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Thematic Conference Proceedings

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CONTENT

Editor's note

The Thematic Conference Proceedings from the International scientific Conference "Legal system in the period of the new reality" was published in the year of the jubilee - 60 years since the founding of the Faculty of Law, University of Priština. At the same time, for the eleventh time in a row, in completely changed social circumstances, an International scientific conference is being held at the Faculty of Law.

Undoubtedly the year in which we mark the jubilee, as well as the previous one, was marked by the pandemic of the COVID-19 virus, the global threat to the population caused by the speed of the virus spread and the consequences it causes for human health. The pandemic potential of the virus has caused unimaginable changes in the functioning of states and affected all aspects of social life. The time in which we live is increasingly called the period of the "new reality". Having in mind the tectonic social changes of which we are contemporaries, as well as the challenges of states in establishing the "normal" functioning of legal systems, this year's International scientific conference was held under the name "Legal system in the time of the new reality". This gave the authors the opportunity to explore a wide range of topics, in the field of legal and other social sciences, which relate to the functioning of legal systems in this period and to present their views, proposals and conclusions to the professional and general public.

The International Scientific Conference "Legal System in the period of the new reality" gathered sixty-two authors, from the country and abroad, who presented forty-five scientific papers independently or as co-authors. Bearing in mind that almost half of the papers were written in English, the papers were published in two volumes of the thematic conference proceedings - one in Serbian and one in English language.

I would like to thank all the members of the Editorial Council, members of the Editorial Board from abroad and the country, as well as reviewers, for suggestions, comments and proposals that were crucial for the final shaping of Thematic Conference Proceedings.

Editor-In-Chief

Prof. dr Zdravko Grujić

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Valerio Massimo MINALE, Ph.D*

ROME AND CHINA ON THE SILK ROADS: A FIRST SKETCH

Abstract

In order to reconstruct the relations – real, imaginary or even utopian – between Rome and China it is necessary to collect and analyze a great number of sources, coming from many different fields. Concerning this perspective, the Silk Road(s), which is a meta-historical concept, represents an unavoidable observation point, used for centuries by merchants, missionaries, soldiers and diplomats. So, the confrontation between the two empires became in the past an instrument for a mutual acknowledgment and self-representation, while in our contemporary times it could be an interpretation key to understand the geopolitics of the "New Great Game".
Key words: Roma and China, Silkroad(s), Empires, acknowledgment and self-representation, "New Great Game"

1. EMPIRES IN CONFRONTATION

It seems that Rome and China knew each other.[1]

Probably it was under Trajan, when he conquered Ctesiphon in 116 and the Roman empire reached its biggest dimension, because of some contemporary victories of the Chinese one on the Western border, that the two worlds arrived to be so few distant to be quite close, even if without never meeting themselves: actually, thereafter the distances started again to increase.

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[1] For a firts step, J. Ferguson, M. Keynes, *China and Rome*, in *Aufstieg und Niedergang der römischen Welt* II.9.2, Berlin-New York, 1978, 581-603 and J.-M. Poinsotte, „Les Romains et la Chine, réalités et mythes", *MEFRA*. 91, 1979, 431-479, but also D. B. Campbell, „A Chinese Puzzle for the Romans", *Historia* 38, 1989, 371-376 (together with Id., „Did the Romans have Links with the Far East? Rome and China", *Ancient Warfare* 9, 2015, 45-49).

Their mutual knowledge developed through some unavoidable spatio-temporal coordinates, which concern on one side two principal trade ways, terrestrial and maritime, in turn split in several further routes, on the other one the ages of the Han (206 b.C.-220 a.C.) and the Tang (621-907), Chinese dynasties which respectively confronted Rome and a good section of Byzantium; in the middle, across the centuries, there were the Persians, the Arabs and at a certain point the Seljuks and the Mongols together with other populations, mainly the Sogdians, who operated as mediators.[2]

In this great scenario the market of the silk, a luxury product everywhere object of desire, represented probably the most relevant vehicle of communication, embodied in the meta-historical concept of Silk Road (or, better, Roads) realized again through the desert regions of Central Asia and across the rivers and the seas from India to Arabia.[3]

Even if this concept has been rather recently introduced in the general debate as *Seidenstrasse* (or *-strassen*) by the German adventurer Ferdinand von

[2] Rather recently, E. de la Vaissiere, *Sogdian Traders. A History*, Leiden, 2005, orig. Paris, 2002.

[3] Apart from J. Thorley, „The Silk Trade between China and the Roman Empire at Its Height, circa A.D. 90-130“, *Greece and Rome* 18, 1971, 71-80 (together with Id., *Silk. Trade Routes, Politics and Commercial Secrets*, in F. Rodriguez Adradeos, ed., *Historia y arqueología. IX Congreso español de estudios clásicos. Madrid 1995*, Madrid, 1998, 241-244), see J.-N. Robert, *De Rome à la Chine. Sur les routes de la soie au temps des Césars*, Paris, 1993 (but 2014, 4e edition revue et augmentée; Ital. transl. *Da Roma alla Cina. Sulle vie della seta al tempo della Roma imperiale*, Gorizia, 2016) and R. McLaughlin, *The Roman Empire and the Silk Routes. The Ancient World Economy and the Empires of Parthia*, in *Central Asia and Han China*, Barnsley, 2016 (together with Id., *Rome and the Distant East. Trade Routes to the Ancient Lands of Arabia, India and China*, London-New York, 2010) and then D. F. Graf, *The Silk Road between Syria and China*, in A. I. Wilson, A. K. Bowman (eds.), *Trade, Commerce, and the State in the Roman World*, Oxford, 2018, 443-529 and B. Hildebrandt, C. Gillis (eds.), *Silk. Trade and Exchange along the Silk Roads between Rome and China in Antiquity*, Oxford-Philadelphia, 2017, where in particular B. Hildebrandt, *Silk Production and Trade in the Roman Empire*, 34-50 (40 ff. on some epigraphic sources concerning the *sericarii*, among them one coming from Puteoli: IG. 14.785; Z. Kádár, „Serica. Le rôle de la soie dans la vie économique et sociale de l'empir romain, d'après des documents écrits. Les Ier et IIIe siècles“, *Acta Classica Universitatis Scientiarum Debreceniensis* 3, 1967, 89-98, 91); more in general, G. K. Young, *Rome's Eastern Trade. International Commerce and Imperial Policy, 31 BC-AD 305*, London-New York, 2001, but also M. G. Raschke, *New Studies in Roman Commerce with the East*, again in *ANRW.* II.9.2, Berlin-New York, 1978, 604-1378, 606-650 (where a huge bibliography). Finally, other bibliography in A. Kolb, M. Spaidel, *Imperial Roma and China. Communication and Information Transmission*, in M. D. Elizalde, W. Jianlang (eds.), *China's Development from a Global Perspective*, Cambridge, 2017, 28-56.

Richtofen in the first volume of his *China, Ergebnisse eigner Reisen und darauf gegründeter Studien* of 1877,[4] it has became absolutely necessary in order to identify a dimension made of exchange of goods and merchants, but also of religions and more in general of ideas and conceptions of the existent world at that time.

The topic has been faced since the Enlightenment – first of all, J. de Guignes, *Réflexions générales sur les liaisons et le commerce des Romains avec les Tartares et les Chinois*, in *Mémoires de l'Academie royale des Inscriptions* 32 (1768) 355-370[5] – always with a strong ideological attitude, always negative towards the Oriental empires, which was reclaimed even by the Marxist thesis elaborated by Karl August Wittfogel in *Oriental Dispotism. A Comparative Study of Total Power* of 1957.

From a certain point to our days the scholars have focused their attention on the trades, which, together with the wars, had represented the main reason of movements along the Silk Roads; another fundamental aspect concerns the religions and their diffusion thanks to the activity of the missionaries and the merchants themselves.

But a correct approach must surpass a simple history of trades, by creating, at any rate in the Roman viewpoint, a scheme of confrontation between the two global powers made on the base of their corresponding representation: actually such a kind of approach, which normally has been used concerning the role of the Persian empire, considered the traditional antagonist of Rome, would be better used concerning the Chinese one.

The specific point is for sure relevant in particular for three main reasons: the Chinese empire was really far away, so its conception into the Roman sources results more fascinating because more filtered through different cultural factors; then it had a more fixed historical experience, at any rate again from the Western viewpoint, because the great distance made the Romans less sensitive to the political changes – after the Warring States, we have only the Han and the Tang dynasties – of the Chinese; finally, it was more open on the sea, through the Indian and the Arabian route.[6]

[4] For example, T. Chin, „The Invention of the Silk Road, 1877“, *Critical Inquiry* 40 (2013) 194-219.

[5] In particular, N. Wolloch, „Joseph de Guignes and Enlightenment Notions of Material Progress“, Intellectual History Review 21, 2011, 435-448.

[6] F. De Romanis, *Cassia, cinnamomo, ossidiana. Uomini e merci tra Oceano Indiano e Mediterraneo*, Roma, 1996; M. R. Cimino (ed.), *Ancient Rome and India. Commercial and Cultural Contacts between the Roman World and India*, New Dehli, 1994; R. Tomber, *Indo-Roman Trade from Pots to Pepper*, London, 2008 together with S. E.

Of course everything connected with the topic of the Silk Roads has a very complex concept and implies the necessity of a multifactorial vision, because the concept is tremendously extended through the time and space.[7]

Inside this multifactorial vision a sensibility of legal history must be considered fundamental, due to the fact that the role of state entities, more or less powerful, but in every case able to control the trades of the caravans and the fleets, has been absolutely pivotal.

The ancient world needed to rule the economy by the law, mainly concerning the long-distance trades across the deserts and the seas and the purchase and sell of the silk, in our case; moreover, this field was strongly connected with the question of taxation, because of the high price of the good imported, both rough and refined; finally, as happened for the purple, the silk became a symbol of power and for this reason it was always more controlled by the state.

Besides the legal sources, testimonies coming from literature, especially related to geography – Ptolemy, Strabo and Pausanias; then, Pomponius Mela – and in consequence with memories of travels, will be useful to try to reconstruct the idea that Rome had of China (and *vice versa*).[8]

Sidebotham, *Berenike and the Ancient Maritime Spice Route*, Berkeley (California), 2011; more in general, V. Begley, R. D. De Puma (eds.), *Roman and India. The Ancient Sea Trade*, Oxford, 1992. More recently K. S. Mathew (ed.), *Imperial Rome, Indian Ocean Regions and Muziris. New Perspectives on Maritime Trade*, New Dehli, 2015 and M. A. Cobb, *Rome and the Indian Ocean Trade from Augustus to the Early Third Century*, Leiden, 2018.

[7] X. Liu, *The Silk Road in the World History*, Oxford, 2010; moreover, R. Cardilli and others (eds.), *Chang'an e Roma. Eurasia e via della seta. Diritto Società Economia*, Padova, 2019.

[8] Beside E. Chavannes, „Les pays d'Occident d'après le Heou Han Chou“, *T'oung Pao* 8, 1907, 149-244 and A. Forke, „Ta-ts'in das römische Reich“, *Ostasiatische Zeitschrift* 14, 1927, 48-60 and F. J. Teggart, *Rome and China. A Study of Correlations in Historical Events*, Berkeley (California), 1939 and 1969, see L. Xinru, *Looking towards the West – How the Chinese viewed the Romans*, in B. Hildebrandt, C. Gillis (eds.), *Silk. Trade and Exchange along the Silk Roads between Rome and China in Antiquity*, Oxford-Philadelphia (Pennsylvania), 2017, 1-5, A. Kolb, M. A. Speidel, „Perceptions from Beyond: Some Observations on Non-Roman Assessments of the Roman Empire from the Great Eastern Trade Routes“, *Journal of Ancient Civilizations* 30, 2015, 117-149 and K. Hoppal, „The Roman Empire according to the Ancient Chinese Empire“, *Acta Antiqua Acadamiae Scientiarum Hungaricae* 51, 2011, 263-305; moreover, L. Ying, „Ruler of the Treasure Country: The Image of the Roman Empire in Chinese Society from the First to the Fourth Century AD“, *Latomus* 63, 2004, 327-339, D. Graf, „The Roman East from the Chinese Perspective“, *Annales Archéologiques Arabes Syriennes* 42/*International Colloquium on Palmyra and the Silk Road*, Damascus, 1996, 199-216 and D. Leslie, K. Gardiner, „«All Roads Lead to Rome»: Chinese Knowledge of the Roman Empire“,

A starting step could be the registration of several embassies sent in order to establish a direct way capable to bypass the Persians together with other intermediaries and their exorbitant systems of taxes; the echoes of military fights, on the other hand, are almost lost in some legends: one among the others is the storytelling that after the battle of Charrae in 53 b.C. a huge number of Roman soldiers were transferred as prisoners to the Eastern border and forced to remain there working and so funding even a community.[9]

Also the piece of information given by Florus in *Epitome* 2.34.62 telling that already Augustus would have tried to introduce diplomatic relations with China – *Seres etiam habitantesque sub ipso sole Indi, cum gemmis et margaritis elephantos quoque inter munera trahentes, nihil magis quam longinquitatem viae inputabant – quadriennium inpleverant; et iam ipse hominum color ab alio venire caelo fatebatur* – seems to be the result of propaganda and more precisely would come from the cultural tendency in presenting the *princeps* as the founder of many different traditions, included the commercial ones, both on the earth and on the sea in peace after his military victory.

Apart from the travels toward the West, around 130 b.C., organised by Zhang Qian, who was a prominent diplomatic under the emperor Wu Ti of the Han dynasty, described in the Sima Qian's *Shiji*[10] and linked mainly with the conquest of the Xinjiang[11] and the Ferghana valley, strategic regions for the silk trade - two circumstances in particular are recorded, both reported in the Fan Ye's *Hou Han Shu*, the so-called *Book of the Posterior* Han.[12]

Journal of Asian History 29, 1995, 61-81 together with D. D. Leslie, K. H. J. Gardiner, *The Roman Empire in Chinese Sources*, Rome, 1996 (cf. E. G. Pulleyblank, „The Roman Empire as Known to Han China“, *Journal of the American Oriental Society* 119, 1999, 71-79). Useful B. J. Mansvelt Beck, *The Treatises of Later Han. Their Author, Sources, Contents and Place in Chinese Historiography*, Leiden, 1990. Finally, Yu Taishan, „China and the Ancient Mediterranean World. A Survey of Ancient Chinese Sources“, *Sino-Platonic Papers* 242, November 2013, online and before Id., *A History of the Relationship between the Western and Eastern Han, Wei, Jin, Northern and Southern Dynasties and the Western Regions*, Philadelphia (Pennsylvania), 2004.

[9] O. H. Dubs, *A Roman City in Ancient China*, London, 1957.

[10] A. F. P. Hulsewé, M. A. N. Loewe, *China in Central Asia: The Early Stage 125 BC-AD 23: An Annotated Translation of Chapters 61 and 96 of the History of the Former Han Dynasty*, Leiden, 1979; moreover, B. Watson, *Ssh-Ma Ch'ien Grand Historian of China*, New York, 1958; see also T. R. Martin, *Herodotus and Sima Qian: The First Great Historians of Greece and China*, Basingstoke, 2009.

[11] J. A. Millward, *Eurasian Crossroads. A History of Xinjiang*, New York, 2007

[12] J. P. Yap, *The Western Regions, Xiongnu and Han, from the Shiji, Hanshu and Hou Hanshu*, place unknown, 2019 and J. E. Hill, *Through the Jade Gate to Rome. A Study of the Silk Routes during the Later Han Dynasty 1st to 2nd Centuries CE. An Annotated Translation from the Hou Hanshu "The Chronicle of the Western Regions"*, North

The first one is represented by the diplomatic mission promoted in 97 by general Ban Chao – leader of a great campaign against the proto-Huns, the Xiongnu, which brought the Chinese army even on the coasts of the Caspius Sea. Pan Ku, his brother, would be the author of the *Chien Han Shu*, the *Book of the Anterior Han* – and entrusted to his assistant Gan Ying in order to promote a direct contact with the Roman empire (*Hou Han Schu* 88.2918), called *Daqin;*[13] he, anyway, following the wrongful suggestions offered by the usual Persians – here the Parthians: their country was called *Anxi* in the Chinese sources – who had a strong interest in preserving completely divided the two worlds without any possibility of the arrangement, preferred to stop in front of the Persian Gulf.

Belonging to that period we have the testimony left by Isidorus of Charax (I century), author of a chronicle of travel, known as Σταθμοὶ Παρθικοί or *Mansiones Parthicae*, across the Persian empire and used by Ptolemy in *Geographia* 1.11.7;[14] referred to a further time is the piece of information concerning the challenge of Maes Titianos (II century), another merchant, used by Maximus of Tyre, who would reach the so-called Stone Tower, probably now the place of the Tajik city of Tashkurgan again in Xinjiang.[15]

The second one, instead, is represented by a delegation sent by Marcus

Charleston, 2015, 2nd ed. (*1.Text, Translation and Notes*; *2.Appendices and Bibliography*); see also Y.-S. Yü, *Han Foreign Relations*, in D. Twitchett, M. Loewe (eds), *The Cambridge History of China. I. The Ch'in and Han Empires, 221 B.C.-A.D. 220*, Cambridge, 1986, 377-462.

13 S. N. C. Lieu, *Da Qin and Fulin. The Chinese Names for Rome*, in S. N. C. Lieu, G. B. Mikkelsen (eds.), *Between Rome and China. History, Religions and material Culture of the Silk Road*, Turnhout, 2016, 123-146.

14 Apart from W. H. Schoff, *Parthian Stations by Isidore of Charax*, Philadelphia (Pennsylvania), 1914**,** see G. Walser, „Die Route des Isidorus von Caharax durch Iran“, *Archäologische Mitteilungen aus Iran* 18, 1985, 145-156, but also I. Khlopin, „Die Reisenroute Isidors von Charax und die oberen Satrapien Parthiens“, *Iranica Antiqua* 12, 1976, 144-145**;** moreover, R. Andreotti, „Su alcuni problemi del rapporto fra politica e controllo del commercio nell'impero romano“, *Revue Internationale des Droits de l'Antiquité* 16, 1969, 215-257.

15 Apart from M. Cary, „Maes, Qui et Titianus“, *The Classical Quarterly* 6, 1956, 130-134, see A. Alemay i Vilamajó, „Maes Titianos i la Torre de Pedra (I): una font grega sobre els orígens de la ruta de la seda“, *Faventia* 24, 2002, 105-120, N. Andrade, „The Voyage of Maes Titianos and the Dynamics of Social Connectivity between Roman Levant and Central Asia/West China”, *Mediterraneo antico* 18, 2005, 41-74 and P. Bernard, „De l'Euphrate à la Chine avec la carovane de Maès Titianos (c. 100 ap. n.è.),“ *Comptes rendus de l'Académie des Inscriptions* 149, 2005, 929-969; moreover, M. Heil, R. Schulz, „Who was Maes Titianus?“, *JAC*. 30, 2015, 72-84; finally, G. Traina, „Central Asia in the Late Roman Mental Map, Second to Sixth Centuries“, in D. Di Cosmo, M. Maas (eds.), *Empires and Exchanges in Eurasian Late Antiquity. Rome, China, Iran, and the Steppe, ca. 250-750*, Cambridge, 2018, 123-132.

Aurelius in 166 and led by a certain Autun, clearly a transliteration of the imperial name of Antoninus, which arrived by ship – the terrestrial way were closed due to the war started on the Eastern *limes* since 162 – in the Tonkin Gulf[16]: this route, destined to be used always with more frequency, was known by Ptolemy, who had described the Malaysia peninsula calling it Golden Chersonese.

Maybe, in 197, a Chinese legation would have reached Antiochia.[17] We know, moreover, that on the occasion of a visit made in Persia by some Chinese ambassadors, they would receive as gifts some "jugglers" coming from a land called *Lijian*, another name for Rome (or for Antiochia or even Alexandria).

Finally, two other diplomatic missions would be sent respectively in 226, during the reign of Wei under the emperor Cao Rui, who ruled between 227 and 239, in 284 by Carinus, thanks to a merchant, to Wu Ti of Jin dynasty.

Anyway, the connection between West and East continued alongside the Silk Roads – starting from the capital of the Chinese empire, Chang'an, continuing through the Gansu corridor, circumventing the Taklamakan desert, arriving at the oasis of Kashgar, and pointing to the lands conquered once upon a time by Alexander the Great, the old Hellenistic kingdoms of Bactriana (more or less the present Afghanistan), Sogdiana (Uzbekistan), and Margiana (Turkmenistan), and eventually to the state of Gandhara and the empire of Kushan,[18] thanks to the activity of countless traders.

2. THE SILK MARKET

In Rome, the silk had appeared at the time of the Republic and it was considered hailing from the mysterious lands of the *Seres*, the producers of the tissue called *sericum*, but became absolutely relevant as object of import only under the Principate and the Dominate, when combined with the purple and called *sericoblatta*, became a symbol of the imperial majesty.

Very interesting is the testimony given by Plinius the Elder in his *Natural*

[16] C. Burgeon, „L'ambassade romaine envoyée dans l'Empire des Han en 166: une expédition maritime fructueuse sur les plans économique et diplomatique?," *Viaggiatori, circolazioni, scambi ed esilio* 2 (2019)/F. Costantini (cur.), *Imperial China and the Silk Roads: Travels, Flows, and Trade*, …, 46-61; moreover, S. Martino, D. Nappo, „La politica orientale tra Traiano e Marco Aurelio", in A. Storchi, G. D. Merola (cur.), *Interventi imperiali in campo economico e sociale. Da Augusto al tardoantico*, Bari, 2009, 121-141, apart from M. Wheeler, *Rome beyond the Imperial Frontiers*, London, 1955 (Ital. transl. *La civiltà romana oltre i confini dell'impero*, Torino, 1963).

[17] A. Piganiol, *Histoire de Rome*, Paris, 1962, 280.

[18] J. Thorley, „The Roman Empire and the Kushans", *Greece and Rome* 26, 1979, 181-190.

History, where he tells that the purchase of silk, which had became at that time a sort of status symbol, was responsible of the loss of a great quantity of gold for the high price due to the origin from far away. Anyway it is a fact that the request of silk caused the development of the caravan cities of the desert in Syria (Palmyra, but also Dura-Europos) and pushed, moreover, the discovery and the following massive use of the Indo-Arabian route, which finished at the harbours of the Red Sea,[19] Leuke Kome and more down Myos Hormos and Bereneike, in turn connected with the Nabatean centre of Petra and Coptos, then Antinoopolis: thanks to the Monsoons, the winds which, according to the legend, have been used for the first time by Hippalus, it was possible to reach the coast of India (Barbaricum and Barygaza; Taprobane, now Ceylon, which was reached under Claudius: Cosmas Indicopleustes in the *Topographia Christiana* says that the silk was imported from there in Byzantium) and over (Cattigara, also well known, was the present Canton).

The relation with the East started to change when the political system was transforming itself into an empire, during the first century b.C.: the rise of this power and its expansion in the Mediterranean Sea, once conquered Egypt in 31, created the political and economic conditions to ask and receive luxury goods coming from the caravan cities placed on the ancient routes of the Hellenistic kingdoms; in the meantime, on the other side, the Han dynasty, put under control the nomads pushing from the Northern regions, was promoting the development of the oasis around the Taklamakan desert into connected points of a globalized market.

But when the Parthians defeated the Seleucid kingdom in Syria the clash with Rome became unavoidable and only in consequence of the peace and with the creation of a new province was possible to increase the role of Palmyra, just quoted, the “bride of the desert” placed in the middle between the Mediterranean Sea and the Euphrates river: the famous “tariff”, a bilingual inscription describing exactly how much duty was charged on a specific good carried by the caravans, gives the sense of the importance of that place, identified as the arrival point of the Silk Roads, where a relevant quantity of precious textiles was buried in the graves; anyway, the glory of Palmyra and of its mercantile aristocracy ended in 272, when the city was definitely conquered by Aurelianus after the revolt of the queen Zenobia.

Since that moment, the confrontation between Rome and Persia was

[19] The most important source is the Periplus of the Erythrean Sea, attesting the existence of a tax called vectigal Maris Rubri: L. Casson (ed.), The Periplus Maris Erythraei. Text with Introduction, Translation, and Commentary, Princeton (New Jersey), 1989.

direct, for centuries, until the crusade promoted by Heraclius in 624; the Indian route, instead, continued to be managed by the Arabian merchants.

The silk market continued to improve its value in Late Antiquity and especially during the Byzantine time as it is possible to observe in the imperial legislation, both in the *Codex Theodosianus* and in the *Codex Iustinianus*: exactly under Justinian the tissue became even essential in that kind of economy.[20]

The emperor, in particular, issued a famous edict about the production and the commerce of silk, in Greek μέταξα, preserved as a simple summary in *Appendix* 5 to the *Novellae*: the text, which was dated by Zachariae von Lingenthal between 540 and 545,[21] states that the purchase from foreign merchants and the resale to authorized craftsmen would have been controlled by the so-called κομμερκιαρίοι, *commerciarii* or better "custom officials".

Byzantium was an empire that structured its power on a wide net of trades, especially with the East: in such a context, the role of the silk market, for its specific character of luxury good too, had an absolutely notable relevance.

During that age the name of China was *Fulin*: the origin could be even a toponym used in some Middle-Persian sources of the Manichaean tradition in the East;[22] Theophylact Simocatta, instead, called that far away land *Taugas.*[23]

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[20] Besides R. S. Lopez, „Silk Industry in the Byzantine Empire", *Speculum* 10, 1945, 1-42 (and Id., „The Role of Trade on the Economic Readjustment of Byzantium in Seventh Century", *Dumbarton Oaks Papers* 13, 1959, 67-85) together with A. Muthesius, „The Byzantine Silk Industry: Lopez and Beyond", *Journal of Medieval History* 19, 1993, 1-67, see Id., *Studies in Byzantine, Islamic and Near Eastern Silk Weaving*, London, 2008 and Ead., *Studies on Silk in Byzantium*, London, 2004, where „Silk in Byzantium: Cultural Imperialism, Identity, and Value" (1-22) and „Byzantine Influences along the Silk Route: Central Asian Silk Transformed" (277-287); moreover, N. Oikonomides, „Silk Trade and Production in Byzantium from the Sixth to the Ninth Century: The Seals of Kommerkiaroi", *Dumbarton Oaks Papers* 40, 1986, 33-53, but also G. C. Maniatis, „Organization, Market Structure, and Modus Operandi of the Private Silk Industry in the Tenth-century Byzantium", *Dumbarton Oaks Papers* 53, 1999, 263-332; for some particular aspects, D. Jacoby, „Silk Manufacture in Western Byzantium", *Byzantinische Zeitschrift* 84/85, 1991/1992, 452-500 and Ch. Papasthatis, „Silktrade and the Byzantine Penetration in the State Organization of South Arabia (c. 533)", in *Cultural and Commercial Exchanges between the Orient and the Greek World*, Athens, 1991, 111-121; finally, again D. Jacoby, „The Jews and the Silk Industry of Constantinople", in *Byzantium, Latin Romania and the Mediterranean*, Aldershot, 2001, XI and Id., „The Jews in the Byzantine Economy (Seventh to Mid-fifteenth Century)", in *Jews in Byzantium. Dialects of Minority and majority Cultures*, Leiden, 2012, 219-255.

[21] „Eine Verordnung Justinian's über den Seidenhandel aus den Jahren 540-547", in *Kleine Schriften* I, Leipzig, 1973, 525-543.

[22] S. N. C. Lieu, „Da Qin and Fulin. The Chinese Names for Rome", cit.

[23] X. Zhang, „On the Origin of Taugast in Theophylact Simocatta and the Later Sources", *Byzantion* 80, 2010, 485-501.

Constantinople not only represented the arrival point of a long way from China through Persia and Arabia, but also became a centre of production, when the emperors started to keep the monopoly of the whole system; in particular, their aim included the attempt to try to regulate the movements both of caravans and fleets, by creating a sort of globalization of the trade.

But this was not a real new order, if we refer to the constitution given in the Eastern part of the empire by Thedosius and the son Arcadius to Cariobaudus, *dux Mesopotamiae*, to commit the trade of silk to the *comes commerciorum*, placed under the *comes sacrarum largitionum*: *Comparandi serici a barbaris facultatem omnibus, sicut iam praeceptum est, praeter comitem commerciorum etiamnunc iubemus auferri* (C. 4.40.2); moreover, interesting is the previous law too: *Fucandae atque distrahendae purpurae vel in serico vel in lana, quae blatta vel oxyblatta atque hyacinthina dicitur, facultatem nullus possit habere privatus. Sin autem aliquis supra dicti muricis vellus vendiderit, fortunarum se suarum et capitis sciat subiturum esse discrimen*, by the same emperors to Faustus, *comes sacrarum largitionum* (C. 4.40.1).

Another useful reference is contained in Procopius' *Anekdota*, wherein the twenty-fifth chapter it is written about the avidity expressed again by Justinian on the silk market of the empire. He would have commanded to sell the raw silk for 8 *solidi* for pound (*libbra*), obtaining as result the destruction of the whole sector, which immediately was transformed in a state monopoly; so the early factories of Tyrus and Berytus would be transferred in the hands of the imperial family. We know that would be the same Justinian who took possession of the secret of the production of silk, according again to Procopius (*De bello Gothico* 4.17), when two monks operating in the Christian church of Persia, after a journey to India, would have brought hidden in empty reeds some seeds of mulberry and eggs with silkworms from the land called Serinda; Theophanes Confessor, indeed, tells that the protagonist of this story would be a Persian.

The problem was represented by the necessity to obtain the raw silk from China, tempting to avoid the intermediation of Persia, which had the main market cities in Vologesiade and Charax Spasinou. Concerning this, there is the testimony left by Menander Protector: Justinian sent an embassy to Ethiopia and Himayar, which corresponds now the state of Yemen, led by a certain Joseph, in order to create an alliance against the Persians, but without any success; in 562 the stipulation of the “eternal peace” with Cosroe Anushirwan opened to the traffic the caravan city of Nisibi, on the border between the two empires; and after, around 568 and 569, the Turks of Sogdiana, defeated the kingdom of the Eftalits and based their centre in Samarkanda, sent some men directly to

Byzantium, to go over just the Persians; at that point, Justin II, the successor emperor, decided to organize another contact, this time under Zemarcus, *praefectus Orientis*, with *khan* Dizabul, through Trabzon on the Black Sea and using the way on the north of Caucasus.

The Chinese chronicles attest another diplomatic mission in 641 under Constantius II to the court of the Tang emperors and something similar in 710 from the East to Justinian II.[24]

Coming back to the previous κομμερκιαρίοι, who were appointed to guarantee the high quality of the silk, after two centuries of disappearance were replaced by Leo III the Isaurian and around 800 a new tax, the κομμέρκιον, similar to the old *portorium*, a kind of *vectigal*, was instituted concerning the trade of the luxury good and especially the import from Persia and China.[25]

An interesting prescription, after other centuries, is preserved in the Book of the Eparch, 6.6. It imposed to the Jews, belonging to the category of the merchants, the ban to trade in silk on pain of flogging and hair cutting; the article of law assumes a certain value because combines a discriminatory measure with an economic decision. Definitively, the norm could be a spark to reflect on the possibility to consider the Byzantine world, again, as a totally globalized environment.

So, simply drawn some of the principal passages which characterised the development of trade relations built by generations of merchants, we are probably able to perceive the dimension and the importance of the whole matter.

Such a complex scenario, which concerns both economy and society, needs a "total" approach to be explored, because it is related to different aspects of the human sciences; another fact is that the history of the silk market between Rome and China involved the experience of transfer of other luxury goods, like spices and precious woods from India, frankincense and myrrh from Arabia, pearls from the Persian Gulf and amber from the northern steppes together with precious stones almost from everywhere; at this point, the same scenario becomes even more extended and intricate.

Furthermore along the Silk Roads three religions grew up and lived a concrete development, that is to say Christianity (as Nestorianism), Buddhism, and Islam: every merchant brought his own faith across far away and unknown territories, of course spreading it, but in a spirit of tolerance.

[24] M. Rizzotto, „L'ambasceria di Costante II in Cina -641-643-: un tentativo di alleanza anti-araba?", *Porphyra* 13, 2016, 5-25.

[25] N. Oikonomides, „The Role of the Byzantine State in the Economy", in A. Laiou (ed.), *The Economic History of Byzantium from the Seventh through the Fifteenth Century*, Washington 2002.

A dramatic example is represented by the phenomenon of Manichaeism, which had a strong character of syncretism and mission irradiating in every direction during Mani's life itself and after his martyrdom, both to the West in the Roman empire and to the East in the Chinese one: the Uyghurs, in particular, once placed their capital in the city of Qocho, an oasis in the Taklamakan desert, established there the first (and unique) Manichaean state of history.

Finally we have to admit that the routes of the silk market played a tremendous role as a gateway and vehicle both for the Western and Eastern civilizations in the historical development of the world of Eurasia: it is exactly for this reason that the reconstruction of the silk market between Rome and China could be a good starting point to give us the sense, again, of a globalised environment made of free movement concerning goods, people and religions, then cultures together with political ideas too.

3. FURTHER PERSPECTIVE

This kind of discourse, built on the collection and the analysis of sources coming from different fields, faces mainly, as we have said at the beginning, the problem of the confrontation, real or imaginary or even utopian, between Roma and China: so it is only by mapping the net of relationships across the time and the space that it could be possible to try to understand how was structured their mutual idea of empire.

Obviously the topic must be considered not in a partial sense, like, in particular, that one elaborated by the culture of the Enlightenment and by its negative idea of the Oriental empires, but from the historic (and eventually historiographic) viewpoint, by focusing the attention on real aspects as, for example, the similarity of the institutional structures, the relevance of some components of the state as bureaucracy and army and of the politics of alliance and submission with the neighboring populations, by imposing tributes too, considered as barbarians, the centrality of the edification of a mutual image, even vague, in the chronicles and in the rest of the literature.[26]

As a matter of fact the Silk Roads, which linked the two empires, must be considered as an instrument of general communication, able to demolish firm

[26] F.-H. Mutschler, A. Mittag (eds.), *Conceiving the Empire. China and Rome Compared*, Oxford, 2008 e W. Scheidel (ed.), *Rome and China. Comparative Perspectives on Ancient World Empires*, Oxford, 2009, where in particular P. Fibiger Bang, „Commanding and Consuming the World: Empire, Tribute, and Trade in Roman and Chinese History“, pp. 100-120.

borders and to establish permeable frontiers; besides this, it is known that the ideology of empire arrived to create an enormous environment, where different people for origin, language, culture and religion used to live together aiming for the same values: on consequence, we have at our disposal a precious instrument to investigate the universalistic character of the Roman empire and that one of its sense of globalization, inside and outside the physical space;[27] the same is for the Chinese one.

Moreover, because the theory of the confrontation between the two empires is built on the process of trade expansion for Roma to the East and for China to the West, the position of the Persian empire together with the other entities which had the role of mediators must be red through this special observation point.[28]

But there is something more.

By looking to its image reflected into a sort of mirror, that is to say the idea of a land so far away from China, it is possible to consider the Roman world as taking consciousness of itself: this kind of confrontation contributed to building in the meantime, through the representation of the "other", a self-

[27] W. Schreiber (hrsg.), *Vom imperium Romanum zum Global Villag. "Globalisierung" im Spiegel der Geschichte*, Neuried, 2000, M. J. Hidaldo de la Vega, „Algunas reflexiones sobre los límites del oikouméne en el Imperio Romano", *Gerión* 23, 2005, 271-285, D. Favro, „Making Rome a World City", in K. Galinsky (ed.), *The Cambridge Companion to the Age of Augustus*, Cambridge, 2005, 234-263, R. Hingley, *Globalizing Roman Culture. Diversity and Empire*, London-New York, 2005, R. Hingley, *Globalizing Roman Culture. Unity, Diversity and Empire*, London, 2005, R. M. Geraghty, „The Impact of Globalization in the Roman Empire, 200 BC-AD 100", *The Journal of Economic History* 67, 2007, 1036-1061, R. B. Hitchner, *The First Globalization. The Roman Empire and Its Legacy in the 21st Century*, Oxford, 2007 (together with Id., „Globalisation avant la lettre. Globalization and the History of Roman Empire", *New Global Studies* 2, 2008, 1-12), G. Djament-Tran, „Rome and the Process of Globalization", *Annales de Géographie* 670.6 (2009) 590-608, M. Pitts, M. J. Versluys, *Globalisation and the Roman World: World History, Connectivity and Material Culture*, Cambridge, 2015.

[28] L. Gregoratti, „The Parthian Empire: Romans, Jews, Nomads, and Chinese on the Silk Road", in M. N. Walter, J. Ito-Adler (eds.), *The Silk Road. I. Long-distance Trade, Culture, and Society: Interwoven History*, Cambridge, 2014, 43-70 together with Id., „The Parthians between Rome and China: Gan Ying's Mission into the West (1st Century AD)", *Akademisk Kvarter* 4, 2012, 109-119, but also F. Grosso, „Roma e i Parti a fine I inizio II secolo d.Cr. attraverso le fonti cinesi", in *Atti del Convegno sul tema: La Persia e il mondo greco-romano (Roma, 11-14 aprile 1965)*, Roma, 1966, 157-161; on Charax Spasinou, in particular, M. Schuol, Die *Charakene: Ein mesopotamisches Königreich in hellenistisch-parthischer Zeit*, Stuttgart, 2000 and moreover again L. Gregoratti, „A Parthian Harbour in the Gulf: The Characene", *Anabasis. Studia Classica et Orientalia* 2, 2011, 209-229.

representation of the Roman empire itself into a sort of dialogue between macro-organisms of ancient history.

Moreover, the travels of famous (and courageous) explorers and the archaeological campaigns of the last two centuries have been part of the fierce rivalry between the British empire and the Russian one in Central Asia, the so-called “Great Game” for the control of the mountain passes; now, the “New Great Game” for the control of the pipelines of oil and gas has some relevant consequences also on the contemporary historiography in China, where the Roman empire is considered a sort of equal interlocutor, that is to say something belonging to the same typology of historical player: so, as well its Western *alter ego*, the Chinese empire had considered for centuries the intermediary populations as barbarians.

The matter could be considered with great attention in a moment characterized by a new horizon of contacts between Europe and China: the knowledge of the history of their relations in the antiquity could offer an useful instrument in order to understand the reality of our days; so, the final result could be a spark to reflect on the opportunity to consider the Roman world and then the Byzantine one, again, as a globalized environment and along this way we will try to find a comparison between past and present too, exactly when the routes of Central Asia seem to appear so strategic.

The gigantic region included between the territories going in the North from the Uyghur autonomous district of Xinjiang in China through the ex-soviet Islamic republics of Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan and Kazakhstan until the Caucasus and in the South via Afghanistan, Iran and Iraq is now interested by terrible conflicts, which use also the religious propaganda, for the control of the channel of transmission of oil and gas directed to Europe: this is, as we have just said, the “New Great Game”.

The movement of goods, people and ideas from East to West and *vice versa* has always found in the Silk Roads its natural expression. The velocity of such a movement has not changed the main problem, which is produced by the connections existing between elements extraneous each other. The merchants, in order to realize and to increase their activity of trade, have always looked for a way of communication, normally obtaining it. This is the reason which makes the Silk Roads, besides a fact of history, even a category of thinking.

