that work. For instance, if some car is used by certain executive authority, it cannot be the object of enforcement, no matter if the car is necessary for carrying out the authority's tasks. Once again – a very broad scope of limitation which does not serve the aim of enforcement limitations (preservation of the public finances)!

4.3. Limitation on enforcement against shares of FBiH, cantons or local self-government in business enterprises

New limitations on enforcement against the state were added by last amendments of the EPA FBiH in 2016. They put an absolute prohibition on enforcement against shares of the state in any enterprise.[26]

As argued for enforcement on state-owned real property, it is unclear why all shares are exempted from enforcement. I do not see how this is aimed at the preservations of public interest tasks. For instance, let's say that FBiH owns 80% of shares in some company. Amount of the enforcement creditor's claim is 15% of the value of the whole shares. In case of enforcement, the state would still be the major shareholder with 65% of shares. Thus, enforcement would not endanger the functioning of the state or its interest in the certain enterprise. This example proves that this provision's amendments are necessary. The scope of the provision should be reduced in a way that the enforcement should be allowed as long as it does not jeopardize the status of the state as a major shareholder, otherwise the state would not be able to control the enterprise. Thus, the state would still be a major shareholder and enforcement creditor's claim would be settled in whole or, at least, partially.

What if the state has less than 50% of shares in an enterprise? Then, this provision does not make sense. As the minority shareholder, the state cannot independently control and manage the enterprise. The primary role of such share is the acquisition of a dividend. In that case, there is no

[25] *https://www.investopedia.com/terms/c/capitalasset.asp*, November 18, 2017. See also N.Nikolovski, *Osnovna sredstva za rad – pojam i podela* available at: *http://www.ets-becej.edu.rs/files/Osnovna%20sredstva-pribavljanje.pdf*, November 18, 2017.

[26] Art. 187a of the EPA FBiH.

reason to keep the enforcement limitation. In the case of the existence of certain enterprises of special interest for the state and whose equity capital should not be changed, although the state is not the major owner,[27] then records should be made of such companies that would be exempted from enforcement.

During the enactment of these amendments, the FBiH Government said that the *rationale* of this article is to protect the FBiH property. The Government argued that courts in FBiH constantly order the annotation of pledge over the *whole amount* of shares of state-owned enterprises, regardless of the amount of debt. In that way, *unnecessary* annotations of a pledge[28] deny and limit the FBiH's right to use its property, concluded the Government.[29] I find that the only meaningful argument from the Government's reasoning is that in courts' practice, the pledge is being established over *all* shares, regardless of the amount of state debt. If it is indeed so (is it not strange why the FBiH Government has not submitted or specified any such court's decision as the proof of its arguments!?), then such a practice can be avoided by adding a simple provision that pledge can be established only against the part of the shares which is needed to settle the debt.[30]

5. Limitations on enforcement against the state according to the EPA RS

Art. 7 (3) of the EPA RS stipulates, similarly as the EPA FBiH, limitations on enforcement on the certain real property and movable property owned by RS, local self-government and state-owned companies. Still, between EPA RS and EPA FBiH, there is a difference in this regard – EPA RS excludes from the enforcement only the property which is necessary for carrying

[27] E.g. enterprises established on the basis of foreign investments and co-owned by foreign investor and the state.

[28] I have to say that establishment of the pledge is not *unnecessary* as argued by the Government. There would have been no annotation of a pledge, if the state had settled its debt on time. The only thing that may be unnecessary is *the extent* of the annotation of pledge, if it is established against the *whole amount* of shares. The annotation of pledge *per se* (as the part of the enforcement procedure) is, certainly, necessary for the debt recovery.

[29] See *Explanation of the Draft of EPA FBiH Amendments from 2016*, 4-5. The Explanation available at: *http://www.parlamentfbih.gov.ba/dom_naroda/bos/parlament/propisi/El_materijali_2016/Zakon%20o%20izmjenama%20i%20dopunama%20Zakona%20o%20izvrsnom%20postupku_bos.pdf*, 20.11.2017.

[30] It should be noted that this kind of provision already exists in Art. 65 of the EPA FBiH which stipulates that enforcement to satisfy a monetary claim shall be decided and enforced for the *amount necessary* to recover the debt. Thus, in the case of excessive establishment of the pledge over shares, the state, as the enforcement debtor, can, already, file an objection, or appeal, invoking the violation of Article 65 of the EPA FBiH. Therefore, the whole argumentation of the Government has no point.

out public interest tasks. Does it mean that EPA RS is compatible with the ECHR's standards? The answer is, still, no, bearing in mind arguments which have previously been raised against similar provisions of the EPA FBiH[31], even though the scope of enforcement limitation is narrowed. Namely, the requirement of lawfulness is still not fulfilled, because, it is not prescribed at all *who*, on the basis of *which criteria* and *how* is to decide which property is necessary for the performance of public interest activities.