In this such a trajectory it is possible to give a real significance to the origin of the name of Rome in Chine: just *Daquin*, “the great China”.

So, into a vision of *Silk Road Studies*, the traditional approach of contemporary history, which presume a definitive rift, put at a certain point,

concerning the relations between Europe and China,[29] must be changed into a perspective of "convergence", according with a sense of metaphorical proximity bounding the two empires.[30]

[29] K. Pomeranz, *The Great Divergence. China, Europe, and the Making of Modern World Economy*, Oxford, 2000 and Princeton (New Jersey), 2002 (Ital. transl. *La grande divergenza. La Cina, l'Europa e la nascita dell'economia mondiale*, Bologna, 2004).
[30] W. Scheidel, *From the "Great Divergence" to the "First Great Divergence": Roman and Qin-Han State Formation and Its Aftermath*, in Id. (ed.), *Rome and China. Comparative Perspectives on Ancient World Empire*, Oxford, 2009, 11-23 and Id. (ed.), *The Power in Ancient China and Rome*, Oxford, 2015; F.-H. Mutschler, A. Mittag (eds.), *Conceiving the Empire. China and Rome Compared*, Oxford, 2008.

REFERENCES

A. Alemay i Vilamajó, „Maes Titianos i la Torre de Pedra (I): una font grega sobre els orígens de la ruta de la seda“, Faventia 24, 2002, 105-120,

N. Andrade, „The Voyage of Maes Titianos and the Dynamics of Social Connectivity between Roman Levant and Central Asia/West China”, Mediterraneo antico 18, 2005, 41-74

R. Andreotti, „Su alcuni problemi del rapporto fra politica e controllo del commercio nell'impero romano“, Revue Internationale des Droits de l'Antiquité 16, 1969, 215-257.

V. Begley, R. D. De Puma (eds.), Roman and India. The Ancient Sea Trade, Oxford, 1992.

P. Bernard, „De l'Euphrate à la Chine avec la carovane de Maès Titianos (c. 100 ap. n.è.),“ Comptes rendus de l'Académie des Inscriptions 149, 2005, 929-969;

C. Burgeon, „L’ambassade romaine envoyée dans l’Empire des Han en 166: une expédition maritime fructueuse sur les plans économique et diplomatique?,“ Viaggiatori, circolazioni, scambi ed esilio 2 (2019)/F. Costantini (cur.), Imperial China and the Silk Roads: Travels, Flows, and Trade, …, 46-61;

M. Cary, „Maes, Qui et Titianus“, The Classical Quarterly 6, 1956, 130-134,

D. B. Campbell, „A Chinese Puzzle for the Romans“, Historia 38, 1989, 371-376 (together with Id., „Did the Romans have Links with the Far East? Rome and China“, Ancient Warfare 9, 2015, 45-49).

G. Djament-Tran, „Rome and the Process of Globalization“, Annales de Géographie 670.6 (2009) 590-608,

T. Chin, „The Invention of the Silk Road, 1877“, Critical Inquiry 40 (2013) 194-219.

M. A. Cobb, Rome and the Indian Ocean Trade from Augustus to the Early Third Century, Leiden, 2018.

R. Cardilli and others (eds.), Chang'an e Roma. Eurasia e via della seta. Diritto Società Economia, Padova, 2019.

E. Chavannes, „Les pays d’Occident d’après le Heou Han Chou“, T'oung Pao 8, 1907, 149-244

O. H. Dubs, A Roman City in Ancient China, London, 1957.

J. Ferguson, M. Keynes, China and Rome, in Aufstieg und Niedergang der römischen Welt II.9.2, Berlin-New York, 1978, 581-603

A. Forke, „Ta-ts'in das römische Reich“, Ostasiatische Zeitschrift 14, 1927, 48-60

D. Favro, „Making Rome a World City“, in K. Galinsky (ed.), The Cambridge Companion to the Age of Augustus, Cambridge, 2005, 234-263,

P. Fibiger Bang, „Commanding and Consuming the World: Empire, Tribute, and Trade in Roman and Chinese History“, pp. 100-120.

D. Graf, „The Roman East from the Chinese Perspective“, Annales Archéologiques Arabes Syriennes 42/International Colloquium on Palmyra and the Silk Road, Damascus, 1996, 199-216

D. F. Graf, The Silk Road between Syria and China, in A. I. Wilson, A. K. Bowman (eds.), Trade, Commerce, and the State in the Roman World, Oxford, 2018, 443-529

L. Gregoratti, „A Parthian Harbour in the Gulf: The Characene“, Anabasis. Studia Classica et Orientalia 2, 2011, 209-229.

L. Gregoratti, „The Parthian Empire: Romans, Jews, Nomads, and Chinese on the Silk Road“, in M. N. Walter, J. Ito-Adler (eds.), The Silk Road. I. Long-distance Trade, Culture, and Society: Interwoven History, Cambridge, 2014, 43-70 together with Id., „The Parthians between Rome and China: Gan Ying's Mission into the West (1st Century AD)“, Akademisk Kvarter 4, 2012, 109-119,

R. M. Geraghty, „The Impact of Globalization in the Roman Empire, 200 BC-AD 100“, The Journal of Economic History 67, 2007, 1036-1061,

F. Grosso, „Roma e i Parti a fine I inizio II secolo d.Cr. attraverso le fonti cinesi“, in Atti del Convegno sul tema: La Persia e il mondo greco-romano (Roma, 11-14 aprile 1965), Roma, 1966, 157-161;

F. Grosso, „Roma e i Parti a fine I inizio II secolo d.Cr. attraverso le fonti cinesi“, in Atti del Convegno sul tema: La Persia e il mondo greco-romano (Roma, 11-14 aprile 1965), Roma, 1966, 157-161;

J. E. Hill, Through the Jade Gate to Rome. A Study of the Silk Routes during the Later Han Dynasty 1st to 2nd Centuries CE. An Annotated Translation from the Hou Hanshu “The Chronicle of the Western Regions”, North Charleston, 2015, 2nd ed.

M. Heil, R. Schulz, „Who was Maes Titianus?“, JAC. 30, 2015, 72-84;

M. J. Hidaldo de la Vega, „Algunas reflexiones sobre los límites del oikouméne en el Imperio Romano“, Gerión 23, 2005, 271-285,

R. B. Hitchner, The First Globalization. The Roman Empire and Its Legacy in the 21st Century, Oxford, 2007 (together with Id., „Globalisation avant la lettre. Globalization and the History of Roman Empire“, New Global Studies 2, 2008, 1-12),

R. Hingley, Globalizing Roman Culture. Diversity and Empire, London-New York, 2005,

R. Hingley, Globalizing Roman Culture. Unity, Diversity and Empire, London, 2005,

B. Hildebrandt, Silk Production and Trade in the Roman Empire, 34-50

B. Hildebrandt, C. Gillis (eds.), Silk. Trade and Exchange along the Silk Roads between Rome and China in Antiquity, Oxford-Philadelphia, 2017,

K. Hoppal, „The Roman Empire according to the Ancient Chinese Empire“, Acta Antiqua Acadamiae Scientiarum Hungaricae 51, 2011, 263-305;

A. F. P. Hulsewé, M. A. N. Loewe, China in Central Asia: The Early Stage 125 BC-AD 23:

Han Dynasty, Leiden, 1979;

D. Jacoby, „Silk Manufacture in Western Byzantium“, Byzantinische Zeitschrift 84/85, 1991/1992, 452-500

D. Jacoby, „The Jews and the Silk Industry of Constantinople“, in Byzantium, Latin Romania and the Mediterranean, Aldershot, 2001, XI and Id., „The Jews in the Byzantine Economy (Seventh to Mid-fifteenth Century)“, in Jews in Byzantium. Dialects of Minority and majority Cultures, Leiden, 2012, 219-255;

Wei, Jin, Northern and Southern Dynasties and the Western Regions, Philadelphia (Pennsylvania), 2004.

A. Kolb, M. Spaidel, Imperial Roma and China. Communication and Information Transmission, in M. D. Elizalde, W. Jianlang (eds.), China's Development from a Global Perspective, Cambridge, 2017, 28-56;

A. Kolb, M. A. Speidel, „Perceptions from Beyond: Some Observations on Non-Roman Assessments of the Roman Empire from the Great Eastern Trade Routes“, Journal of Ancient Civilizations 30, 2015, 117-149,

I. Khlopin, „Die Reisenroute Isidors von Charax und die oberen Satrapien Parthiens“, Iranica Antiqua 12, 1976, 144-145;

X. Liu, The Silk Road in the World History, Oxford, 2010;

R. S. Lopez, „Silk Industry in the Byzantine Empire“, Speculum 10, 1945, 1-42 (and Id., „The Role of Trade on the Economic Readjustment of Byzantium in Seventh Century“, Dumbarton Oaks Papers 13, 1959, 67-85;

Pulleyblank, „The Roman Empire as Known to Han China“, Journal of the American Oriental Society 119, 1999, 71-79;

D. D. Leslie, K. H. K. Gardiner, „«All Roads Lead to Rome»: Chinese Knowledge of the Roman Empire“, Journal of Asian History 29, 1995, 61-81

S. N. C. Lieu, „Da Qin and Fulin. The Chinese Names for Rome“,

S. N. C. Lieu, Da Qin and Fulin. The Chinese Names for Rome, in S. N. C. Lieu, G. B. Mikkelsen (eds.), Between Rome and China. History, Religions and material Culture of the Silk Road, Turnhout, 2016, 123-146.

T. R. Martin, Herodotus and Sima Qian: The First Great Historians of Greece and China, Basingstoke, 2009.

J. A. Millward, Eurasian Crossroads. A History of Xinjiang, New York, 2007

K. S. Mathew (ed.), Imperial Rome, Indian Ocean Regions and Muziris. New Perspectives on Maritime Trade, New Dehli, 2015

S. Martino, D. Nappo, „La politica orientale tra Traiano e Marco Aurelio“, in A. Storchi, G. D. Merola (cur.), Interventi imperiali in campo economico e sociale. Da Augusto al tardoantico, Bari, 2009, 121-141,

B. J. Mansvelt Beck, The Treatises of Later Han. Their Author, Sources, Contents and Place in Chinese Historiography, Leiden, 1990.

G. C. Maniatis, „Organization, Market Structure, and Modus Operandi of the Private Silk Industry in the Tenth-century Byzantium“, Dumbarton Oaks Papers 53, 1999, 263-332;

R. McLaughlin, The Roman Empire and the Silk Routes. The Ancient World Economy and the Empires of Parthia, in Central Asia and Han China, Barnsley, 2016 (together with Id., Rome and the Distant East. Trade Routes to the Ancient Lands of Arabia, India and China, London-New York, 2010)

D. Leslie, K. H. J. Gardiner, The Roman Empire in Chinese Sources, Rome, 1996 (cf. E. G. F.-H. Mutschler, A. Mittag (eds.), Conceiving the Empire. China and Rome Compared, Oxford, 2008.

F.-H. Mutschler, A. Mittag (eds.), Conceiving the Empire. China and Rome Compared, Oxford, 2008 e W. Scheidel (ed.), Rome and China. Comparative Perspectives on Ancient World Empires, Oxford, 2009,

A. Muthesius, „The Byzantine Silk Industry: Lopez and Beyond“, Journal of Medieval History 19, 1993, 1-67, see Id., Studies in Byzantine, Islamic and Near Eastern Silk Weaving, London, 2008 and Ead., Studies on Silk in Byzantium, London, 2004, where „Silk in Byzantium: Cultural Imperialism, Identity, and Value“ (1-22) and „Byzantine Influences along the Silk Route: Central Asian Silk Transformed“ (277-287);

N. Oikonomides, „Silk Trade and Production in Byzantium from the Sixth to the Ninth Century: The Seals of Kommerkiaroi“, Dumbarton Oaks Papers 40, 1986, 33-53,

N. Oikonomides, „The Role of the Byzantine State in the Economy“, in A. Laiou (ed.), The Economic History of Byzantium from the Seventh through the Fifteenth Century, Washington 2002.

Ch. Papasthatis, „Silktrade and the Byzantine Penetration in the State Organization of South Arabia (c. 533)“, in Cultural and Commercial Exchanges between the Orient and the Greek World, Athens, 1991, 111-121;

J.-M. Poinsotte, „Les Romains et la Chine, réalités et mythes“, MEFRA. 91, 1979, 431-479,

A. Piganiol, Histoire de Rome, Paris, 1962, 280.

M. Pitts, M. J. Versluys, Globalisation and the Roman World: World History, Connectivity and Material Culture, Cambridge, 2015.

K. Pomeranz, The Great Divergence. China, Europe, and the Making of Modern World Economy, Oxford, 2000 and Princeton (New Jersey), 2002 (Ital. transl. La grande divergenza. La Cina, l'Europa e la nascita dell'economia mondiale, Bologna, 2004).

M. G. Raschke, New Studies in Roman Commerce with the East, again in ANRW. II.9.2, Berlin-New York, 1978, 604-1378, 606-650

J.-N. Robert, De Rome à la Chine. Sur les routes de la soie au temps des Césars, Paris, 1993 (2014, 4e edition revue et augmentée; Ital. transl. Da Roma alla Cina. Sulle vie della seta al tempo della Roma imperiale, Gorizia, 2016)

F. De Romanis, Cassia, cinnamomo, ossidiana. Uomini e merci tra Oceano Indiano e Mediterraneo, Roma, 1996; M. R. Cimino (ed.), Ancient Rome and India. Commercial and Cultural Contacts between the Roman World and India, New Dehli, 1994;

Maris Rubri: L. Casson (ed.), The Periplus Maris Erythraei. Text with Introduction, Translation, and Commentary, Princeton (New Jersey), 1989.

M. Rizzotto, „L'ambasceria di Costante II in Cina -641-643-: un tentativo di alleanza anti-araba?“, Porphyra 13, 2016, 5-25.

W. Schreiber (hrsg.), Vom imperium Romanum zum Global Villag. “Globalisierung” im Spiegel der Geschichte, Neuried, 2000,

M. Schuol, Die Charakene: Ein mesopotamisches Königreich in hellenistisch-parthischer Zeit, Stuttgart, 2000

W. Scheidel, From the “Great Divergence” to the “First Great Divergence”: Roman and Qin-Han State Formation and Its Aftermath, in Id. (ed.), Rome and China. Comparative Perspectives on Ancient World Empire, Oxford, 2009, 11-23 and Id. (ed.), The Power in Ancient China and Rome, Oxford, 2015;

W. H. Schoff, Parthian Stations by Isidore of Charax, Philadelphia (Pennsylvania), 1914,

J. Thorley, „The Silk Trade between China and the Roman Empire at Its Height, circa A.D. 90-130“, Greece and Rome 18, 1971, 71-80 (together with Id., Silk. Trade Routes, Politics and Commercial Secrets, in F. Rodriguez

Adradeos, ed., Historia y arqueología. IX Congreso español de estudios clásicos. Madrid 1995, Madrid, 1998, 241-244),

J. Thorley, „The Roman Empire and the Kushans“, Greece and Rome 26, 1979, 181-190.

R. Tomber, Indo-Roman Trade from Pots to Pepper, London, 2008 together with S. E. Sidebotham, Berenike and the Ancient Maritime Spice Route, Berkeley (California), 2011;

F. J. Teggart, Rome and China. A Study of Correlations in Historical Events, Berkeley (California), 1939 and 1969,

Yu Taishan, „China and the Ancient Mediterranean World. A Survey of Ancient Chinese Sources“, Sino-Platonic Papers 242, November 2013,

G. Traina, „Central Asia in the Late Roman Mental Map, Second to Sixth Centuries“, in D. Di Cosmo, M. Maas (eds.), Empires and Exchanges in Eurasian Late Antiquity. Rome, China, Iran, and the Steppe, ca. 250-750, Cambridge, 2018, 123-132.

G. Walser, „Die Route des Isidorus von Caharax durch Iran“, Archäologische Mitteilungen aus Iran 18, 1985, 145-156,

B. Watson, Ssh-Ma Ch'ien Grand Historian of China, New York, 1958;

N. Wolloch, „Joseph de Guignes and Enlightenment Notions of Material Progress“, Intellectual History Review 21, 2011, 435-448.

L. Xinru, Looking towards the West – How the Chinese viewed the Romans, in B. Hildebrandt, C. Gillis (eds.), Silk. Trade and Exchange along the Silk Roads between Rome and China in Antiquity, Oxford-Philadelphia (Pennsylvania), 2017, 1-5,

L. Ying, „Ruler of the Treasure Country: The Image of the Roman Empire in Chinese Society from the First to the Fourth Century AD“, Latomus 63, 2004, 327-339,

G. K. Young, Rome's Eastern Trade. International Commerce and Imperial Policy, 31 BC-AD 305, London-New York, 2001

J. P. Yap, The Western Regions, Xiongnu and Han, from the Shiji, Hanshu and Hou Hanshu, place unknown, 2019

Y.-S. Yü, Han Foreign Relations, in D. Twitchett, M. Loewe (eds), The Cambridge History of China. I. The Ch'in and Han Empires, 221 B.C.-A.D. 220, Cambridge, 1986, 377-462.

X. Zhang, „On the Origin of Taugast in Theophylact Simocatta and the Later Sources“, Byzantion 80, 2010, 485-501.

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РИМ И КИНА НА ПУТУ СВИЛЕ: ПРВА СКИЦА

Резиме

Да би се реконструисали односи - стварни, замишљени или чак утопијски - између Рима и Кине, неопходно је прикупити и анализирати огроман број извора који долазе из много различитих области. Што се тиче ове перспективе, Пут свиле, који је метаисторијски концепт, представља незаобилазну тачку осматрања, јер су га вековима користили трговци, мисионари, војници и дипломате. Дакле, сучељавање две империје постало је у прошлости инструмент за међусобно познавање и самозаступање, док би у наше савремено доба могло бити кључ тумачења за разумевање геополитике „Нове велике игре“.

Кључне речи: Рим и Кина, пут(еви) свиле, царства, познавање и самозаступање, „Нова велика игра“

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FROM CORONATION TO CORONAVIRUS: FRUSTRATION OF CONTRACT AND COVID-19[1]

Abstract

This paper is dedicated to the problem of frustration of contractual purpose due to unforeseen new circumstances. It examines rules on frustration of purpose in a comparative perspective, outlines their historical development and attempts to identify their common core elements. The author discusses cases from English, US and German law in order to show the anatomy of cases of frustration of purpose and the relevance of this doctrine in today's circumstances of a global pandemic of a new coronavirus. The author concludes that in many cases a doctrine of frustration of purpose will be necessary in order to avoid unjust outcomes when performance of contractual obligation has not become impossible or difficult, but rather commercially pointless due to the COVID-19 pandemic and the measures imposed to combat it. The author also underlines the importance of flexibility of rules on frustration – courts should have the power to amend contracts in light of new circumstances and the power to fairly distribute loss between the parties, especially in cases where a contract is terminated.

Key words: Frustration of purpose. Changed circumstances. Clausula rebus sic stantibus. Force majeure. Hardship.

INTRODUCTION

The global pandemic of the new coronavirus and the measures imposed to contain it have caused great upheaval in many commercial activities around the globe. Trade and commerce have been negatively influenced by lockdowns, restrictions on travel, limits on social interaction, illness of employees and other

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consequences of the pandemic. Disruptions caused by COVID-19 will certainly upend many commercial contracts by making them pointless or more difficult or impossible to perform. Many parties will seek to be excused from their obligations on account of great, sudden and unforeseeable difficulties created by COVID-19. Many government have already issued statements in which they acknowledge that the pandemic represents a *force majeure* event in the broad sense of the word – an unforeseeable damaging event beyond control of contractual parties.[2] Most businesspeople, we may suppose, will also acknowledge the exceptional nature of the situation and renegotiate their contracts, but there will also be many cases which end up before courts and arbitral tribunals. Thus, the pandemic will inevitably influence contract law, but other areas of law as well.[3]

Since deadly pandemics, floods, earthquakes, wars and other disasters are nothing new in the long history of the law, all legal systems recognize some type of relief from contractual obligations in exceptional circumstances. In some jurisdictions relief is more restricted than in others, but generally speaking, all legal systems recognize the idea that contractual promises are not and cannot be considered as unconditional. Impossibility of performance, whether it is construed narrowly or liberally, is the strongest reason to relieve a party from its obligation. Frustration of contractual purpose may be considered as equally significant as impossibility of performance because it is a special kind of impossibility – the impossibility of achieving the commercial aim of the transaction. Both types of problems are included in the doctrine of frustration in English law. Increased difficulty of performance, on the other hand, is less of a reason to terminate an obligation, but many legal systems, mostly civil law jurisdictions, provide relief in cases of extreme difficulty of performance which renders it unjustly damaging for the promisor.

The pandemic of the new coronavirus will surely confirm the importance of all legal rules which recognize the significance of changed circumstances for contractual relations, but this paper aims to examine the importance of one

[2] K. P. Berger, D. Behn, „*Force Majeure* and Hardship in the Age of Corona: A Historical and Comparative Study“, *McGill Journal of Dispute Resolution*, Vol. 6 (2019–2020), No. 4, 79–80, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575869, 1 April 2021.

[3] The coronavirus pandemic has already attracted the attention of many lawyers and legal scholars, see e.g. K. Pistor, *Law in the Time of COVID-19*, Columbia Law School, 2020, available at: https://scholarship.law.columbia.edu/books/240/?utm_source=scholarship.law.columbia.edu%2Fbooks%2F240&utm_medium=PDF&utm_campaign=PDFCoverPages, 2 April 2021.

particular type of cases in which changed circumstances undermine the contract – cases of frustration of purpose. Other types of cases, impossibility of performance or difficulty in performance, will be equally important and probably much more numerous, but the questions which arise with regard to frustration of purpose are so specific and interesting that they warrant individual examination.

Every jurisdiction has its own system of rules dealing with changed circumstances in contract law and the terminology is always specific – even if the same terms are used, their meaning is slightly different in every legal systems. It is therefore quite challenging to speak generally about the importance of changed circumstances and to attempt a comparative overview. What is impossibility in one legal system may be deemed hardship somewhere else. What is hardship in one jurisdiction may be regarded as normal contractual risk in another. Nevertheless, an analysis which goes beyond specific rules of particular legal systems is a necessary attempt to understand the core issues in dealing with changed circumstances in contract law. Here we will attempt to outline the anatomy of cases in which it may be prudent and warranted to grant relief from a contract whose commercial purpose has failed.

A HISTORICAL NOTE

Modern contract law developed through a centuries-long process of abstraction and generalization of particular legal solutions. Specific types of enforceable promises and agreements gradually gave rise to the general idea that all freely made agreements should have binding legal force (the principle of *pacta sunt servanda*). This general idea required a general limitation, which mediaeval scholars found in the *clausula rebus sic stantibus*.[4] Cannon lawyers and moral theologians were inclined to honour all agreements, whether they were clothed in a particular form or not, as a matter of ethical principle. But it was equally ethical to depart from an agreement if circumstances persisting at the time it was concluded had significantly changed. They were not concerned, as lawyers of later centuries, with economic liberalism and certainty of business transactions. *Clausula rebus sic stantibus* was a prominent part of European common law (*ius commune*) until the end of the 18th century, when it was abandoned in favour of legal certainty and freedom of contract (in the sense that courts should not interfere with freely made contracts).[5] None of the great

[4] For the historical overview: R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition,* Oxford University Press, 1996, 579–582.
[5] Ibid.

codifications, the French, the Austrian nor the German civil code accepted the idea of *rebus sic stantibus* as a general rule, but subsequent cases and the realities of commercial life gradually showed that this approach was misguided.[6]

English law was unfamiliar with Roman rules on impossibility and mediaeval *clausula rebus sic stantibus* so it had to develop its own system of rules for unforeseen events which disturb contractual relations – the doctrine of frustration. Since the middle of the 19th century, English courts have been developing the doctrine of frustration, according to which a contract is discharged *ipso iure* if it becomes frustrated i.e. if it becomes impossible or pointless to perform. English law and other common law systems generally do not consider a contract frustrated simply because an obligation of one party has become more onerous than originally predicted, it is necessary to show that the whole contractual transaction has failed.

Different historical path taken by civil law and common law resulted in a drastically different approach to changed circumstances in contract law. Generally speaking, common law systems are far less inclined to change contractual obligations due to changed circumstances. Judicial relief is granted only in very exceptional cases – when contracts cannot be performed at all, or when performance in new circumstances has completely different significance than originally intended. Civil law systems, in contrast, allow relief not only in cases of impossibility, but also when performance becomes unfairly onerous for one party. Frustration of purpose, on the other hand, is not recognized in all civilian jurisdictions, e.g. French law.

DOCTRINE OF FRUSTRATION

Unlike civil law jurisdictions, whose mediaeval foundations contain the doctrine of *clausula rebus sic stantibus*, English law was not familiar with the idea that a contract may lose its binding nature due to an unexpected turn of events. In fact in 1647 the Court of King’s Bench decided that a lessee must pay his rent even if he was deprived of possession of the leased property for a period of three years by an enemy army.[7] The court justified its decision with the unconvincing argument that the lessee could have provided for the event of an

[6] For a comparative overview: H. Rösler, “Change of Circumstances”, *The Max Planck Encyclopedia of European Private Law*, Max-Planck-Gesellschaft – Oxford University Press, 2012, 163–167.

[7] *Paradine v Jane* [1647] EWHC KB J5, available at: http://www.bailii.org/ew/cases/EWHC/KB/1647/J5.html, 27 March 2021.

invading army in the contract and since he did not, he accepted that risk. This case clearly shows that a contract should not be absolutely binding in its literal sense regardless of drastic changes in its factual context. It is mere fiction to say that a party to a contract accepts all risks which are not provided against in the contract. It cannot be reasonable expected from the parties to take into account and make provisions for all possible future contingencies. When entering into a contract a party accepts the *normal*, *usual*, *typical* and *probable* risks associated with a certain type of transaction. If some specific and likely danger existed for the parties to a particular contract, of which they were aware, their failure to provide for it in the contract may be deemed as acceptance of that risk. But all other risks, which are not usual for a certain type of transaction or which are highly improbable, should not be deemed covered by a contract which says nothing about them.

The idea of absolute contractual liability was finally laid to rest in the case of *Taylor v Caldwell* which established the idea that a contract can be frustrated by supervening events. The Court of Queen's Bench decided that parties to a contract of lease were released from their obligations by the fact that the subject of the lease, a music hall, had burned down before performance fell due without fault of either party.[8] Justice Blackburn, citing civil law rules on impossibility in support, based the decision on the idea that all contracts whose performance depends on a continued existence of a person or an object contain an implied condition that the contract should be terminated if that person or object should perish. The result of this decision is obviously reasonable, but the idea of an implied condition is a very indirect and unnecessary statement of the old legal rule *impossibilium nulla est obligatio*. The court used the idea of an implied condition to justify its decision probably in order to reconcile the decision with the old rule on absolute contract liability – it felt a need to base the termination of the contract on the intention of the parties, putative as it may be.[9] The implied condition was subsequently abandoned in favour of a more convincing explanation for departing from the literal meaning of the contract – namely, that certain events and circumstances simply were not envisaged by the parties at the time of making the contract and if such events and circumstances make the performance of the contract something essentially different from what the parties expected, then the contract is frustrated and both parties should be

[8] Taylor v Caldwell [1863] EWHC QB J1, available at: http://www.bailii.org/ew/cases/EWHC/QB/1863/J1.html, 27 March 2021.
[9] M. P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, Oxford University Press, 2006, 724.

free of their obligations.[10] More simply put, a contract is frustrated if an unforeseen change of circumstances drastically alters the interest of the parties in performance.

English doctrine of frustration covers not only cases of impossibility or impracticability, but also cases in which new circumstances make the contract pointless. The idea that a contract is frustrated if supervening events render its goal unattainable first entered English law in the world famous case of *Krell v Henry* in which it was decided that a lessee should be released from his obligation to pay rent if the sole purpose of the lease was to allow him to watch the coronation procession which was unexpectedly cancelled after contract conclusion. The contract was concluded by exchange of letters without mention of the upcoming coronation, but it was evident from the circumstances of its conclusion that the purpose of the contract was to watch the coronation procession (the possibility of renting the flat to watch the coronation was advertised in the windows of the flat and the contract was concluded only for two days corresponding to the original date of the coronation). The case was decided in favour of the lessee on the basis of the doctrine of implied condition, with reference to the landmark case of *Taylor v Caldwell*. The court concluded that the parties' contract was subject to the implied condition that the coronation is not cancelled. This case was more difficult than *Taylor and Caldwell* because the object of the contract did not perish and performance was still possible. Furthermore, the question of assumption of risk was open for discussion. Why should the lessor assume the risk that the lessee may not achieve the ultimate purpose for which he took the rooms? It seems that the deciding fact in this case was that the value of the rooms stemmed from the possibility of watching the coronation procession. It would have been impossible for the lessor to receive the agreed price or to let rooms for only two days if it was not for the purpose of watching the coronation. Therefore, watching the procession was not only a one-sided motive, but the common purpose of the parties – the foundation of their contract – and failure of that purpose, due to an unforeseen event, brings the contract to an end. Even though the risk of cancellation of such an event was substantial, the court concluded that cancellation was so unlikely that the parties did not contemplate that possibility when concluding the contract.[11]

[10] *Ibid*., 725–726.

[11] This reasoning clearly shows why the idea of an implied condition is unrealistic. Rules on frustration of contract are intended to fill unintentional gaps in the contract i.e. to regulate circumstances which are not provided for in the contract.

Two important conclusion may be drawn from *Krell v Henry*: firstly, frustration of purpose destroys a contract only if the frustrated purpose was shared by the parties – it is not enough that one party knew of the other party's purpose, it is necessary that the value of the whole contract depends on some common purpose; secondly, unpredictability of the event which frustrates the contract should be judged according to the circumstances of the case and more leniently in case of individuals concluding a simple contract of relatively low value. In other words, it is not necessary that a frustrating event is objectively extremely unlikely, it is sufficient to conclude that for the parties, in their particular circumstances, it was reasonable to disregard it.

In another case arising out of the cancelled coronation of Edward VII the Court of Appeals decided that a contract for hire of a steamboat to watch the King review the British fleet and cruise around the fleet was not frustrated by the King's illness.[12] The court decided that watching the review was not the foundation of the contract. The difference between this case and *Krell v Henry* should be recognized in the fact that the steamboat remains useful even if it is no longer possible to use it to watch the royal review of the fleet, whereas a two day hire of rooms only had meaning because of the coronation.[13]

Krell v Henry is an excellent example of how the doctrine of frustration of purpose can be used to deal with disruptions caused by the new coronavirus. There will certainly be many similar cases of contracts which have been concluded with regard to a certain event which subsequently had to be cancelled due to the viral outbreak. If a contract no longer makes sense for the parties, it is reasonable to consider it frustrated and the parties' obligations discharged. This is especially clear when cancellation of a certain event makes performances of both parties' practically worthless.

The possibility of discharge by frustration was expanded by English courts to cover all cases in which the joint purpose of the parties in concluding the contract has failed due to an unforeseen change of events for which neither party is responsible.[14] The deciding factors are the existence of a common purpose between the parties – both parties assumed the risk of success of a certain undertaking – and complete failure of that purpose. As an example of frustration, Furmston cites the interesting case of a ship hired by Spanish Republican

[12] Herne Bay Steamboat Co v Hutton [1903] 2 KB 683, cited according to: H. Beale, *Chitty on Contracts*, Sweet and Maxwell, 23-034.
[13] H. Beale, *Chitty on Contracts*, Sweet and Maxwell, 23-034.
[14] M. P. Furmston, *op. cit*., 722–723.

Government which was seized by Franco's forces.[15] In June 1937 the Republicans hired a British ship in order to evacuate civilians from northern Spanish ports during July. Given the situation in Spain at that time, the price of hire was three times the usual rate, which indicates that the owners of the ship accepted the unusual risk of the transaction and wanted to profit from it. As it turned out, the ship was seized by Nationalists in middle of July and returned to its owner in September. The court decided that the Republican Government was discharged from its obligation to pay for the hire because the common purpose of the parties was permanently frustrated by the delay caused by seizure of the ship.

Cases such as this show that even temporary impossibility of performance can completely frustrate the purpose of the contract because performance at a later time has completely different meaning for the parties. This will be the case in many shipping contracts, charter parties and other transaction in which time is of the essence.

Doctrine of frustration in English law is ultimately based on justice and fairness in contractual relations, but this does not mean that courts have a wide discretion to discharge contractual obligations whenever they consider them to be unfair – frustration is limited to exceptional cases in which, due to a change of circumstances, performance of the contract in its literal meaning would lead to a result completely different from the one the parties had intended.[16] The underlying rationale has shifted from the implied condition to a radical change in the obligation. Frustration occurs when new events change the significance of contractual obligations so much that the contract can be considered as completely different from the one the parties originally concluded. In the words of Lord Radcliffe: "*Non haec in foedera veni*. *It was not this that I promised to do*."[17]

This rationale seems to adequately describe the problem of changed circumstances in general, as well as the problem of failure of the common purpose of the parties. It is also evocative of the civil law notion of *clausula rebus sic stantibus* – all promises are given subject to the condition that the fundamental factual prerequisites of performance remain substantially unchanged. Standards of frustration are not strictly delineated[18] and same ideas

[15] Tatem Ltd v Gamboa [1939] 1 KB 132 cited according to: M. P. Furmston, *op. cit.*, 723.
[16] H. Beale, *op. cit.*, Ch. 23, sec. 2.
[17] Davis Contractors v Fareham Urban DC, [1956] A. C. 696, available at: https://www.trans-lex.org/311200/_/davis-contractos-ltd-v%C2%A0fareham-urban-district-council%C2%A0%5B1956%5D-ac-696/, 31 March 2021.
[18] H. Beale, *op. cit.*, Ch. 23, sec. 2.

appear in different form over and over again, both in common law and civil law jurisdictions.

The legal consequences of frustration were originally simple but harsh: a frustrated contract was terminated *pro futuro* from the moment of frustration and neither party could recover payments which had fallen due before the moment of frustration.[19] Loss lies were it has fallen. Since this approach inevitably leads to unfair results in many cases, the courts abandoned it in favour of restitution of money paid in advance in cases of "total failure of consideration" i.e. when the party which paid in advance received no benefit at all.[20] This solution was better than the original rule, but it still offered very limited relief since it did not apply to specific performance and costs incurred, but allowed only for restitution of paid sums of money if no benefit was received in return. It was necessary for the Parliament to pass a statute before the legal consequences of frustration were finally regulated more completely and more fairly. According to the Law Reform (Frustrated Contracts) Act 1943 a court has some discretion to distribute losses arising out of frustration between the parties. The court may order restitution of money paid (but taking account of the expenses incurred by the payee) and compensation for costs of performance insofar as the other party received a valuable benefit by performance.[21] English courts do not have the power to deal with new events by changing the content of the contract. *Ex lege* termination of the contract is the only result of frustration.

FRUSTRATION OF PURPOSE IN US LAW

US law recognizes the doctrine of frustration of contract and gives it even wider scope in cases of impracticability than English law – it stands somewhere between the harsh approach of English law and the liberal approach of Civil law (but still much closer to restrictive rules of English law).[22] The Restatement (Second) of Contracts contains a provision according to which an obligation is discharged if performance has been made impracticable, without fault of the promisor, by a subsequent event *"(…) the non-occurrence of which was a basic assumption on which the contract was made (…)*" (Section 261). In addition to this rule, the Restatement also includes a rule on frustration of

[19] M. P. Furmston, *op. cit.*, 737–739.
[20] *Ibid*, 739–741.
[21] For a detailed overview of the Law Reform (Frustrated Contracts) Act 1943 see: M. P. Furmston, *op. cit*., 741–748.
[22] For a comparative outline of the US doctrine of impracticability and frustration of purpose see: K. P. Berger, D. Behn, *op. cit.*, 103–107.

purpose according to which an obligation is discharged if "*(…) a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made (…)*" (Section 265). These broad statements could lead us to believe that American courts are liberal in the application of the doctrine of frustration, but that is not the case. In fact, the rules laid down in the Restatement (Second) of Contracts do not accurately represent the actual case law because American courts are very suspicious of the doctrine of frustration and do not easily depart from the principle of binding nature of contract – relief is granted only in cases of total frustration of purpose by an exceptional event.[23]

The stringent approach of US law to frustration of purpose is exampled by the case of *Lloyd v Murphy* in which it was decided that a lessee must pay the agreed rent even if he was prohibited from using the rented property for the originally envisaged purpose by government wartime restrictions.[24] Namely, a contract of lease of business premises was concluded in August 1941 "*for the sole purpose of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purpose whatsoever without the written consent of the lessor*". This purpose was greatly limited by government wartime restrictions on sale of automobiles which were introduced in 1942, after the US entered the war, but the court refused to discharge the lessee from his obligations for two reasons: firstly, the government did not completely prohibit sale of new cars and the lessors subsequently allowed the lessee to use the property for other purposes or to sublease it (lessee's purpose was not completely frustrated); secondly, imposition of restrictions on car sales was a foreseeable event at the time of contract conclusion (lessee assumed the risk of restrictions). The court stressed the fact that the premises were located on a busy road and that the lessee's purpose was only restricted and not totally frustrated as he could still sell new cars under certain conditions and he could still provide repairs and sell petrol. The court also stressed the fact that the lessee was a professional car dealer who must have been aware that there was a great risk of government restrictions on car sales since similar measures were already

[23] For frustration of purpose in US law see: G. S. Crespi, "Frustration of Purpose as an Excuse for the Non-performance of Contractual Obligations Impacted by the Coronavirus Covid-19 Pandemic and by Pandemic-Related Governmental Restrictions: Some Preliminary Thoughts" (Preliminary Draft), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595310, 29 March 2021.
[24] Lloyd v Murphy 25 Cal. 2d 48, 153 P.2d 47 (1944), available at: https://casetext.com/case/lloyd-v-murphy, 29 March 2021.

being enacted and the sale of new cars was soaring in expectation of imminent restrictions. This case clearly shows the limits of frustration of purpose. Discharge of obligations is not to be granted lightly, but only when highly unlikely events completely destroy the commercial purpose of a contract. Any other approach could dangerously undermine legal certainty.

An example of total frustration of purpose may be found in the case of *20th Century Lites Inc v Goodman* in which it was decided that a contract for lease of a neon sign installation was frustrated by government wartime prohibition of outdoor lighting between sunset and sunrise.[25] The court came to the conclusion that night time lighting was the principal goal of the parties' at the time of contract conclusion so that daytime use of the neon sign, as just a large advertisement, does not exclude frustration. The crucial factual difference between this case and the case of the car dealership is that here the object of the contract completely lost its commercial value. The neon sign could not be used by the lessee or by any other person since the government generally prohibited outdoor lighting during the night. The crucial normative difference between this case and the case of the car dealership is that the court qualified the wartime restriction on lighting as an unforeseen event so that the risk of its occurrence was not assumed by the lessee, even though the contract was concluded in September 1941, at a time when various wartime regulations were already in force and the danger of war was clearly visible. Perhaps the restriction on lighting was not expected due to the geographic distance between the US and the theatres of war. In any event, this case provides an example of a contract whose subject matter has lost all commercial value and which should, therefore, be considered as frustrated. It would be unfair to require the lessee to pay rent for an object which completely lost its usefulness for an indefinite period of time (the duration of the war could not have been accurately predicted). On the other hand, a case such as this raises the question of distribution of risk. If the risk of occurrence of a frustrating event was not assumed by either party, why should only one party bear the loss? In the case of the neon sign, the lessor of the sign had to incur the cost of production, delivery, installation and maintenance of the sign. If the contract is frustrated and lessee released from his obligations, should he not be under a duty to pay for at least a part of those expenses? In order to avoid unjust outcomes, the courts must be granted wide discretion in distributing losses arising out of a frustrated contract.

[25] 20th Century Lites, Inc. v. Goodman 64 Cal.App.2d 938 (Cal. Ct. App. 1944), available at: https://casetext.com/case/20th-century-lites-inc-v-goodman, 29 March 2021.

Legal consequences of frustration are not regulated by statute in American law and there is no uniform judicial practice when it comes to compensation of reliance losses. Some courts leave the loss where it has fallen, while other courts allow compensation of reliance losses (costs incurred in preparation for performance of a contract which has been frustrated) but only if certain conditions are met, for instance if the other party is left with a benefit.[26] The Restatement (Second) of Contracts offers wide discretion to the courts, but it is not certain how ready they are to use it.[27] American courts are generally disinclined to amend the frustrated contract, although there have been heavily criticised attempts to reform the contents of a contract.[28]

FAILURE OF THE BASIS OF THE TRANSACTION

Civil law legal systems are generally more inclined to amend or rescind a contract due to an unforeseen change of circumstances since the idea of *clausula rebus sic stantibus* has long been established in legal thinking and the binding nature of contracts is explained through consent and not through the idea of consideration i.e. a bought promise.[29] Civil law starts from the idea that promises should be kept, but also recognizes the fact that no promise can be unconditional. The leading example of civil law approach in dealing with changed circumstances in contract law is provided by the German doctrine of failure of the basis of the transaction (*Wegfall der Geschäftsgrundlage*). This is a very broad idea that every contract rests on a subjective (common perception of the parties) or objective foundation (necessary circumstances) and that drastic changes of that foundation may lead to rescission or amendment of the contract.[30] New circumstances are legally relevant if the court concludes that the parties would not have concluded the contract or that they would have concluded a different contract had they foreseen these new circumstances and if it would be unfair to hold the parties bound by their original contract.[31] The hypothetical will of the parties is important because in dealing with new circumstances the court

[26] R. A. Hillman, *Principles of Contract Law*, West Academic Publishing, 2013, 367–369.
[27] Ibid.
[28] *Ibid*., 369–372. The famous (or infamous) case of reformation is Aluminum Co. of America v Essex Group where the court decided to change a pricing formula which, due to unexpected events, failed to reflect the true costs of processing aluminum.
[29] K. P. Berger, D. Behn, *op. cit.*, 115–117.
[30] See: D. Looschelders, *Schuldrecht: Allgemeiner Teil*, Vahlen, München, 2018, 281–283.
[31] D. Looschelders, *op. cit*., 282–283.

is essentially filling a gap that the parties left in the contract when they failed to take into account the possibility of a change of circumstances.[32] The normative element – unfairness of original contract in new circumstances – stems from the basic notion of good faith in contract law and serves to protect legal certainty (*pacta sunt servanda*) since a contract may be changed only in exceptional circumstances i.e. if the original contract leads to evidently and harshly unjust results due to a change of circumstances.

The history of this part of German law is very interesting. The drafters of the German Civil Code, influenced by the will theory, rejected the *clausula rebus sic stantibus*, but very soon after the enactment of the Code the courts developed the idea of failure of the basis of the transaction in order to deal with problems posed by hyperinflation in the wake of the First World War.[33] It is noteworthy that German rules on changed circumstances in contract law started from the most dubious case of hardship – money losing its value. However, circumstances persisting in Germany after the First World War were so difficult and inflation was so high that it was impossible to qualify these new circumstances as normal business risk. The doctrine of failure of the basis of the transaction was elaborated by German courts for almost a century and it was finally introduced to the German Civil Code in 2002 as § 313 which codifies the rules developed by the courts.[34] Unlike many other rules on changed circumstances, § 313 regulates not only subsequent change of circumstances, but also common mistake at the time of contract formation.

Cases of failure of the basis of the transaction have been divided into several separate categories according to type of failure: failure of equivalence, failure of purpose and common mistake.[35] With regard to the subject of this article, we should take a closer look at cases of failure of purpose

[32] Interpretation of the contract takes precedence over rules on changed circumstances. If the court interprets the contract to govern new circumstances there is no ground for amending or terminating it. See: H. Brox, W.-D. Walker, *Allgemeines Schuldrecht*, C. H. Beck, München, 2018, 322–323. If new circumstances are not governed by the contract the court still has to interpret the contract to find out what the original intention of the parties was in order to determine the hypothetical will of the parties.

[33] K. P. Berger, D. Behn, *op. cit.*, 120–122. To be more precise, German courts did not come up with this idea, as it was already very developed in German legal theory (especially in the work of Paul Oertmann, who introduced the notion of the basis of the transaction – *Geschäftsgrundlage*), but they introduced it to legal practice using the general provision on good faith as the statutory basis (§ 242 BGB).

[34] The intention of the legislator was not to reform this area of law, but merely to set it down in a statute. H. Brox, W.-D. Walker, *op. cit.*, 321; D. Looschelders, *op. cit.*, 279.

[35] D. Looschelders, *op. cit.*, 285–287.

(*Zweckstörung*). Since the risk of usefulness of performance is generally borne by the creditor, there has to be a clear standard for distinguishing the common purpose of the parties (whose failure undermines the contract) from one-sided purpose of either party (whose failure is legally irrelevant). German legal theory considers the purpose of the contract relevant only if it is common to the parties to that extent that insisting on performance even when that purpose fails would constitute contradictory behaviour.[36]

This line of reasoning is particularly appropriate where a contract is concluded with reference to a particular event which is subsequently and unexpectedly cancelled – a very numerous group of cases in the present calamity. If a carnival organiser concludes a contract with musicians to perform on two evening as part of a carnival and the carnival is subsequently cancelled due to the outbreak of the Gulf War, the purpose of the contract is lost and the musicians cannot insist on payment of the agreed remuneration.[37] The court stressed the fact that the risk of cancellation of the carnival was assumed by both parties and that the musicians could rely in good faith that the contract should only be binding if the carnival can take place.[38] Similarly to the coronation cases, the crucial element of this case was the fact that a contract made sense only in the context of a special event which was unexpectedly cancelled. Unlike the coronation cases, it seems that the change of circumstances in this case was even more exceptional and unforeseeable since outbreak of a war may generally be regarded as less likely than cancellation of a certain ceremony due to illness of persons taking part in it.

The case of the cancelled carnival is an excellent example for many contracts which have become pointless due to the coronavirus pandemic. It shows how a contract can be completely undermined even though performance is technically still possible and not more difficult than originally anticipated. It also shows how frustration of purpose is more akin to impossibility than hardship, since it is based on impossibility of attaining the common purpose of the parties. The contract, in fact, cannot be performed as originally intended because performance would be something radically different from what the parties expected.

Unlike Common law systems, German law considers adaptation of the contract as the primary remedy in cases of frustration. A contract will be terminated only if adaptation is not possible or if it would be unfair to the other

[36] *Ibid*, 286.
[37] OLG Karlsruhe NJW 1992, 3176, cited according to: D. Looschelders, *op. cit*., 286.
[38] *Ibid*.

party.[39] The idea behind this hierarchy of remedies is that the contract should be upheld in its original meaning as far as it is possible. Termination of contract is seen as more damaging to the principle of *pacta sunt servanda* than adaptation by the court. The party influenced by unforeseen events may immediately sue for performance of the adapted contract, it is not necessary to first adapt the contract and then sue on it in a separate procedure.[40]

THE FRENCH EXCEPTION

With regard to rules on changed circumstances, French law has long been an exception to the general civil law tradition.[41] Drafters of the Code Civil, like their German counterparts a century later, considered the mediaeval *clausula rebus sic stantibus* irreconcilable with freedom of contract and security of legal transactions. Unlike the German situation, however, French courts refused to depart from the sanctity of contract and no rules on hardship or frustration of purpose were ever developed.[42] Only recently, in 2016, Code Civil was reformed to include a provision which allows amendment or termination of the contract in cases of hardship – when "a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who has not accepted the risk of such a change".[43] The party facing difficulties in performance cannot, however, immediately request judicial relief – it is necessary that the parties first attempt to renegotiate the contract and only if negotiations fail can the court interfere.[44]

New rules of the Code Civil say nothing of frustration of purpose. It is doubtful whether French courts would be willing to extend the provision on hardship to cases in which performance is not more difficult, but "only" pointless. In fact it is yet to be seen whether French courts will use their new

[39] D. Looschelders, *op. cit.*, 284–285.
[40] *Ibid*.
[41] See: K. P. Berger, D. Behn, *op. cit.*, 117–118.
[42] Strict adherence to the binding nature of contract is shown by the infamous case of *Canal de Crappone* from 1876 in which the French Court of Cassation refused to amend a price which had been agreed in 1567 – a decision which can parallel the strictness of the English law in *Paradine v Jane.*
[43] Art. 1195 CC, cited according to: J. M. Smits, C. Calomme, *The Reform of the French Law of Obligations: Les jeux sont fait*, Maastricht University Faculty of Law, 2016, 7–8, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845796, April 1 2021.
[44] *Ibid*.

power to amend contracts, given their previous reservations and the fact that many parties exclude application of the Code Civil rules on hardship to their contracts.[45] Cases of frustration of purpose brought about by the coronavirus pandemic will have to be dealt with by contractual *force majeure* clauses or by renegotiation between the parties.

THE NEED FOR FLEXIBLE REMEDIES

It would defy common sense to consider contractual promises as absolute and detached from the factual circumstances which the parties find themselves in. If an unexpected event frustrates the original intention of the parties it is necessary to depart from the original provisions of the contract. But that departure does not have to be dramatic. It may seem logical to think that when the basis of a contract fails that the contract also fails i.e. that frustration of purpose leads to complete discharge of all obligations under the contract. Common law legal systems generally recognize only one result of frustration – *ex lege* termination of the contract. This rule rests on a general idea that courts cannot and should not interfere with the contents of a contract. This approach is misguided because there are many cases in which new circumstances simply make one aspect of the contract pointless or frustrate its purpose only for a limited time. Reformation of the contract in such cases should be the preferred legal remedy. It is evidently more in line with the principle of *pacta sunt servanda* to uphold the contract with some changes than to terminate it completely.

It is sometimes said, especially in common law jurisdictions, that courts do not have the power to interfere with contracts – with the autonomous specific regulation of the parties based on their consent and their free will. Whether this idea is based on a romantic ideal that a contract must be based exclusively on the free will of the parties or on more practical considerations that the court cannot decide the best solution in a particular case, it is misguided. It is far better for legal certainty and more in line with *pacta sunt servanda* to allow the court to amend the contract in light of the new circumstances on request of one party. Such a rule has been widely accepted in civil law, not only in jurisdiction which have a long tradition of adapting contracts to new circumstances, such as German law, but also by jurisdictions which have traditionally upheld a very strict interpretation of *pacta sunt servanda*, such as French law.

[45] K. P. Berger, D. Behn, *op. cit.*, 120.

Court intervention in a contract is reasonable because it is the ultimate solution for unforeseen events. Frustration occurs when there is a gap in the contract and this gap may be filled by the parties, by the court or by chance – but new circumstances cannot be undone.[46] It is better to find a compromise solution, whether through renegotiation or litigation, than to completely abandon a transaction. Of course, this is only possible with regard to cases of partial or temporary frustration of purpose. When it becomes evident that the parties no longer have any chance of attaining their commercial purpose, the contract is inevitably at its end.

In the context of COVID-19 it seems that flexible rules on frustration will better serve practical needs of contracting parties. Measures imposed to fight the pandemic change constantly and the intensity of viral spread is also in flux. Borders are being closed and opened, restrictions are imposed and lifted and generally speaking there is little certainty as to what measures will be imposed and how long they will be in effect. In such circumstances it seems appropriate to allow courts to suspend performance or to provide for a different method of performance when a contractual purpose cannot be achieved as originally intended. Of course, it is best if the parties themselves manage to agree on a revision of the contract, but in cases where this is not possible the court should have the right to make the most of the contract. It may, therefore, be supposed that the pandemic of the new coronavirus will affirm the importance of rules on changed circumstances, but also the importance of their flexibility.

Courts should not only have the right to change the frustrated contract, but also to distribute loss arising out of frustration. The party seeking discharge from its obligations may be required to pay a part of the loss borne by the other party. Many legal systems, including common law jurisdictions, already provide for this right. Distribution of loss should correspond to the distribution of risk. When a contract fails because its purpose is frustrated it is because the purpose was common to both parties – both sides assumed the risk of achieving a certain goal. When risk of failure materialises, both parties should be required to bear its consequences. In many cases both parties will have incurred reliance losses and it may be just to leave these losses where they fell, but sometimes one party has higher costs in preparation for performance than the other party (as in the case of the useless neon sign) and these costs should then be divided between the parties.

[46] This has been clearly and persuasively stated by Chapman: "When a court proceeds to apply the doctrine of frustration of purpose it is merely affirming that it, rather than chance, should fill in the gaps." T. W. Chapman, "Contracts – Frustration of Purpose", Michigan Law Review, Vol. 59, 1960, 116.

An exact formula for the distribution of losses cannot be established as everything will depend on the circumstances of the case.

CONCLUSION

The law will not face the difficulties of COVID-19 pandemic empty-handed – rules on impossibility, hardship and frustration of purpose, which have been developed over a long period of time and with regard to various disasters, are numerous, refined and effective. Furthermore, many commercial contracts contain *force majeure* and hardship clauses which are wide enough to cover disruptions caused by the new coronavirus.[47] There will certainly be many cases and many difficult cases before courts and arbitrators, but it is unlikely that the pandemic will substantially change the legal approach to changed circumstances. The question of risk will remain the central deciding factor: relief will be granted when exceptional, reasonably unforeseeable and irresistible extraneous events hinder performance or destroy the contract's meaning. Contractual liability is strict, but not absolute. When entering a contract the parties do not assume all risks which might arise later, but only the usual and probable risks. If something wholly unexpected happens later and destroys the meaning or balance of the transaction, parties cannot fairly be held to their original promises.

Systemic disruption caused by COVID-19 will confirm the importance of rules on changed circumstances and strengthen their application in practice. Given its global nature and consequences, the coronavirus pandemic will also offer an incentive for comparative study and harmonization of various rules dealing with unforeseen events. As we have seen, there are large differences in legal rules for unforeseen events, regardless of the fact that all these rules boil down to fairness and cooperation between contracting parties. It is to be hoped that the coronavirus will bring different rules on impossibility, hardship and frustration of purpose closer together.

The coronavirus pandemic will also bring rules on frustration of purpose to the foreground. Social distancing rules and lockdowns have caused cancellation of many events: festivals, concerts, fairs, conferences, holiday trips, business trips etc. In many of these cases parties will be faced with the problem of frustration of purpose – literal performance may still be possible and no more

[47] For instance, the ICC *force majeure* clause from 2003 lists plagues and epidemics as examples of *force majeure* events. Available at: https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/, 31 March 2021. There is a new version of the clause since 2020 and it also makes specific mention of plagues and epidemics.

difficult than envisaged, but the commercial purpose of the transactions may have fallen away.

Finally, the raised awareness of importance of unforeseen events in contract law should be used as a basis for legislative and judicial reform of unsatisfactory rules. Common law jurisdictions could certainly expand the scope of remedies in cases of frustration to include other options apart from *ex lege* termination of the contract. Restrictive rules, in general, should be relaxed: courts should be allowed to amend contracts in light of new circumstances. Constant changes in measures against the coronavirus and the fast pace of the epidemic show that flexibility is crucial to achieving just results. In some cases it will be enough to suspend performance for a certain period of time, in other cases it will be enough to order a different method of performance. Sometimes termination of the contract will be the only solution and sometimes it may be enough to discharge the parties from liability for damages.

In addition to the power to terminate or amend a contract, the courts should have wide discretion to divide the loss between the parties. While there are cases in which it may be just to leave the loss where it fell, there are also cases in which distribution of loss is the only way to achieve a just result. If one party incurred significant costs in reliance on the contract and the contract is subsequently terminated through no fault of his, the other party should be required to compensate a part of those costs.

REFERENCES

Beale, H., *Chitty on Contracts*, 32nd ed., Sweet and Maxwell, 2017.

Berger, K. P., D. Behn, „*Force Majeure* and Hardship in the Age of Corona: A Historical and Comparative Study“, *McGill Journal of Dispute Resolution*, Vol. 6 (2019–2020), No. 4.

Brox, H., W.-D. Walker, *Allgemeines Schuldrecht*, C. H. Beck, München, 2018.

Crespi, G. S., “Frustration of Purpose as an Excuse for the Non-performance of Contractual Obligations Impacted by the Coronavirus Covid-19 Pandemic and by Pandemic-Related Governmental Restrictions: Some Preliminary Thoughts” (Preliminary Draft), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595310.

Furmston, M. P., *Cheshire, Fifoot and Furmston’s Law of Contract*, Oxford University Press, 2006.

H. Rösler, “Change of Circumstances”, *The Max Planck Encyclopedia of European Private Law*, Max-Planck-Gesellschaft – Oxford University Press, 2012.

Hillman, R. A., *Principles of Contract Law*, West Academic Publishing, 2013.

Looschelders, D., *Schuldrecht: Allgemeiner Teil*, Vahlen, München, 2018.

Pistor, K., *Law in the Time of COVID-19*, Columbia Law School, 2020.

Smits, J. M., C. Calomme, *The Reform of the French Law of Obligations: Les jeux sont fait*, Maastricht University Faculty of Law, 2016.

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ОД КРУНИСАЊА ДО КОРОНАВИРУСА: ОСУЈЕЋЕЊЕ УГОВОРА И КОВИД-19

Резиме

Овај рад је посвећен проблему немогућности остварења сврхе уговора услед непредвиђених новонасталих околности. У њему се истражују правила о немогућности остварења сврхе уговора у упоредноправној перспективи, приказује се историја њиховог настанка и покушавају се пронаћи њихови заједнички суштински елементи. Аутор разматра случајеве из енглеског, америчког и немачког права како би показао анатомију случајева осујећења сврхе уговора и значај те установе у постојећим условима глобалне пандемије новог коронавируса. Аутор закључује да ће установа осујећења уговора бити неопходна у многим случајевима како би се избегла неправична решења када испуњење уговорних обавеза није постало ни немогуће ни отежано, већ бесмислено у економском смислу због пандемије коронавируса и мера донетих у борби против ње. Аутор такође истиче значај флексибилности правила о немогућности остварења сврхе уговора – судови треба да имају овлашћење да измене уговор у светлу новонасталих околности и овлашћење да одреде правичну расподелу трошкова између странака, нарочито када се уговор мора раскинути.

Кључне речи: Немогућност остварења сврхе уговора. Промењене околности. Clausula rebus sic stantibus. Виша сила. Немогућност испуњења.

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EMERGENCY PHASE AS SPECIAL LEGAL ORDER IN HUNGARY DURING THE EPIDEMIC CAUSED BY COVID-19

Abstract

In order to the deceleration and mitigation of the effects of the coronavirus instruments not previously used were used by the legislator in Hungary, too. Naturally, provisions similar to neighboring countries were made it unique to adapt to the Hungarian constitutional order, social peculiarities, and institutional set-up. In Hungary on 11 March, 2020 was the emergency phase – apostrophized as a special legal order in the Basic Law of Hungary – first promulgated, under which the government may issue a decree suspending the application of certain laws, may deviate from legal provisions, and may take other emergency measures. The purpose of the authors of the work is to present a comprehensive picture of the legal system of the "new reality" brought to Hungary by the coronavirus pandemic from the beginning to the present day by focusing on provisions to be implemented in part or in full by the police.
Keywords: coronavirus, special legal order, emergency phase, regulatory governance, police tasks.

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1. INTRODUCTION

In 2020, the only means of tackling the coronavirus epidemic were restrictive measures aimed at preventing or slowing down its spread.[1] The key to successful epidemic management was the high-quality implementation of restrictive protection measures.[2] These measures mainly focused on personal protection, compliance with which is a matter of individual responsibility.[3] The social treatment of epidemic management has necessitated the widespread use of restrictive measures for protection purposes. These are materialized in legal provisions, so a temporary reorganization of legislative powers was necessary to deal with the rapidly changing situation. In this context, a special legal order was promulgated, which gave the government special legislative powers. [4]

A significant proportion of emergency measures have restricted or suspended fundamental human rights. Restrictions on fundamental rights are a legitimate and necessary corollary of police action. The massive restriction of fundamental rights (affecting the entire population of the country or a significant part of it) by the law's force has been an unprecedented challenge for both citizens and the police as a law enforcement body. These challenges required a high degree of tolerance on the part of the authority in order for society to have a good sense of protection functions. Each of the restrictive measures introduced affected the freedom of action of all or part of society. Society needed to see restrictions not as an end in itself but as a means of defense. Due to the Covid-19 virus epidemic, several fundamental rights have been restricted in Hungary, such as the right to free movement and residence and the right of peaceful assembly. The right to physical and mental health was indirectly affected by the life situation resulting from the restrictive measures and the health burden caused by the viral situation. For example, the health care system only provided care for

[1] M. Zajenkowskia, P. K. Jonasonb, M. Leniarskaa, Z. Kozakiewicz, Who complies with the restrictions to reduce the spread of COVID-19?: Personality and perceptions of the COVID-19 situation. Personality and Individual Differences Vol 166, 2020. DOI:10.1016/j.paid.2020.110199

[2] C. Clark, A. Davila, M. Regis, S. Kraus, Predictors of COVID-19 voluntary compliance behaviors: An international investigation. Global Transitions Vol. 2, 2020, Doi: 10.1016/j.glt.2020.06.003

[3] P. Ai, Y. Liu, & X. Zhao, Big Five personality traits predict daily spatial behavior: Evidence from smartphone data. Personality and Individual Differences, Vol 147, 2019, 285–291.

[4] S. Bódi, The Clash of Civilizations? Analysis of the migration crisis situation brought about by mass immigration and the special legal order. Military Science, Vol 1-2, 2016, 45.

emergencies and severe cases so that the capacity thus freed up could be used to treat viral patients.

2. THE EMERGENCY AS A SPECIAL LEGAL ORDER IN HUNGARY

A special legal order is a state framework for dealing with a social or natural phenomenon that cannot be dealt with in the state's normal functioning. A common feature of these phenomena is that they threaten the people, the state, or the constitutional order.[5] Its purpose is to maintain the efficiency of the operation of the state for a transitional period. An additional goal can be to develop a security and protection system that ensures the performance of tasks that arise during emergencies. The elimination of dangers for which the "ordinary" operation of the state organizational structure is not suitable or for which the organizational and operational conditions are not suitable must be implemented.[6] Compared to other special legal situations[7], the characteristic of an emergency is that it is not aimed at the state's armed defense. Pursuant to Article 53 of the Fundamental Law of Hungary, the government declares a state of emergency in the event of an elemental disaster or industrial accident endangering the safety of life and property and may prevent emergency measures specified in a cardinal law, and as specified in a cardinal law - may suspend the application of specific laws, deviate from statutory provisions, and take other extraordinary measures. Government regulations automatically expire when the emergency ceases. In a special legal order, including emergency times, the exercise of fundamental rights may be restricted or suspended.[8] In the event of an emergency, the principle of the separation of powers necessarily becomes

[5] L. Csink, When should the legal system be special? - Iustum Aequum salutare, 2017. 4, 7-17.

[6] L. Lakatos, Situations requiring the implementation of special legal orders of the defense type and their modern practical solution - In: Júlia Hornyacsek (ed.): Practical experiences of the operation of the defense administration in the light of today's challenges. Budapest, Dialóg Campus Publishing House, 2019, 38-61.

[7] State of emergency, state of emergency, preventive defense, terrorist threat, unexpected attack.

[8] Exceptions are the right to life and human dignity, as well as torture, inhuman or degrading treatment, servitude, trafficking in human beings, medical or scientific experimentation without consent, human breeding practices, exploitation of the human body and its parts (organ trafficking) and the prohibition of human reproduction (cloning). Exceptions are also the presumption of innocence, the right to a defense in criminal proceedings, the principle of “nullum crimen sine lege”, the principle of “nulla poena sine lege” and the principle “ne bis in idem”.

limited. The government, as an executive factor, exercises a broad legislative function during such a period. During this period, the government with expanded power must show sufficient restraint.

3. THE ROLE OF THE POLICE IN EMERGENCY MEASURES IN HUNGARY

The emergency in Hungary was first declared on 11 March 2020.[9] Along with the declaration of the emergency, the legal institution of official home quarantine was introduced.[10] The control of compliance with the rules of this epidemiological measure has been the general police body's responsibility. In addition, to control the rules of entry into the territory of Hungary, border control at Hungary's internal Schengen borders was temporarily reintroduced, which in the first stage affected the Austrian and Slovenian border sections. As there is significant transit traffic through Hungary between East and West, a transport corridor has been designated as a transit route. Therefore, it has become necessary to monitor compliance with transit rules and road sections, motorway rest areas, and petrol stations designated as transit routes.

The police were also responsible for examining requests for exemption from the restrictions and prohibitions on entry.[11] The latter task was so large in volume that a separate apparatus was initially required to carry it out. Rules on curfews - together with other provisions such as exclusive time slots reserved for the purchase of the elderly - entered into force on 28 March 2020.[12] The control of these and the sanctioning of violations also expanded the responsibilities of the police. By the beginning of the summer, the dynamics of the number of cases took a favorable turn. Therefore, the emergency was lifted on 18 June 2020.[13] This status lasted until 4 November 2020, when the government again declared a state of emergency due to the second wave's rising numbers.[14]

The most defining rules became the rules on curfew, official home quarantine, wearing masks, the closing of shops, and restrictions on staying in

[9] Government Decree 40/2020 (III.11.) On the declaration of a state of emergency.
[10] Government Decree 41/2020 (III.11.) On the measures to be taken in the event of an emergency ordered to prevent the health and life of Hungarian citizens in order to prevent a human epidemic causing a mass illness endangering the safety of life and property.
[11] Government Decree 81/2020. (IV.1.) On emergency measures for the protection of health and life and the restoration of the national economy.
[12] Government Decree 71/2020 (III.27.) Declaration On the curfew.
[13] Government Decree 282/2020 (VI.17.) On the elimination of the emergency situation declared on 11 March 2020.
[14] Government Decree 478/2020 (XI.3) on the declaration of a state of emergency.

catering establishments. It is worth mentioning that, in line with European trends, the government banned all public demonstrations. It was a strong barrier of fundamental rights. Violation of these may result in a fine. The gravity of the infringements is intended to be emphasized by the possible amounts of the fines. For most misdemeanors, a fine of HUF 5,000 to HUF 500,000 can be imposed. There are misdemeanors, in the case of which it is possible to impose a fine between HUF 5,000 and HUF 150,000, or even between HUF 5,000 and HUF 1,000,000. These fines had a clear impact on the 2020 statistics. Based on the data related to the on-the-spot fine, it can be concluded that there was no significant change in the number of fines imposed. This is certainly because "general public space offenses" (such as road traffic offenses, public cleanliness offenses, etc.) have been pushed into the background due to curfews, but epidemic control offenses have taken their place. Based on the statistics published on the police's official website (www.police.hu), in the period between 2015 and 2019, the annual average number of persons punished with on-site fines was 462,610. In comparison, the year 2020 resulted in on-the-spot fines of 471,196 people, a negligible increase of 1.86% from the average of the last five years. Therefore, we can state that the epidemic situation did not generate a decline in field fines. The situation is even more interesting in terms of the amount of on-the-spot fines imposed. The average total annual amount of fines for the period 2015-2019 was HUF 5,684,415. The year 2020 - certainly due to the high amounts of fines for epidemiological violations - amounted to HUF 8,266,707. This far outweighs the increase in the number of sanctions, an increase of 45.4%. In the period from the outbreak of the epidemic in Hungary to 18 January, a total of 1426 people were prosecuted for violations of quarantine rules, 26459 for access restrictions, and 20178 for mask-wearing rules. A further 163 people were dealt with by the police for violating assembly rules.[15] Regarding the latter, it is worth mentioning that according to the news published by the organizer about the demonstration that took place in the days before the article was written, the police took action against 320 people, so there is a strong assumption that sanctions for violating the right of the assembly will increase significantly.[16]

The legislature did not seek to promote defense solely by misdemeanors. It also sought to prevent the fake news phenomenon from hindering his defense. He, therefore, ordered the punishment of a person who, during a period of special

[15] Source: National Police Headquarters

[16] https://mihazank.hu/varjuk-a-marcius-15-en-megbirsagoltak-jelentkezeset-es-a-szolidaritasi-adomanyokat/ /access: march 20th 2021/

legal order, claims or rumors a false fact or fact in public in such a way as to obstruct or frustrate the effectiveness of the defense. However, in doing so, the legislator extends criminal liability to such a vast extent that it is neither necessary nor proportionate. The legislator uses difficult-to-interpret, inaccurate terms. Furthermore, uncertain concepts run counter to legal certainty. This keeps those who speak in public affairs during a special legal order or even use social media uncertain, as it is not clear exactly what speeches criminal law prescribes.[17]

4. COORDINATION OF DEFENSE

In order to make decisions related to the epidemic situation and to make proposals to the government exercising decision-making rights, the Operational Staff Responsible for Coronavirus Epidemic Control (later only the Operational Staff) was established on 31 January 2020, headed by the Minister of Police (Minister of the Interior).), who directs the activities of the tribe with the involvement of the Minister for Health (Minister for Human Resources).

Other members (based on Government Resolution 1012/2020 (I.31.) In force at the time):

- Director-General for Public Safety of the Ministry of the Interior,
- the national police chief,
- the Director-General of the State Health Care Center,
- Director-General of the National Institute of Hematology and Infectious Diseases of the South Pest Central Hospital,
- the Director-General of the National Directorate General of Aliens,
- the Director-General of the National Directorate-General for Disaster Management,
- Director-General of the National Ambulance Service
- the national chief medical officer,
- Director-General of the Counter-Terrorism Information and Crime Analysis Center.

Its other members shall, in accordance with the rules in force at the time of writing[18]:

[17] A. Domokos, Certain criminal rules related to the epidemic during a special legal order. Glossa Irudicia special issue, 2020, 73-83.

[18] Government decree 286/2020 (VI.17.) On the tasks of the Operational Staff operating during epidemiological preparedness.

- the Secretary of State appointed by the Minister for Public Administration,
- State Secretary appointed by the Minister for Economic Development,
- the Secretary of State appointed by the Minister for Foreign Affairs,
- the Secretary of State appointed by the Minister for Defense,
- the Secretary of State appointed by the Minister for Health,
- the national chief medical officer,
- State Secretary for Internal Security in the Ministry headed by the Minister responsible for law enforcement (same as the former Director-General for Public Security in the Ministry of the Interior),
- Head of the Operations Staff on-call center.

In order to analyze and assess the epidemic situation and coordinate the activities of the organizations involved in the defense, on 25 February 2020, the government established the Operational Staff Monitoring Center. The National Police Headquarters manage this organization.

The following organizations delegate members here:

- Ministry of Innovation and Technology
- Ministry of Human Resources
- Ministry of Foreign Affairs and Trade
- Hungarian Defense Forces
- National Directorate General for Disaster Management
- National Center for Public Health
- National Ambulance Service.

In order to deal with the third wave of the epidemic, the National Tribe was formed on 12 March, 2020. Its task is to coordinate the tasks within the National Police Headquarters' competence, fulfill the reporting and information obligations, and prepare the management decisions.

To preserve and ensure the optimal use of medical supplies, the hospital command system was established, which started operating on 30 March, 2020. The essence is that the police or the army's chief officers - in addition to or instead of performing their original duties - have been assigned to head various public hospitals, state health care institutions and perform hospital command duties.[19] They cannot take a position on medical matters, and they cannot make a decision. The decision, instruction, and control rights are limited to the performance of tasks related to preserving hospital supplies (materials and equipment). In order to coordinate the activities of the hospital commanders, the Deputy Chief of

[19] A total of 108 institutions.

Police of the National Police, acting as the commander-in-chief of a national hospital, works under the so-called hospital commanding staff, whose task is to coordinate the activities of commanders, to optimize the distribution of national stocks as needed, and to collect, analyze and evaluate the information necessary for various management decisions.

5. CONCLUSION

There is no doubt that the coronavirus epidemic has resulted in a completely different life situation than usual. It posed new, unprecedented challenges to the entire population of the country. The situation pushed classical policing into the background and resulted in a special task system specifically tailored to the epidemiological situation. At the same time, of course, the previous tasks still need to be performed. The performance of these two systems of tasks required new organizational solutions.

Although a general and mass restriction of fundamental rights is unusual in a liberal democracy, the life situation generated by a pandemic requires a lifestyle limited by strict rules in order to protect the most important value to be protected, human life and health. The relatively high number of measures shows that compliance with restrictive measures is only partially achieved through voluntary compliance. Therefore law enforcement has a significant role to play. The increasing appearance of demonstrations signals the finiteness of people's patience. The police's firm action shows that the state is still not lowering the level of defense. From all this, it can be predicted that increasing police activity is expected until the favorable turn of the epidemic situation and the consequent easing of the rules.

REFERENCES

Marcin Zajenkowskia, Peter K. Jonasonb, Maria Leniarskaa , Zuzanna Kozakiewicz (2020): Who complies with the restrictions to reduce the spread of COVID-19?: Personality and perceptions of the COVID-19 situation. Personality and Individual Differences Vol 166. DOI:10.1016/j.paid.2020. 110199

Cory Clark, Andrés Davila, Maxime Regis, Sascha Kraus (2020): Predictors of COVID-19 voluntary compliance behaviors: An international investigation. Global Transitions Vol. 2 Doi: 10.1016/j.glt.2020.06.003

Ai, P., Liu, Y., & Zhao, X. (2019). Big Five personality traits predict daily spatial behavior: Evidence from smartphone data. *Personality and Individual Differences, Vol 147, pp.* 285–291

Stefania Bódi (2016): The Clash of Civilizations? Analysis of the migration crisis situation brought about by mass immigration and the special legal order. Military Science, Vol 1-2 pp 45. (Original: Bódi Stefánia (2016): A civilizációk összecsapása? A tömeges bevándorlás által életre hívott migrációs válsághelyzet elemzése és a különleges jogrend. Hadtudomány, 1–2)

Lóránt Csink (2017): When should the legal system be special? - Iustum Aequum salutare, 2017. 4. pp. 7-1. (original: Csink Lóránt (2017): Mikor legyen a jogrend különleges? – Iustum Aequum salutare, 4 pp. 7-16)

László Lakatos (2019): Situations requiring the implementation of special legal orders of the defense type and their modern practical solution - In: Júlia Hornyacsek (ed.): Practical experiences of the operation of the defense administration in the light of today's challenges. Budapest, Dialóg Campus Publishing House, 2019. pp. 38-61. (Original: Lakatos László (2019): A honvédelmi típusú különleges jogrendek életbeléptetését igénylő helyzetek és azok korszerű gyakorlati megoldása – In: Hornyacsek Júlia (szerk.): A védelmi igazgatás működésének gyakorlati tapasztalatai napjaink kihívásainak tükrében. Budapest, Dialóg Campus Kiadó, 2019. pp. 38-61)

Andrea Domokos (2020): Certain criminal rules related to the epidemic during a special legal order. Glossa Irudicia special issue pp. 73-83 (original: Domokos Andrea: Egyes, a járványhoz kapcsolódó büntetőjogi szabályok különleges jogrend idején Glossa Irudicia különszám pp. 73-83)

Government Decree 40/2020. (III.11.) On the declaration of a state of emergency

Government Decree 41/2020 (III.11.) On the measures to be taken in the event of an emergency ordered to prevent the health and life of Hungarian

citizens in order to prevent a human epidemic causing a mass illness endangering the safety of life and property

Government Decree 81/2020. (IV.1.) On emergency measures for the protection of health and life and the restoration of the national economy

Government Decree 71/2020. (III.27.) Declaration On the curfew

Government Decree 282/2020 (VI.17.) On the elimination of the emergency situation declared on 11 March 2020

Government Decree 478/2020. (XI.3) on the declaration of a state of emergency

Government Decree 286/2020. (VI.17.) On the tasks of the Operational Staff operating during epidemiological preparedness

https://mihazank.hu/varjuk-a-marcius-15-en-megbirsagoltak-jelentkezeset-es-a-szolidaritasi-adomanyokat/ /access: March 20th 2021/

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ПРАВНИ ПОРЕДАК ТОКОМ ВАНРЕДНОГ СТАЊА У МАЂАРСКОЈ ТОКОМ ЕПИДЕМИЈЕ COVID-19

Резиме

Да би успорио и ублажио ефекте коронавирусних инструмената који се раније нису користили, законодавац је користио институт увођења ванредног стања и у Мађарској. Природно, одредбе сличне суседним земљама учиниле су јединственим прилагођавањем мађарском уставном поретку, социјалним посебностима и институционалном уређењу. У Мађарској је 11. марта 2020. године први пут проглашена ванредно стање - апострофирана као посебан правни поредак у Основном закону Мађарске - према којој влада може издати уредбу о обустави примене одређених закона, може одступити од законских одредби и може предузети друге хитне мере. Сврха аутора рада је да представе свеобухватну слику правног система „нове стварности“ коју је у Мађарску донела пандемија коронавируса од почетка до данас, фокусирајући се на одредбе које ће се делимично или у потпуности бити примењиване од стране полиције.

Кључне речи: коронавирус, посебан правни поредак, ванредно стање, регулаторно управљање, полицијски задаци.

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THE IMPACT OF COVID 19 ON VULNERABLE POPULATIONS

Abstract

COVID - 19 pandemic from the very beginning, in the scientific and professional debate began to open some questions related to both, the practice of human rights during this crisis, and the emergence of new forms of crime. And that general state of chaos and panic, which lead to economic crisis, becomes even more chaotic and panic for the vulnerable populations: deprived of the liberty, people in custody, victims, poor, homeless, migrants. Why? Because their already fragile situation, which largely depends on the functioning of the system, on mercy and humanity, now is on the edge of the abyss due to the mobilization of the institutional system to deal with the COVID - 19 crisis. In fact, that mobilisation, in great extent, neglects the regular daily support services towards vulnerable people. And the watchful eye of the NGO sector, accompanied by media coverage, has begun to reveal lack of care and negligence by certain state governments. On the surface come up some weaknesses within the institutional systems related to the exercise of certain human rights, which revealed the dual values and standards in regards to care and protection of certain categories of citizens. Namely, the COVID-19 crisis opened many issues related to the protection of victims of crimes that take place behind closed doors because functioning of the social services is in great extent reduced. Furthermore, concerning issues are the protection of homeless, addicts and other vulnerable categories that have a greater need for protection in such and similar health crisis and pandemic situations.

Previous raised concerns related to the vulnerable categories of citizens and their situation and protection during the COVID-19 will be the subject matter of this paper.