Since enforcement limitations are prescribed by the rules of enforcement procedure, it is logical that this issue shall be decided by the court. Nevertheless, it is unclear whether the court has an absolute discretion in terms of assessing whether something is necessary for activities of public interest. If, for instance, certain executive authority declares some real property as the property necessary for performing activities of public interest, is the court limited by such a declaration? If so, the court's hands are, *ab initio*, tied.

Further, it is not clear how this decision will be made. It is not envisaged whether the court shall invoke Art. 7 (3) *ex officio* or only upon the objection of the enforcement debtor; or whether the special hearing shall be scheduled for solving this issue or can the court decide without any hearing. All of these doubts and questions are completely legitimate, because of Art. 7 (3) does not provide answers and there are no guidelines in case-law[32] or in scholar papers to clearly determine the content and meaning of the above-said provision. It is for these reasons, that this provision does not fulfil the requirement of lawfulness required by the ECtHR.[33]

One should notice that Art. 7 (3) exempts from an enforcement not only real property and movable property, but also *rights* of RS, local self-government and state-owned enterprises. Linguistic interpretation of this provision implies that *all types of rights* come under this provision since no particular rights are stipulated. Application of the mentioned provision can lead to two problems. First, the relation between Art. 7 (3) and Art. 166 (7) is not clear. Art. 166 (7) stipulates that general rules of enforcement against monetary claims are not to be applied on enforcement against monetary funds on bank accounts of the RS, local self-government or state-owned enterprise, which are *needed for* (not *necessary* as prescribed by Art. 7 (3)) performing public interest tasks. Therefore, it is not clear whether Art. 166 (7) is just the concretization of Art. 7 (3) in the sense that it clarifies that claim (right) to monetary funds on the bank account is just one of the rights mentioned in Art. 7 (3) or it stipulates that the right to monetary funds on bank account may be subject to different enforcement limitation rules. Second, monetary funds are *res fungibiles* and monetary

[31] *Supra*, section 4 of this paper.

[32] I have not been able to find a consistent or any case-law upon this issue.

[33] These arguments can be raised, also, against Art. 79a (2) of the EPA FBiH.

funds on a bank account are in their nature *inter partes* rights (claims)[34]. Therefore, it is unclear which funds are subject to the limitation of Art. 166 (7) (funds *needed to* carry out public interest tasks). The problem gets bigger if all funds are being kept only on one main bank account and there is no special purpose account. Is it going to be possible to separate the funds on which the enforcement is allowed from the funds on which the enforcement is not allowed? It seems that this was the problem with the strike of the state-controlled railway company Željeznice Republike Srpske (hereinafter: ŽRS) employees. They tried to enforce their claims against the company on company's funds on two bank accounts. The RS Ministry of Justice sent a note to the court, requesting such enforcement to be suspended because those two bank accounts contain funds necessary to carry out activities of public interest. Ministry argued that RS Government donated certain amount funds to the ŽRS for the railway infrastructure maintenance and therefore required an activation of Article 7 (3).[35] Still, since these are the main bank accounts of ŽRS, how can the court divide funds donated for the infrastructure maintenance from the rest of funds on which the enforcement is permitted? This example shows us that vague provisions can cause a lot of problems in case-law.

The Constitutional Court of Bosnia and Herzegovina came to the same conclusion and stated that Art. 7 (3) is not clear enough because it does not prescribe *who* and in *which* procedure shall define more clearly which objects and funds are needed to carry out public interest activities or how shall funds for fulfilling a debt to creditors be provided for.[36]

6. The legal path for solving the problem – clearer legal rules

Before I go further with the proposal for legislation changes, there is the question on which we should answer – do human rights standards arising from ECHR go so far that it is necessary to amend abovementioned national legislation? There is no doubt that ECtHR is not a fourth judicial instance and that an abstract control of legislation before it is not possible. Further, where are the limits of human rights standards arising from ECHR, especially if we bear in mind that legitimate people's representatives chose how to legislate an enforcement procedure?

I argue that it is absolutely justified and necessary to change the provisions on enforcement against the state. It would not be that

[34] On legal nature of bank accounts see in P.Miladin, Bankarski računi pravnih i fizičkih osoba, *Pravo u gospodarstvu: časopis za gospodarskopravnu teoriju i praksu*, 44/2005, 4, 146-148.
[35] See news report of the *Alternativna televizija*, available on *http://www.youtube.com/watch?v=bmw1C6dy6pQ*, July 15, 2017.
[36] Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP-774/03, § 395.

problematic if, for example, enforcement is only prohibited on state's real property, movable assets and monetary claims (except funds on bank accounts), which are *necessary* for carrying out the public interest activities, if on the other hand, there is an unhindered enforcement against monetary funds on bank accounts (state budget); or at least if the limitation on enforcement against the budget would be more reduced than it is the case now with the EPA FBiH. In the sense of the later, one can cite the example of Serbia that enables debt recovery through enforcement procedure of up to 50% of the total budget funds for the budget user (state-controlled entity). If funds for that user are spent, there shall be transfer from another appropriation to the appropriation of the user against whom enforcement is made.[37]