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Keywords: pandemic, health crisis, restriction, vulnerable populations.

1. INTRODUCTION

We live in a time that faces difficult challenges for the survival of the world: wars, terrorism, organized crime, environmental disasters, humanitarian crisis, and health disasters. All of them are primarily caused by human factor. And while the world is mobilizing to avoid the negative consequences of these catastrophes, at the same time they persist and spread, as someone feeds and fuels them. As the famous sociologist Emil Durkheim (1858 - 1917) has said that the conflict of opposing forces is a necessary and driving force for the development of each society and the world, in general.

In the context of the new and current challenge (COVID - 19 pandemic) from the very beginning, in the scientific and professional debate began to open some questions related to both, the practice of human rights during this crisis, and the emergence of new forms of crime. The virus is spreading, hospitals are overcrowded, medical workers and health professional are lacking, many COVID-19 related deaths are registered etc. are daily news in the media that cause fear and panic not only among state officials, but also among whole population. The national authorities fear because they are entitled and obliged to take care of the safety and health of their citizens, especially in emergent situations, and the citizens because everyone is afraid for the health and life, both for themselves and for their loved ones. And that general state of chaos and panic, which lead to economic crisis, becomes even more chaotic and panic for the vulnerable populations: deprived of the liberty, people in custody, victims, poor, homeless, migrants. Why? Because their already fragile situation, which largely depends on the functioning of the system, on mercy and humanity, now is on the edge of the abyss due to the mobilization of the institutional system to deal with the COVID - 19 crisis. In fact, that mobilisation, in great extent, neglects the regular daily support services towards vulnerable people. In addition, restricted movement, job closures, curfews and limited gatherings, also limit the normal flow of aid and support services for some of them.

And of course, the watchful eye of the NGO sector, accompanied by media coverage, has begun to reveal lack of care and negligence by certain state governments. On the surface come up some weaknesses within the institutional systems related to the exercise of certain human rights, which revealed the dual values and standards in regards to care and protection of

certain categories of citizens. Namely, the COVID-19 crisis opened many issues related to the protection of victims of crimes that take place behind closed doors because functioning of the social services is in great extent reduced. Furthermore, concerning issues are the protection of homeless, addicts and other vulnerable categories that have a greater need for protection in such and similar health crisis and pandemic situations.

Previous raised concerns related to the vulnerable categories of citizens and their situation and protection during the COVID-19 will be the subject-matter of this paper.

2. THE IMPACT OF COVID-19 ON CERTAIN VULNERABLE POPULATIONS AND STATE RESPONSE

In time of pandemic much more concerns are related to violence, abuse, exploitation of vulnerable groups of citizens "behind closed doors", at homes, prisons, refugee camps, families or marginalized communities where citizens face social exclusion and marginalisation. Where is the problem here? The problem is that those citizens, instead to receive additional and strengthened protection, they are more marginalized and left alone to cope with the new problems and challenges in their daily life. Namely, the health, social and other mechanisms of control and supervision are focused to the healthcare crisis that is currently being assessed as the greatest health threat. That threat is also used to justify reduced care and protection by the public social and health services, especially to vulnerable categories of citizens who are at great risk to become victims of further violence and exploitation.

2.1. Persons deprived of liberty and COVID -19

Convicted persons and other inmates in correctional and other penal institutions are especially affected by COVID -19. They face with inadequate exercise of the right to health care, unsatisfactory hygiene conditions which threatens the right to quality of life and health. In fact, in overcrowded prisons, where many people are serving prison sentences in single cells with unsatisfactory health care protection, the COVID crisis is a real threat to the inmate’s lives and safety, especially to incarcerated and detained children in correctional facilities. And as the situation escalates in many countries, penitentiaries are not immune to certain negative consequences caused by COVID-19.

Covid-deaths of prisoners and prison staff have been reported in many prisons. By June 2020, for example, about 500 inmates in the United States had died of COVID-19. Or in April, 238 inmates and 115 staff at the Cook County jail were positive, in Arkansas 690 inmates were positive, in New York prison 1420 personnel were positive, out of which seven end up with fatal consequences.[1]

Also, due to the poor hygiene conditions in some prisons, violent protests have been reported that end up with injuries and deaths of many prisoners. For example, in Bogotá Prison, Colombia, prisoners protested, and in prison riot 23 were killed and over 80 prisoners were injured. As a result, the government decided to amnesty and to release around 10,000 prisoners from Columbian prisons. Other riots and more escapes have been reported in several Italian prisons since the Italian government announced certain restrictive measures to prevent COVID-19. The escalation of the situation was due to the interruption of the weekend visits to which prisoners are entitled, as an attempt by the authorities to prevent the spread of COVID-19 among inmates. In other Italian prison have been registered six COVID-related deaths, out of which three are drug overdose deaths because the prisoners broke into the hospital and voluntarily took wrong medication or have had overdosed. In several prisons few violent escapes are registered, who are mainly provoked by the prescribed contact limitations.[2]

Based on such and similar examples, the United Nations, the Council of Europe, the European Union and other international and national non-governmental organizations have adopted a number of recommendations, resolutions and international standards for special protection of person deprived of their liberty during the COVID pandemic. Some of them are the following: a) UNODC Technical Assistance Services, Protecting Children deprived of liberty during the COVID-19 outbreak, b) UNODC Position Paper COVID - 19 preparedness and responses in prisons, (31 March 2020), c) World Health Organization, Preparedness, prevention and control of COVID - 19 in prisons and other places of detention (interim guidance, 15 March 2020), d) IASC (Inter-Agency Standing Committee) Interim Guidance COVID - 19: Focus on Persons Deprived if Their Liberty, e) Council of Europe, Principles for the

[1]O. Alison Jordan, H. Melvin Wilson, “Addressing Covid – 19 and Correctional Facilities: A Social Work Imperative”, *Social Justice Brief*, National Association of Social Workers, 2020.
[2] Ibid

treatment of persons deprived of their liberty in the context of the coronavirus pandemic (COVID-19), 20 March 2020.

They provide excellent guidelines on how to make good preparatory plans for dealing with the situation in prisons: on the one hand, how to avoid infection, and on the other hand, how to treat COVID positive and suspected. States are urged to use detention even more restrictively, to decriminalize sex work and drug abuse in order to decrease arrests and detentions measures. They also call for release of those convicts who are assessed as low risk and who do not have much time left to serve their prison sentences. Particular attention should be paid to vulnerable prisoners, such as elderly, sick, pregnant women, who need to be released on parole or the prison sentence to be replaced by another alternative measure (for example house arrest, referral to an attendance centre).[3]

Hence, guidelines and standards generally refer to: providing adequate health care to covid infected, ensuring proper hygienic conditions in prisons, access to clean air, special protection and support for vulnerable inmates (HIV and hepatitis infected), more frequent use of alternative sanctions, more frequent application of conditional release, use of detention as a last measure, in exceptional situations. And, many countries, in order to prevent the virus transmission among inmates in correctional facilities, in the name of greater security, often ban visits and weekend leaves and release low-risk prisoners. In the first case, the restrictions are necessity and legally justified in times of urgency, but restriction of family contacts for longer period enhances the negative feelings and worsen the pains of imprisonments (loss of freedom, of material goods and services, of heterosexual relations, of autonomy and of security, Clemer, 1940)[4] caused by deprivation of liberty. The latter carries an undeniable risk of a deterioration of the mental health of prisoners. Additionally, the postponement, i.e. the interruption of certain rehabilitation programs and trainings as part of the re-socialization processes (education, cognitive skill trainings, vocational training etc.), during a pandemic, worsen the already fragile mental state of the inmates. In the latter case, release is a more humane solution. In this regard, the state authorities in many countries around the world, aware of the risk of uncontrolled spread of the infection in

[3] Council of Europe, Principles for the treatment of persons deprived of their liberty in the context of the coronavirus pandemic (COVID-19), 20 March 2020.

[4] Љ. Арнаудовски & А. Груевска-Дракулевска, *Пенологија*, Правен факултет Јустинијан Први, Скопје, 2-ри Август – Штип, 2013.

penitentiaries, have enacted decision to release certain categories of convicts, temporarily or permanently which is good solution in time of crisis.

The Government of Ethiopia, for example, has released more than 30,000 prisoners and has heightened sanitation measures. Indonesia has released more than 50,000 people, including 15,000 people incarcerated for drug-related offenses. The Islamic Republic of Iran has released 40% of its total prison population, around 100 000 people, while Chile around 50 000 prisoners. Although France is one of the countries that have proper hygiene conditions in closed institutions (correctional, educational, health care institutions, shelters centres etc.), as a result of the first case of COVID-19 registered in certain prison institution, between 5,000 and 6,000 prisoners were early released from serving their sentence. On April 7, 2020, Turkey passed a draft law on a temporary release of prisoners in order to reduce prison overcrowding and protect inmates from virus infection. The proposed law has released 45,000 inmates. An additional 45,000 prisoners were freed permanently as a result of a long-term plan to reduce prison overcrowding. Also, more than 200 inmates in Slovenia have been released temporary during the COVID-19 pandemic. In the United States, the country with the highest number of prisoners in the world (till January 2019, there were 2.12 million prisoners), because of many infected and due to the fear and worries about virus further transmission among inmates and among prison staff as well, the early release of inmates was one of preventive and protecting measures enacted by the state officials. They prioritize people at risk and the elderly, including approximately 10,000 federal inmates over the age of 60 - groups whose initial data show that they are most severely affected by COVID - 19.[5]

Although such measures, in general carry risks, such as increased crime due to released prisoners, or worsen mental illness and anxiety due to restricted visits, nevertheless, in emergency circumstances, in order to protect public health, including the health of convicts are necessary.

2.2. Homeless and COVID - 19

Homeless people are risk category because they are socially excluded people who usually don’t have health insurance and the access to primary health care is lacking. Because of their lifestyle they suffer from a number of

[5]Е. Трпеска Мујоска и К. Битраков, Соочување со пандемијата ковид – 19 во Македонските затвори и установи за сместување на лица лишени од слобода, Центар за стратегиски истражувања, МАНУ, 2020.

health problems, especially bronchial and heart diseases. Because have many medical co-morbidities, under pre-COVID-19 conditions, they are 10 times more likely to die than the general population. Also, their living conditions (lack of basic hygiene such as inability to wash and change clothes) provide an ideal setting for the spread of many diseases. And, due to COVID 19 pandemic situation, homeless people are even more at risk because almost all recommendations for protection (stay at home, social isolation, social distance, recommendations for increased hygiene etc.) do not apply to them. As risky population, they are not included in the governmental general public policies to combat the pandemic. Therefore, a special approach, care and protection should be designed and provided for the homeless. Their poor condition must not be left to the fate, humanity and mercy of NGOs, the Red Cross and individuals. In such situations, the government needs to show its humane and social dimension because although, everyone is at risk, certain categories are still more risky and vulnerable than others. Authorities and organizations in several European countries have taken the vulnerability of homeless people into account when planning and implementing containment measures. For example, in Croatia, homeless persons who consume food in public kitchens must follow hygiene and social distancing measures. Municipalities in the Netherlands have set up special housing units for homeless people who become infected. Homeless centers in Belgium and Germany are also opening special sectors to house COVID-19 patients. In Ireland, many homeless people are housed in emergency accommodation, which sometimes requires that they vacate it during the day, despite the fact that facilities such as schools, restaurants and libraries are shut. France, Belgium, Luxembourg and others have extended so-called 'winter programs' to avoid closing shelters and evicting people onto the streets during the pandemic. Essential social services are maintained despite lock-down measures in many countries, for example in Italy. But, living conditions in shelters, where shared facilities and dormitories are commonplace, make it quite much impossible to effectively control the transmission of a highly infectious disease. In that sense, one service providing accommodation to people with health problems who are experiencing homelessness in Paris has recorded 13 cases of COVID-19.[6]

In Macedonia, the situation shows that the COVID 19 has increased the homeless, users at the homeless shelter in Skopje, from 100 to 150. But

[6] European Union Agency for Fundamental Rights (FRA) Coronavirus pandemic in the EU fundamental rights implication, Bulletin 1, February-march, 2020.

according to the recommendations, they receive protective masks, can take a bath, get clean clothes, food, and have night accommodation in winter months.

2.3. Drug addicts and COVID – 19

COVID-19 pandemic is an additional risk factor for drug and alcohol addicts, especially for those who are not under institutional protection treatment and who do not receive regular therapy but are supplied on the black market as best they can. Special risk factors are isolation, social distance, financial problems, reduced assistance and counselling services. Such factors create additional pressure, anxiety and depressive feelings that often find a way out in taking other sedative drugs, mostly in large doses that can increase the risk of adverse effects, like vomiting, dizziness, or in some case fatality.

In times of stress, drug use has tends to increase. Due to boredom, isolation, financial worries, etc., some people who use drugs can increase their doses. In those situations, it is likely that many people will become addicted to them, while people who are already addicted and under treatment will relapse.

As we usually known about connection between drug addiction and domestic violence, now, in time of COVID 19 both risk factors enhance vulnerability. For, example, one study has found that 938 women in Brazil were more vulnerable to domestic violence when their partners abuse alcohol and drugs. Those situations can escalate due to reduced supply from liquor store and local business closings, and might result in more aggressive behaviours toward family members. On the other hand, anxiety, depression, and other worries as consequences of COVID 19 could contribute to increased substance consumption or relapse and, thus, to intensify tendencies toward domestic violence.[7]

Another negative impact of COVID-19 to drug addicted is the increased possibility for fatal consequences. In Germany, the number of people who died from drugs during the COVID-19 increased by 13 percent compared to previous year (in 2020 have died 572, while in 2019 - 432 people due to long-term drug use).[8] In other American study the data show that reports of anxiety disorder symptoms were about three times bigger than those reported in the second quarter of 2019 (25.5% versus 8.1%), and depressive disorder was about four times bigger (24.3% versus 6.5 %). Also, 13.3% of respondents

[7]Lisieux E. de Borba Telles, A. M. Valenca at all, “Domestic violence in the COVID-19 Pandemic: a forencis psychiatric perspective”, *Braz. Journal of Psychiatry*, 2020.
[8]more on: https://www.aa.com.tr/mk.

reported starting or increasing substance abuse (including drugs and alcohol). America has had a substance abuse problem for a major part of its history, but evidence shows that COVID-19 is making it worse. In June, 2020 it was reported that alcohol sales had risen 27% since March 7. Millennium Health, a national drug testing laboratory, also found worrisome trends when comparing the period this year before the national emergency was declared on March 13, to the period from then to the end of May. It found an increase of 32% for non-prescribed fentanyl, 20% for methamphetamine, 12.5% for heroin and 10% for cocaine, accompanied by an 18% increase in suspected drug overdoses.[9]

In terms of Covid 19 impact on drug users in Europe, the European Monitoring Center for Drugs and Drug Addiction (EMCDDA) in 2020 has conducted several analyzes in European countries, and especially in the Western Balkans. Some of them are related to (1) the impact of COVID-19 on drug use and drug services in Western Balkans, (2) drug supply via dark-net markets and (3) drug services and help-seeking in Europe. Data show that the problem is much greater in long-term high-risk opiate users who have developed an addiction and take opiates more often. In fact, the pandemic increase consumption. Additional negative consequences and effects of COVID on drug addicts which were recognized in the Europeans counties are: increased number of suicides and overdoses, increased anxiety and depressive states, increased consumption of alcohol and other sedatives and increased violence and thefts.

During the confinement period, drug-related deaths are registered in Bulgaria (mostly among young people), Denmark, France (associated with the consumption of large doses of methadone) and Finland. Increased anxiety and depressive disorders are result of loneliness and lack of physical contact with others. The social isolation accompanied with increased fear of contracting the virus and worries about people close to them who are particularly vulnerable provoke negative psychological consequences that demand expert psychological and psychiatric help. The EMCDDA studies also revealed increased demand for low-threshold substitution treatment that is possible consequence of reduced heroin availability and a reduced ability to purchase heroin due to loss of income. But, on the other hand the greater availability of opioid medications can increase the opportunities for the misuse of them that can cause death. As a response, harm reduction services in some countries have

[9] D. Sparkman, Drug Abuse on the Rise Because of COVID-19, available at. https://www.ehstoday.com/covid19/article/21139889/drug-abuse-on-the-rise-because-of-the-coronavirus, Aug 24, 2020.

reported the introduction of new interventions dedicated specifically to reduce the risks associated with the misuse of opioid substitution medications, particularly for new clients who might be less familiar with these products. Also, certain findings show that reduced mobility, disruption of social networks and reduced access to money and drugs have been accompanied by increased violence and crime, mostly property crimes among high-risk users in some countries, such as Denmark, Ireland and Cyprus.[10]

The analysis of the situation in Macedonia also registered additional negative consequences for drug users during the pandemic, such as increased simultaneous use of multiple drugs. Overdose deaths have also been reported among their clients during the lockdown. Concerning issue is the limitation of services during pandemics and curfews. Namely, Drug treatment in general health care settings was not provided during the lockdown. Contacts with customers must be announced in advance by phone, which means that there are no open days and services available at all times. An additional problem for Opioid substitution treatment (OST) is the growing influx of registered patients who have been released as a result of the pandemic release measure. They, together with the local addicts (who are now forced to call the services because they cannot find heroin on the street) , increase their burden. So the availability and accessibility of both drug treatment and harm reduction services is limited due to reduced capacities. Alternative counselling (through online services and telephone calls) has proven to be insufficient for this category of users.[11]

What must be learned from the pandemic in the context of protecting marginalized drug users and low-income individuals who appeared to be most affected by the lockdown? Although some services remained available and some of the changes were possible thanks to the support of international organizations, networks and donors, still each country should make every effort and those categories to receive special protection due to their increased vulnerability.

2.4. Victims of domestic violence and COVID 19

Due to restrictions and isolation measures, victims of domestic violence are also among the most vulnerable categories. The situational stress,

[10]EMCDDA, *Impact of COVID-19 on drug services and help-seeking in Europe*, EMCDDA, Trendspotter Briefing, EMCDDA, Lisbon, 2020b.

[11]EMCDDA, Impact of COVID – 19 on drug use and drug services in Western Balkans, EMCDDA Trendspotter Briefing, Publications Office of the European Union, Luxembourg, 2021.

threat of unemployment, reduced income, substance abuse (especially alcohol), limited resources and less social support for victims could contribute to an increased risk of domestic violence and femicide[12] Almost all countries in the world are experiencing an increase in domestic violence cases. The fact is that some individuals find themselves confined with their aggressors with limited contact to their supporting environment. In general, studies have shown that while other forms of violent crime may or may not be influenced by global epidemics, domestic violence often reports substantially increase after the catastrophic event.[13] In Australia, requests for assistance in cases of domestic violence (against children as well) have increased. Although police recorded 40% reduction in overall crime rate during curfew, they still recorded an increase (5%) in domestic violence. France also registered a 32-36% increase in domestic violence during periods of self-isolation and quarantine measures. As a result, they began offering hotels as shelters for the victims.. Domestic violence-related homicides have also been reported in some European countries.[14] A study conducted by the Australian Institute of Criminology (AIC) in 2020 identified that most women[15] (65%) experienced the onset or escalation of domestic violence. Those who experienced physical or sexual violence said that violence increased in frequency and severity during the pandemic. Also, some of them did not report the violence to the police or other services because they were afraid, since they had to stay at home longer with the violent partner during the period of mandatory isolation.[16]

In America, according to certain findings, the number of cases of domestic violence in the period March-May 2020 was increased by 5%.[17] In the Balkan countries, representatives of a number of NGOs from Albania, Kosovo, Serbia, Montenegro, Croatia, Bosnia and Herzegovina, Romania, expressed concern about the escalation of domestic violence and, on the other hand, limited opportunities to provide adequate assistance and protection to victims.

[12] Lisieux E. de Borba Telles, A. M. Valenca at all, "Domestic violence in the COVID-19 Pandemic: a forensic psychiatric perspective", *Braz. Journal of Psychiatry*, 2020.
[13] M. ana Dubey, R. Ghosh at all, COVID-19 and addiction, Diabetes Metab Syndr. 2020 September-October; 14(5): 817–823, Published online June 2020. doi: 10.1016/j.dsx.2020.06.008
[14] K. Usher et al. "Family violence and COVID-19: Increased vulnerability and reduced options for support", *Wiley Public Health Emergency Collection*, doi: 10.1111/inm.12735, 2020.
[15] In the study 15.000 women were interviewed.
[16] M. Liotta, Record rates of family violence meet anticipated COVID impact, 2020
[17] L. Hsu & A. Henke, "COVID-19, staying at home, and domestic violence", *Review of Economics of the Household* volume 19, 145–155, 2020.

What indicate some figures from the spot? In March, 2020 Kosovo police registered 169 cases of domestic violence, an increase of 36% over the same month last year. The Domino Association from Split pointed out that the calls of women seeking emergency accommodation or other assistance are on the rise. In Serbia, on April 16, the Belgrade-based Autonomous Women's Center reported that they had received three times more calls than usual during the first month of the state of emergency.[18]

In Macedonia, the official statistics in the Ministry of Interior record that during 2020, 992 (compared to 989 in 2019) domestic violence based crimes were registered. 90.7% of the offenders were male. Most of the crimes committed during domestic violence (59.9%) are "bodily injury", followed by "endangering safety" with 33.9%. Four family related homicides were also committed in 2020. Otherwise, in 36.5% of the cases, the perpetrators had certain symptoms of mental disorders, and in 20.6% were under the influence of alcohol during the time of their violent acts. Apart of family related crimes under the Criminal code, in 2020 the police received 486 reports by the victims for less offence (under the Law on misdemeanours against the public order) related to family violence (470 in 2019). Additional 3.759 complaints were recorded (3,196 complaints were registered in 2019).[19] These data actually reveal that the number of domestic abuse complaints has increased much more (additional 550 cases). But, regardless of the formal classification of the reported cases and their further prosecution, the police have received increased number of domestic abuse cases which means that the impact of COVID 19 can be linked to the rise of family violence. How it can be explained?

In the literature there are two theoretical explanations for the increase in domestic violence. According to one, domestic violence is a crime of opportunity which means that being close to the abuser for a long time creates increased opportunities for violence. For example, an employed woman experiences less violence because she spends less time at home in a vulnerable state. Staying together at home increases the time of abuse. It is the so-called *exposure reduction theory of domestic violence*. According to the other, increasing a woman's power to negotiate reduces domestic violence. That power is determined by economic opportunities outside of the *cost-sharing ratio*. In this regard, woman’s bargaining power, determined by economic opportunities outside the relationship and the cost of separation, reduces

[18]X. Bami, N. "Dervisbegovic, at all, “КОВИД 19 и семејното насилство: кога домот не е најбезбедното место”, *Balkan insights*, BIRN, April 21, 2020.
[19] Ministry of interior of North Macedonia, Annual Report 2020.

violence against women. Brassiolo (2016) finds that a reduction in the cost of divorce reduces domestic violence in Spain. Fajardo-Gonzalez (2020) finds that women hold jobs to maintain a better exit option in abusive relationships. Aizer (2010) finds that increasing women's relative wage in a local labor market decreases violence against women. Thus, if a pandemic increases the cost of leaving a relationship, by making it harder and more dangerous to relocate to a new neighbourhood or find a new job, domestic violence should increase.[20]

Domestic violence during a pandemic is associated with a number of factors such as economic stress, increased exposure to exploitative relationships, and reduced opportunities for support. In such situations the abusers more easily control the victims and prevent them from seeking help because they fear further violence. In addition, some research has found that certain victims do not seek help because they have no other alternative place to stay due to isolation measures. Some experts the so-called "invisible pandemic" of domestic violence during the COVID-19 crisis have considered as a "ticking time bomb" or a "perfect storm."[21]

And the tragedy to be even worse, social, health, and legal services, such as shelters, legal aid offices, childcare centers, health-care facilities, and rape crisis centers in many countries are overwhelmed and understaffed. Some shelters are full; others have been converted into health facilities. Unless governments provide sufficient guidance, resources, and training to local authorities, people will continue to be at greater risk of domestic violence.[22] In Macedonia, also, the social assistance centers were operational on a part-time basis and from home, which meant that they provided only telephone counselling. Awareness must be raised among citizens and the neighbours about the increased risks of domestic violence that need to be reported.

Governments, NGOs, and the private sector need to incorporate human rights and gender lens into all of their COVID-19 responses and funding structures to address this new reality. In this regard, several non-governmental organizations from the region, based on the scanned situation with domestic violence in the Western Balkans, adopted *Recommendations to governments, donors and civil society organizations to address violence against women and domestic violence during and after the COVID-19*. Consequently, the Ministry

20 L. Hsu & A. Henke, "COVID-19, staying at home, and domestic violence", *Review of Economics of the Household* volume 19, 2020, 145–155.
21 C. Bettinger-Lopez, A. Bro, "A Double Pandemic: Domestic Violence in the Age of COVID-19", Council on foreign relations, In brief, May 13, 2020.
22 Ibid.

of Interior issued a notification that victims of crime will not be subject to sanctions if they leave their homes due to violence, but there is no special notification for the removal of abusers from their homes. Also, the Ministry of labour and social policy has prepared informative videos and leaflets (2020) about types of abuse in domestic violence and the available services for victim assistance and support, including the (online) hotlines for victims.[23] The local social services provided food and hygiene packages for all registered victims of domestic violence, as well as for all single parents at social risk.

3. CONCLUSION

Vulnerable citizens, victims, homeless, socially excluded groups, addicts, who are left on the margins of society are usually of secondary importance when the states prioritize and design the goals and measures to combat COVID 19.

For example, homeless, without real conditions for proper hygiene or improved health, depend on whether the NGO sector and the state will include them in special treatment and health care programs and services. Or a substance addicts who obtain alcohol or drugs on the black market in conditions of job losses and workplace closures, reduced wages and curfews experience increased pressure and abstinence crises (drug withdrawal syndrome), that result in mood swings, exhaustion, violence or in taking other alternative drugs that can be fatal. Therefore, their vulnerable mental health, which might be disturbing, should get a special place in the social and health-care services. Although many public social centres work with restricted capacity, such limited work time cannot be to the detriment of certain citizens (victims, homeless, substance abusers) who can be found in a state that need interagency emergency response. Quite the opposite, the state in health crisis must increase its capacity to record the cases that need special help, support and protection. Their family members also suffer, and the psychological consequences can be far-reaching. Violence and abuse *behind closed doors* are difficult to be detected and that’s way are easily silenced. In pandemic health crisis, the public interest to detect and report certain violent acts is usually reduced because

[23] Справување со насилство врз жените и семејното насилство во Западен Балкан за време и по здравствената криза со КОВИД-19, Препораки до Влади, донатори и граѓански организации, Australian development cooperation & The Kvinna till kvinna foundation, 2020.

everyone is more concerned about its own safety, ignoring collective (group) or interests of others. Then the violence can easily spread.

Therefore, this new pandemic is a test whether the society is ready to respond to the challenges faced by particularly vulnerable categories. The citizens are also tested on how they perceive homeless, addicted, deviants: whether as additional threat and risk that should be afraid of or, as people with specific problems who are struggling with the new challenges in their daily lives that need extra help, compassion, and support. The whole society and the declarations for humanity and care are on the test, so we will "pass or fail" that test. Exactly, in such crises, the social and human dimension of the entire crisis management system can be seen. And, the excuse that all measures have been taken "in accordance with the law" does not mean that the additional difficult situation of the vulnerable populations needs to be left to the fate, mercy or humanity of individuals or civil society organizations.

REFERENCES

C. Bettinger-Lopez, A. Bro, “A Double Pandemic: Domestic Violence in the Age of COVID-19”, Council on foreign relations, In brief, May 13, 2020.

Council of Europe, Principles for the treatment of persons deprived of their liberty in the context of the corona virus pandemic (COVID-19), 20 March 2020.

D. Sparkman, Drug Abuse on the Rise Because of COVID-19, available at. https://www.ehstoday.com/covid19/article/21139889/drug-abuse-on-the-rise-because-of-the-coronavirus, Aug 24, 2020

E. Lisieux de Borba Telles, A. M. Valenca at all, “Domestic violence in the COVID-19 Pandemic: a forencis psychiatric perspective”, *Braz. Journal of. Psychiatry*, 2020.

Е. Трпеска Мујоска и К. Битраков, Соочување со пандемијата ковид – 19 во Македонските затвори и установи за сместување на лица лишени од слобода, Центар за стратегиски истражувања, МАНУ, 2020.

EMCDDA, Impact of COVID – 19 on drug use and drug services in Western Balkans, EMCDDA Trendspotter Briefing, Publications Office of the European Union, Luxembourg, 2021.

EMCDDA, *Impact of COVID-19 on drug services and help-seeking in Europe*, EMCDDA, Trendspotter Briefing, EMCDDA, Lisbon, 2020b.

European Union Agency for Fundamental Rights (FRA) Coronavirus pandemic in the EU fundamental rights implication, Bulletin 1, February-march, 2020

IASC (Inter-Agency Standing Committee) Interim Guidance COVID - 19: Focus on Persons Deprived if Their Liberty, 27 March, 2020.

K. Usher et al. Family violence and COVID-19: Increased vulnerability and reduced options for support, Wiley Public Health Emergency Collection, doi: 10.1111/inm.12735, 2020.

L. Hsu & A. Henke, “COVID-19, staying at home, and domestic violence”, *Review of Economics of the Household* volume 19, 145–155, 2020.

M. ana Dubey, R. Ghosh at all, COVID-19 and addiction, Diabetes Metab Syndr. 2020 September-October; 14(5): 817–823, published online June 2020. doi: 10.1016/j.dsx.2020.06.008

M. Kushel and Q&A, “A Crisis on Top of a Crisis: Homelessness in the Time of COVID-10”, *UCSF Magazine*, University of California San Francisco, 2020.

Ministry of interior of North Macedonia, Annual Report 2020.

Olivier Nay, Can a virus undermine human rights? Published Online, April 20, 2020, https://doi.org/10.1016/S2468-2667(20)30092-X

UNODC Position Paper COVID - 19 preparedness and responses in prisons, 31 March 2020.

UNODC Technical Assistance Services, Protecting Children deprived of liberty during the COVID-19 outbreak, 2020.

World Health Organization, *Preparedness, prevention and control of COVID - 19 in prisons and other places of detention* (interim guidance, 15 March 2020.

X. Bami, N. Dervisbegovic, at all, "КОВИД 19 и семејното насилство: кога домот не е најбезбедното место", *Balkan insights*, BIRN, April 21, 2020.

J. Rovner, Youth Justice under Coronavirus, Linking Public Health Protections with the Movement for Youth Decarceration, The sentencing project, 2020.

Љ. Арнаудовски & А. Груевска-Дракулевска, *Пенологија*, Правен факултет Јустинијан Први, Скопје, 2-ри Август – Штип, 2013.

O. Alison Jordan, H. Melvin Wilson, "Addressing Covid – 19 and Correctional Facilities: A Social Work Imperative", *Social Justice Brie*f, National Association of Social Workers, 2020.

Справување со насилство врз жените и семејното насилство во Западен Балкан за време и по здравствената криза со КОВИД-19, Препораки до Влади, донатори и граѓански организации, Australian development cooperation & The Kvinna till kvinna foundation, 2020.

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УТИЦАЈ COVID-19 НА ВУЛНЕРАБИЛНУ ПОПУЛАЦИЈУ

Резиме

COVID-19 од самог почетка, у научној и стручној расправи почело је да се отвара више питања која се односе како на праксу људских права током ове кризе, тако и на појаву нових облика злочина који злоупотребљавају читаву хаотичну ситуацију у своју корист. А то опште стање хаоса и панике постаје још беспомоћније и ризичније за рањиве категорије грађана: лишене слободе, особе у притвору, жртве, сиромашне, бескућнике, мигранте. Зашто? Јер је њихова ионако крхка ситуација, која у великој мери зависи од функционисања система, милости и хуманости, сада на ивици провалије због мобилизације институционалног система да се избори са кризом COVID-19. У ствари, та мобилизација у великој мери занемарује друге услуге свакодневне подршке према осетљивим групама. И будно око невладиног сектора, праћено медијским извештавањем, почело је да открива недостатак бриге и немара неких државних влада. На површини се појављују неке слабости у институционалним системима повезане са остваривањем одређених људских права, које су откриле двоструке вредности и стандарде према бризи и заштити одређених категорија грађана. Наиме, криза COVID-19 отворила је многа питања везана за заштиту жртава злочина која се одвија иза затворених врата у ситуацији када постоји смањено функционисање социјалних служби и служби за спровођење закона. Даље, забрињавајућа питања су заштита бескућника, зависника и других рањивих категорија које имају већу потребу за заштитом у оваквим и сличним здравственим кризама и пандемијским ситуацијама.
Претходно изражене забринутости у вези са осетљивим категоријама грађана и њиховом ситуацијом и заштитом током ЦОВИД-19 анализиране су у овом раду.
Кључне речи: пандемија, здравствена криза, ограничење, рањиве популације.

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THE RIGHT OF PAID SICK LEAVE AS SOCIAL INSURANCE RIGHT AND THE CORONAVIRUS PANDEMIC

Abstract

As an integral part of a comprehensive social security system, the COVID-19 crisis drew major attention to the relevance of sickness benefits. Paid sick leave – the right to paid time off when a worker is too ill to work or to enable a worker to care for an ill family member – is enshrined under human rights law. Sick leave (or paid sick days or sick pay) is paid time off from work that workers can use to stay home to address their health needs without losing pay. Sick leave can include a mental health day and taking time away from work to go to a scheduled doctor's appointment. It has played a key role in protecting incomes, health and jobs during a health-driven labour market crisis. As social insurance right, paid sick leave can play a role well beyond its core function to protect sick workers during a health pandemic and subsequent economic crisis. The aim of the paper is to analyze the challenges of paid sick leave throughout the coronavirus pandemic in the Republic of North Macedonia. The paper concludes that paid sick leave as social insurance right can be a particularly effective tool during the pandemic.
Key words: employer, social security, social rights.

1. INTRODUCTION

The COVID-19 pandemic represents the most serious public health crisis in the Republic of North Macedonia since the founding of the country as an

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independent state, with the fastest spread and the widest infection range challenging the country's socio-economic development and people's daily life. In such circumstances, the right of paid sick leave gains importance not just for workers in a formal economy but for workers in an informal economy too.

The right of paid sick leave, as a basic labor standard/worker's right is paid time off from work that workers can use to stay home to address their health needs without losing pay.[1] It differs from paid vacation time or time off work to deal with personal matters because sick leave is intended for health-related purposes. Sick leave can include a mental health day and taking time away from work to go to a scheduled doctor's appointment. Some policies also allow paid sick time to be used to care for sick family members or to address health and safety needs related to domestic violence or sexual assault.[2] Paid sick leave can reduce employee turnover, increase productivity, and reduce the spread of disease in the workplace and the community.[3]

The COVID 19 pandemic has turned from a public health crisis into an unprecedented labour market crisis in the course of only a few months.

Income security during sickness is provided through a variety of means and approaches. As social human and social security right, paid sick leave is an important policy for protecting workers and their communities during a pandemic, serving not only to preserve jobs and incomes but also to contain the spread of the virus. Paid sick leave has been the prime instrument to support eligible employees in quarantine – an unprecedented policy.

The role of social health protection has been particularly highlighted as a human right that safeguards the economic productivity of a healthy workforce and serves as a social and economic stabilizer in times of crises.[4] Without social health protection that includes paid sick leave many people working in the formal or informal economy and living in developed or developing countries cannot afford to choose.[5]

The right to take sick leave is recognized as an entitlement separated from other types of leave such as holidays in both International Labour

[1] T. W. Smith, *Paid Sick Days: A Basic Labor Standard for the 21st Century*, National Opinion Research Center at the University of Chicago, 2008, 2.
[2] V. Lovell, *Valuing Good Health: An Estimate of Costs and Savings for the Healthy Families Act*, Institute for Human Policy Research, Washington, 2005, 15.
[3] Employment Policy Foundation, *Employee Turnover – A Critical Human Resource Benchmark*, 2002, 5.
[4] X. Scheil-Adlung & L. Sandner, *The case for paid sick leave*, World Health Report, Background Paper, 9, 2010, 4.
[5] Ibid.

Organization (ILO) Holidays with Pay Recommendation No. 98 from 1954 and Convention No. 132 (Revised) from 1970. Sick leave periods should be defined in a way that ensures they are not counted as holidays and workers accumulate holiday entitlements during a sick leave that is reflected within contracts, for everyone and for specific occupations.[6]

The core function of paid sick leave is to support workers during a temporary sickness spell in three ways:

First, paid sick leave protects workers' incomes, in the form of sick pay (continued wage payments by the employer) or sickness benefits (through social insurance).

Second, paid sick leave protects workers' jobs, by keeping employment relationships intact during a period of illness.

Third, paid sick leave protects workers' health, by allowing sick workers to recover at home rather than to continue going to work. Going to work while sick may prolong illness and further reduce productivity.[7]

If there is no policy for taking paid time off for illnesses, many workers continue to go to work when they are sick, jeopardizing their recovery and health. Research has shown that taking adequate time to rest and recuperate when sick encourages faster recovery and helps prevent minor health conditions from progressing into more serious illnesses.[8] Paid sick leave allows workers who are (potentially) infected to stay at home rather than infect others at or on their way to work. It allows infected and potentially infected workers to quarantine quickly, without job loss and with limited income loss.

2. INTERNATIONAL REGULATION OF PAID SICK LEAVE

Various ILO Conventions, regulations, concepts and approaches define a broad concept of social health protection that includes paid sick leave by focusing on providing universal access to health care and financial protection in

[6] Part-Time Work Convention No. 175 form 1994, article 7. Labour Clauses Recommendation No. 84 form 1949, paragraph 2. Nursing Personnel Recommendation No. 157 form 1977, paragraph 41. Home Work Recommendation No. 184 from 1996, paragraphs 23 and 24. Domestic Workers Recommendation No. 201 form 2011, paragraph 6.

[7] A. S. Martin, H. Inanc & C. Prinz, Job Quality, Health and Productivity: An evidence-based framework for analysis", *OECD Social, Employment and Migration Working Papers*, no. 221, OECD Publishing, Paris, 2018.

[8] V. Lovell, *No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave*, IWPR Publication No. B242. Washington, DC: Institute for Women's Policy Research, 2004, http://www.iwpr.org/pdf/B242.pdf, 15.02.2021.

case of sickness. In this context, financial protection includes compensation for the economic loss caused by the reduction of productivity and the stoppage or reduction of earnings resulting from ill health. Sick leave and related income replacement constitute a key component of ILO Convention 102 on (Minimum Standards) Social Security that sets minimum standards for social security and is deemed to embody an internationally accepted definition of the very principle of social security. It states that sickness benefits shall cover incapacity to work resulting from a morbid condition and involving a suspension of earnings. The later ILO Convention 130 suggests a slightly higher standard of benefits. The ILO Decent Work Agenda defines work of acceptable quality that ensures, among others, basic security. The Social Protection Floor initiative led by the ILO and World Health Organization established in the context of the One United Nations response to the economic and financial crisis, requests countries to build adequate social protection for all through basic social guarantees for every citizen.[9] This includes a set of essential social transfers, in cash and in kind, to provide minimum income security. Key components comprise universal access to essential health care and income support for those with insufficient income and income security. The concept was endorsed by the Global Jobs Pact that the International Labour Conference adopted in June 2009. These concepts are embedded in the Declaration of Philadelphia adopted in 1944 where social security has explicitly been recognized as a Human Right. It is expressly formulated as such in the Universal Declaration of Human Rights[10] and the International Covenant on Economic, Social and Cultural Rights.[11] The General Comment No. 19 of the Committee on Economic, Social and Cultural Rights on Article 9 of the International Covenant on Economic, Social and Cultural Rights defines the right to social security as encompassing the right to access and maintain benefits without discrimination to ensure protection from for example lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member. These objectives demand the establishment of measures to provide support to those who are unable to make sufficient contributions for their protection. In other words, it calls for the continuation of salary payments or income replacement in case of sickness.[12] While social security rights are not explicitly mentioned in the European Convention on Human Rights, they nonetheless fall within its scope.

[9] *Strategies for the Extension of Social Security Coverage*, ILO, TMESSC, 2009.
[10] Articles 22 and 25.
[11] Article 9.
[12] X. Scheil-Adlung & L. Sandner, *op. cit*, 5.

3. NATIONAL REGULATION OF PAID SICK LEAVE

In the Republic of North Macedonia, all employers are required to pay their employees for some time away from work when they are ill. According to North Macedonia law, the right to paid sick leave is part of compulsory social insurance contributions for all workers who have an employment contract or are self-employed. The social insurance for employers is mainly governed by the Constitution of the Republic of North Macedonia, labour law and social security law.

The Constitution of the country stipulates that all citizens have a right to social security and social insurance, determined by the law and collective agreement.[13]

Currently, the social security system in North Macedonia consists mainly of three types of social programs: contributory social insurance, non-contributory social assistance, and tax-financed social welfare. Based on the Law on Mandatory Social Insurance Contributions, compulsory social insurance includes contributions for health insurance. Mandatory contributions are deducted from the employee's gross salary and paid to the Health Insurance Fund by the employer, concurrently with the payment of net salaries and other taxes.[14]

The health insurance is established as mandatory and voluntary. Mandatory health insurance is established for all the citizens of the Republic of North Macedonia for providing health services and monetary compensations based on the principles of thoroughness, solidarity, equality and efficient usage of funds under conditions determined by Law.[15] The mandatory health insurance is implemented by the Health Insurance Fund of the Republic of North Macedonia. Voluntary health insurance is established for providing health services that are not included in the mandatory health insurance. Voluntary health insurance can be implemented by insurance companies founded according to the insurance regulations. Insured persons, in terms of the Law on Health Insurance, shall be the insured and the members of his/her family.[16]

Law on labour relations provides sick pay for workers who have compulsory social insurance. Accordingly, sick pay depends on the duration of the sick leave: up to 7 days – 70% of the salary; up to 15 days – 80% of the salary; above

[13] *Constitution of the Republic of North Macedonia*, Official Gazette of the Republic of Macedonia No. 52/1991, article 34.
[14] Official Gazette of the Republic of Macedonia No. 142/08 ...247/18.
[15] *Law on health insurance*, Official Gazette of the Republic of Macedonia (consolidated text), article 2.
[16] Ibid, article 4.

15 days – 90% of the salary. The employer bears the burden of sick pay if the employee's inability to work lasts up to 30 days. Above 30 days, health insurance should calculate the sick leave.[17] The underlying idea is that employers would become more aware of the use being made of sick leave and would exercise better supervision than the social security system. In the event of taking a new sick leave within three days upon the end of the preceding sick leave, the employer shall be entitled to request from the first instance medical panel to verify the new sick leave or extend the expired preceding sick leave.

The insured persons can exercise the right to salary compensation until the recovery of capacity for work or the establishing of invalidity. The benefit is paid, if they meet the following conditions:

- if the health insurance lasted for at least six months continuously before the occurrence of the case;
- the contribution to the compulsory health insurance is regularly paid or with a delay of up to 60 days;
- the assessment of temporary incapacity for work was given by the selected doctor, that is, the medical commission.[18]

Employees may be granted exceptional unpaid sick leave. This can be the case when the employee has not reached 6 months of sickness insurance. As a policy response to coronavirus, the country should exclude the minimum of six months insurance period to allow workers to access sickness benefits from the moment they conclude an employment contract or from the moment they become self-employed.

The assessment of temporary working disability is ascertained based on medical examination and medical documentation. The assessment for sick leave of up to 30 days is supplied by a doctor. For a longer period, a medical commission should be formed.

The country also provides supplements for dependents, i.e. dependent family members such as children and unemployed spouses. Parental leave and sickness benefits are often used in support of childcare duties. Keeping children at home when they have contagious diseases like viruses prevent illness and work absence among their schoolmates' parents. Because children are more susceptible to disease, carry and spread viruses over a longer period of time than adults, and

[17] *Law on Labour relation*, Official Gazette of the Republic of Macedonia No. 62/2005, (as amended to June 2019), article 112.
[18] *Law on health insurance*, article 15.

are often the first to get the infection in the community[19], preventing children from being disease vectors in school and child-care settings can significantly reduce workplace absence and productivity effects among adults. Children have better short- and long-term health outcomes when they are cared for by their parents[20]; hospital stays are shorter when parents are involved in care.[21] With increased flexibility in attending to sick children, the Law on health insurance is likely to reduce treatment costs and overall length of illness.

Sick leave to take care of children is normally paid at the rate of 100% if the child is under three years old and for children older than that 70% of the salary of the employee. For the duration of quarantine, these should be increased to 100% of the salary for everyone and should cover all parents whose child is in quarantine.

Claimants continue to pay social security contributions while on sick pay or sickness benefits. The country does not have a determined sickness benefits period, therefore sickness benefits can be provided for an unlimited duration.

4. SICKNESS BENEFITS AS NATIONAL POLICY RESPONSE IN THE CONTEXT OF CORONAVIRUS PANDEMIC

Facing the challenges of coronavirus, the North Macedonian government has established strong command-and-control mechanisms, reminiscent of war times, to respond to this crisis and control the virus. However, interventions through social security policy and questions that must be reconsidered concerning pandemic-related crises have been largely neglected in academic research.

Paid sick leave is intended to protect the worker's status and income during the period of illness or injury through health and financial protection.[22] As the COVID-19 pandemic unfolds, sickness benefits have been suddenly put

[19] C. J. King, *Quoted in Study Shows School-Based Nasal Influenza Vaccinations Significantly Reduce Flu-Related Costs in Families*, University of Maryland Medical Center, 2004, 5.
[20] S. J. Palmer, *Care of Sick Children by Parents: A Meaningful Role*, Journal of Advanced Nursing, 1993, 189.
[21] H. I. Kristensson, E. Gunnel & M. Gerhard, *Increased Parental Participation in a Pediatric Surgical Day-Care Unit*, Journal of Clinical Nursing, 1997, 299.
[22] B. Šunderić, *Socijalno pravo*, Pravni fakultet Univerziteta u Beogradu, Belgrade, 2009, 13.

under the spotlight as a major measure to mitigate the spread of the disease and ensure income protection of those who fell sick.[23]

Reviews of current practice show that sickness cash benefits have been among the measures most widely used by Governments to address the impact of COVID-19 on workers and their families.[24]

Although in the country, according to different criteria and conditions, all workers who have an employment contract or are self-employed have access to paid sick leave in case of COVID-19 or quarantine, important coverage gaps remain:

- Workers in non-standard dependent employment, such as casual and zero hour contract workers, remain mostly excluded from sick pay. For instance, casual workers are not entitled to paid leave while workers on zero-hour contracts only receive sick pay for those hours called upon.

- Gig workers, freelancers, and workers in dependent self-employment are in most cases not entitled to a paid sick leave. Some platforms voluntarily provide sick pay to their gig workers, although compensation levels tend to be very low.

- Sickness affects all people irrespective of the type of employment contract, whether dependently or self-employed, and irrespective of whether they are employed, unemployed or inactive. Still, the access to and the quality of sick pay/benefits often differ for people in these categories. Anecdotal evidence shows the limitation and inequities of a system that does not provide publicly organized sickness benefits in the context of a crisis such as COVID-19.[25]

- Without access to sickness benefits, workers may be forced to return to work to keep their jobs or maintain their salary, thereby potentially passing on the virus to other workers and clients.

Paid sick leave as social insurance right ensuring social security encompasses more than one single area of social policy and requires much more coordinated policy intervention from different arenas, including economic policy, employment policy, fiscal policy, and social policy.

[23] ILO, *Review of international experience in social insurance sickness benefits for gig workers*, 2020, 1.
[24] OECD, *Insurance and COVID-19*, 2020.
[25] Bureau of Labour Statistics, *Employee Benefits Survey*, 2020.

5. CONCLUSION

Social policy intervention is deeply connected with the social fact that modern society is a risk society, and some social risks, such as environmental pollution and global warming, have evolved into global risks that challenge all nation states. Today, the need for a human rights-based approach to social insurance is greater than ever.

The Republic of North Macedonia has social insurance sickness benefits that cover workers in standard and non-standard forms of employment and include the self-employed on a mandatory or voluntary basis.

In North Macedonian law the concept of paid sick leave consists of two components: leave from work due to sickness and cash benefits that replace the wage during the time of leave due to sickness. This concept is reflected in the definition of paid sick leave as compensated working days lost due to sickness of workers.

It can be concluded that paid sick leave can perform a wider role throughout a contagious pandemic and subsequent economic crisis.

Paid sick leave, however, can only facilitate an orderly de-confinement and be an effective device during the pandemic under two conditions. First, if the country keeps in place its temporary extensions, and second, if it further extends paid sick leave entitlements to groups of workers that are still not covered. Otherwise, like many other policy tools, paid sick leave remains a partial response with significant inequalities across different groups of employed and self-employed workers.

Structural paid sick leave reforms will have to reappear on the agenda when the pandemic passes, consisting of permanently improving access to paid sick leave for the entire workforce, promoting prevention of sickness and the return to work of recovered workers and preparing for future pandemics by improving the adaptability of paid sick leave as a human and social right.

REFERENCES

Martin S., Inanc H., & Prinz C., Job Quality, Health and Productivity: An evidence-based framework for analysis", *OECD Social, Employment and Migration Working Papers*, no. 221, OECD Publishing, Paris, 2018.

Šunderić B., *Socijalno pravo,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2009, 13.

Bureau of Labour Statistics, *Employee Benefits Survey*, 2020.

King J., *Quoted in Study Shows School-Based Nasal Influenza Vaccinations Significantly Reduce Flu-Related Costs in Families*, University of Maryland Medical Center, 2004, 5.

Constitution of the Republic of North Macedonia, Official Gazette of the Republic of Macedonia no. 52/1991, article 34.

Employment Policy Foundation, *Employee Turnover – A Critical Human Resource Benchmark*, 2002, 5.

Kristensson H. I., Gunnel E., & Gerhard M., Increased Parental Participation in a Pediatric Surgical Day-Care Unit, *Journal of Clinical Nursing*, 1997, 299.

ILO, *Review of international experience in social insurance sickness benefits for gig workers*, 2020, 1.

Law on Health Insurance, Official Gazette of the Republic of Macedonia (consolidated text), article 2.

Law on Labour Relation, Official Gazette of the Republic of Macedonia no. 62/2005, (as amended to June 2019), article 112.

Law on Mandatory Social Insurance Contribution, Official Gazette of the Republic of Macedonia no. 142/08 ...247/18.

OECD, *Insurance and COVID-19*, 2020.

Part-Time Work Convention No. 175 form 1994, article 7. Labour Clauses Recommendation 1949 no. 84, paragraph 2. Nursing Personnel Recommendation 1977 no. 157, paragraph 41. Home Work Recommendation 1996 no. 184, paragraphs 23 and 24. Domestic Workers Recommendation 2011 no. 201, paragraph 6.

Palmer S. J., Care of Sick Children by Parents: A Meaningful Role, *Journal of Advanced Nursing*, 1993, 189.

Strategies for the Extension of Social Security Coverage, ILO, TMESSC, 2009.

Smith T. W., *Paid Sick Days: A Basic Labor Standard for the 21st Century*, National Opinion Research Center at the University of Chicago, 2008, 2.

Lovell V., *No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave*, IWPR Publication No. B242. Washington, DC: Institute for Women's Policy Research, 2004, http://www.iwpr.org/pdf/B242.pdf, 15.02.2021.

Lovell V., *Valuing Good Health: An Estimate of Costs and Savings for the Healthy Families Act*, Institute for Human Policy Research, Washington, 2005, 15.

Scheil-Adlung X., & Sandner L., The case for paid sick leave, *World Health Report*, Background Paper, 9, 2010, 4.

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ПРАВО НА ПЛАЋЕНО БОЛОВАЊЕ КАО ПРАВО СОЦИЈАЛНОГ ОСИГУРАЊА И ПАНДЕМИЈА КОРОНАВИРУСА

Резиме

Као саставни део свеобухватног система социјалног осигурања, пандемија COVID-19 скренула је велику пажњу на значај накнада за болест. Плаћено боловање - право на плаћено одсуство када је радник превише болестан за рад или омогућавање раднику да брине о болесном члану породице – представља гарантовано људско право. Боловања (или плаћена боловања) плаћају се као одсуство са посла које радници могу искористити да остану код куће како би решили своје здравствене потребе без губитка зараде. Боловање може укључивати дан менталног здравља и одласка са посла на заказани преглед код лекара. Плаћено боловање је одиграло кључну улогу у заштити прихода, здравља и радних места током кризе на тржишту рада узроковане болешћу COVID-19. Право на плаћено боловање као право из социјалног осигурања може играти улогу која превазилази своју основну функцију у заштити болесних радника током здравствене пандемије и накнадне економске кризе. Циљ рада је да анализира изазове плаћеног боловања током читаве пандемије коронавируса у Републици Северној Македонији. Чланак закључује да плаћено боловање као право социјалног осигурања може бити посебно ефикасно средство током пандемије.

Кључне речи: запослење, послодавац, социјално осигурање, социјална права.

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RUSSIAN JUSTICE IN THE PERIOD OF NEW REALTY

Abstract

The relevance of the study is propelled by the fact that COVID-19 remains a pressing problem in Russia. Russian Justice has also been transformed due to the quarantine. The purpose of this study is to provide a detailed analysis of the impact of pandemic restrictions on justice and a widespread introduction of digital technology in courts` activity.
Key words: justice, criminal procedure, access to justice, social distancing, electronic management.

1. INTRODUCTION

Like in many European countries (UK, Spain, Sweden), the first COVID-19 cases in Russia were reported on 31 January 2020. From February to May, we saw an exponential growth in reported cases. In the summer months, there was a tangible decline in the incidence of COVID-19 in Russia. In the fall, the incidence began to rise again, surpassing the spring rates of reported cases. On 10 February 2021, the total number of cases reported in Russia exceeded 4 million. This figure is quite high, and Russia ranks 5th in the Top 5 countries with the largest total number of COVID-19 cases in the world.

In connection with the unfavorable situation due to the new coronavirus infection, Federal Service for Surveillance on Consumer Rights Protection and Human Wellbeing *(Rospotrebnadzor*) has been carrying out a set of anti-epidemic and preventive measures. In order to organize the implementation of

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these anti-epidemic measures, Rospotrebnadzor has issued more than 500 regulatory, methodological and recommendatory documents. On 28 October 2020, Rospotrebnadzor ordered all Russians to wear masks in crowded public places, on public transport, in parking lots and in elevators. A crowded public place, where it is mandatory to wear a mask, is defined as any place where more than 50 people can be at the same time. Regional authorities have been taking measures to restrict entertainment and catering services. Due to the fact that Russia is currently maintaining air communication with 15 countries, Rospotrebnadzor is carrying out the inspection of all incoming persons at all checkpoints across the state border. Tests are carried out regularly. Certain categories of citizens are being vaccinated with two vaccines developed in Russia (the list is constantly expanding with an increase in vaccine production).

For the purposes of this article, it is worth mentioning some restrictions that have affected the work of courts, which are traditionally a place where a large number of citizens can gather. In order to ensure the sanitary and epidemiological well-being of the population, the following restrictions apply in Russian courts: personal reception of citizens by chief judges has been temporarily suspended; access to court buildings for persons who are not participants in the proceedings, including representatives of the media, is temporarily restricted; participants in the proceedings are allowed to enter the court building only if they are wearing personal protective equipment (masks and gloves) and after measuring the visitor's body temperature; all persons in court buildings are required to maintain social distance.

2. THE JUSTICE SYSTEM: NEW CHALLENGES

The pandemic of the new COVID-19 infection posed a major challenge for the national justice system that struggled to cope with the new work format defined by social distancing and electronic document management. As the study of international experience shows, the changes made to the judicial sector were not uniform. Some jurisdictions have “modern” courts (which can make better use of the latest technology). Courts in many countries continue to apply litigation approaches that have existed for decades (or even centuries).[1] Even within Russia, the workload has increased in some parts of the judicial system,

[1] T. Sourdin, B. Li, D. M. Mc Namara (2020). Court innovations and access to justice in times of crisis, Health Policy and Technology, 30 August 2020, https://doi.org/10.1016/j.hlpt.2020.08.020.

while in others, on the contrary, it has decreased. For example, in the criminal justice sector, there has been an increase in the need to review bail, house arrest and detention procedures (in order to reduce the number of people held in pretrial detention facilities where possible). The courts continued to consider cases of an urgent nature (on the selection, extension, cancellation or change of a restrictive measure; on the protection of the interests of a minor or a person duly recognized as legally incompetent; in case of refusal of a legal representative from medical intervention necessary to save a life). Judicial practice followed the path of choosing the type of administrative punishments not related to arrest (in order to ensure the sanitary and epidemiological safety of arrested persons). At the same time, the burden on another part of the justice system has eased as economic activity has declined. During the period of quarantine restrictions in the spring of 2020, judges issued rulings on the suspension of civil cases that have already begun, and rulings on reassigning the date of the court session for administrative cases.

Many Russian courts were unable to switch to a remote work format. There are two reasons for this. First, the activities of many Russian courts are not digitalized. Many courts do not have electronic document management and other digital interaction mechanisms. Simply put, in many cases, they still rely on the exchange of hard copy procedural documents. The experience of the Moscow courts was positive due to the operation of the Unified Information Portal of the Moscow Courts of General Jurisdiction. Citizens can create a personal account and digitally submit documents to the Moscow City Court and individual district courts). If it is necessary to submit applications of a non-procedural nature, citizens can use the services of the electronic reception desk on this Portal. At the same time, they still have the opportunity to submit procedural documents using postal services. Second, prior to the COVID-19 pandemic, few courts implemented video conferencing as a way of holding interim or final hearings. Currently, only some criminal hearings are being conducted using videoconferencing (consideration of cassation complaints of a convicted person against a sentence and appeals against a decision to arrest). However, if the case is being considered at first instance, the defendant must be present in the courtroom. The court may decide to conduct the entire trial using video conferencing.

In response to COVID-19, many Russian courts have rapidly implemented supporting technologies that have allowed video conferencing and sometimes document sharing using web platforms including Skype, Zoom, and WhatsApp. For example, on 25 March 2020, a district court in Kazan passed a

judgement via a Skype video call. On 30 March 2020, a city court in the Sverdlovsk region considered a case via a WhatsApp video call. On 21 April 2020, the Supreme Court of the Russian Federation held its first online hearing: the civil disputes panel considered its first virtual case. Such experience shows that holding such hearings is possible, but it is too early to talk about a complete transition of the courts' activities online. In criminal proceedings, the insufficient level of network security and the reduced presence effect due to poor quality video and sound do not allow organizing a full-fledged trial (especially in terms of direct examination of evidence, participation of jurors, etc.). To improve the level of communication quality and protect information channels and servers, serious financial and technical costs will be required in the future. On the positive side, modern technology can help judges work, interact with the media and the public, as well as electronically support the functions of registration, sorting procedural documents, resolving disputes and managing court cases. In addition, courts can use the opportunities provided by technology to change the way courts work and function. However, this can only be achieved with the widespread introduction of innovations, which is difficult on a countrywide scale (more than 55 thousand judges work in 85 constituent entities of the Russian Federation).

3. PROTECTING THE RIGHT OF ACCESS TO JUSTICE

In 2020, a significant number of courts around the world have urgently switched to operating remotely in response to the spread of COVID-19. Despite the general benefits of the justice system using the Internet and other online technologies, it raised interesting questions about the impact of innovation on access to justice. This right is an integral part of the rule of law and the principle of equality before the law, and it is guaranteed by international conventions. In accordance with Article 13 (1) of the UN Convention on the Rights of Persons with Disabilities establishes the right of access to justice States are obliged to provide procedural and age-appropriate accommodations to make it easier for individuals to participate as a direct or indirect participant in a process (including as witnesses). Access to justice also refers to a number of other procedural rights, including the right to have access to procedures, information and venues used in the administration of justice, and the right to be tried without undue delay. It is important to ensure the realization of the right of access to justice in all ways of resolving disputes in Russia, where this and other conventions on human rights have been ratified.[2]

[2] Kobets P.N., Krasnova K.A. Cyberstalking: public danger, key factors and prevention,

Despite significant progress, access to justice still remains a major issue. On the one hand, during the period when the personal reception of citizens was prohibited, the only form of remote access to the court was the use of e-mail, which caused certain difficulties. Firstly, not all citizens have access to the Internet and are confident email users. Secondly, not all courts have an official email address, and even if they existed at the time of the introduction of restrictions, there were difficulties with the registration of incoming e-mails and the distribution of electronic documents between the judges. There were issues with access to e-mail in the event that a judge, who was self-isolating, did not have access to their work email.

4. CONCLUSIONS

The issues associated with conducting justice during quarantine required an urgent solution, which prompted a widespread introduction of digital technology. An analysis of judicial practice in 2020 allows us to conclude that the adaptation of the courts to the current situation in Russia was quite successful. The most important tasks that the justice system is facing in the modern world are to quickly respond to the changing conditions and to improve the legal mechanisms of the use of technology in order to ensure access to justice.

REFERENCES:

Convention on the Rights of Persons with Disabilities and Optional Protocol, https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

Kobets P.N., Krasnova K.A. Cyberstalking: public danger, key factors and prevention, PRZEGLĄD WSCHODNIOEUROPEJSKI IX/2 2018: 43-53.

Tania Sourdin, Bin Li, Donna Marie McNamara (2020). Court innovations and access to justice in times of crisis, Health Policy and Technology, 30 August 2020, https://doi.org/10.1016/j.hlpt.2020.08.020.

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РУСКО ПРАВОСУЂЕ У ПЕРИОДУ НОВЕ РЕАЛНОСТИ

Резиме

Релевантност студије покреће чињеница да COVID-19 и даље представља кључни проблем у Русији. Руско правосуђе такође је трансформисано због мера ограничења слободе кретања. Сврха овог рада је да пружи анализу утицаја ограничења због пандемије на правосудни систем и широко распрострањено увођење дигиталне технологије у рад судова у Русији.

Кључне речи: правда, кривични поступак, приступ правди, социјално дистанцирање, електронско управљање

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THE OPERATION OF THE CRIMINAL LAW IN SPACE: SELECTED PROBLEMS OF INTERNATIONAL COOPERATION IN THE FIGHT AGAINST CRIME IN THE DIGITAL ENVIRONMENT

Abstract

This article is divided into the research of certain problems of international cooperation in combating crime, including ones in the digital environment connected with the omissions of current criminal legislation. The article was analyzed the Russian Federation and a number of CIS countries criminal legislation provisions that determine the rules for the operation of criminal law in the space, in terms of the potential ability to optimize international cooperation in combating crime. Based on the research, the author formulates and justifies the proposals on the feasibility of integrating the criminal legislation of the CIS countries into criminal legislation of other countries. These suggestions are aimed at forming the necessary prerequisites for criminal law extending to transnational crimes characterized by the digitalization of the implementation mechanism and crime commission on the territories of different states.
Key words: criminal law, the operation of criminal law in space, digitalization, cyberspace, combating crime.

Over the millennia, crime has evolved with human development simultaneously. In the course of evolution, the science and technology development has had an influence not only on the development of human society and states, but also on the dramatic modification of the forms and methods of

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criminal activity. In recent decades, the science and technology progress has actively contributed to the transformation of crime and its mastery of the information field. It has been transformed into cyberspace allowing not only to control certain processes (both technical and social) remotely, but also to shape them this way. The World Wide Web has spread to almost all countries and continents. The Internet offers multiple opportunities not only for legitimate but also for unauthorized use. By virtue of its internal structure, crime adapts relatively fast to changing environment, applying and adjusting all new technical opportunities to improve criminal activity. Information and telecommunication technologies have not evaded this evolution either. Changing against the background of digital space capabilities improvement, globalization causes greater prerequisites for the integration of crime and the emergence of new cybercrime types and leads to attracting subjects who had not thought of breaking the criminal law and who become involved in committing crimes due to information influence and (or) simplification of their committing by means of the Internet or other information and telecommunication networks.[1]

Only three decades ago, at the end of the XX century, computer crimes were uncommon being mainly represented by certain types of fraud. At present, virtually the whole criminal activity takes advantage of the digital environment to one extent or another. According Russian and foreign scientists' research, the utilization of information and communication technologies has become a predominant way or one of the main ways of committing a great variety of criminal encroachments, characterized by various orientation.[2] Many countries that initiate regional, inter-regional and inter-state discussions on existing problems in various formats have drawn attention to the danger of this phenomenon. International fora and UN bodies have long been discussing the possibility of regulating the Internet, the security issues and the permissible degree of government interference in the digital space processes.[3]

Statistics and open information sources confirm that millions of people on all continents become victims of crimes committed in cyberspace. Criminals

[1] Enders, W., Sandler, T; Is transnational terrorism becoming more threatening? *Journal of Conflict Resolution* 44, 2000, 307-308.

[2] M. Reshnyak, S. Borisov; Major Aspects of Criminal Law Protection in Digital Economy» from Regional Development to Global Economic Growth, *Bezopasnost Biznesa*, 3 (MTDE 2020), 41-43.

[3] V.Ovchinsky et al., Russia and the Challenges of the Digital Environment: Working paper, Russian International Affairs Council, *Spetskniga*, Moscow, 2014, 4-5.

often cause harm not only to specific organizations, but also to various authorities and, in some cases, to individual states. Moreover, criminal encroachment may affect the interests of several countries simultaneously.

The intensive digitalization of virtually all areas of social life creates conditions for the committing crimes at any distance from the object of offense, and also complicates the identification of those involved in them and the proofs the circumstances in which unlawful acts have been committed. In such circumstances, the participants in the same crime, as well as its victims, may be located in different countries, and the crime itself, as it develops, may also affect the territory of two or more states. In other words, digitalization is one of the main prerequisites for the globalization of criminal activity. The effectiveness of countermeasures depends on coordinated efforts of all countries concerned, as well as on a number of other factors, including the level on which national criminal law provisions governing its territorial and extraterritorial jurisdiction are adapted to the corresponding new criminal challenges.

It should be noted that an awareness of the cybercrime problem universality has facilitated the process of enhancing international cooperation in combating crimes in the digital space. At the same time, it should be noted that the emerging international and national legislation is far behind the ongoing changes. Legal cooperation framework improvement that consists of both international legal instruments and national legislation is one of the most important areas for enhancing the effectiveness in the fight against crimes, including the ones committed in the digital environment. The unification of legislation governing the criminal law in digital space can serve as a vector for developments in this field.

In particular, the legal control gap in criminal law in digital space for Russia and a number of CIS countries is the failure or deficiency in regulating such law specificities in relation to complex isolated crimes committed on the territory of two or more states. First of all, it is referred to continuing, protracted and divisible crime. Another problem is legislative gaps in regulating the criminal law operation concerning the commission of a crime in complicity with persons located in two or more states. Specifically, there is no such regulation in Articles 11 and 12 of the Criminal Code of the Russian Federation (hereinafter referred to as the RF Criminal Code).

In most countries, the territorial and extraterritorial criminal legislation provisions take into consideration the need to apply the norms contained therein to persons who have committed so-called conventional crimes which are international by their nature wherever they have been committed. Notwithstanding, in our view,

it is equally important to explore in detail the national criminal law in digital space operation peculiarities with regard to any offence.

It should be noted that an attempt has been made to establish the normative frameworks for the situations described above in the Model Penal Code for the CIS Member States[4] (hereinafter referred to as MPC), which is still recommendatory by nature. Thus, Article 13 part 2 (a) of this Code stipulates that any CIS State on whose territory the crime has been initiated, continued or completed has jurisdiction of the offense. This provision enables the application of national criminal law to the person who has committed any transnational crime, if at least part of the subject of crime was committed on the territory of the State concerned. For example, it happens when a liable person in furtherance of common intention regularly steals money from bank account using information and communication technologies and thus illegally getting remote access to it from the territory of different CIS Member States.

The Penal Code also includes recommendations to consider a crime committed within the territory of a certain CIS member state if it is committed in complicity with a person who has committed a crime in another country. It also stipulates a provision for settling the issue of the criminal liability prosecution place in the event that a person has committed a crime on the territory of two or more CIS Member States. In such cases, the place where the person has been prosecuted is decisive in accordance with the treaties between States.

The Penal Code provisions highlighted above have already been integrated into the criminal legislation of certain CIS member States to some extent, for example, by the Republic of Belarus, the Republic of Kazakhstan, the Republic of Uzbekistan, the Republic of Turkmenistan, and Ukraine. These recommendatory provisions are implemented to the greatest extent in Article 5 part 2 of the Criminal Code of the Republic of Belarus, which requires that a crime is considered to be committed in Belarus if it is initiated, continued or completed there, or if it is committed within Belarus in complicity with a person who has committed a crime in another country.[5] Article 7 Part 2 of the Criminal Code of the Republic of Kazakhstan stipulates that a criminal offence which was

[4] CIS Member States Penal Criminal Code (adopted by Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States resolution of February 17, 1996) // Appendix to the Inter-Parliamentary Assembly of the CIS Member States information letter, 1997, № 10.

[5] Criminal Code of the Republic of Belarus // National Legal Internet Portal of the Republic of Belarus // [Electronic media] URL: https://pravo.by/document/?guid=3871&p0=Hk9900275 (access date: 20.01.2021).

initiated, or continued, or completed on its territory, shall be recognized as a crime committed on this State territory.[6]

In contrast to Criminal Code of the Republic of Belarus, the officials of the Republic of Kazakhstan have not focused on the Penal Code's recommendations concerning the criminal law operation in connection with the crime committed in complicity with a person who has committed a crime in another country.

In our view, the provision on application of national criminal law to a crime partially committed on the territory of Ukraine, stipulated in Article 6 part 2 of the Criminal Code of Ukraine, is formulated incorrectly: «an offense shall be deemed to have been committed on the territory of Ukraine if it has been initiated, continued, completed or discontinued on the territory of Ukraine».[7] In this case, it is evident that the terms "completed" and "discontinued" are identical in meaning, so it would be more appropriate to use the term "terminated", as well as an indication of the premeditated crime stages.

The content of Article 11 of the Criminal Code of the Republic of Uzbekistan, regulating the Code operation regarding persons who have committed crimes on the territory of Uzbekistan, is the subject of considerable concern. Compared to the Penal Code and the criminal legislation of other CIS countries, the specified criminal law defines what type of offence is considered to be committed on the territory of the State in more detail: "a crime committed on the territory of Uzbekistan shall be an act: a) commenced, completed, or interrupted on the territory of Uzbekistan; b) committed outside Uzbekistan with the effect thereof being available on the territory of Uzbekistan; c) committed on the territory of Uzbekistan with the effect thereof being available outside the borders of Uzbekistan; d) belonging to a cumulative crime with a part thereof committed on the territory of Uzbekistan".[8]

It is noteworthy that legislators of the Republic of Uzbekistan included the criminal law theory concerning interrupted criminal activity, formally and materially defined corpus delicti, and complex individual crimes into the provision of the General part of this Criminal Code. At the same time, in our

[6] Criminal Code of the Republic of Kazakhstan // [Electronic media] URL: https://online.zakon.kz/m/document?doc_id=31575252 (access date: 20.01.2021).

[7] Criminal Code of Ukraine of April 5, 2001 No. 2341-III // [Electronic media] URL: https://online.zakon.kz/Document/?doc_id=30418109 (access date: 17.02.2021).

[8] Criminal Code of the Republic of Uzbekistan of September 22, 1994 No. 2012-XII // [Electronic media] https://online.zakon.kz/ document/?doc_id=30421110 (access date: 17.02.2021).

view, it is important to point out the omission in Article 11 of the Penal Code of the Republic of Uzbekistan of a reference to crime preparation, where a person has not yet initiated a socially dangerous act, as well as to the commission of a crime in complicity.

The basic Article 13 provisions of the Penal Code have been considered, but not without certain peculiarities in the Criminal Code of the Republic of Turkmenistan, which regulates the applicability of criminal law to persons who have committed crimes in the territory of the State. For example, Article 7 part 4 of the Criminal Code of the Republic of Turkmenistan stipulates that " in case of crime execution in the territory of two and more states responsibility comes according to the penal statute of Turkmenistan if the crime is ended or stopped in the territory of Turkmenistan".[9] The comparative analysis of provision under consideration and Article 13 part 2 (a) of the Penal Code, Article 5 part 2 of the Criminal Code of the Republic of Belarus, Article 6 part 2 of the Criminal Code of Ukraine, as well as Article 11 of the Criminal Code of the Republic of Belarus allows us to assert that our provision in question does not include neither the stage of preparation for a crime, nor the fact that a crime may be uncompleted not only by virtue of its suppression, but other circumstances for the reasons beyond that person's control.

The CIS Member States national criminal legislation analysis has shown that the aforesaid specificity of crimes committed with the use of information and communication technologies has not been taken into consideration. It means that crimes may cause any socially dangerous consequences except the ones indicated in the criminal law as an actus reus obligatory component of the corresponding offence, or may not cause mandatory or other socially dangerous consequences on the territory of a certain state, but constitute a danger being caused. It is reasonable to consider such crimes in connection with in the light of their partial implementation on the territory of the State where the corresponding socially dangerous actions were committed and (or) the indicated socially dangerous consequences occurred, or where there was a real risk of the emergence of these consequences.

We consider that the highlighted above specificities of the legal regulation of the CIS countries' criminal legislation in space indicate that to increase the effectiveness of their cooperation in combating crime, including those acts committed in cyberspace, it is necessary to unify the appropriate criminal law norms, correcting the identified and other omissions.

[9] Criminal Code of Turkmenistan of June 12, 1997 No. 222-1// [Electronic media] URL: https://online.zakon.kz/document/?doc_id=31295286 (access date: 17.02.2021).

REFERENCES

Enders, W., Sandler, T. Is transnational terrorism becoming more threatening? Journal of Conflict Resolution 44, (2000), pp. 307-308.

V.S. Ovchinsky et al., Russia and the Challenges of the Digital Environment: Working paper // Russian International Affairs Council // Moscow: Spetskniga, 2014, pp. 4-5. (in Russian)

M.G. Reshnyak, Major Aspects of Criminal Law Protection in Digital Economy / M.G. Reshnyak, S.V. Borisov: from Regional Development to Global Economic Growth // Bezopasnost Biznesa, (MTDE 2020), № 3, pp. 41-43. (in Russian)

CIS Member States Penal Criminal Code (adopted by Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States resolution of February 17, 1996) // Appendix to the Inter-Parliamentary Assembly of the CIS Member States information letter, 1997, № 10.

Criminal Code of the Republic of Belarus // National Legal Internet Portal of the Republic of Belarus URL: https://pravo.by/document/?guid=3871&p0=Hk9900275 (access date: 15.02.2021).

Criminal Code of the Republic of Kazakhstan // [Electronic media] URL: https://online. zakon.kz/m/document?doc_id=31575252 (access date: 20.01.2021).

Criminal Code of Turkmenistan of June 12, 1997 No. 222-1// [Electronic media] URL: https://online.zakon.kz/document/?doc_id=31295286 (access date: 17.02.2021).

Criminal Code of the Republic of Uzbekistan of September 22, 1994 No. 2012-XII // [Electronic media] URL: https://online.zakon.kz/document/?doc_id=30421110 (access date: 17.02.2021).

Criminal Code of Ukraine of April 5, 2001 No. 2341-III // [Electronic media] URL: https://online.zakon.kz/Document/?doc_id=30418109 (access date: 17.02.2021).

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ВАЖЕЊЕ КРИВИЧНОГ ЗАКОНА У ПРОСТОРУ: ОДАБРАНИ ПРОБЛЕМИ МЕЂУНАРОДНЕ САРАДЊЕ У БОРБИ ПРОТИВ ЗЛОЧИНА У ДИГИТАЛНОМ ОКРУЖЕЊУ

Резиме

Овај чланак подељен је на истраживање одређених проблема међународне сарадње у борби против криминалитета, укључујући и оне у дигиталном окружењу повезаних са недостацима актуелног кривичног законодавства. Чланак је анализирао одредбе кривичног законодавства Руске Федерације и низа земаља Заједнице независних држава (ЗНД) које одређују правила за примену кривичног закона у свемиру, у смислу потенцијалне способности оптимизације међународне сарадње у борби против криминалитета. На основу истраживања, аутор формулише и оправдава предлоге о изводљивости интегрисања кривичног законодавства земаља ЗНД у кривично законодавство других земаља. Ови предлози имају за циљ стварање неопходних предуслова за кривично право које се протеже на транснационалне злочине које карактерише дигитализација механизма примене и извршења кривичних дела на територијама различитих држава.
Кључне речи: кривично право, примена кривичног права у свемиру, дигитализација, сајбер простор, борба против криминалитета.

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CONTEMPORARY TYPES AND MODELS OF THE OMBUDSMAN INSTITUTION

Abstract

Effective protection of rights and freedoms guaranteed to an individual is considered to be one of the most important tasks and goals of democratic states. Ombudsman-type institutions seem to have become one of the very sufficient instruments of controlling public administration activities, guarding good governance and thus protecting human rights. Therefore, they have become very common all over the world. The aim of this paper is a legal analysis of the models of Ombudsman-type institutions which exist in contemporary world. The subject of the paper is determining the main criteria of their classification, distinguishing their clearest types and models, defining their characteristic features, presenting their similarities and differences. The most common classification of Ombudsmen distinguish: a central Ombudsman with general competences, a central Ombudsman with specialized competences, a local Ombudsman with general competences and a local Ombudsman with specialized competences. There is also distinguished a quasi-Ombudsman institution. Among the models of the Ombudsman-type institutions there have been distinguished, inter alia: a classic East Nordic model, a Danish model, a British-French model, a classic model with competences of protecting human rights, a redress model and a control model, which have been discussed in the paper.

Key words: Ombudsman, classification, types, models, good administration, human rights.

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1. INTRODUCTION

In the modern world the degree of observing the rights and freedoms guaranteed to an individual is determined by the creation of an effective system of their protection. This task remains one of the most important goals and, at the same time, challenges posed in front of democratic states. In addition to judicial protection of rights and freedoms, which still remains the basic means of claiming infringed rights, the Nordic model of non-judicial protection of citizens' rights, implemented by Ombudsman-type institutions, has recently become popular. The Ombudsman is usually an independent supreme state body with constitutional authority, located at the central level and related to some extent with the Parliament, especially with its control function. However, there is no uniform type or model of the Ombudsman institution created universally. Therefore, it is worth taking a reflection over the models of contemporary Ombudsmen created and functioning in different states.