Regarding the law quality principle (clarity, predictability, and non-arbitrariness) that has already been discussed, the provisions that create, or rather, try to create a legal standard, need to be supplemented to clearly define *who* and on the basis *of which criteria* decides whether some property or a right are necessary for carrying out tasks of public interest, and to *what extent* the enforcement can be permitted. It should be stipulated that the court is the only competent authority to decide whether certain enforcement can be done. Exemption from enforcement under these provisions should be limited on the property and rights *necessary* for carrying out public interest tasks and the burden should be on the enforcement debtor to prove that certain property should be exempted from enforcement. Also, a court should not decide on this issue *ex officio*, but only on the objection of the enforcement debtor. This method is partially stipulated by the EPA FBiH because it is prescribed that a court should decide in every case whether the conditions for enforcement limitation are fulfilled. Nevertheless, detailed instructions for court proceedings are missing and in the case of enforcement on real property, the court has nothing to decide on, because the all real property is being exempted from the enforcement. In this regard, the rules on the enforcement procedure of Croatia and Montenegro can be taken as an initial step, which prescribe that, based on the circumstances that existed at the moment of filing the motion for enforcement, it shall be estimated whether a certain property could be the subject of enforcement.[38]

It is evident that provisions on limitations upon the enforcement against the state have a very broad scope, because they refer to every

[37] Art. 56a of the Law on Budgetary System, *Official Gazette of Republic of Serbia*, no. 54/09, 73/10, 101/10, 101/11, 93/12, 62/13, 63/13, 108/13, 142/14, 68/15, 103/15, 99/16.

[38] Art. 4 (7) of the Croatian Law on Enforcement, *Official Gazzete*, no. 112/12, 25/13 и 93/14 and Art. 27 (6) of the Montenegrin Law on Enforcement, *Official Gazzete of Montenegro*, no. 36/11, 25/13, 93/14.

method and object of enforcement. Even if they satisfy the principle of *lawfulness*, these provisions are not proportionate in the terms of Art. 1 of Protocol 1 of ECHR, because they put an excessive burden on an individual (enforcement creditor). The quantity and broad scope of these provisions give the final answer to the previously asked question – yes, the ECHR standards of human rights protection go so far that it is necessary to amend the laws on the enforcement procedure in RS and FBiH.

With regards to the conditions of clarity and predictability, it is necessary to use the same terminology, which is not the case currently. Namely, if we look more carefully, we will notice that legislators are using different words and phrases to limit the enforcement for the sake of performing public interest tasks: *necessary to* (*neophodno*)[39], *needed to* (*potrebno*)[40] or *serves to (služi za)*[41] for performing public interest tasks. At first, we have to examine whether the words *necessary to* (neophodno) and *needed to* (potrebno) have the same meaning or have a different meaning in terms of the degree of "necessity" of certain property to perform public interest tasks. Two arguments indicate that these words are synonyms. First, linguistically, it seems that these words have the same meaning.[42] Second, while the Constitutional Court of Bosnia and Herzegovina was assessing in one of its decisions whether Art. 7 (3) of the EPA RS is in accordance with the ECHR, it has replaced phrase *needed to* with the *necessary to*.[43] If these words (phrases) do not have the same meaning, then one of these two phrases (I would say *neophodno*) indicates at the higher degree of need for performing tasks of public interest. The third phrase – *serves to* (*služi za*), certainly does not have the same meaning as the previous two. It extends the privileged status of the state as enforcement debtor. If a certain property serves a particular purpose, it does not mean that it is necessary for its realization. This purpose can be accomplished without that property, but with more difficulties.

The above said indicates that only one term should be used. Between currently used words: *necessary to*, *needed to* and *serves to*, I find *necessary to* as the most appropriate solution. The reason is that this term would create a standard that exempts from enforcement only the basic property that the state uses in the performance of its public interest tasks, those that are essential and indispensable for those tasks.

Importance of clarity of enforcement procedure rules has been recognized by the Committee of Ministers of the CoE. In one of its recommendations, it states that "enforcement should be defined and

[39] Art. 7 (3) of the EPA RS
[40] Art. 166 (7) of the EPA RS.
[41] Arts. 79a, 117a (2) and 137a of the EPA FBiH.
[42] *Речник српског језика* (ed. M. Nikolić), Matica Srpska, Novi Sad 2011., 805, 973.
[43] Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP-774/04, § 395.

underpinned by a clear legal framework" and that "any legislation should be sufficiently detailed to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible".[44]

7. Concluding remarks

Poor public finances affect every aspect of our lives. Collection of the state debt is no exemption. Republika Srpska and Federacija Bosne i Hercegovine have created extremely broad limitations on enforcement against them and entities related to them. As seen throughout this paper, rules which stipulate such limitations are unclear and unpredictable and therefore cannot satisfy the lawfulness principle developed by the ECtHR. Also, the quantity of these limitations put an excessive burden on enforcement creditor in the sense of Art. 1 of Protocol 1 to the ECHR.

It should be noted that the enforcement against monetary funds on bank account should be the easiest way to collect the state debt. Unfortunately, limitation of this enforcement method is the most controversial limitation of the enforcement against the state. The most recent decisions of the ECtHR against the BiH concern this issue.[45] In these cases, applicants have not been able to enforce judgments in their favour for years (between four and eleven years)[46]. The ECtHR stated that there are already more than four hundred similar applications pending before it. Applicants cannot benefit from switching to another method of enforcement (e.g. enforcement of real property or movable property) due to the stipulated limitations on those methods as well. This indicates that enforcement against the state debt is one of the urgent problems in BiH and legislative amendments are needed.

If one summarizes all limitations prescribed by the EPA RS and EPA FBiH, it can conclude that we, the citizens of Bosnia and Herzegovina, are faced with the *phenomenon of an unlimited limitation on enforcement against the state*. This is certainly not in accordance with the ECtHR's case-law and recommendations of the Committee of Ministers of CoE.

[44] Council of Europe Recommendation Rec (2003) 17 of the Committee of Ministers to Member States on enforcement, 09.09.2003. Cf. Н.Бодирога, 63-66.

[45] *Kunić and Others v. Bosnia and Herzegovina*, no. 68955/12 7270/15 7286/15 7316/15 7321/15 7325/15 7336/15 7408/15 7418/15 7429/15 19494/15 19501/15 19547/15 19548/15 19550/15 19617/15, judgment of November 14, 2017 and *Spahić and Others v. Bosnia and Herzegovina*, no. 20514/15 20528/15 20774/15 20821/15 20847/15 20852/15 20914/15 20921/15 20928/15 20975/15 21141/15 21143/15 21147/15 21224/15 21237/15 21239/15, judgment of November 14, 2017.

[46] *Kunić and Others v. Bosnia and Herzegovina*, § 30, *Spahić and Others v. Bosnia and Herzegovina*, § 30.

Igor Popović, master prava
Asistent na Pravnom fakultetu Univerziteta u Banjaluci

ZAKONI O IZVRŠNOM POSTUPKU U BOSNI I HERCEGOVINI: USKLAĐENOST SA EVROPSKIM STANDARDIMA O ZAŠTITI LJUDSKIH PRAVA

Rezime

Zakoni o izvršnom postupku entiteta u Bosni i Hercegovini (Republike Srpske i Federacije Bosne i Hercegovine) ograničavaju ili u potpunosti onemogućavaju izvršenje u postupcima u kojima je država dužnik. Država se pri ovome gleda kao jedan širi subjekt, u koji se uključuju svi nivoi vlasti (entiteti, kantoni i lokalne samouprave, ali i neki drugi subjekti koji su pod kontrolom države). Takve ograničavajuće odredbe odnose se na svaki predmet i sredstva izvršenja (nepokretne i pokretne stvari, novčana potraživanja, dionice i sl.). Argumentuje se da one ne ispunjavaju uslov zakonitosti razvijen u praksi Evropskog suda za ljudska prava, prije svega zbog nejasnosti i nepredvidljivosti, ali da isto tako nisu srazmjerne u smislu prava na imovinu tražioca izvršenja zbog njihove brojnosti i obima dometa. Naposljetku, autor predlaže da se kroz izmjene i dopune uspostavi jasniji pravni okvir i daje prijedloge za početne korake za ostvarenje tog cilja. U tom smislu, izvršenje se može ograničiti samo na onim stvarima i pravima koje su nužne sa obavljanje poslova od opšteg interesa. Dodatno, potrebno je ujednačiti terminologiju u zakonima, dati konkretn(ij)e smjernice za određivanje da li neka stvar ili pravo mogu da budu predmet izvršenja, jasno propisati da je jedino izvršni sud nadležan da određuje da li se može ili ne može provesti određeno izvršenje. Cilj predloženih rješenja je, pored usklađivanja zakonodavstva sa EKLjP i smanjenje mogućnosti zloupotrebe prava od strane države.

Ključne riječi: izvršni postupak, princip zakonitosti, kvalitet zakona, Konvencija za zaštitu ljudskih prava i osnovnih sloboda, Evropski sud za ljudska prava.

Milica Stojković[1]

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LEGAL FRAMEWORK OF STATE AID IN THE EUROPEAN UNION MARKET

Abstract

State aid policy is a type of EU competition policy that symbolizes the braking system of industrial sector strategies that impede competition in the Single Market of the European Union. The determination of conditions and the procedure for controlling state aid are carried out to protect free competition in this specific market, applying the principles of market economy and stimulating economic development. It is necessary to ensure transparency in the granting of state aid, as well as respecting the provisions of the public law related to the state aid institute. It is fascinating to apply state aid to certain areas, such as regional aid, research, development and innovation assistance, environmental aid and assistance in taking risk capital. It is crucial that the economic life of the European Union be harmonized with the legislative framework of the communitarian law, which will also be the subject of the research presented in this paper.