The hereby article aims at making a legal analysis of the models of Ombudsman-type institutions which exist in contemporary world. The subject of the paper is determining the main criteria of their classification, distinguishing their clearest types and models, defining their characteristic features, presenting their similarities and differences.

2. CLASSIFICATION OF THE OMBUDSMAN INSTITUTION

There are multiple approaches to the classification of the Ombudsman institution, made in terms of different criteria used for this: the number of people performing this function (one-person and collective institutions), the level and territorial scope of its activity (central and local authorities), the subject of its activity, or the scope of its competences (general and specialized Ombudsmen), etc.[1] Alongside the central-level Ombudsmen, they are more and more often appointed at individual levels of the federal (Canada, Australia) or administrative (Great Britain, Italy) state structure, as well as at the local government level, e.g.

[1] See in more detail the criteria for the division and classification of state bodies: *Organy i korporacje ochrony prawnej, (Legal protection bodies and corporations)*, ed. V. Serzhanova, S. Sagan, Warsaw 2014, pp. 21 et seq.; compare: S. Serzhanova, S. Sagan, *Nauka o państwie współczesnym (Science on a Contemporary State)*, Warsaw 2013, p. 175 et seq. On the typology of Ombudsman institutions see: I. Malinowska, *Rzecznik Praw Obywatelskich w systemie ochrony praw i wolności w Polsce (Ombudsman in the System of the Rights and Freedoms' Protection in Poland)*, Warsaw 2007, p. 58 et seq.

at the city level (Zurich, The Hague, Detroit, Gdynia)[2]. There also exists the phenomenon of specialization, or the so-called 'sectorization', resulting from the appointment of Ombudsmen in various spheres of state administrative activity (prison system, military service, health care, national minorities, bankruptcy cases, personal data protection, consumer protection, protection of individual computer data, freedom of the press, etc.)[3].

In the doctrine one can also come through an approach to the classification of Ombudsmen, which could be described as a 'mixed' one. It consists in applying for this purpose more than one criterion at the same time. An example of such an approach to the issue is the classification adopted by Izabela Malinowska, who has divided Ombudsmen using two criteria at the same time: territorial scope and competences. Based on the above, the following classification has been created:

• a central Ombudsman with general competences, covering the entire state and all matters with the territorial and subject scope of his activity;

• a central Ombudsman with specialized competences, who acts on the territory of the entire state, specializing in a specific area of affairs assigned to him (e.g. Ombudsman for children, military, health, etc.);

• a local Ombudsman with general competences, whose scope of activity is a specific unit of territorial division, e.g. a commune (city), region (county, province), federation subject (state, land, etc.), and the scope of competences covers all matters;

• a local Ombudsman with specialized competences, covering a territorial unit and a specific type of cases (e.g. two Ombudsmen for Children in Belgium, the Ombudsman for Health Service in the UK, the Ombudsman for Children in Madrid)[4].

[2] One might put a thesis that the process of decentralization of this institution is progressing internationally. See: M. Seneviratne, *Ombudsmen: Public Services and Administrative Justice*, London 2002, p. 3. An example of this tendency is the fact that on November 27, 1991, the Ombudsman at the Gdynia City Council was appointed in Poland. See A. Kubiak, *Rzecznik Praw Obywatelskich* (*Ombudsman)*, 'Państwo i Prawo' 1990, no. 12, p. 3.

[3] However, these bodies are often not subordinated to the Parliament, but to the Government, and sometimes they are non-governmental organizations. This phenomenon is typical for the Nordic countries, and has become especially common in, for example, Finland. For more on this see: V. Serzhanova, *Parlamentarny Ombudsman w Finlandii (Parliamentary Ombudsman in Finland)*, 'Ius et Administratio' 2006, no. 4 (12), p. 61; compare also: *Organy* ..., op. cit., pp. 144-145.

[4] In more detail see: I. Malinowska, *Rzecznik Praw*…, p. 58 et seq.

The analysis of this institution in various states leads to a conclusion that most of them are Ombudsmen of the first type, i.e. central ones with general competences. It should be noted, however, that for some countries, mainly with a complex territorial system (such as the USA, the United States or Canada), but not only (e.g. Japan), the occurrence of solely local Ombudsmen is characteristic, while in others (e.g. Germany, Great Britain or Norway) usually there are Ombudsmen of the second type, i.e. central ones with specialized competences. Central Ombudsmen with a specialized range of competences are also typical of the Nordic countries[5].

The central Ombudsman with general powers, sometimes also called the classical Ombudsman, is distinguished by the fact that he is usually appointed by the Parliament, by a simple majority of votes, the rules of his activities are regulated by the constitutions, he is an irrevocable, monocratic, term body. Of course, there are slight differences in the jurisdiction of Ombudsmen in different countries[6].

Central Ombudsmen with specialized competences take similar forms, but differ in the scope of their competences. They are usually Ombudsmen for children, military, prison, discrimination/equality[7], insurance, freedom of speech, health, etc. This type of Ombudsman is considered to be more effective in his activities, because, unlike the classic Ombudsman, his work also involves controlling, giving opinions, making the public aware, and not only accepting and considering applications[8].

Local Ombudsmen with general competences are distinguished by greater contact with the local community, which they owe to their opinion-forming publishing activity in local media. There are many examples of this type of Ombudsman throughout Europe and beyond the continent (USA, Canada, United Kingdom, Netherlands, Belgium, Denmark, Switzerland, Italy, Germany). The territorial scope of their competences most often covers the city or region. The actions of these officials include responding to complaints by intervening, mediating, seeking a compromise and explaining to the officer the

[5] Compare: *Polskie prawo konstytucyjne (Polish Constitutionnal Law)*, ed. W. Skrzydło, Lublin 1999, p. 440.

[6] See: I. Malinowska, *Instytucje ombudsmana w państwach Unii Europejskiej (Ombudsman Institutions in the European Union States)*, ‘Przegląd Europejski’ 2002, no. 1, pp. 94-96.

[7] See: A. Krizsán, *Ombudsmen and Similar Institutions for Protection against Racial and Ethnic Discrimination*, in: *Minority Governance in and beyond Europe. Celebrating 10 Years of the European Yearbook of Minority Issues*, ed. T. Malloy, J. Marko, Leiden – Boston 2014, pp. 61–84.

[8] I. Malinowska, *Instytucje ombudsmana*…, p. 94-98.

errors in the proceedings that led to dissatisfaction of the petitioners. The requirements for submitting complaints, as already mentioned, are simple, these officials are easily accessible to citizens and the procedure is not very formal.

The last of the four types of Ombudsmen, i.e. local with specific competences, combines the advantages of the second and third types. However, its rarity is worth emphasizing: the Ombudsman for Children in Madrid, the Austrian Länder, Belgium (each for the French- and Flemish-speaking community), the Ombudsman for Health Service in Great Britain.

Moreover, due to the criterion of the appointment procedure, the subject literature distinguishes a quasi-Ombudsman. This applies to institutions set up by bodies or entities other than Parliaments, e.g. by the Governments, and even by associations or non-governmental organizations. An example of such Ombudsmen is the Chancellor of Justice in Sweden and Finland (Sw. *Justitiekanslern*, Fin. *Oikeuskansleri*)[9] appointed by the government and acting alongside it, the Ombudsman for the prevention of monopolistic practices, for consumer protection, whose activities focus on counteracting unfair competition. Quasi-Ombudsmen are not widespread on such a large scale as, for example, specialized Ombudsmen, but they are also found in Norway, Denmark, Great Britain, France, the United States, Canada[10].

3. MODELS OF THE OMBUDSMAN-TYPE ORGANS

The subject literature devoted to the research on the functioning of the Ombudsman-type organs also shows the division of Ombudsmen into specific models. It is worth emphasizing that this division has not been sufficiently uniformly adopted in the doctrine and there are various approaches in this regard.

A so-called classical model has become common, but its content is not unambiguous at all, because the authors dealing with this issue understand it differently. According to some authors, the classic Ombudsman is – to put it simply – an Ombudsman appointed at the central level with general

[9] It is an institution derived from the culture of Nordic law, which is believed to have given rise to the development of modern Parliamentary Ombudsmen in Scandinavia. More about the Chancellor of Justice of the State Council in Finland see: V. Serzhanova, *Suomen perustuslaki. Ustawa zasadnicza Finlandii (The Basic Law of Finland)*, Rzeszów 2017, p. 122 et seq.; compare: B. Kucia, P. Mikuli, *Źródło inspiracji instytucji ombudsmana – rozwiązania skandynawskie (A Source of Inspiration for the Ombudsman Institution - Scandinavian Solutions)*, in: *Instytucje ombudsmana w państwach anglosaskich. Studium porównawcze (Ombudsman Institutions in Anglo-Saxon States. A Comparative Study)*, ed. P. Mikuli, Warszawa 2017, p. 28 et seq.

[10] I. Malinowska, *Instytucje ombudsmana*…, pp. 70-72.

competences[11]. However, the most common approach in the understanding of the classic Ombudsman is its model, which was created on the basis of the experience of the Nordic countries. But here it also seems that this concept needs to be made more precise, because the understanding of the classic Ombudsman model boils down, in fact, to a pattern that was shaped on the basis of the Swedish-Finnish solutions. Its essence is the establishment of a body operating at the central level, which task is to control the functioning of both the public administration and the judiciary. Agnieszka Gajda aptly writes about it, who understands the classic model of this institution as an Ombudsman who controls not only all levels of public administration, but also courts and has the power to prosecute, or apply for punishment or start disciplinary proceedings against an official who violates applicable regulations of law, characterized by the subject of control according to the Swedish prototype, i.e. controlling in accordance with the criterion of lawfulness, proper functioning of state administration and state officials[12]. Such an approach to understanding the classic model of the Ombudsman institution seems to be the most justified, since extending the scope of the Ombudsman's competences also to the judiciary is a characteristic feature that is a peculiarity of the model based on the tradition of the Eastern Nordic legal culture[13].

[11] See: I. Malinowska, *Rzecznik Praw*…, p. 58. The author calls an ombudsman of central location and general competences the 'classic' one.

[12] A. Gajda, *Ewolucja modelu ombudsmana w ujęciu teoretycznoprawnym (Evolution of the Ombudsman Model in the Theoretical and Legal Frame)*, in: *Instytucje ombudsmana* …, op. cit., pp. 16-17. Compare: P. Leino, *The Wind Is in the North*, 'European Public Law' 2004, vol. 10, pp. 338-339.

[13] The separation of the Nordic legal culture is associated with the concept of the Nordic world (Norden), which includes a group of culturally and linguistically related Germanic nations, inhabiting mainly the geographical areas of the Scandinavian Peninsula, but also the adjacent territories of Northern and North-Western Europe. Therefore, we formally include five countries to this group: Norway, Denmark, Iceland, Sweden and Finland. The constitutional law and political systems doctrine divides the Nordic world into two legal culture subgroups: the West Nordic, which includes: Norway, Denmark and Iceland, and the East Nordic, which includes Sweden and Finland. See: J. Husa, *Nordic Reflections on Constitutional Law. A Comparative Nordic Perspective*, Frankfurt am Main-Berlin-Bern-Bruxelles-New York-Oxford-Wien 2002, *passim*. In the Polish-language literature, the issues of the Nordic legal culture and its division into East and West Nordic subgroups are researched by: V. Serzhanova, *Suomen perustuslaki* ..., p. 7 et seq .; *eadem*, *Ewolucja konstytucji państw nordyckich (Evolution of the Nordic States' Constitutions)*, in: *Państwo i prawo w dobie globalizacji (The State and the Law in the Age of Globalization)*, ed. S. Sagan, Rzeszów 2011, p. 270; also *eadem*, *Tryb uchwalania oraz reforma Konstytucji Republiki Islandii (The procedure for adopting and reforming the Constitution of the Republic of Iceland)*, in: *W kręgu zagadnień konstytucjonalizmu*

The second quite commonly distinguished in the doctrine is a model also derived from the Nordic tradition, but from the circle of – one could say – West Nordic or otherwise – West Scandinavian legal culture, namely the so-called Danish model. Although it was created on the basis of the tradition of the Nordic countries, it is characterized by a fundamental difference from the classical model, consisting in excluding from the scope of the Ombudsman's competences the control of the judiciary activity. Typically, it covers powers to control only the activities of public administration, including the activities of officials carrying out public administration tasks[14].

Moreover, when applying the criterion of the appointment procedure, directness and accessibility for citizens, and due to the differences in this respect in relation to the models based on the Scandinavian experiences, the doctrine often distinguishes the so-called British-French model. These differences are manifested mainly in the fact that Ombudsmen are not appointed by the Parliament, but by the head of state, and are available to citizens through deputies, not directly[15].

Authors who thoroughly investigate the solutions adopted for the Ombudsman institution in Anglo-Saxon states come to the conclusion that despite finding a number of similarities, no uniform, coherent model of Ombudsman-type institutions, which could be considered common for this legal area, has been developed. Moreover, not all member states of the Commonwealth

oraz współczesnego państwa (In the Circle of Issues of the Constitutionalism and a Conntemporary State), ed. V. Serzhanova, Rzeszów 2015, p. 31; also *eadem*, *Naczelne zasady ustroju politycznego w Konstytucji Republiki Finlandii (Fundamental Principles of the Political System in the Constitution of the Republic of Finland)*, in: *Zagadnienia prawa konstytucyjnego. Polskie i zagraniczne rozwiązania ustrojowe. Księga jubileuszowa dedykowana Profesorowi Dariuszowi Góreckiemu w siedemdziesiątą rocznicę urodzin (Constitutional Law Issues. Polish and Foreign System Solutions. A Jubilee Book Dedicated to Professor Dariusz Górecki on the Seventieth Anniversary of His Birth)*, ed. K. Skotnicki, K. Składowski, A. Michalak, Łódź 2016, pp. 363-377.

[14] A. Gajda, *Ewolucja modelu ...*..., p. 17. Compare: S. Rudholm, *The Chancellor of Justice*, in: *The Ombudsman: Citizen's Defender*, ed. D.C. Rowat, London 1965, p. 17 et seq.

[15] See: A. Domańska, *Pozycja ustrojowo-prawna Rzecznika Praw Obywatelskich (Systematc and Legal Position of the Ombudsman)*, Łódź 2012, p. 8, who distinguishes a Scandinavian and a British-French model. About the ombudsman model based on the French pattern of Mediator see: M. Criste, *The Protection of the Fundamental Rights through the Advocate of the People*, 'Annales Universitatis Apulensis. Series Jurisprudentia' 2009, no. 12, p. 59.

in the field of ombudsman use British solutions, as is the case with other institutions and political aspects[16].

The authors of the English-language subject literature propose a completely different typology of the Ombudsman institution from the above examples. They seem to take into account the main tasks for which the Ombudsman is appointed. For example, Linda C. Ref perceives the classic Ombudsman as an institution constituting a mechanism for examining complaints on irregularities occurring in public administration bodies and a guarantor of administrative justice, which is not intended to protect human rights, despite entrusting him in some legal systems with the power to conduct proceedings in the event of the occurrence of cases of discrimination in the activities of administrative bodies or in the administrative acts issued by them[17].

On the contrary, according to other authors, a classic Ombudsman is the one that has been equipped with instruments for the protection of human rights. This position is supported by Bernard Frank, as well as Gerald E. Caiden, N. MacDermot, A. Sandler, Dennis Pearce and others. According to their concept, the classic Ombudsman, despite the lack of legally defined competences in the field of upholding human rights, in fact and in practice of its functioning, perceives and interprets his functions exactly in this way[18].

Against the background of the development of the above concept in the doctrine of human rights, another classification has been created by Benny Y. T. Tai. He has distinguished six Ombudsman models based on the criterion of the extent to which the Ombudsman is involved or not in the protection of human rights. According to his division, the first model covers the classic Ombudsman exercising control over the activities of public administration in terms of compliance with the principles of good administration. The second model, which

[16] B. Kucia, P. Mikuli, M. Podsiadło, *W poszukiwaniu anglosaskiego modelu instytucji ombudsmana (In Search of the Anglo-Saxon Model of the Ombudsman Institution),* in: *Instytucje ombudsmana* …, op. cit., p. 247.

[17] See: L.C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, 'International Studies in Human Rights' 2004, vol. 79, p. 86. This view is reinforced in the Polish constitutional law doctrine: A. Gajda, *Evolution of the model*..., p. 25.

[18] B. Frank, *The Ombudsman and Human Rights – Revisited*, 'Israel Yearbook on Human Rights' 1976, vol. 6, p. 123; G. E. Caiden, N. MacDermot, A. Sandler, *The Institution of Ombudsman*, in: *International Handbook of the Ombudsman: Evolution and Present Function*, ed. G. E. Caiden, Westport 1983, p. 3; D. Pearce, *The Ombudsman: Review and Preview – the Importance of Being Different*, in: *The International Ombudsman Anthology: Selected Writings form the International Ombudsman Institute*, ed. L. C. Reif, The Hague – London – Boston 1999, p. 73 et seq.; compare: A. Gajda, *Ewolucja modelu*… ..., s. 25-26.

is a classic Ombudsman in the field of legal regulations, however, perceives his tasks in the dimension of ensuring the observance of the right to good administration in the activities of public administration as an element of human rights protection. The third model is the Ombudsman based on the classical model, referring to the applicable national and international laws and standards in the field of human rights. The fourth model assumes the coexistence of the Ombudsman with other institutions, whose task is to promote and protect human rights. The fifth model is one whose task is clearly and unequivocally defined as taking measures to protect human rights on the basis of the provisions of the constitution and legislation in force, and who has been equipped with instruments allowing him to investigate cases of violations of these rights. Finally, the sixth model, also known as a hybrid type, is one that combines the features of a classic Ombudsman, whose task is to oversee the proper functioning of public administration, and the constitutional and statutory authority to act in the field of violations and protection of human rights[19].

Due to the form and type of actions taken, the literature on the subject presents the division of the ombudsman institution into the redress model and the control model[20].

4. CONCLUSION

There are multiple approaches to the classification of the Ombudsman institution, made according to different criteria, such as: the number of people performing this function, the level and territorial scope of its activity, the subject of its activity, or the scope of its competences, etc. Besides the central-level Ombudsmen, there are Ombudsmen appointed at different levels of the federal or administrative territorial structure, as well as at the local government level. Alongside with the Ombudsmen of general competences, they often specialize in various spheres of state administrative activity.

In the Polish constitutional law doctrine the most common classification of Ombudsmen distinguish: a central Ombudsman with general competences, a central Ombudsman with specialized competences, a local Ombudsman with general competences and a local Ombudsman with specialized competences. The

[19] B. Y. T. Tai, *Models of Ombudsman and Human Rights Protection*, 'International Journal of Politics and Good Governance' 2010, vol. 1, no. 1.3, Quarterquarter III, p. 1-11.; compare: A. Gajda, *Ewolucja modelu*… ..., pp. 26-27.

[20] See: M. Seneviratne, *Ombudsmen* …, pp. 13-14. Compare: K. Heede, *European Ombudsman: Redress and Control at Union Level*, Hague 2000, pp. 70-112.

analysis of this institution in various states leads to a conclusion that most of them are Ombudsmen of the first type, i.e. central ones with general competences. Therefore, the central Ombudsman with general powers is also called the classical ombudsman.

The subject literature also distinguishes a quasi-Ombudsman, which applies to institutions set up by bodies or entities other than Parliaments (e.g. Governments).

Moreover, it is important to underline, that in the doctrine there also exists an approach of distinguishing different models of the Ombudsman-type institutions, though they have not been sufficiently uniform. Among them there is also known a so-called classic model, which is most commonly used regarding the model created on the basis of the experience of the Nordic states, especially the Swedish-Finnish one. Its essence consists in the establishment of a body operating at the central level, which task is to control the functioning of both the public administration and the judiciary.

Another model, which has also been distinguished on the basis of the Nordic countries' experience, is called a Danish model. Usually, it covers powers to control only the activities of public administration, including the activities of officials carrying out public administration tasks. Its fundamental difference from the classical model consists in excluding from the scope of the Ombudsman's competences the control of the judiciary activity.

There also exists a so-called British-French model, which differences are manifested mainly in the fact that such Ombudsmen are not appointed by the Parliament, but by the head of state, and are available to citizens through deputies, not directly. It is also worth adding, that despite existing of a number of similarities between the Ombudsmen functioning in the Anglo-Saxon world, no uniform, coherent model of the Ombudsman-type institutions, which could be considered common for this legal area, has been developed.

There is conducted a vast discussion in the doctrine, concerning the fact if Ombudsmen are created to protect human rights or not, just limiting there scope of competences to controlling public administration and good governance. There has not still been found a uniform position on the matter.

REFERENCES

Caiden G. E., MacDermot N., Sandler A., *The Institution of Ombudsman,* in: *International Handbook of the Ombudsman: Evolution and Present Function,* ed. G. E. Caiden, Westport 1983.

Criste M., *The Protection of the Fundamental Rights through the Advocate of the People*, 'Annales Universitatis Apulensis. Series Jurisprudentia' 2009, no. 12.

Domańska A., *Pozycja ustrojowo-prawna Rzecznika Praw Obywatelskich (Systematc and Legal Position of the Ombudsman)*, Łódź 2012.

Frank B., *The Ombudsman and Human Rights – Revisited,* 'Israel Yearbook on Human Rights' 1976, vol. 6.

Gajda A., *Ewolucja modelu ombudsmana w ujęciu teoretycznoprawnym (Evolution of the Ombudsman Model in the Theoretical and Legal Frame)*, in: *Instytucje ombudsmana w państwach anglosaskich. Studium porównawcze (Ombudsman Institutions in Anglo-Saxon States. A Comparative Study)*, ed. P. Mikuli, Warszawa 2017.

Heede K., *European Ombudsman: Redress and Control at Union Level*, Hague 2000.

Husa J., *Nordic Reflections on Constitutional Law. A Comparative Nordic Perspective,* Frankfurt am Main-Berlin-Bern-Bruxelles-New York-Oxford-Wien 2002.

Krizsán A., *Ombudsmen and Similar Institutions for Protection against Racial and Ethnic Discrimination*, in: *Minority Governance in and beyond Europe. Celebrating 10 Years of the European Yearbook of Minority Issues*, ed. T. Malloy, J. Marko, Leiden – Boston 2014.

Kubiak A., *Rzecznik Praw Obywatelskich (Ombudsman)*, 'Państwo i Prawo' 1990, no. 12.

Kucia B., Mikuli P., *Źródło inspiracji instytucji ombudsmana – rozwiązania skandynawskie (A Source of Inspiration for the Ombudsman Institution - Scandinavian Solutions)*, in: *Instytucje ombudsmana w państwach anglosaskich. Studium porównawcze (Ombudsman Institutions in Anglo-Saxon States. A Comparative Study)*, ed. P. Mikuli, Warszawa 2017.

Kucia B., Mikuli P., Podsiadło M., *W poszukiwaniu anglosaskiego modelu instytucji ombudsmana (In Search of the Anglo-Saxon Model of the Ombudsman Institution)*, in: *Instytucje ombudsmana w państwach anglosaskich. Studium porównawcze (Ombudsman Institutions in Anglo-Saxon States. A Comparative Study)*, ed. P. Mikuli, Warszawa 2017.

Leino P., *The Wind Is in the North*, ‘European Public Law’ 2004, vol. 10.

Malinowska I., *Instytucje ombudsmana w państwach Unii Europejskiej (Ombudsman Institutions in the European Union States)*, ‘Przegląd Europejski’ 2002, no. 1.

Malinowska I., *Rzecznik Praw Obywatelskich w systemie ochrony praw i wolności w Polsce (Ombudsman in the System of the Rights and Freedoms’ Protection in Poland)*, Warsaw 2007.

Organy i korporacje ochrony prawnej, (Legal protection bodies and corporations), ed. V. Serzhanova, S. Sagan, Warsaw 2014.

Pearce D., *The Ombudsman: Review and Preview – the Importance of Being Different*, in: *The International Ombudsman Anthology: Selected Writings form the International Ombudsman Institute*, ed. L. C. Reif, The Hague – London – Boston 1999.

Polskie prawo konstytucyjne (Polish Constitutionnal Law), ed. W. Skrzydło, Lublin 1999.

Reif L.C., The Ombudsman, *Good Governance and the International Human Rights System*, ‘International Studies in Human Rights’ 2004, vol. 79.

Rudholm S., *The Chancellor of Justice, in: The Ombudsman: Citizen’s Defender*, ed. D.C. Rowat, London 1965.

Seneviratne M., *Ombudsmen: Public Services and Administrative Justice*, London 2002.

Serzhanova V., *Ewolucja konstytucji państw nordyckich (Evolution of the Nordic States’ Constitutions)*, in: *Państwo i prawo w dobie globalizacji (The State and the Law in the Age of Globalization)*, ed. S. Sagan, Rzeszów 2011.

Serzhanova V., *Naczelne zasady ustroju politycznego w Konstytucji Republiki Finlandii (Fundamental Principles of the Political System in the Constitution of the Republic of Finland)*, in: *Zagadnienia prawa konstytucyjnego. Polskie i zagraniczne rozwiązania ustrojowe. Księga jubileuszowa dedykowana Profesorowi Dariuszowi Góreckiemu w siedemdziesiątą rocznicę urodzin (Constitutional Law Issues. Polish and Foreign System Solutions. A Jubilee Book Dedicated to Professor Dariusz Górecki on the Seventieth Anniversary of His Birth)*, ed. K. Skotnicki, K. Składowski, A. Michalak, Łódź 2016.

Serzhanova V., *Parlamentarny Ombudsman w Finlandii (Parliamentary Ombudsman in Finland)*, ‘Ius et Administratio’ 2006, no. 4 (12).

Serzhanova V., *Suomen perustuslaki. Ustawa zasadnicza Finlandii (The Basic Law of Finland)*, Rzeszów 2017.

Serzhanova V., *Tryb uchwalania oraz reforma Konstytucji Republiki Islandii (The procedure for adopting and reforming the Constitution of the Republic of Iceland)*, in: *W kręgu zagadnień konstytucjonalizmu oraz współczesnego państwa (In the Circle of Issues of the Constitutionalism and a Conntemporary State)*, ed. V. Serzhanova, Rzeszów 2015.

Serzhanova S., Sagan S., *Nauka o państwie współczesnym (Science on a Contemporary State)*, Warsaw 2013.

Tai B. Y. T., *Models of Ombudsman and Human Rights Protection*, 'International Journal of Politics and Good Governance' 2010, vol. 1, no. 1.3, Quarterquarter III.

Др Викторија СЕРЖАНОВА*

САВРЕМЕНЕ ВРСТЕ И МОДЕЛИ ИНСТИТУЦИЈЕ ОМБУДСМАНА

Резиме

Ефикасна заштита права и слобода гарантованих појединцу сматра се једним од најважнијих задатака и циљева демократских држава. Изгледа да су институције типа омбудсмана постале један од довољних инструмената за контролу активности јавне управе, чувајући добро управљање и тиме штитећи људска права. Стога су постали врло чести у пракси већине држава у свету. Циљ овог рада је правна анализа модела институција типа омбудсмана који постоје у савременом свету. Предмет рада је утврђивање главних критеријума њихове класификације, разликовање њихових типова и модела, дефинисање њихових карактеристика, представљање сличности и разлика. Најчешћа класификација институције омбудсмана разликује: централног омбудсмана са општим надлежностима, централног омбудсмана са специјализованим надлежностима, локалног омбудсмана са општим надлежностима и локалног омбудсмана са специјализованим надлежностима. Такође постоји истакнута институција квази омбудсмана. Међу моделима институција типа омбудсмана разликују се, између осталог: класични источно-нордијски модел, дански модел, британско-француски модел, класични модел са надлежностима за заштиту људских права, модел правног лека и контролни модел, о којима је било речи у раду.

Кључне речи: омбудсман, класификација, врсте, модели, добра администрација, људска права.

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INTELLIGENCE IN MODERN GLOBAL CONDITIONS

Abstract

In this paper, the author will analyze the need for intelligence and the role of intelligence services in combating contemporary threats and challenges in a nation state. In the introductory part of the paper, the author scientifically defines the term intelligence. The author further identifies the covert methods used by the intelligence service in its work. The content will be prepared on the basis of analysis of scientific literature and using electonic content. In the preparation of the content of the paper, the author will apply the general scientific methods: the descriptive method, the normative method and the method of content analysis as a separate scientific method.

Key words: intelligence, intelligence services, the method of covert observation, the method of covert surveillance, the method of covert scientific research

1. INTRODUCTION

Most of the intelligence organizations in the modern form of existence were established immediately after the end of the Second World War and in the countries of Western Europe after gaining their independence.[1]

The tasks of intelligence refer to the collection of data and information, their analysis and reporting to the state authorities (as users) which are competent to make decisions regarding the security, defense and protection of the economic, political and other interests of the state. The intelligence should be in function of

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[1] A. B. Prados and R. A. Best., *INTELLIGENCE OVERSIGHT IN SELECTED DEMOCRACIES, CRS REPORT* for Congress, September 21.1990.

supporting the state policy and achieving protection of the vital national interests (permanent interest, vital interests and important interests in the Republic of North Macedonia).

Intelligence consists of the following contents: (1) data collection and information; (2) analysis and reporting of users; (3) creating conditions for counter-intelligence protection from the actions of other intelligence services and bodies from abroad and (4) enabling the process of protecting the country from any attack from undertaking timely defense activities.

Roy Godson a professor at Georgetown University who is also president of the National Center for Strategic Information and president of the NGO Consortium for the Study of Intelligence, describes intelligence as "knowledge, organization and activity that results in;[2]

- the collection, analysis, production, distribution and specialized exploitation of information relating to any other government, political group, party, military force, movement or other association believed to be related to the security of the group or government;
- Neutralizing and opposing similar activities by other groups, governments or movements; and covert activities undertaken to influence the composition and conduct of such groups or governments.

Based on the definition, Roy Godson identifies four elements of intelligence:

1. Covert collection which means obtaining important information through the use of special, usually secret, human and technical methods;
2. Counterintelligence which means identification, neutralization and use of other state intelligence services;
3. Analysis and assessment, i.e. assessment of the collection and other data and delivery to the policy makers of a finished product that is clearer than it may be in the data themselves;
4. Covert action that is an attempt to influence politics and events in other countries before revealing one's own involvement.

According to Sherman Kent, the intelligence service is correlated with information and it is determined that the basic task of the intelligence services is to gather information, systematize it and deliver it to interested users.

[2] R. Godson, Intelligence and National Security in: R. Shultz, R. Godson, T. Grenwood (eds.) Security Studies for the 1990s, Washington, New York, London: Brassey' s /US/, A Maxwell Macmillan Company, 1993, 213.

Hans Bourne defines intelligence services as government services responsible for collecting, sorting and providing information in order to ensure the security of society and the freedom of its citizens.[3]

According to Milan Milosevic,[4] the intelligence service means a specialized organization of the state apparatus, which with specific methods and means performs intelligence, security, subversive and other activities, in order to protect the internal and external security and achieve the strategic goals of their country, as well as protection of the service itself.

According to Ljubomir Stajić,[5] the intelligence service is defined as a specialized, relatively independent institution of the state apparatus that is authorized by legal, but also by secret means and methods to collect significant intelligence and information about other countries or their institutions and possible internal opponents of the state, necessary for conducting the state policy and undertaking other procedures in war and peace, and by its own activity, independently or with other state bodies to implement part of the state and political goals of the country.

According to Saša Mijalković,[6] the subject of action of the modern intelligence services are the intelligence activities as well as the subversive contents. Also in modern conditions, the intelligence activity is realized by the intelligence services as separate, independent bodies of the state administration but also by specialized police, scientific, diplomatic and other institutions and bodies. The Intelligence Service is a specialized organization of the state apparatus which with specific methods and means conducts intelligence, security, subversive and other activities in order to achieve protection from internal and external interests of opponents, using specific methods and means in order to achieve certain political interests and protection of internal and external security. In principle, the intelligence service has a dual role. On the one hand, it is obliged to collect secret data on foreign countries and organizations, to analyze them and on that basis to make the necessary assessments, so that the state leadership can successfully create and implement its policy. At the same time, the intelligence service is obliged through a specific activity to protect the

[3] H. Born, Democratic and Parliamentary Oversight of the Intelligence Services: Practices and Procedures, in: Sourcebook on Security Sector Reform, P. Fluri, M. Haśič (eds.) Geneva Centre for the Democratic Control of Armed Forces/Centre for Civil-Military Relations, Belgrade, Geneva/Belgrade, 2004, 275-277.

[4] M. Milosevic, (2001). *State Security System*, Police Academy, Belgrade, 2001.

[5] Lj. Stajic, *Basics of Security*, Police Academy - Belgrade, 2004, 201.

[6] S. Mijalković, M. Miloševič, *Contemporary Information Service*, Publisher High School of Internal Affairs, Banja Luka, 2013, 36, 37.

secret data in its own country, preventing the efficient operation of the intelligence service of other countries. And in terms of subversive action, the intelligence service has a dual role, especially when it comes to the services of the great powers. On the one hand, this service acts secretly in order to achieve the vital state goals and on the other hand with secret methods, they prevent the subversive activity of foreign countries directed towards their own country.

According to Tome Batkovski, the term "intelligence activity" means a specific social activity aimed at external and internal opponents, i.e. current or potential enemies of certain countries or social groups, whose object of interest are the most subtle and best kept secrets of foreign undertaken in order to realize the vital interests of the states, i.e. other social groups.[7] The main goal of the intelligence services is to obtain specific confidential information that is from importance for the realization of the other strategic interests of a certain state or another appropriate entity.

According to Aleksa Stamenkovski, intelligence is a specific function of the state that needs to gather true and timely information on all possible dangers in order to successfully conduct the foreign and domestic policy of the state. When defining the term intelligence if we start from the literal translation of the English word "intelligence" used as a word that means that it is "reporting" or "reporting on particularly important news", it can be concluded that intelligence goals, activities and behavior of other countries, then intelligence is defined as providing information about these events.[8]

According to Mitko Kotovcevski, the Intelligence Service is an organized activity or organization an institution which at the request of the leading political forces, obtains, evaluates and presents to the leading political structures, classes or countries certain data about the opponent, protects its own interests from opponents and engages other activities that contribute to the achievement of certain political goals". The Intelligence Service is an important state specialized organization that collects, analyzes and evaluates intelligence data and information about other countries, their military and economic potentials, political situation, monitoring the intentions of other countries, scientific discoveries, mediation between countries (and secret diplomacy) and other data of vital interests for the successful functioning of the state.[9]

[7] T. Batkovski, *Intelligence, Security and Counterintelligence Tactics*, Skopje, 2008.
[8] A. Stamenkovski, *Basics of intelligence*, Publisher NIP Gjurgja, Skopje, 1999, 20.
[9] M. Kotovcevski, *Contemporary Intelligence Services*, Publisher Macedonian Civilization, Skopje, 2002, 41.

The complexity of the intelligence sphere as well as the dynamism, variability and scalability of the intelligence services in accordance with the requirements and needs of society, explains the difficulty of finding relevant scientific references and in that context to make a choice of certain definitions for the meaning of the intelligence services.

A number of authors determine the importance of intelligence services, omitting the socio-economic conditions of their occurrence and initial organization. These authors define "intelligence" as the collection of data that can make it easier for a government to gain an advantage over an adversary or intelligence is a process that determines the usability and reliability of information that enables the adversary to prevail.[10]

The above definitions highlight the fundamental aspects of the work of the intelligence services and based on them we can conclude the following:

- Intelligence Service is a specialized part of the state apparatus;
- The Intelligence Service is headed by the narrowest political top of the country (Head of State, Prime Minister, Parliamentary Committee, etc);
- The Intelligence Service is relatively independent data by legal as well as by secret means and methods;
- The Intelligence Service is authorized by law to carry out its tasks.

Basically, intelligence has an obligation:

- to protect the sovereignty, independence and territorial integrity of a country;
- to provide protection of the constitutional legal order, protection of human rights and fundamental freedoms;
- to carry out intelligence activities (to take action aimed at external and internal adversaries i.e. the current the most subtle and best kept secrets of foreign states and other social entities and which are undertaken in order to realize the vital interests of the states i.e. other social groups) in order to ensure the national security of a state;
- Carry out counterintelligence activities to identify, disable and eliminate the intelligence activities of foreign intelligence services or organizations or individuals involved in espionage, sabotage, subversion or terrorism;
- To provide the country' structures such as the President, the Prime Minister and the Parliament with the necessary information necessary to address certain issues related to the achievement of security in the field

[10] W. V. Kennedy, *Intellegence War*, Salamander Books, London, 1983, 15.

of domestic and foreign policy, social and economic development, scientific and technological progress;

- Take measures and activities in the fight against terrorism, organized crime, corruption that affect the interests of national security, as well as to identify, prevent and eliminate other threats;
- To provide protection for senior government officials and foreign diplomats, to protect foreign and public during their stay in Macedonia.

One of the goals of the establishment and operation of the intelligence services is to identify risks and threats both external and internal and to provide analysis and information on them and to deal with them.

The intelligence service, through the use of covert and legal methods,[11] should monitor the objective reality and take measures and actions in order to timely detect the forms and sources of security threats.

2. GLOBAL NATURE OF MODERN THREATS

Since the end of the Cold War, the world has faced a number of traditional and new challenges, risks and security threats. An essential feature of these challenges, risks and threats is that they are becoming increasingly unpredictable, asymmetric and transnational in nature.[12]

Regional and local conflicts, state failure, regional conflicts, ethnic and religious extremism, terrorism, organized crime, corruption, proliferation of weapons of mass destruction and illegal migration, economic development problems, uneven economic and demographic change, deficit of energy resources, uncontrolled consumption of natural resources and endangerment of the environment endanger the stability of individual countries and the region in general, as well as global security. The consequences of natural disasters and technical-technological accidents, as well as endangering the environment and constant security risks for the state, its population and material goods. The tendency of increased use of information and communication technologies is followed by a constant increase in the risks of high-tech crime and endangerment of information and telecommunication systems. The challenges, risks and threats

[11] For more on covert and legal methods of the intelligence service see more at S. Mijalković, I. Miloševič, *Contemporary Information Service*, Publisher High School of Internal Affairs, Banja Luka, 2013.

[12] T. Gerginova, *Global Security*, Publisher: Faculty of Security - Skopje, 2015, 141.

to security at the global, regional and national levels are constantly multiplying and changing the character, intensity and forms of manifestation.

In modern conditions, the intelligence service applies the following in its work covert methods – covert observation method, covert survey method and covert scientific research method. Reasons for greater use of these methods are: opening of interstate borders; exchange of people, goods and ideas; In their work, the intelligence services adhere to the principle of rationality and economy (obtaining data that can be obtained in a covert or legal way – this is followed by less cost and less risk).[13]

3. THE METHOD OF COVERT OBSERVATION

In its work, the Intelligence Service uses the Method of Covert Observation as a planned and systematic activity of the Intelligence Service, which involves external observation of space, objects and actions in other countries, through its own senses or with the help of technical devices, which at the expense of the Intelligence Service performed by a citizen who has legal cover for residence and movement in the field. The citizen – undercover observer uses the legal opportunity in another country – tourist visit of relatives, official visit, etc., so that he can move smoothly and observe the direction that is of interest to the intelligence service. The citizen – covert observer must first acquire knowledge through appropriate training which includes the space, facilities and actions that should be subject to surveillance.