Keywords*: law, State aid policy, competition, European Union.*

1. Introduction

The International commercial law is primarily created by the international legislator in an organized way (through international conventions) or spontaneously, autonomously (through the creation of business customs, standard, type contracts, collections of uniform legal terms, clauses and arbitration practices, etc.).[2]

Especially appealing the field of competition law is both because of its specificity and its actuality. The importance of competition is, traditionally, emphasized by the elasticity of demand, as well as the

[1] PhD student, Faculty of Law for Business and Justice in Novi Sad, e-mail:*mstojkovic1@yahoo.com*.

[2] S. Carić *et al.*, *Privredno pravo*, Univerzitet Privredna akademija, Fakultet za ekonomiju i inženjerski menadžment, Novi Sad 2011., 4.

disproportion between the needs and desires of consumers, and their ability to pay.[3]

With the adoption of the first acts of competition law, the most important goals of this policy of the European Union were proclaimed: protection of consumers' interests, reduction of prices and increase in the quality of products and services, open market economy with free competition, distribution of economic power to a broader circle of commercial entities, redistribution of financial resources and wealth, establishment of optimal efficiency at microeconomic and macroeconomic level and development of European economy, increase of social well-being, protection of economic entities from undisclosed these activities of competitors, balanced regional growth in the monitored markets, highest possible employment rate in the society, strengthening of internal and external competitiveness of the European economy.[4]

State aid policy is a unique part of competition policy, which implies the prohibition of subsidies or any form of state aid to certain companies that significantly distort competition, both in the domestic market and internationally. There are, of course, exemptions here, only if the companies in practice have proven positive business on the territory of the economic community. State aid policy is a type of competition policy of the European Union, which enables the monitoring of government policy in support of its national companies.[5] It symbolizes the braking system of industrial sector strategies, which impede competition in the Single Market of the European Union.

The notion that the Single Market of the European Union is threatened by the insufficiently examined state aid policy is quite correct. Violation of competition on the market can find justification only within the framework of state authorities. State aid policy represents a means of dominance on the market without physical, regulatory and fiscal barriers.[6]

State aid policy differs from any other national policy, as well as from the Commission's policy of restrictive practice, monopoly or merge. The goals of its regulation relate to the government or the state, not to the enterprises. The issue of granting state aid to business entities is significant because of its economic effects (whether the purpose for which

[3] B.Rakita, *Međunarodni marketing*, Ekonomski fakultet, Beograd 2003., 233.

[4] R. Baldwin, C. Wyplosz, *The Economics of European Integration*, McGraw-Hill, London 2006., 48.

[5] The concept of a state in the law of EU competition is viewed very widely because, in addition to the state itself, it implies its bodies and local communities. Also, the term includes public law institutions, public and private enterprises and institutions founded by the state, or through which it creates direct control over the business.

[6] Often, state aid policy is perceived as an instrument for fragmenting the market that is justified by a state epithety.

aid is granted is whether the competition has been violated) because any situation in which state aid is granted creates a risk of corruption.[7]

2. Legal aspects of state aid in communal law

Under global competitiveness, we mean the ability of the country to stimulate, economic, institutional and social action, the successful appearance and the survival of its companies in the world market, and the result of the interaction, firm-government, the ability to change the conditions of competitiveness on a global, world level.[8]

Legal aspects of state aid are a necessary instrument for monitoring competitiveness. The Tenth Competition Policy Report of 1981 relates to state aid policy. The idea was to highlight the need for assessing state aid policy, and possible ban, so as not to have a recurrence on the part of national authorities. The fact is that the adequately used state aid policy can be useful in achieving the objectives of the founding contracts, such as market integration, reduction of economic and regional disparities, or coordination with other forms of competition policy.

Under Article 107 of the Treaty[9] on the functioning of the European Union (from now on: the Treaty), any aid granted by a Member State or its State resources which distorts or threatens to compete with the favor of an undertaking or certain of its products is contrary to the Single Market to the extent that it changes the exchange between Member State. State aid policy is not opposed to the market in question: when state aid relates to a social character and when it is granted to an individual consumer without discriminating against the originating product, and when it is allowed in the case of rehabilitation as a result of a natural disaster, and the consequence of extraordinary circumstances. Assistance is defined here as any positive or negative action of a state that represents a monetary measure to achieve a particular goal. This financial step may consist of doing, such as subsidies, or omissions, such as tax exemption.[10]

It is about the following legal and economic situations. The first is where state aid promotes the economic development of an area where the standard of living is below average, or where there is severe

[7] State aid - deliberate investment or hidden corruption?, *http://www.istinomer.rs/pictures/wledit_pdf/622770574875176.pdf,* last visited August 3, 2016.
[8] J. Kozomara, *Tehnološka konkurentnost*, Ekonomski fakultet, Beograd 1994., 50.
[9] The Treaty on the Functioning of the European Union, Consolidated version, *Official Journal of the European Union*, C 115/47.
[10] This includes exemption from social and pension insurance costs, loan guarantees under very favorable conditions and coverage of exploitation losses.

unemployment.[11] Job creation assistance may be approved by the Commission when evaluating, the goal is not crucial, but the impact of the measure on the competition.[12] The second is where state aid is used to promote a particular project of common European interest in removing a severe economic disorder in a Member State. The third case is in the situation where state aid is used to facilitate the development of individual or commercial regions unless it distorts the conditions of exchange in a measure that would be contrary to the common interest. The fourth case is recognized when state aid is used to promote culture and preserve cultural and artistic heritage, with the requirements of respecting the basic rules of competition. Other categories of assistance include those identified by the Council with a qualified majority on the proposal of the Commission.[13]

3. Control of state aid policy

Effective implementation of competition law is created by the joint action of the European Commission and national competition authorities that form the European Network of Competition Authorities.[14] When it comes to the decision-making process whether a state aid is contrary to competition or not, we have a notification process that involves the publication and delivery of state aid policy implemented by a particular government in the industrial sector. An urgent need to find out whether the strategy in question leads to a distortion of trade between the Member States.

The period that occurs between the application of the state aid itself and the sending of a notification to the Commission often makes the problem of the promptness of the treatment. The Commission instructs the case manager to supply facts related to the State aid policy that is the subject of the examination. In this period there is information about the characteristics of state aid.[15]

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[11] The Commission has defined the cumulative conditions for obtaining state aid: the aid cannot be higher than a certain percentage of total investment, while the rate depends on the difficulty of the situation (the assistance cannot exceed 75% of the total investment, that is, from 130,000 euros). The same must be assessed by an adequate method, it should not relate to the territory of the whole country, but only to the regions, and its effect must be evaluated by economic sectors.

[12] Help is especially prohibited that makes the establishment of the company more difficult.

[13] M. Cini, L. McGowan, *Competition Policy in the European Union*, Palgrave Macmillan, Basingstoke 2008[2]., 138.

[14] S. Ahn, „Competition, Innovation and Productivity Growth: A Review of Theory and Evidence“, *OECD Working Papers: No. 317*, Economics Department 2002., 102.

[15] If the State aid investigation is positive and approved the decision obtained is published in the Commission's Official Journal. Negative and conditional decisions are published in the Official Journal of the L series. The duration of the investigation by the Commission takes place within six months.

The Commission has the opportunity to conduct an informal investigation of state aid policy, where there is no subsequent review at the Court of Justice of the European Union. Article 108 of the Treaty defines the activities of the Commission and the Court in the matter of decision-making. It is pointed out that the Commission, in cooperation with the Member States, reviews the granted assistance, proposes measures to improve the development and functioning of the common market. If the aid awarded is not by the Unified Market and that its abuse is evident, the Commission shall decide to terminate this assistance.

If a Member State, after this, does not apply the adopted decision, the Commission or interested party shall send a complaint to the Court of Justice, which has a period of three months, to make its decision on the issue of the particular legal matter. Control of the behaviour of business entities as state aid users must be implemented. Article 107 sets out the conditions for granting state aid, while Article 108 regulates the regime of state aid issued. Adequate implementation in the economic life of state aid is of great importance for the existence of a fair market competition, especially in such a broad and specific space for the competition of competitors.

The Competition Directorate has become a critical factor in controlling state aid over time. Its staff is highly motivated to achieve the objectives of competition policy, the purpose of which is to establish a competitive and integrated European economy, which together strengthens the functioning and importance of the European Union.[16] Competition policymakers did not understand the seriousness of the abuse of state aid, until the recession in 1973, when the Commission was forced to take a serious approach to this situation.

The Commission, as the guardian of the right of a competition of the European Union, faced numerous notifications, but not with the cooperation of the member states themselves. The year of 1985 is significant for this topic, since this year the State Aid Act was passed, which besides legal had a statistical significance. It was precisely this legal regulation that established a trend in the movement of state aid, which, on average, among all member states at the time, by the beginning of the nineties, amounted to 15% of public expenditures and 4% of GDP. This act has determined the basic principles of state aid. It is envisaged that certain state aid is not fair in all its forms, that the effectiveness of the policy has to be proven and that the transparency of all aspects of state aid must always be a priority. The evolution of state aid policy has been shaped by three sub-components of this strategy: regional state aid policy, sectoral state aid policy, and general state aid policy.

[16] F. Mancini, D. Keeling, "Democracy and the European Court of Justice", *The Modern Law Review*, Vol. 57, 2/ 1994., 175-190.

4. State aid policy in the EU practice

Competition is not an isolated phenomenon, but an interdisciplinary phenomenon that arises from the internal and external environment, and links business strategy, macroeconomic policy, legal and regulatory reform, education, motivation of management and workers, and many other economic, business and social factors to create a single strategic plan and competitiveness policies in order to create higher added value.[17] State aid policy, as part of the competition policy in the European Union market, is often placed on the test of verification of its legitimacy and compliance with the legislative framework of the public law.