Also, the citizen who uses the method of covert observation must have the following abilities:

- Precise observance of details;
- Knowledge and skills in the use of cryptography and codes (namely, the observed must be recorded in a coded manner);
- To have a quality memory.

In order to achieve the best results in observation, the allowed observer is already familiar with the views, sketches, photos of the object that should be subject to observation.

The citizen performs specific observation with a dual purpose:

- Confirmation of already known data (determination of their reliability);
- Access to new, hitherto unknown data on the intelligence service.

[13] T. Batkovski, *Intelligence, Security and Counterintelligence Tactics*, Skopje, 2008, 80.

4. THE METHOD OF COVERT SURVEILLANCE

The method of covert surveillance is a planned and systematic activity of the intelligence service and implies conducting a survey of previously trained persons, both in the field of methodology of research of social phenomena and in terms of goals and requirements of the intelligence service, which have a real and legal legend for such activity in a given country. The specificity of this method is that the questionnaires include questions whose answers the intelligence service is interested in and which will not cause doubt in the surveyed population in the real intentions and goals of the organizer and the implementer of the survey.

Namely, the most common goals of covert surveys are:[14]

- To get acquainted with the political views of the target group in a given country, especially in sensitive periods from a political-security aspect;
- To know the views of the target group regarding individual political leaders, political parties, movements and organizations;
- To get acquainted with the views of the target group in given pre-election periods the outcome of which is important for the intelligence service;
- To get acquainted with the views of the target group in the pre-war or pre-crisis period;
- To get acquainted with the attitudes of the target group towards the current state leadership.

Based on the survey data, using adequate analytical methods, the intelligence service can draw conclusions about the following:

- the degree of trust enjoyed by a given state leadership among the target group;
- the readiness of the target group for active involvement in defense against aggression;
- The degree of trust of certain political parties in the target group in relation to the upcoming elections and the like.

The obtained conclusions are needed to make assumptions about the behavior of the given target group (target group can represent; the entire population of a country; part of the population, as a religious group, national minority; ethnic group, social group etc.), in a period which is important from the aspect of the intelligence service i.e. for the users of its intelligence product (the state leadership).

[14] T. Batkovski, *Op. cit.***,** 84.

5. THE METHOD OF COVER SCIENTIFIC RESEARCH

The method of Covert scientific research is a planned and systematic activity of the intelligence service and implies planned involvement of a scientist or scientific institution in collecting intelligence data at the expense of the intelligence service through the realization of legal scientific projects on the territory of the enemy. The client of the covert scientific research is the intelligence service that needs (according to its programmed goals) to find information about the opponent that can be of different nature according to the content (sociological, anthropological, national-ethnic, religious, scientific-technological, military defensive and the like).

The cover-up is that in addition to the basic tasks arising from the given (approved) scientific-research project, certain fields are explored at the request of the intelligence service. This research is realized in a way that they will remain masked for the organizer of the research and the scientist and the institution (that is in parallel the scientist or the institution conducts two researches – one "open" and the other "hidden".

The scientists who participate in the covert scientific research are not in an agency relationship with the intelligence service, but work on the basis of mutual agreement which means their high awareness of the subject of interest on the one hand and great loyalty to the service on the other.

Conducting covert scientific research can be realized in the following situations:[15]

- The domestic scientific-research institution to have a legal approval for research on the territory of the opponent (independently or in cooperation with a foreign scientific-research institution);
- The scientist to be involved in the scientific-research project of a foreign institution on the territory of the opponent;
- The scientist must have legal approval for independent implementation of the scientific research project on the territory of the opponent.

Given the huge expansion of the spheres of scientific research cooperation internationally in the modern world there is a growing opportunity for intelligence services to use this method collect the desired data.

In the end, it can be concluded that the covert methods have the following characteristics: The citizen, who secretly data about the opponent at

[15] Ibid, p. 85.

the expense of the intelligence service, should be expert in the subject of interest; The citizen who secretly data about the opponent on behalf of the intelligence service, in addition to performing a legal activity (this activity serves as a mask), also performs a covert activity (in addition to the service); To realize the covert methods, the citizen uses a legal and real agenda; The citizen should be a stable person in a psychological sense, faithful to the relevant service; The data collected by these methods are open, but only for trained persons, who can assess their value (in addition to the intelligence service);

6. CONCLUSION

We can conclude that today the Intelligence should be in function of the realization of the state policy and the realization of the protection of the vital national interests (permanent interest, vital interests and important interests in the Republic of North Macedonia). The intelligence service is a specialized part of the state apparatus that collects, classifies, analyzes, evaluates and presents to the state leadership, data, assessments and proposals of political, military, economic, cultural and other character, related to the vital state interests and goals, engages in the performance of other received from the state leadership, related to the achievement of strategic national goals and protect its own interests from the opponent.

In order to achieve intelligence, taking into account the experiences and research so far, modern intelligence services use different intelligence disciplines and intelligence components. Of particular interest should be political intelligence, economic intelligence, human intelligence, information intelligence, etc.[16]

In this paper, the author analyzes political intelligence which is an intelligence component that begins with knowing or studying the state ant its

[16] T. Gerginova, "Political intelligence as an intelligent component" - The paper was published in the Proceedings, No. 4 from the Fourth International Scientific Conference entitled "Harmonization of legal regulations with legal flow (ACQUIS COMMUNITE) in Bosnia and Herzegovina and other experiences, organized by the Research Center from Banja Luka, Republika Srpska - BiH and in cooperation with the Institute for Advanced Law in Belgrade, Republic of Serbia, 2002.

internal and external policies. Political intelligence is aimed safeguarding the vital, national values and interests of one's own country, collecting data and information as a means of overseeing the secrets of one's own country and organizing activities to prevent the penetration of foreign intelligence services, the study and the suppression of all forms of foreign covert subversive activities in particular overturns.

The intelligence analyst basically collects data and information in order to achieve the protection of the national values and interests of a nation state and its strategic goals.

Various questions are posed that represents important directions of research of contemporary political intelligence in order to develop the need to understand different cultures, especially Eastern culture, values, beliefs, priorities and political processes.

For example, questions are asked about the activities of the government, the activities of political parties about certain types of pressure from formal and informal groups such as political parties, various associations, religious or ethnic organizations, trade unions, etc.).

Various questions are also asked regarding the National Economy which is important for the survival, development and daily functioning and development of the state and society. Economic policy is an integral component of national security policy. Therefore, in the realization of the protection of the national economic resources and in the development of the national economy, many economies include the intelligence and the intelligence services. Recently, special intelligence institutions have been established for economic and labor counter-espionage. The Economic Intelligence Service with its tools and methods, seeks to obtain the ownership of important secrets in this area. For the realization of intelligence tasks, the economic intelligence service uses all intelligence methods and lately uses the most modern electronic and other technical means.

REFERENCES

Alfred B. Prados and Richard A. Best., *INTELLIGENCE OVERSIGHT IN SELECTED DEMOCRACIES, CRS REPORT* for Congress, September 21.1990.

Batkovski, Tome., (2008). *Intelligence, Security and Counterintelligence Tactics*, Skopje

Gerginova, Tatiana., (2015). *Global Security*; Publisher: Faculty of Security – Skopje

Gerginova, Tatjana., (2020). "*Political intelligence as an intelligent component*" - The paper was published in the Proceedings, No. 4 from the Fourth International Scientific Conference entitled "Harmonization of legal regulations with legal flow (ACQUIS COMMUNITE) in Bosnia and Herzegovina and other experiences, organized by the Research Center from Banja Luka, Republika Srpska - BiH and in cooperation with the Institute for Advanced Law in Belgrade, Republic of Serbia.

Kotovcevski, Mitko, (2002). *Contemporary Intelligence Services*, Publisher Macedonian Civilization, Skopje

Mijalković,, Saša., Milośevič,, Milan, (2013). *Contemporary Information Service*, Publisher High School of Internal Affairs, Banja Luka

Stamenkovski, Aleksa, (1999). *Basics of intelligence*, Publisher NIP Gjurgja, Skopje

Roy Godson, (1993). Intelligence and National Security in Rishard Shultz, Roy Godson, Ted Grenwood (eds.) Security Studies for the 1990s, Washington, New York, London: Brassey' s /US/, A Maxwell Macmillan Company

Born H., (2004). Democratic and Parliamentary Oversight of the Intelligence Services: Practices and Procedures, во Sourcebook on Security Sector Reform, Fluri P., Haśič M. (eds.) Geneva Centre for the Democratic Control of Armed Forces/Centre for Civil-Military Relations, Belgrade, Geneva/Belgrade

William V. Kennedy, (1983). *Intellegence War*, Salamander Books, London, p. 15.

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ПРИКУПЉАЊЕ ОБАВЕШТАЈНИХ ПОДАТАКА У САВРЕМЕНИМ ГЛОБАЛНИМ УСЛОВИМА

Резиме

У овом раду аутор анализира методе прикупљања обавештајних података и објашњава улогу обавештајних служби у борби против савремених претњи и изазова у националним државама. Обавештајна служба је специјализовани део државног апарата који прикупља, класификује, анализира, оцењује и представља државном руководству податке, процене и предлоге политичког, војног, економског, културног и другог карактера, који се односе на виталне државне интересе и циљева, ангажује се у извођењу осталих примљених од државног руководства, повезаних са постизањем стратешких националних циљева и заштите сопствених интереса. У овом раду аутор анализира политику прикупљања обавештајних података као обавештајне компоненте која започиње познавањем или проучавањем државе и њених унутрашњих и спољних политика. Политика прикупљања обавештајних података има за циљ заштиту виталних, националних вредности и интереса сопствене државе, прикупљање података и информација као средство надгледања тајни сопствене државе и организовање активности за спречавање продора страних обавештајних служби, проучавање и сузбијање свих облика страних тајних субверзивних активност.

Кључне речи: обавештајни подаци, обавештајне службе, метода прикривеног посматрања, метода прикривеног надзора.

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PATENT SETTLEMENTS IN THE PHARMACEUTICAL INDUSTRY

Abstract

In the pharmaceutical industry, companies that research and develop new drugs usually obtain a number of patents. During the validity of patents, pharmaceutical companies have a monopoly position on the market. This monopoly position is justified, since a patent is an effective means available to pharmaceutical companies to return funds invested in research and development of new drugs.

Given that patents last for 20 years in most countries, as well as the possibility of extending protection for another five years on the basis of supplementary protection certificates, generic drug manufacturers often challenge the validity of these patents or place their drugs on the market, forcing patent owners to initiate court proceedings to protect their rights and prevent generic drugs from entering the market. During litigation, manufacturers of original and generic drugs often decide to enter into an agreement. Although the terms of the agreement vary from case to case, a number of agreements involve the payment of a patent holder to a generic product manufacturer, who undertakes not to place his products on the market for a certain period of time. In this context, the subject of the paper will be the analysis of the compliance of such agreements from the aspect of competition law, with reference to current cases from foreign case law.

Key words: patent; pharmaceuticals; generics; investment; market.

1. INTRODUCTION

A patent is a right that protects inventions, or solutions to a certain technical problem. The invention is "any new or useful process, machine, article

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of manufacture, or composition of matter".[1] This right arises by the decision of the competent state body and entry into the register of patents, managed by that body.[2] The territorial effect of the patent is limited to the state whose body has admitted this right. Also, this right is time limited to 20 years, beginning with the day of the patent application submission. This time limit is generally accepted in the world in line with the standards of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This time limit also represents the guaranty to the inventor that his product will be the only product of its kind on the market for 20 years.[3] Every state has its body in charge of granting patents. In Serbia, the Intellectual Property Office is responsible for the tasks related to intellectual property rights, including the patent. In the USA, the responsible body for granting patents is United States Patent and Trademark Office (USPTO), and in the European Union, the European Patent Office (EPO).

The patent is an exclusive right, i.e. monopoly right. That means that within the validity period only the patent owner has authorization to economically use the protected invention or to stop others from economically using the protected invention. A patent is, figuratively speaking, a kind of balance between the interests of the companies that invest in the research and development and the community interest. In fact, the state recognizes inventor's right to be the only one to produce and sell a protected invention for a limited period of time. In return, the patent owner publishes the invention, i.e. the results of scientific research, thus enabling the continuation of scientific research and progress.

In a market economy, characterized by free-market competition, patents provide a legal monopoly position. This solution isn't ideal, but it enables the achievement of the important social goal, the encouragement of social development.[4] A patent, as an exclusive property right, represents a kind of reward for the holder of that development. The owner of such an exclusive right is certainly in a position to abuse that right. For example, the patent owner can block use of future more sophisticated inventions. It can also unable the social community to enjoy the benefits of the invention itself, and through licensing agreements it can close the market in those areas that are covered by the patent.[5] Beside this risks that underline the system, and are contrary with goals for which

[1] B. Lehman, The Pharmaceutical Industry and the Patent System; 2003, 4. https://users.wfu.edu/mcfallta/DIR0/pharma_patents.pdf, February 23, 2021.
[2] S. M. Marković, *Pravo intelektualne svojine*, Beograd, 2000, 97.
[3] B. Lehman, op. cit. 4.
[4] S. M. Marković, *Patentno pravo*, Beograd, 1997, 37.
[5] Ibid.

that system exists, the risks can be effectively controlled by taking certain measures, like antimonopoly regulations, compulsory license etc.

In order to be protected by a patent, the invention must be new, it must has inventive part and it must be industrially applicable. The inventions that are protected by patent intrude in every aspect of human lives. For example, some of the most important patents for human society are Tesla's patents related to electric energy transmission; electrical lighting (patents by Edison and Swan); plastic (Baekeland patents), ballpoint pen (Biro patents), microprocessors (Intel patents). Patents are granted for new machines, industrial products, process of industrial production. Also, patents are granted for new chemical mixtures, food, medical and pharmaceutical products.

2. PATENTS IN THE PHARMACEUTICAL INDUSTRY

Pharmaceutical industry highly contributes to health improvement. Vaccines, antibiotics, anticancer agents, anticoagulants and other discoveries and drugs have significantly improved the length and the quality of patient's life worldwide. However, inventions in the field of pharmacy are very different from other inventions. These inventions have a long development period, which is quite complex and expensive, and often uncertain. On average, research and development of pharmaceutical products lasts about 12 years, from early phases of research and development to final approval for placing the product on the market by the competent authorities. Financial investments in the research and development of new innovative drugs are quite high, average about one billion euros for one drug. Due to these significant financial investments, which are accompanied by high risks, the patent system is on one hand, guarantee for return of these investments, and on the other hand, encouragement for the continuation of new innovative research.

Having in mind complexity and long procedure to obtain permission for placing the product on the market (drug research phase, filing and examination of the patent application, clinical trial of the drug), pharmaceutical companies submit the patent application in the early phase of drug research and development. The research and development process is, however, continued after submission of the patent application. Because the patent lasts for 20 years from the date of submission the patent application, there is no time for drug commercialization (average 7 to 8 years). It is a short period for pharmaceutical companies to return theirs investments and make profit, which, among other things, enables further research and development of new drugs. This short term

protection may discourage some investments in innovative pharmaceutical industry. For this reason, the pharmaceutical industry needed opportunity to extend the validity of patent protection. This was enabled by the introduction of the supplementary protection certificate into the patent system, which provides additional protection for five more years.[6] Until the introduction of this additional protection many pharmaceutical companies, due to lack of economic stimulus, quit the research and development of drugs based on new substances, and turn to cheaper modification of existing drugs. However, drugs modified in such a way hadn't a significant contribution in terms of treatment efficacy.

The innovative pharmaceutical industry creates products that represent technological advances in terms of improving the quality of life of sick people around the world. However, pharmaceutical companies can not function without patents, which represent a+ kind of economic catalyst, or compensation for the high research and development costs that these companies have. In other words, the innovative pharmaceutical companies that have a great impact on human society can function only in conditions of exclusion of competition, which the patent allows. Thanks to the nature of the patent, pharmaceutical companies know in advance that their work will be rewarded with the potential profit after the patent granted. Namely, the patent is a guarantee that no competitor of a patent owner will be able to ″copy his idea‟ and in that way prevent the patent owner from making a profit.[7]

In different branches of industry, patents have different effects. For example, in the electronic industry competitors often "share" their patents by merging and cross-licensing. This is the consequence of product complexity in the electronic industry, which often contains many patented technology. However, in the pharmaceutical, chemical and biotechnological industry the patent protects the vast investment in the research and clinical trial, even before the patented product reached the market.[8] Pharmaceutical patents are of great importance because the process for the production of pharmaceutical products can be easily repeated or copied by competitors, with small investments in research and clinical trials. Hence, pharmaceutical patents rarely appear as the subject of a license agreement. In other words, the owners of pharmaceutical

[6] This institute was first introduced in the United States (1984) and japan (1988), and then introduced in the European Union (1992). S. M. Marković, *Pravo intelektualne svojine i informaciono društvo*, Beograd, 2018, 80.
[7] Z. Roth, „The Monopoly Factory: Want to fix the economy? Start by fixing the Patent Office“, *The Washington Monthly*, 2005, https://washingtonmonthly.com/2005/06/01/the-monopoly-factory/, March 5, 2021.
[8] B. Lehman, op. cit. 2.

patents strictly preserve the exclusivity of their right. This behavior of the owners of pharmaceutical patents is necessary for the reason that in the pharmaceutical industry, capital investments are focused on laboratory research and clinical trials, and not on the production of the final product. The patent is the only effective means of protection and return on investment.

In many industries that are based on technology, it is possible to keep in secret the inventions until the moment of their appearance on the market. The inventors of such inventions often delay the submission of the patent application, in order to maximize 20 years-long patent validity.[9] On the other hand, inventions that are results of medical research are reveled earlier, usually before the product appears on the market. Namely, in the field of human pathology scientists have obligation to share the results of their researches for ethical reasons. In addition, unlike other industries, the pharmaceutical industry is strongly regulated, with the aim of ensuring the safety and efficacy of pharmaceutical products.

Pharmaceutical products has great significance for human society. Without big investments in the research and development of these products, today we wouldn't have most of the new drugs on the market. Having in mind the specific features of the pharmaceutical industries, that is the pharmaceutical products, the patent is the only efficient means that enables innovative pharmaceutical companies to return the huge funds invested in the research and development of these products. Besides, the patent that provides a monopoly position on the market, prevents other participants, or manufacturers of generic drugs to enter the market.

3. GENERIC DRUGS

In order to place and sell their products on the market the pharmaceutical industry must obtain approval from the competent state authority. In Serbia in accordance with The Law on Medicinal Products and Medical Devices, the Medicine and Medical Devices Agency is in charged for, among other things, to issue marketing authorizations for medicines. After obtaining a marketing authorization, a pharmaceutical company as patent owner has exclusive right to sell its product under protected name for the duration of patent protection. The researches have shown that placing a new drug on the market costs the pharmaceutical company approximately 802 million dollars during the 10 to 15

[9] B. Lehman, op. cit. 7.

years long period.[10] The only means that allows pharmaceutical companies to return, i.e. to compensate funds spent during the research and development of new drugs, and to make a profit, is a patent. . However, the FDA website contains information that 9 out of 10 prescriptions that are filled out in the United States refer to generic drugs.[11] This information rise the question, why are generic drugs used in such a high percentage. In order to answer this question, it is necessary to explain the nature of generic drugs, their development and the process of appearance on the market

The generic drug compared to original patented drug have the same characteristics regarding dosage, quality, purpose, effects, strength and stability. In addition, the generic drugs have the same form as the original drug (e.g. pill or injection), route of administration (oral or topical). For example, metformin is the generic version of the Glucophage drug, which is used for diabetes type 2 treatment. Both drugs can be obtained with a prescription in the same dosage, prescribed in the same quantities, and have the same instructions for use. One more important characteristic of generic drugs is that they contain the same active ingredients as the original drugs, which means that they have the same risks and benefits compared to the patented drugs. Before generic drugs appears on the market, rigorous controls and tests are carried out by the competent agencies for medicines that issue a license for placing a generic medicine on the market. The purpose of such control is to check safety, efficiency and quality, before issuing a marketing authorization for a generic drug. In addition, in some states, like in the USA, competent authorities conducts control of production facilities, in order to ensure compliance of the business of generic drug manufacturers with regulations on good manufacturing practice

Between original and generic drugs other are a lot of similarities, but no absolute identity. According to pharmaceutical regulations and the rules of good pharmaceutical practice, generic drugs must differ from the original ones in terms of color and appearance. Besides these small differences, generic drugs are highly wanted on the market due to their far lower price. The lower price of generic drugs (even by about 85% compared to the price of the original drug) is a consequence of the fact that, unlike the manufacturers of original drugs, the manufacturers of generic drugs do not have the costs necessary for research and

[10] J.A. DiMasi, R.W. Hansen, H.G. Grabowski, „The price of innovation: new estimates of drug development costs“, *Journal of Health Economics*, 22/2003, 182; https://fds.duke.edu/db?attachment-25--1301-view-168, March 10, 2021.

[11] https://www.fda.gov/drugs/generic-drugs/generic-drug-facts https://www.fda.gov/drugs/buying-using-medicine-safely/generic-drugs, March 13, 2021.

development of new drugs. In other words, manufacturing generic drugs is carried on based on the data obtained by manufacturers of patented drugs. These data are available immediately after publishing the patent application, i.e. the patent files. The absence of long, expensive and complex researches, affects the simpler procedure for obtaining a marketing authorization of generic drugs on the market. Generic drugs are in large scale equivalent to suitable original drugs, so before their marketing authorization, an abbreviated version of an application is submitted. However, a marketing authorization of generic drug can not be issued before the period of patent protection of the original drug expire, including possibly approved the supplementary protection certificate.

The increased availability of generic drugs enables the competitive market. This competition, on the other hand, ensures that treatment, i.e. approach to health care, be available to a large number of patients. Medical professionals and consumers can be certain in the quality and effect of generic drugs. Besides, that the marketing authorization of generic drug is issued based on shorten version of the application, competent authority conducts strict control of these drug. The objective of this control is to test the quality, firmness and purity of generic drugs, i.e. to check if these drugs have the same effect and purpose as the original one. This control includes also the facility inspection, with the aim to determine are the generic production, packaging and testing facilities meet the same quality standards as within the manufacturer of the original drug.

The pharmaceutical companies sell the original drugs under the certain trademark. The generic name is, however, the name of the active ingredient. The pharmaceutical company that has developed and protected the new drug, has the right to be only one to sell the drug under the protected trademark or generic name on the market, during the time of patent validity. Never the less, when the time of patent protection expires, a new opportunity arises for its cheaper generic version. Generic drugs that enter the market in a short period of time after the termination of patent protection of orogonal drugs, cause huge losses to pharmaceutical companies. In the USA one research has shown that during 5 years period after the entrance on the market, known manufacturers of the original drugs had lost over 60 billion dollars.[12] The pharmaceutical companies, manufacturers of the original drugs, in order to cut losses after the patent protection expires, turn to different business strategies. One of them is the conclusion of the so-called “pay for delay” agreements.

[12] J. DeRuiter, P. L. Holston, „Drug Patent Expirations and the “Patent Cliff“, *U.S. Pharm*. 2012;37(6), 12-20, March 15, 2021.

4. PAY FOR DELAY AGREEMENTS[13]

Patent agreements in the pharmaceutical industry are one of the most questionable issues in competition law.[14] There are the pharmaceutical companies that are very active in researching new compounds. These companies often produce a limited number of drugs protected by patent, or production is based on the license. On the other hand, manufacturers of generic drugs produce a wide range of drugs not protected by patent. These manufacturers do not invests or symbolically invests in the research and development of drugs. Generic drugs contain the same active ingredient as the original drug, but can differ from it in some characteristics, like the manufacturing process, excipients, packaging, color, taste.

In order to avoid profit loss after the patent protection expires, some pharmaceutical companies turn to different business strategies. One of them is concluding so called "pay- for-delay" contract. It's an agreement on which grounds the manufacturer of generic drugs is obligated that in a certain time period won't place on the market his drugs. On the other hand, the manufacturer of the original drugs is obligated to pay a certain amount of money to the manufacturer of the generic drug as compensation. "Pay-for-delay" agreements provide benefits for both contracting parties. Thanks to this agreement, the manufacturer of generic drugs prolongs monopoly position on the market and in that way makes an additional profit. Also, the manufacturer of generic drugs makes a safe and significant profit, without previous entering the market.

After an extensive investigation of competition in the pharmaceutical sector in 2008, the European Commission is more focused to "pay-for-delay" agreements. The Commission has issued a number of formal Statements of Objection, for example, against the pharmaceutical companies Servier and Lundbeck, on the two disputed cases regarding citalopram (antidepressant) and perindopril (cardiovascular medicine). In the Servier case the Commission has fined the French pharmaceutical company and five more manufacturers of generic drugs. The motive for fining was series of agreements that Servier concluded with its competitors, manufacturers of generic drugs, with the aim to obtain a monopoly

[13] In the literature, these agreements are translated as "settlements agreement". These are the agreements that deal with delaying the entrance of generic drugs on the market.

[14] S. Frank, W. Kerber, „Patent settlements in the pharmaceutical industry: What can we learn from economic analysis?“, 2, https://www.researchgate.net/publication/292539733_Patent_Settlements_in_the_Pharmaceutical_Industry_What_Can_We_Learn_From_Economic_Analysis, March 16, 2021.

position for perindopril, the bestselling blood pressure drug of this pharmaceutical company.[15]

In the Lundbeck case, the Commission has also fined the Danish pharmaceutical company, Lundbeck, on four agreements that this company has concluded with its competitors. The agreements provided postponement of entry on the market of generic drug citalopram, with the aim to significantly increase the profit of the Danish pharmaceutical company. The manufacturers of the generic drugs, in return, have received significant sums of money as compensation.

In the Commission report from 2012, it has been pointed out, that in the meantime total number of concluded pay-for-delay agreements in the pharmaceutical sector is considerably increased. The Commission has analyzed these agreements from the aspect of competition law. In other words, if the goal or effect of these agreements is to obstruct the entry of generic drugs into the market, it could potentially violate the EU rules on competition, especially Art. 101 TFEU.[16]

After the report from 2012, the Commission continued to regularly to monitor potentially problematic "pay-for-delay" agreements. In this respect, the Commission started investigation against the American pharmaceutical company Johnson&Johnosn and the Swiss company Novartis to assess whether the agreement between Johnson&Johnson and Sandoz, Novartis generic branch, may have aimed or effected the entry at the Dutch market of generic version of fentanyl, powerful painkiller. The result of the investigation were high fines against both companies.

It is interesting that the cases Lundbeck and Servier reached the General Court of the EU. After the imposition of fine by the Commission, the Lundbeck company filled the lawsuit with the General Court of the EU against the European Commission.[17] The claim was denied.[18] The "Servier" company has

[15] Commission decision of 9.7.2014., Perindopril (Servier); https://ec.europa.eu/competition/antitrust/cases/dec_docs/39612/39612_12448_6.pdf

[16] European Commission, Antitrust: Commission enforcement action in pharmaceutical sector following sector inquiry, Brussels; https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_593, March 20, 2021.

[17] More on this case in: C. Seitz, „Pay for delay Verträge in der pharmazeutische Industrie“, *Europäische Zeitschrift für Wirtschaft Recht (EuZW)*22/2016, 856-859.

[18] Case T-472/13 – Lundbeck v Commission https://curia.europa.eu/juris/document/document.jsf?text=&docid=183148&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=436778, March 20, 2021.

also filled the lawsuit with the General Court of the EU against the European Commission. Unlike the Lundbeck case, in the Servier case the Court has partially upheld the claim.[19] That is, the Court didn't agree with the Commission's findings that the agreement concluded with the Krka represents the restriction of competition, either in terms of aim or effect, and the decision of the Commission is annulled in that part. Besides that, the Court hadn't support the European Commission finding on abuse of dominant position by the company Servier within the meaning of Art. 102 TFEU[20] and determined that the Commission didn't determine accurately that the relevant product market was limited to Servie's drug perindopril. Based on that, the Commission concluded that Servier has a dominant position on the relevant market. However, the Court reversed that part of the Commission's decision and annulled the appropriate fine. The decision in the Servier case emphasizes the importance and difficulties of defining the relevant market in pharmaceutical cases, making it clear that such a market definition must be based on a thorough analysis that takes into account the overall regulatory, therapeutic and economic context.

Therefore, "pay- for-delay" agreements open numerous questions:

Do these kinds of agreements represent a violation of competition regulation?

Does the payment of monetary compensation by the owner of a pharmaceutical patent to a manufacturer of generic drugs by itself raise suspicions of anti-competitive behavior?

Is the agreement of this kind justified on the meaning of the Art. 101 (3) TFEU?

The Court of Justice of the European Union has the opportunity to answer to these questions on the current case C-307/18.[21] More on this case will be discussed later in the paper. More on this case will be discussed further in the paper.

[19] Case T-691/14 – Servier and others v Commission https://curia.europa.eu/juris/document/document.jsf?text=&docid=208862&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=2195832, March 20, 2021.

[20] Treaty on the Functioning of the European Union (TFEU), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

[21] Case C-307/18 – Generics (UK) and Others; https://curia.europa.eu/juris/document/document.jsf;jsessionid=E1E12EA9D588C7CEFA7E26A28E0ABBFC?text=&docid=222887&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2378854, March 21, 2021.

5. CURRENT PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Beginning January 2020, the Court of Justice of the European Union (CJEU) has for the first time explained the criteria regulating the question of whether the agreements concluded between manufacturers of the original drugs and the manufacturers of the generic drugs violate EU competition rules. The occasion for decision-making was the dispute between the pharmaceutical company GlaxoSmithKline (GSK) and the British Competition and Markets Authority. The British pharmaceutical company GSK is the patent holder for paroxetine, an antidepressant available only with doctor's prescription, as well as several secondary patents that protect the production process of paroxetine. This company sold the drug under the name "Seroxat". In1999, main GSK's patent for this drug expired. The company was faced with the possibility that the manufacturers of the generic drugs, based on an abbreviated application, would request permission to place their own version of this medicine on the market. That is exactly what happened during 2000, when three pharmaceutical companies, Ivax, GUK and Alpharma, submitted application for marketing authorization of the generic version of the paroxetine in the different EU countries. As these companies in the meantime obtained permission, GSK concluded series of agreements with them, based on secondary patents valid until 2016.

The agreement with Ivax, which lasted for three years, predicted that Ivax had the exclusionary right of distribution of the maximum amount of approved generic drugs in the UK, in exchange for an annual fee.

The second and third agreement with GUK and Alpharm are in fact two different settlement agreement. According to these agreements, GSK, among other things, has pledged to purchase the entire stock of the generic drugs intended for the UK and to pay, annually, or monthly marketing fee. In exchange, GUK and Alpharma had obliged to sign the agreement on sub-distribution of the paroxetine with Ivax under the indexed price and obliged not to produce and distribute, none of the generic drugs in the UK while the supply agreement between Ivax and GUK is valid. Thus, the agreements concluded by GSK with the three generic drug manufacturers implied the obligation of those three manufacturers not to enter the market while GSK's patents were in force. Besides that, they obliged to stop disputing GSK's patents, in exchange for a significant amount of money.

Considering that by concluding three agreements with the generic drug manufacturers, GSK abused its dominant position on the paroxetine market, the British Competition and Markets Authority has fined the companies that signed mentioned agreements. The dispute eventually reached the CJEU.

Basically, the CJEU has debated are the manufacturers of generic drugs potential competitors to GSK, then, when the agreements 'by object' is anti-competitive and does the GSK's strategy of concluding the different agreements with the aim to postpone the entry of generic drugs on the market represents an abuse of dominant position.

5.1. Potential competition

As for the question regarding the potential competition, the Court pointed out that the agreement between the companies is subject to prohibition within the meaning of Art. 101, paragraph 1 TFEU only if it has a negative effect on the competition on the internal market. The presumption for that is that those companies are at least in potential competitive relation. In the specific case, the potential competition assumes existence, first of all, the real and concrete possibility for the manufacturer of generic drugs to enter the market and compete with companies on that market. Examining this fact must be done concerning the market structure and economic and legal context in which the competitors operate. In the disputed case the patent for paroxetine has expired. Thus, the manufacturer of generic paroxetine could be regarded as a potential competitor to GSK, under the condition that in the time of concluding the agreement took enough preparatory measures to enter the specific market, in the time period during which he could put pressure on the competition. Besides that, there shouldn't be an insurmountable barrier to enter the market. Regarding that, the Court has noted the following: a) the patent does not represent a barrier to market entry, because its validity can be challenged; b) the patent proceedings that protects the manufacturing process of the active ingredient, and which is in public domain, cannot be considered as insurmountable barrier for market entry c) concluding agreements between a number of companies operating at the same level in the production chain, some of which are not present on market concerned, constitutes a strong indication that there were competitive connection between those companies and d) the intention expressed by the original medicine manufacturer to pay a larger sum of money to generic medicine manufacturer in exchange for postponement of market entry of those medicine, and which was implemented by agreement, represents further such indication. In addition, the

very existence of a patent dispute is evidence of a potentially competitive relation between the manufacturer of original medicine and the manufacturer of generic medicine.

5.2. Agreements that are anti-competitive by its object

In the dispute analyzed above, the Court also dealt with the question of qualification of the agreements that are anti-competitive by its object. According to the Court, such qualification cannot be based upon unsubstantiated allegations, but it requires content analyzes of the agreement provisions, its goals, nature of the goods and services that are the object of the agreement, as well as realistic functioning conditions and structure of the market concerned. Starting from the fact that the pharmaceutical sector, among other things, is characterized by strong obstacles for market entry of generic drugs, as well as the controlled prices that affect them, the Court considered that the agreements on delaying market entry of generic drugs are especially sensitive regarding competition regulations. Because of that, the concept of restriction by object must be strictly interpreted. In other words, this restriction may include only those acts that are by their nature harmful to competition. In the context of the case analyzed above, the Court has concluded that the agreement concluded on patent infringement dispute cannot be automatically considered as restrictions by object. This also applies in the situation when this agreement provides for the payment of a certain amount of money by the manufacturers of original medicines to their competitors, the manufacturers of generic medicines. Such payment is justified when the transferred sum is equivalent to the cost of litigation or the value of goods or services that a generic drug manufacturer delivers to its competitor.

However, if it is clear from the agreement analysis, that mentioned money transfer cannot have any explanation besides the representation of the commercial interest of the involving parties, in order not to participate in the competition, this kind of agreement restricts competition 'by object'. Following this principle that mentioned restriction must be interpreted very closely, the Court actually reduced this restriction only to cases when the other explanation for concluding the agreement can’t be found.

5.3. Abuse of dominant position

In the end, the CJEU had to decide whether the strategy consisting of series of patent settlements, including some agreements that not have been

identified as a violation of Art. 101 TFEU (in the specific agreement between GSK and Ivax), could represent the abuse of the dominant position. The Court gave a positive answer to this question, provided that the complete strategy was able to restrict competition and produce exclusionary effects that went beyond the specific anti-competitive effects of individual agreements. The Court relied mainly on the opinion of the British Competition Appeal Tribunal (CAT) on the existence of a strategy that had, if not aimed at, at least the effect of delaying the entry of generic medicines into the market. According to the CAT, the effect of strategy as a whole could exceed the effects of individual agreements. It was that opinion that served to the CJEU to justify that the concept of abuse of dominant position may include agreements which, although they did not violate the Art. 101 TFEU, contributed to the cumulative anticompetitive effects of other agreements.

6. CONCLUSION

There is a conflict of interest between manufacturers of patented drugs and manufacturers of generic drugs. The manufacturer of the patented drug wants to hold a monopoly position on the market as long as possible, in order to recover the investments in research and development. On the other hand, the manufacturer of generic drugs must wait for quite a long time in order to put its product on the market. The manufacturer of original drugs is aware that the lower price of generic drugs can contribute significantly to profit decreasing after the patent protection expire when the market of a certain drug is taken by its generic copy. This situation is especially problematic for the manufacturers of original drugs, the ones that didn’t succeed in reclaiming invested funds in the drug's research and development during the patent protection.

In order to avoid loss or decrease in profit after the patent protection is over, the manufacturers of original drugs resort to different business strategies. A common strategy is to conclude the so-called 'pay-for-delay' agreement with generic drug manufacturers. Such agreements in most cases represent the violation of effective market competition. The pharmaceutical companies are aware that competition authorities strictly monitor these agreements. Because of that the pharmaceutical companies carefully and cautiously come to concluding such agreements. Nevertheless, the decisions of competition authorities are often too harsh.

The analysis of current cases has shown that there is no clear regulatory framework, as well as no clear and rightful determination of competition

violation in every specific case. Having that in mind, as well as the uncertainty of investment in research and development of the new drug because of the limited patent protection, there is a risk that pharmaceutical companies will be discouraged in the future to invest in the research and development of the new drug.

The analyzed foreign decisions show that the practice of the European institutions is not completely uniform regarding the determination of relevant market for pharmaceutical products. The precise definition of the relevant market is crucial for determining the existence of dominant position, or its abuse, and therefore the violation of effective market competition.

Anyway, the competition authorities during the evaluation of an agreement on delaying entrance to the market of generic drugs must take into account the need of establishing a reasonable balance between the aspects of patent law and the competition law, in order to evaluate, from case to case, is such agreement problematic or permitted according to competition law.

The verdict in the case C-307/18 is significant in the part where it speaks about wide principles regarding assessments of whether the agreement restricts competition 'by object'. In the meaning that the Court of Justice of the EU relies on the cases Cartes Bancaires (C-67/13 P) and Maxima Latvija (C-345/14), and concluded that restrictions 'by object' must be interpreted restrictively and limit to the situations in which experience or context indicates that an agreement will be harmful to competition.

REFERENCES

DeRuiter J., P. L. Holston, „Drug Patent Expirations and the “Patent Cliff”, *U.S. Pharm*. 2012;37(6), 12-20.

DiMasi J.A., R.W. Hansen, H.G. Grabowski, „The price of innovation: new estimates of drug development costs“, *Journal of Health Economics*, 22/2003, 151-185.

Frank S., W. Kerber, „Patent settlements in the pharmaceutical industry: What can we learn from economic analysis?“;

https://www.researchgate.net/publication/292539733_Patent_Settlements_in_the_Pharmaceutical_Industry_What_Can_We_Learn_From_Economic_Analysis.

Lehman B., The Pharmaceutical Industry and the Patent System; https://users.wfu.edu/mcfallta/DIR0/pharma_patents.pdf.

Marković S.M., *Patentno pravo*, Nomos, Beograd, 1997.

Marković M.S., *Pravo intelektualne svojine*, Službeni glasnik, Beograd, 2000.

Marković S.M., *Pravo intelektualne svojine i informaciono društvo*, Službeni glasnik, 2018.

Roth Z., „The Monopoly Factory: Want to fix the economy? Start by fixing the Patent Office“, *The Washington Monthly*, 2005, https://washingtonmonthly.com/2005/06/01/the-monopoly-factory/.