The Landesbanken example illustrates the case of state aid granted to German and Austrian banks to raise as many loans as possible on more favourable terms than their competitors. After the investigation, the Commission decided that in the present case it was an unfair state aid aimed at extorting competition from the loan market. On the other hand, the European Commission approved € 38 million assistance to an Italian Fiat carmaker to improve the knowledge of workers who were on the verge of failure, due to rationalization in production and the introduction of more modern processes.

Also, in 2003, the Commission approved state aid for 293 million euros for a joint research of companies (Motorola, Philips, STMicroelectronics) in the development of technology based on the production of integrator circuits of nanometer dimensions. The regional state aid policy lays down its legal basis in Article 107 of the Treaty, and it refers to state aid that promotes the development of economic regions with the low standard of living and high unemployment. The Dutch government approved regional state aid to SCI Systemes to build a factory for RS computers and accessories needed by Hewlett-Packard.

The Commission took the view that there were violations of the rules of local investment and competition, in case other investors did not receive tax relief. In May 2004, the European Commission ordered the Danish public service TV2 to repatriate the aid granted to it by the state in the money, as this support was used for antipropaganda against media competitors and frequency manipulation. When providing assistance that alleviates the living conditions of the region, there should be no imposition of conditions of exchange that could endanger effective competition in the European Union market. These two aspects of regional policy are trying to reconcile. One-quarter of the total state aid granted in the territory of the member states of the European Union is precisely the one that belongs to the regions.

[17] J. Rosić, P. Veselinović, *Nacionalna ekonomija*, Ekonomski fakultet, Kragujevac 2008., 39.

In the case of a favourable fiscal agreement between Ireland and Apple, the European Commission concluded that Apple had obtained unlawful tax benefits from Ireland in the form of beneficial tax arrangements. Such facilities are available on a selective basis for this company over a period. The particular treatment has led Apple to pay income tax at an effective tax rate of 1 percent on the European profit for 2003, to reach a marginal 0.005 percent in 2014.[18]According to the Commission's view, the two companies belonging to the Apple Group (Apple Sales International and Apple Operations Europe) have directed their profits internally to the fictitious "head office". The minimum part of the profits earned by these two companies was taxed in Ireland, while the remaining large portion was allocated to those above "central", where it avoided taxing.[19]

State aid policy contains the four principles underlying its implementation by the Competition Directorate and was determined in 1971 in the Regional Aid Resolution. The first law represents a balanced regional aid policy in line with the needs and development of the region, compared to the best among them. This illustrates assistance to areas facing a decline in industrial development and their convergence with leading development centres in the territory of a Member State so that residents have equal conditions for living and working. To this end, regional maps are created to help distribute the aid properly. The second principle is recognized through the transparency of local support, the third through the possibility of quantifying it, and the fourth through the specificity of assistance for each region in particular.

Over time, there has been systematic and continuous work on improving the legal framework for specific sectors such as financial services, energy, telecommunications, the pharmaceutical industry[20], the market of "smart" phones[21], transport. The economic and financial crisis has led to an increase in the participation of the state in the market life of business entities. For example, state aid in the banking sector amounted to 1.6 trillion euros, or 13% of the EU's GDP, from 2008 to 2012. The contribution of this type of competition policy is essential for the survival of the common market's integrity. Member States have created a sustainable strategy of state aid policy by 2020, in the form of a permanent program with a focus on defined goals.

[18] Ireland has provided unlawful tax relief to Apple, worth as much as 13 billion euros; European Commission, State Aid, Press Release, Brussels August 30, 2016.

[19] Apple made arrangements with Ireland to pay a tax of around 500 euros for every million euros of profit.

[20] The Commission's fight in the field of copyright protection, in particular for the protection of generic companies engaged in the production of antidepressants and drugs for cardiovascular diseases.

[21] The so-called Patent War between Motorola and Samsung.

The general government policy category contains all those aid schemes or aid schemes that can not be classified as a sectoral or regional one. The Commission and the Competition Directorate are authors of various legal acts, including the Legal Framework of the State Union for R&D, 1985. The State Aid for Growth, Employment and Competitiveness Act was adopted in 1993, when this policy became a horizontal state aid policy, with a primary emphasis on small and medium-sized enterprises.

An essential aspect of the relationship between the government and industry at the national level is the regulation of the state-owned sector: electricity generation and distribution, gas distribution, water supply, transport, postal services, and telecommunications. In time, the Commission wished to enforce competition rules in the area of so-called natural monopolies. The task of the Commission was to subtract the state's exclusive control over these areas. The importance of introducing competition in this area is excellent. It is obvious here that it provides the necessary support to the technological development of these areas, with all social and financial sorts, such as new jobs and a reduction in the cost of citizens.

Under Article 106 of the Treaty, regardless of whether they are public, public sector enterprises must not in any way interfere with competition in the area in which they operate. This article is widely interpreted by the concept of enterprise and state. In addition to public companies, there are companies engaged in activities of general interest, firms with exclusive rights and fiscal monopolies. It should be noted that the rights under Article 106 of the Treaty cannot be granted unless they are under Articles 101 and 102.

Accordingly, the Court of Justice of the European Union explicitly prohibits the granting of this type of rights in the field of telecommunications and television frequencies, in which way the abuse of a dominant position by state television occurs. For a company to have the opportunity to perform activities of general interest, the Commission has defined three criteria. These criteria require a cumulative fulfilment of the following elements: continuous satisfaction of the needs of the broadest range of users, products and services, equal conditions for all, and provision of services at cost price without significant profit.

The Court of Justice of the European Union has taken the view that the production, transport, and distribution of electricity at a single price for all consumers by the same criteria is a specific area and that the application of exclusionary competition rules would disrupt the desirable market situation. According to the provisions of Article 106, there are situations for which the Court has determined that they may be conditioned by the exclusion of competition, if such a state is necessary, and this case represents one of the foreseen exceptions to the general competition rules.

5. Instead of the conclusion

There are three guidelines for the proper coordination of industrial and competition policy: they must not be understood as an incompatible policy, but must be based on the principles of communal law, the new industrial policy must be entirely in the context of economic and monetary union, and industrial policy competences must be the result of a more extended phase integration of the European market, which implies alliance between the state and the market.[22] A government-backed government takes precedence over its competitors.[23]

The objective of the state aid policy in the Single Market of the European Union is to assist the Member States in the legal and economic regulation of this assistance by creating a budgetary framework. The correct policy of public expenditure with its transparency should contribute to the development of investment projects of European interest. Administrative constraints should be reduced in the implementation of the correct state aid policy with the characteristics of the non-aggravation of competition and exchange in the common market, and seek to prevent business entities from taking on the roles of the actors of misuse of this type of assistance.

Interesting forms of state aid in local aid, assistance in research, development, and innovation, aid for environmental protection and support in taking risk capital in today's economic enterprises are interesting. These forms have varying shapes, depending on the space, society and time in which they occur.

It is necessary to permanently strive for harmonization of the legal matter of the participating states of the Unified Common Market with the communal law in the relevant legal issues related to the implementation of the state aid policy in real life, by legitimate expectations and legislative frameworks, as universal regular principles.

[22] W. Sauter, *Competition Law and Industrial policy in the EU*, Clarendon Press, Oxford 1997., 85-111.

[23] For more information see: *http://ec.europa.eu/competition/state_aid/overview/index_en.html,* last visited 18.01.2016.

Milica Stojković
doktorand, Pravni fakultet za privredu i pravosuđe, Novi Sad

PRAVNI OKVIR DRŽAVNE POMOĆI NA TRŽIŠTU EVROPSKE UNIJE

Rezime

Politika državne pomoći predstavlja vrstu politike konkurencije Evropske unije, koja simbolizuje kočioni sistem strategija industrijskih sektora, koje vode ometanju konkurencije na Jedinstvenom tržištu Evropske unije. Određivanje uslova i postupak kontrole državne pomoći odvijaju se u cilju zaštite slobodne konkurencije na ovom specifičnom tržištu, primenom načela tržišne ekonomije i podsticanja privrednog razvoja. Potrebno je obezbediti transparentnost pri dodeli državne pomoći, kao i poštovanje odredbi komunitarnog prava koje se odnose na institut državne pomoći. Veoma je interesantna primena državne pomoći kod pojedinih oblasti, kao što su regionalna pomoć, pomoć za istraživanje, razvoj i inovacije, pomoć za očuvanje životne sredine i pomoć prilikom preuzimanja rizičnog kapitala. Od ključnog značaja je uskladiti privredni život Evropske unije sa legislativnim okvirom komunitarnog prava, što će predstavljati i predmet istraživanja prezentovan u ovom radu.

Ključne reči: pravo, politika državne pomoći, konkurencija, Evropska unija.

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Example: J. Ćirić, 310–316.

Example: J. Ćirić, 310 etc.

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7. Statutes and other regulations are cited with a complete title in roman, followed by the name of the official publication (e.g. official gazette) in italics, and then the number (volume) and year of publication in roman. In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

   Example: Zakon o privrednim društvima – ZPD, *Službeni glasnik RS*, br. 125/04.

   7.1. If the statute has been changed and supplemented, numbers and years should be given in a successive order of publishing changes and additions.

   Example: Zakon o obligacionim odnosima –ZOO, *Službeni list SFRJ*, br. 29/78 39/85, 45/89 - odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93 i *Službeni list SCG*, br. 1/2003 - Ustavna povelja)

8. Articles of the statutes and regulations should be cited as follows:

   Example: Article 5 (1) (3); Article 4–12.

9. Citation of court decisions should contain the most complete information possible (category and number of decision, date of decision, the publication in which it was published).

10. Latin and other foreign words, Internet addresses etc. should be written in italics.

11. Citation of the websites should contain the title of the text, address of the page and the date of access.

   Example: Hodson David, EU approves European divorce enhanced co-operation, *www.davidhodson.com/assets/documents/enhancedcoop.pdf*, last visited 14 April 2011.