Seitz C., „Pay for delay Verträge in der pharmazeutische Industrie“, *Europäische Zeitschrift für Wirtschaft Recht (EuZW)Nr. 22*, München, 2016.

Case C-307/18 – Generics (UK) and Others;

https://curia.europa.eu/juris/document/document.jsf;jsessionid=E1E12EA9D588C7CEFA7E26A28E0ABBFC?text=&docid=222887&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2378854.

Case T-472/13 – Lundbeck v Commission

https://curia.europa.eu/juris/document/document.jsf?text=&docid=183148&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=436778.

Case T-691/14 – Servier and others v Commission

https://curia.europa.eu/juris/document/document.jsf?text=&docid=208862&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=2195832

Treaty on the Functioning of the European Union (TFEU),

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

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PATENTNI SPORAZUMI U FARMACEUTSKOJ INDUSTRIJI

Rezime

U farmaceutskoj industriji, kompanije koje istražuju i razvijaju nove lekove obično dobijaju čitav niz patenata. Za vreme važenja patenata farmaceutske kompanije imaju monopolski položaj na tržištu. Ovaj monopolski položaj je opravdan, budući da je patent efikasno sredstvo koje stoji na raspolaganju farmaceutskim kompanijama da vrate sredstva uložena u istraživanje i razvoj novih lekova.

Imajući u vidu da patent u najvećem broju zemalja traje 20 godina, kao i mogućnost da se zaštita produži za još pet godina na osnovu sertifikata o dodatnoj zaštiti, proizvođači generičkih lekova često osporavaju valjanost ovih patenata ili stavljaju u promet svoje lekove, primoravajući vlasnike patenata da pokrenu sudski postupak radi zaštite svojih prava i sprečavanja ulaska generičkih lekova na tržište. U toku sudskog procesa, proizvođači originalnih i generičkih lekova često se odluče da sklope sporazum. Iako se uslovi sporazuma razlikuju od slučaja do slučaja, određeni broj sporazuma uključuje plaćanje nosioca patenta proizvođaču generičkog proizvoda, koji se obavezuje da određeni vremenski period neće plasirati svoje proizvode na tržište. U tom kontekstu, u radu je analizirana usklađenost takvih sporazuma sa aspekta prava konkurencije, uz oslanjanje na aktuelne slučajeve iz strane sudske prakse.

Ključne reči: patent; farmaceutski proizvodi; generički lekovi; investicije; tržište.

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„FALSE“ MANDATORY MEDICAL TREATMENTS

Summary

Principle of authonomy of the will has not been consistently enforced in any branch of law because this cannot be done without simultaneous threat to legal certainty, the private interests of others or the collective interests. Legal subject, actually his autonomy, through a whole series of general and relative limitations, is put in the foreground of the common good and the collective or private interests that are more prevalent at the given moment.

Medical Law, novel part of a letter-day legal system, is no exception in this sense. Namly, legal institute of informed consent is a primary medium for excrecising authonomy of the will in Medical Law and it is still the basic rule. However, the exceptions to that rule exists.

In the following lines we will classify the situational deviations from the principle of autonomy of the will expressed through informed consent. For this purpose, we will divide all exceptions into two groups. The first group consists of interventions that we have marked as „real“ interventions undertaken by the force of law, and the second consists of those interventions which are marked as „false“ mandatory interventions. Second group is in our focus in this paper.

Key words: informed consent, consent of the injured party, civil liability, unlawfulness, mandatory medical treatments.

1. INFORMED CONSENT – TERM AND THE SCOPE

The conception of informed patient consent is in advance projected ethical minimum that has to be achieved during medical intervention. Even though the idea is not entirely new, it didn’t gain full momentum until the second half of the 20th century. Although the socio-economic roots of this change are

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far more complex, it is in principle the result of a fundamental change in regard to, firstly in the relation researcher – subject of research, and then in the relation medical representative– patient[1].

What did the mentioned change and introduction of the requirement for the informed consent essentially bring? In order to reach the answer to this question, it is necessary to first know that the consent of an informed patient, strictly legally speaking, is a manifestation of another legal institute with a significantly broader effect. It is a legal institute of the injured party's consent. The logic of presenting views, therefore, is very simple – if we want to understand exactly how does a manifestation of one legal institute works, it is necessary to take a step further in the direction of proper understanding of the legal institute from which it derives.

The consent of the injured party works on a relatively simple principle. Actually, if the person who suffered the damage agreed in advance[2] to the harmful consequences of another person's actions, he has no grounds to demand compensation from the person responsible[3]. In order to avoid any doubts, this does not mean that the injured party cannot pursue a lawsuit. A person that has beforehand consented to the damage may file a lawsuit and seek compensation for damages. In that sense, there are no obstacles, since no one can prevent any subject, if he believes that some of his rights have been violated, disputed or endangered, from seeking protection. The subject can go to court even when his

[1] V. Jeremić, „Informirani pristanak: komunikacija između liječnika i bolesnika“, *JAHR*, 4 (1), 2013, 525.

[2] When we say "in advance", this term should be interpreted in a broader context. From the standpoint of the legal system which puts tremendous effort to provide high level of legal certainty, it would be ideal situation if one who consents to damage provides its consent prior to harmful action. However, although legislator remains silent, it is considered that person consented in advance if consent was given during harmful action, but before damage is caused. Once damage is caused, any consent to a damage would be considered as "remission of debt".
Compare: Zakon o obligacionim odnosima, "Sl. list SFRJ", br. 29/78, 39/85, 45/89 - odluka USJ i 57/89, "Sl. list SRJ", br. 31/93, "Sl. list SCG", br. 1/2003 - Ustavna povelja i "Sl. glasnik RS" (later in text: ZOO RS), br. 18/2020, art. 163, sec. 1 and 2 and art. 344. Also: N. Đurđević, „Pristanak oštećenog kao osnov isključenja protivpravnosti štetne radnje“, *Pravni zbornik*, br. 2-3, 1995, 135.

[3] Principle of individual liability in Law of Torts, unlike Criminal Law, is not inviolable. There is significant number of different and especially important cases of liability for another, and from perspective of this paper the most important one is liability of employee for damage that employers cause to third party. That is why we use term "person responsible", because person who caused damage and person who is liable are not necessarily the same person.

belief is completely and/or obviously wrong, and even when he knows or must know that it is wrong.

Therefore, if the injured party decides on such a step and sues the person responsible despite previously given consent, it is considered that with his contradictory behavior he has abused the right to sue, that is, the right to demand compensation for the damages. It is clear that this form of abuse should be opposed. However, the trouble is that the state, that is the court as the body before which the procedure is conducted, cannot know what is happening in every specific relation and on which statements of intention it is possibly based. Therefore, in order for the other party to successfully oppose to these types of abuse of rights, the legal order leaves it with one effective mean by which it will be pointed out to the court to the committed abuse and invite him not to satisfy the claim for damages that the other party points out.

More precisely, the defendant party at the very moment of giving consent acquires abstract possibility to defend in the current civil proceedings in the substantive field by pointing out one special objection – consent of the injured party. This is, of course, under the condition that that abstract possibility is concretized by the actual causing of the damage. The defendant's side will, if the existence of the prior evidence is provided, definitely reject the claim with an objection.

The conditions whose fulfillment is required in order for the consent of the injured party to produce the projected effect through the legal norm are: adequate intellectual, cognitive and willing capacity of the injured party, his statement which clearly defines the absence of the desire to further protect his legally protected good, as well as a valid temporal link between consent and the fact of causing damage.

Thus, this institute represents a functional symbiosis of two principles. Firstly, the principles of autonomy of will[4] which enables the holder of a legally protected good to dispose of his good, among other things, by also not insisting on his legal protection. Likewise, part of this symbiosis is the principle of prohibition of abuse of subjective rights. It does not allow the contradictory behavior of individuals, in this case of the injured party to introduce uncertainty into legal life by invoking the tortfeasor for liability, even though according to the original statement of the injured party this should not be the case. Identical symbiosis, but narrowly specialized, is represented by the informed consent.

[4] M. D. Ginsberg, "Beyond Canterbury: Can Medicine and Law Agree about Informed Consent? And Does It Matter?", *Journal of Law, Medicine & Ethics*, 45 (1), 2017, 106.

Namely, informed consent is a form of concretization, directly of the legal institute of the consent of the injured party, and through it, therefore indirectly, of the mentioned principles of autonomy of will and prohibition of abuse of subjective rights whose symbiosis it represents[5]. The concretization, i.e., specialization of the legal institute that indicates the direction of the institution. In this case, the fact that this legal institute covers a very limited number of special cases in which the damage occurs, in contract to the institute of consent of the injured party, from which it derives by concretization[6]. More precisely, the informed consent application domain is narrowed by only those damages that occurred during medical intervention. If we observe exclusively from normative aspect, it further follows that legal institute of informed consent refers to institute of injured party's consent, as *lex specialis* to *lex generalis*.

It is considered that through the legal institute of informed consent, the idea expressed in the maxim *voluntas aegroti suprema lex* is fully realized. More precisely, that means a deviation imposed by law from the classic text of the Hippocratic Oath. The deviation goes in the direction of putting the patient's autonomy in the foreground. From this, by further concretization of the mentioned principle, specific authorizations are moving from the fact that the patient solely decides, according to his intentions, whether to seek help and from whom, and whether to agree to any of the offered treatments, or if he will leave the treatment and at what time[7].

However, the centuries old principle is respected in parallel in the implementation of medical interventions that is expressed through the maxim

[5] Informed consent as a principle, we might say, was created by combining two requirements in legal system. The first has historical dimension and refers to obligation of medical personnel to obtain consent before intervention. Second request, somewhat more recent, complements the first one and refers to obligation of medical personnel to provide patient with relevant information's of certain quality, to compensate patients lack of expertise.
J. Berg *et al, Informed consent: Legal theory and clinical practice*, Oxford University Press, New York, 2. Ed, 2001, 41.
Observation on quality and quantity of information's that should be provided to patient in more detail at: S. Radulović, *Činjenice odlučujuće za isključenje protivpravnosti pri medicinskoj intervenciji i njihov međusobni odnos*, Doktorska disertacija, Kosovska Mitrovica, 2015, 221-233.

[6] Consent of informed patient, if we put on a side non-legal dimension of this institute, connects two separate legal arias – Constitutional Law and Law of Obligations i.e.Tort Law (тако: R. R. Faden, T. L. Beauchamp, N. M. P. King, *A History and Theory of Informed Consent*, Oxford University Press, New York, 1986, 23).

[7] О томе: I. Sorta-Bilajac, "Informirani pristanak – konceptualni, empirijski i normativni problemi", *Medicina fluminensis*, 47 (1), 2011, 38-39.

primum non nocere, since the patient's consent to a certain treatment, or even his insistence on the implementation, does not oblige the medical representative to undertake the intervention. This is especially true if deems that, according to his best conviction, that implementation of that intervention would not be medically indicated, particularly if he considers it would be contraindicated.

Nevertheless, it can be obvious what informed consent is, we completely agree with that, only to those who have just started studying this concept in all its ambiguity[8]. We have already talked about this in part, in the introductory considerations, informed consent is not "only" a legal institution. More precisely, it would not be correct to characterize it as purely legal phenomenon. Particularly, it would not be correct to characterize it as a legal institute that promotes the absolute supremacy of the patient's will in regard to the other party that participates in the legal case in question. Informed consent has a far greater reach, and therefore we believe that, proved that we aspire to accuracy and completeness of the presentation, it is better to speak about it as a kind of value[9].

In that sense, we fully agree with the definition of informed consent in which it is defined as a medical-ethical area that is a link between fundamental ethical knowledge and clinical practice. It is a link on which the attitude towards the patient is tested, whereby, in this process, the analysis comes to the fore, then the evaluation of medical knowledge and ethical potential in issues related to the patient's personality, freedom of opinion and freedom to decide, his rights and protection of those, during medical intervention or research, but also issues regarding participation of relatives, representatives, and general communication in the relationship between the medical representative, medical institution, patient, and possibly his representative[10].

It further follows that, although in a strictly legal sense that is, informed consent essentially is not a unilateral declaration of intent. Namely, informed consent is not, as it is often understood, just a signature on a form that is presented to the patient immediately before the implementation of intervention[11]. It is, at least it should be, although it is not in accordance with its legal nature[12], a *joint*

[8] Berg J., *op. cit*, 3.

[9] It is possible to study informed consent, not just like legal institute, but even like a doctrine.
V. Jeremić, *op. cit*, 525-526.

[10] N. Gosić, *Bioetika in vivo*, Pergamena, Zagreb, 2005, 135 and on.

[11] On legal and essential differences between formal consent in a form of a signature and consent as a process of communication in detail at: K. I. Reid, "Informed Consent in Dentistry", *Journal of Law, Medicine & Ethics*. 45 (1), 2017, 78-81.

[12] M. D. Ginsberg, *op. cit*, 109.

decision [emphasized by S.R.] on the (non)implementation of the medical intervention that was formed as a result of continuous[13] communication between two equal, competent and autonomous subjects – medical representative and the patient[14]. It represents the culmination of the creative process in which the patient's competences for making a decision on (non)consent are upgraded through a valid corpus of relevant information obtained from a designated medical representative, and its autonomy is achieved through the subordination of expertise of the medical representative[15]. It is precisely in this creative moment that we see, from our standpoint, the best illustrated reasons regarding why informed consent is a value. In our opinion, it represents the overall harmonization of a whole series of scientific, ethical and personal demands identified in a complex relationship in which, firstly, the medical representative and the patient participate, but not only them, also the medical institution, as well as the state.

2. MEDICAL INTERVENTIONS WHOSE PERMISSIBILITY DOES NOT DEPEND ON THE PATIENT'S PRIOR CONSENT

Although it can be rightly said that the autonomy of will is a basic principle, not only of the law of obligations, but also of the entire legal order, it is not unlimited. On the contrary, respect for the autonomy of will is not unlimited. It cannot be without simultaneous threat to legal certainty, the private interests of others and the collective interests. That respect ends where personal initiative conflicts with principles and interests that are still considered more important in relation to it. Specifically, the autonomy of will, favors private interests, but the legal order, especially that part of the order, which is marked as a civil law, intends to promote and protect those interests, for the purpose of their later unhindered realization. However, not at all costs. When the private interests, maybe not oppose, but certainly do not coincide with the interests of the wider social community in which the individual aspires to realize his interests or with

[13] In context of continuous communication our undivided attention grabbed the term "preventive ethics". In detail at: K. I. Reid, *op. cit*, 81-82.
[14] V. Jeremić, *op. cit*, 526. Similar: J. Berg, *op. cit*, 3.
[15] The term „consent“ comes from Latin language. Latin term *consentire* from which term "consent" derives literally means "feeling together" or "mutual feeling" (*con* – together, *sentire* – feelling).
Тако: S. M. Wolf, E. Clayton, F. Lawrenz, "The Past, Present, and Future of Informed Consent in Research and Translational Medicine", *Journal of Law, Medicine & Ethics*, 46 (1), 2018, 7-8.

the private interests of individual subjects that have priority, law must play its basic role – the role of the main mechanism of socialization. That will leave aside the interests of the individual and his autonomy, through a whole series of general and relative limitations, and put in the foreground the common good and the collective or private interests that are more prevalent at the given moment.

Let's transfer that knowledge to the subject matter. The principle of autonomy of will as a means of realizing the interests of individuals, as well as its general or specific limitations, are most often related to that part of the law of obligations which, perhaps somewhat simplified, is called contract law. Under contract law, autonomy of will, with a dose of simplification comes down to freedom of contract. Freedom of contract is not unlimited. It is limited, firstly through a general formulation in which public order, mandatory regulations and good customs are placed in front of it, and then through the whole series of so-called special limitations arising from the specificity of particular situations. Although the association in this area is the clearest and even though autonomy of will in contract law is a very interesting phenomenon, from the point of view of medical law we are more interested in autonomy of will and its place among the principles of regulation of other sources of obligation relations. Specifically, we are thinking about causing damage.

Positive law, namely, allows a person to exercise his autonomy, among other things, also by not protecting his legal goods when they are threatened, disputed or violated. If it so wishes, the person may, through prior consent for causing damage, to his own goods, material or immaterial, firstly expose to potential damage, and then, when the damage actually occurs give up on the claim for compensation. Certainly, such treatment of someone's legal goods depends, in the first instance, on the will of the person to whom those goods belong, but it also happens that the law allows intrusion into other people's legal goods and causing damage also without prior consultation with that person. This usually happens when it is necessary for the protection of, primarily general, but also of some private interests. Such cases, however, represent only occasional exceptions to the dominant principle of autonomy of will expressed through the consent of the injured party, which for some reasons of legal certainty, have to be explicitly enumerated according to the system *numerus clausus*.

What is valid for the general principle, is absolutely valid for all its emanations. Informed consent is therefore no exception in this regard. Namely, when due to the state of emergency in which the patient finds himself or some other circumstances which the legislator recognizes primacy cannot be given to autonomy of will, we encounter what we consider situational deviations from the

universality of the legal institute of informed consent. Therefore, informed consent is still the rule, nothing has change in that regard, especially since the famous case Schloendorff v. Society of New York Hospital in which it was set as a principle. However, the exceptions to that rule exist, and they are no less interesting than the rule itself[16]. Whether they confirm it or question it, can be discussed, but we will not deal with that in this paper.

Instead, in the following lines, we will classify the previously mentioned situational deviations from the principle of autonomy of will in this field. To this end, we will divide all exceptions into two groups. The first group consists of interventions that we have marked for the purposes of this paper as real interventions undertaken by the force of law, and the second those interventions which are, although they are not the antipodes of the first one, in the true sense of the word, undertaken by the force of law as false interventions.

2.1. Real and false interventions which are undertaken by force of law — classification criterion

The previously obtained consent of the patient, provided that he has relevant information regarding his condition and the proposed medical intervention represents, it is not disputed, the basis for the permissibility of implementation of intervention. However, our positive law knows a whole range of situations in which medical intervention is carried out without the request for previously obtained patient consent. Medical interventions in those situations are allowed even without the realization of this legal fact, which, as we have mentioned, aims to justify the implementation of intervention. Justification in the form of patient's consent in those situations, in fact, is not necessary, because the same is found directly in the letter of the law. The letter of the law and the position of the legislator expressed through it are those who in specific and precisely determined cases authorize prescribing the medical representative, sometimes even oblige him to undertake the intervention, regardless of the possible attitude of the patient about it. More precisely, regardless of whether the

[16] We will, however, leave the idea of "implied consent" on a side for now because in situations regulated by this principle there is no risk of damage or that risk is negligible. On "implied consent" in detail at: J. Kirby, "Informed consent: what does it mean?", *Journal of medical ethics*, 9, 1983, 71; S. Kusa Kumar, P. Ambika Prasad, D. Siddhartha, "The Importance of Informed Consent in Medicine", *Scholars Journal of Applied Medical Sciences (SJAMS)*, 1(5), 2013, 458; K. Satyanarayana Rao, "Informed consent: an ethical obligation or legal compulsion?", *Journal of cutaneous and aesthetic surgery*, 1 (1), 2008, 33.

patient agrees with the implementation of a specific medical intervention or not, the intervention will either be carried out directly without determining his will or he will be imposed with the duty to undergo the intervention under the threat of execution of a certain sanction, most often a misdemeanor.

It is clear from this statement that these cases are in fact, very different from each other. However, regardless of all the heterogeneity of this group, that does not mean that among the situations we are observing, it is not possible to notice some common moments and raise them to the level of classification criterion. That would, furthermore, allow more order to be introduced into the subject matter and facilitate the navigation in the sea of norms scattered in various legal acts, which unfortunately, is a distinct feature of medical law in the Republic of Serbia.

Therefore, the basic question is what moment can be taken as a classification criterion. There are several moments that, more or less equally compete for this position. Some of them certainly deserve to be presented in some future papers. However, it seems to us that one stands out for its significance and that is the concrete possibility of actually examining the patient's will. Namely, in both groups of cases of medical interventions that are undertaken without insisting on the patient's consent, the question of the patient's possible consent or dissent to the intervention, is not raised. However, in the group of interventions that we have marked as real interventions that are undertaken by the force of law, the will can be determined, but such determination is not approached, because the will does is not treated as a fact that is legally relevant. In the second group of cases, in the case of so-called false interventions undertaken by the force of law, the patient's will cannot be determined, at least not without unnecessarily endangering his life or current health condition. Therefore, the legislator does not insist on it either, but finds the justification for the implementation of the intervention precisely in the need to not compromise the life and health of the patient unnecessarily.

At this point, we should also offer an explanation of the terminology that we have chosen for the purpose of designating the classification factors. Certainly, we mean the terms "real" and "false" interventions that are undertaken by the force of law. Namely, the justification for performing both groups of interventions is found in explicit, situation-oriented norms. Since in the first group of cases the patient's attitude towards the intervention and his will to undergo it or not, if there was any need for it, could be determined, indeed, it can really be rightly said that such interventions are undertaken by force of law

because the existence of authority in a legal norm is, in essence, the only legally relevant fact on which the permissibility of the intervention depends.

On the other hand, in the second group of interventions that we marked as false, the justification for performing the intervention is in the very letter of the law, but only and purely because the patient's will cannot be determined in a specific case. If the specific situation was different, i.e., if the attending physician had the opportunity to obtain the patient's consent, the intervention would not have been allowed without the patient's affirmative statement. Thus, the specificity of the second group of medical interventions is the fact that it is a legal norm, that is, the authorization contained in it, is a secondary or better said, subsidiary condition for the permissibility of a medical intervention. Subsidiary in the sense that its fulfillment is not required, if the prior primary condition is fulfilled in the form of obtained informed consent.

2.2. Prominent cases of false medical interventions undertaken by the force of law

When it comes to false interventions that are undertaken by the force of law, the most significant case surely represents the situation in which the patient's health or even life is in imminent danger. As a rule, precisely in those situations when the urgency of the patient's condition requires a quick reaction, communication is proving to be more difficult or impossible. Also, as a rule, in these situations the patient's representative is not present, or it is not possible to reach them in a timely manner[17]. Then the question of how to proceed arises. More precisely, the question is whether to give priority to the norms of the Criminal Code of Republic of Serbia[18] and the ZOO RS, which oblige to provide assistance or literally adhere to the need for the patient's consent.

Dilemmas about that resolves the special legal act[19] which allows medical intervention, that is considered urgent in the sense that it does not suffer

[17] Possible answers on what to do in these situations in SarsCov-19 pandemic scenario in detail at: B. Arun, "Clinical Trials during the COVID-19 pandemic: Challenges of putting scientific and ethical principles in practice", *Perspectives in Clinical Research*, 11 (2), 2020, 62.

[18] Krivični Zakonik Republike Srbije, "Sl. glasnik RS", br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019 (latter in text: KZ RS), art. 127, 253, 296.

[19] Zakon o pravima pacijenata, "Sl. glasnik RS", br. 45/2013 i 25/2019 - dr. zakon, (latter in text: ZOPP RS), art. 18.

delay due to the state in which the patient is, to be performed even without the prior consent of the patient. This refers, above all, to situations where the patient is unconscious, in a coma or is unable to express his will for other reasons[20]. In other words, the urgency of the state requires the creation of a presumption that the patient would agree to an emergency intervention if he had the opportunity to express his will. Based on this assumption, intervention becomes permissible.

We have a practically identical legal setting in the situation where the intervention that the patient consented to started, but there was a need to change the procedure[21]. For example, the patient is placed under total anesthesia, and then during the procedure, it turns out that the procedure needs to be expanded or completely changed. The logic of regular cases in which medical intervention is undertaken, orders a discontinuation of the initiated intervention, the patient is taken out of anesthesia, and it is required that his consent for a new or extended procedure is obtained. However, when the degree of urgency to change or expand the procedure is extremely high, so much so that any delay would endanger the life or health of the patient, it is allowed to continue with another or extended procedure even if the patient did not consent to it. The assumption in this case is that the patient would consent to this procedure if the need was recognized earlier[22]. Therefore, the law, on the basis of this irrefutable presumption, otherwise quite well-founded in most cases, allows the implementation of an intervention to which the patient has not *de facto* consented.

3. CONCLUDING REMARKS

Undertaking medical intervention in itself is not allowed. On the contrary, it is considered impermissible. This is because almost every medical

Compare to: K.L. Zaleski, D.B.Waisel, "Withholding Information from an Anxiety-Prone Patient?", *AMA Journal of Ethics*, 17 (3), 2015, 210; J. Kirby, *op. cit*, 71;S. Kusa Kumar, P. Ambika Prasad, D. Siddhartha, *op. cit*, 456.

[20] Discussion on what is ethical background for this normative frame and what situations are included in this frame in detail at: J. Radišić, *Profesionalna odgovornost medicinskih poslenika*, Institut društvenih nauka, Beograd, 1986, 215-216.

[21] First to ask this question in domestic legal theory is professor Jakov Radišić at: J. Radišić, *op. cit*, 182.

[22] Background for the idea on presumed consent can be found in: ZOPP RS, art. 18. paragraph 4 which is based on several different theoretical research. Some of them can be found at: J. Radišić, *op. cit*, 181-182; N. Đurđević, "Pretpostavljeni pristanak pacijenta na lečenje prema nemačkom pravu", *Medicinsko parvo i medicinska etika*, Univerzitet u Beogradu i Institut za društvene nauke, Beograd, 1994, 47-48; P, Klarić, "Odogvornost za štetu zbog grešaka u medicini", *Izlaganje prema zapisniku sa tribine kluba pravnika od 12.09.2001. godine*, 2001, 6.

intervention — this does not refer only to interventions that are extremely invasive such as, let's say, surgical — it produces certain harmful consequences. As such, without a legally valid justification, it is considered an unauthorized intrusion into the legally protected goods of the patient. Moreover, the intention in the newer theory of law is to declare medical activity dangerous, and on that basis replace the subjective responsibility of a medical representative with an objective one. Although the idea of objectifying the responsibility of medical representatives for the damage caused is not particularly close to us, one thing is certain: the harmful consequences that occur during a medical intervention can be of different character, scope, and intensity. However, even when it is clear to the layman's understanding that they are a regular accompanying consequence of the intervention, the damage caused requires a call for accountability, and in the case of fulfillment of other conditions, obliges to compensation.

Thus, medical interventions are in principle considered to be an unauthorized encroachment on the legally protected goods of the patient. However, the theory of law, correctly recognizing the need of modern man to rely on medical activity in order to preserve its most important values — life and health, creates a controlled space within a complex health care system for the operation of medical professionals relaying on scientifically verified methods.

The controlled space we are talking about is very clearly demarcated so that there would be no doubts regarding rights, obligations, and responsibilities. The boundaries of this space are determined in one of two ways: by the patient's informed consent to a medical intervention or by an explicit legal norm. Beyond the limits set by the patient's informed consent or explicit legal approval to undertake the intervention, it is not possible to undertake it without considering that it is unlawful.

In other words, the most common being patient's consent, we will add in cooperation with other facts, the one that justifies the medical intervention, but sometimes it is an explicit legal norm that authorizes the medical representative to undertake the intervention regardless of the patient's will which is determined through his consent. Within the second group of cases mentioned, since our attention was focused on examining the situational universality of patient's informed consent, but also on bringing more order to this issue, we proposed a classification of interventions that are not based on patient consent to real and false. For that purpose, we used the possibility of prior examination of the patient's will as a classification criterion. On that basis, if the will can be examined beforehand, we have marked interventions as false interventions that

are undertaken by force of law. If, on the other hand, it is not possible to examine the will for any reason, we have marked such interventions that are undertaken on the basis of an explicit legal authorization as false.

REFERENCES

Arun B., "Clinical Trials during the COVID-19 pandemic: Challenges of putting scientific and ethical principles in practice", *Perspectives in Clinical Research*, 11 (2), 2020, 59-63

Berg J., Appelbaum P., Lidz, C., Parker L., *Informed consent: Legal theory and clinical practice*, Oxford University Press, New York, 2. Ed, 2001,

Ginsberg M. D., "Beyond Canterbury: Can Medicine and Law Agree about Informed Consent? And Does It Matter?", *Journal of Law, Medicine & Ethics*, 45 (1), 2017, 106-111

Gosić N., *Bioetika in vivo*, Pergamena, Zagreb, 2005

Đurđević N., "Pretpostavljeni pristanak pacijenta na lečenje prema nemačkom pravu", *Medicinsko parvo i medicinska etika*, Univerzitet u Beogradu i Institut za društvene nauke, Beograd, 1994,

Đurđević, N., „Pristanak oštećenog kao osnov isključenja protivpravnosti štetne radnje", *Pravni zbornik*, br. 2-3, 1995, 131-137

Zaleski K. L., Waisel D. B. "Withholding Information from an Anxiety-Prone Patient?", *AMA Journal of Ethics*, 17 (3), 2015, 209-214

Jeremić V., „Informirani pristanak: komunikacija između liječnika i bolesnika", *JAHR*, 4 (1), 2013, 525-533

Kirby J., "Informed consent: what does it mean?", *Journal of medical ethics*, 9, 1983, 69-75

Klarić P., "Odogvornost za štetu zbog grešaka u medicini", *Izlaganje prema zapisniku sa tribine kluba pravnika od 12.09.2001. godine*, 2001

Kusa Kumar S., Ambika Prasad P., Siddhartha D., "The Importance of Informed Consent in Medicine", *Scholars Journal of Applied Medical Sciences (SJAMS)*, 1(5), 2013, 455-463

Radišić J., *Profesionalna odgovornost medicinskih poslenika,* Institut društvenih nauka, Beograd, 1986

Radulović S., *Činjenice odlučujuće za isključenje protivpravnosti pri medicinskoj intervenciji i njihov međusobni odnos*, Doktorska disertacija, Kosovska Mitrovica, 2015

Reid K. I., “Informed Consent in Dentistry”, *Journal of Law, Medicine & Ethics*. 45 (1), 2017, 77-94

Satyanarayana Rao K., “Informed consent: an ethical obligation or legal compulsion?”, *Journal of cutaneous and aesthetic surgery*, 1 (1), 2008, 33-35

Sorta-Bilajac I., “Informirani pristanak – konceptualni, empirijski i normativni problemi”, *Medicina fluminensis*, 47 (1), 2011, 34-47

Faden, R. R., Beauchamp T. L., King N. M. P., *A History and Theory of Informed Consent*, Oxford University Press, New York, 1986

Wolf S. M., Clayton E., Lawrenz F., “The Past, Present, and Future of Informed Consent in Research and Translational Medicine”, *Journal of Law, Medicine & Ethics*, 46 (1), 2018, 7-11

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„НЕПРАВЕ“ МАНДАТОРНЕ МЕДИЦИНСКЕ ИНТЕРВЕНЦИЈЕ

Резиме

Принципи аутономије воље ни у једној грани права не може бити потпуно доследно и безусловно спроведен без истовремене претње по правну сигурност, приватне интересе других субјеката или опште друштвене интересе. Правни субјект, односно његова аутономија, кроз серију општих и посебних ограничења, бива стављена у други план у односу на опште добро и опште или приватне интересе који су значајнији у датом тренутку.

Медицинско право, млада грана модерних правних поредака, није изузетак у том смислу. Наиме, правни институт пристанка информисаног пацијента је примарно средство за остваривање аутономије воље у медицинском праву и он је основно правило. Ипак, у односу на ово правило постоје значајни изузеци.

У наредним редовима класификоваћемо ситуационе девијације од принципа аутономије воље изражене кроз пристанак информисаног пацијента. У ту сврху, поделићемо изузетке у две групе. Прву групу чине интервенције које смо за потребе рада означили као „праве“ интервенције предузете по сили закона. Друга група, а она је у фокусу нашег рада, састоји се од интервенција које смо означили као „неправе“ мандаторне интервенције.

Кључне речи: Информисани пристанак, пристанак оштећеног, грађанскоправна одговорност, противправност, мандаторне медицинске интервенције.

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PROCEDURE FOR ESTABLISHING THE STATUS OF COMMON-LAW PARTNER

Abstract

The paper presents and analyzes the provisions of the amended Law on Pension and Disability Insurance (2003) of 2019, which provides for a procedure for establishing the status of common-law partner as a novel non-contentious status-related procedure in our legal system. The amendments to this law stipulate that the right to a family pension, in addition to the spouse, may also be exercised by a common-law partner under the conditions provided by law. The main novelty is that it is stipulated that the common-law status of the surviving common-law partner of the insured party, who wants to acquire the right to the family pension, is established by a court decision in a non-contentious procedure, so that the decision of the non-contentious court proves his/her common-law status, which is one of the prerequisites for acquiring the family pension, given that the common-law partnership is not registered in the public books, unlike the marital relationship. The procedure in which the common-law status of a common-law partner with an insured person is established, which the legislator wrongly named procedure for establishing the existence of a common-law marriage, is a one-party non-contentious status-related procedure in which the court acts according to general rules of non-contentious procedure.

Keywords: common-law partner status, special non-contentious status-related procedure.

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1. INTRODUCTION

Amendments to the Law on Pension and Disability Insurance of 2019[1], in the provision of the amended Article 28, provided for a special non-contentious status-related procedure for establishing common-law status of the common-law partner as a method of legal protection that can be initiated by a common-law partner when there is a need for this type of legal protection.

Considering that common-law partnership is not registered in our country's public books, the legislator provided for a non-contentious procedure as a method of legal protection in which the surviving partner of the insured partner is able to obtain a court decision establishing his/her status of a common-law partner from a common-law marriage, and which he/she will be able to use, as a public document, in the procedure of acquiring the right to the family pension to prove that he/she meets the legal conditions concerning his/her status.

The provision of Article 28 of the amended LPDI (2003) of 2019 is significant in multiple ways. With this provision, the legislator equated the spouse and common-law partner in terms of the right to acquire the right to family pension and thus eliminated the discriminatory attitude towards the common-law marriage and common-law partner of the insured partner in the domain of the pension insurance; recognized the right of the common-law partner to family pension even after the termination of the common-law marriage, if after its termination the right to support was established in the court proceedings; regulated conditions under which the common-law partner may acquire the right to family pension; and provided for the regular legal means and the way in which the common-law partner can prove his/her common-law status.

2. COMMON-LAW MARRIAGE AND COMMON-LAW FAMILY

2.1. In order for the common-law partner to acquire the right to family pension after the death of the insured partner, it is necessary that he/she was a member of a common-law family as a common-law partner of the insured, or that after the termination of the common-law marriage, the deceased partner, as the provider of the support, was required to support the common-law partner upon the decision of the court. Rights that were definitely recognized to the common-law partner in the provisions of the amended LPDI (2003) of 2019 represent harmonization of legal solutions in the field of pension insurance with

[1] Law on Pension and Disability Insurance, "Official Gazette of the Republic of Serbia", Nos. 34/03, 64/04 – decision of the Constitutional Court of the Republic of Serbia, 84/04 – state law, 85/05, 101/05 – state law, 63/06 – decision of the Constitutional Court, 5/09, 107/09,101/10, 93/12, 62/13, 108/13, 75/14, 142/14, 73/18, 46/19 – decision of the Constitutional Court, and 86/19, hereinafter referred to as "LPDI (2003)".

provisions of the Family Law (2005)[2], which equated marriage and common-law marriage,[3] but also with the Constitution of the Republic of Serbia (2006).[4]

2.2. Marriage and common-law marriage, although both characterized as cohabitation between a woman and a man, represent, in addition to kinship, two different bases for starting a family. In modern social relationships, common-law marriage, as cohabitation between a woman and man, is an increasingly common basis of a family that coexists with a family based on the marital relationship of the spouses. Common-law marriage has to some extent become a mass phenomenon for different reasons and increasingly appears as a permanent form of cohabitation as opposed to marriage and marital family.

There are significant differences between marriage and common-law marriage, as legal institutes. Marriage is regulated by law and is a strictly formal cohabitation of a woman and a man,[5] while the common-law marriage is a more permanent cohabitation of a woman and a man regulated by law, between whom there were no marriage obstacles at the time of its creation.[6] An important difference between marriage and common-law marriage is a way of their creation and termination. The difference between marriage and common-law marriage is reflected, above all, in the absence of formal conditions provided for marriage. In addition to the differences in gender of common-law partners,[7] common-law marriage is characterized by cohabitation of a more permanent nature,[8] monogamy, stability,[9] duration[10] and the fact that its existence is known to third

[2] Family Law, "Official Gazette of the Republic of Serbia", Nos. 18/05, 72/11, 6/15, hereinafter referred to as "FL (2005)".

[3] It is interesting that it took the legislator almost fourteen years to, in domain of social legislation, equate the spouse and common-law partner in terms of acquiring the right to a family pension, although in the meantime this law has been amended several times.

[4] Constitution of the Republic of Serbia, "Official Gazette of the Republic of Serbia", No. 98/06.

[5] Article 3 of the FL (2005).

[6] Article 4 of the FL (2005).

[7] In Serbian law, common-law marriage is founded between heterosexual partners, same as marriage.

[8] A more permanent cohabitation is a legal standard whose content is determined by case law in the process of interpretation if the legislator has not prescribed a minimum length of its duration as a condition for acquiring or exercising a civil subjective right.

[9] The explanation of the proposal of the Family Law states that the duration of the common-law marriage alone is not crucial, but the intention of the common-law partners to keep their cohabitation stable and that it was formed to last indefinitely, same as marriage.

[10] Due to this feature, common-law marriage differs from occasional extramarital sexual relations, because it is based freely with the partners' intention to last.

parties.[11] Unlike marriage that ends by death of the spouse and annulment and divorce in a legally prescribed procedure, common-law marriage ends not only by death, but also by consensual or unilateral termination or simply by leaving cohabitation.

Marriage is the basis for the formation of a marital family that arises, as a rule, by having children during its duration, while a common-law family, as a rule, is formed by having a child together in a common-law marriage.

2.3. During the historical development of society, the common-law marriage has long been a social phenomenon, but not a legal institute.[12] Changes in society's attitude towards the common-law marriage and freedom of choice of the form of cohabitation of heterosexual partners are also reflected in the domain of law, especially in terms of its legal regulation and actions which it causes.

2.4. In addition to marriage, the provisions of the FL (2005) also regulate the common-law status of the common-law partners[13] by providing for their rights and duties during and after the termination of their cohabitation. In this way, the common-law marriage underwent a transformation, since from the actual cohabitation it became a legal institute and a form of cohabitation between partners, which represents an alternative to marriage. In a common-law marriage, the lack of legal forms that characterize marriage is compensated by legal rules relating to the duration of the cohabitation of common-law partners, the fulfillment of family rights and duties equivalent to the rights and duties of spouses, absence of marriage obstacles when forming a common-law marriage and the birth of joint children who have the same rights in all spheres of social life as children born in a marriage.

2.5. According to the modern domestic legal solutions, common-law partners have the same rights and duties within the family relations as the spouses under the conditions provided by law.[14] Common-law partners, like spouses, have the right to adopt a child,[15] right to support,[16] right to joint property,[17] right

[11] See: З. Поњавић, *Породично право,*Правни факултет у Крагујевцу, Крагујевац, 2005, 132.
[12] *Ibidem,*129.
[13] Legal regulation of common-law status was primarily an expression of a legal and political position that an economically weaker partner should be protected when the other partner does not want or will not formalize their partnership by marriage and who is not aware of the consequences of not being married, while to a lesser extent it was expression of achieving gender equality and anti-discrimination attitude or favoring the autonomy of the will of the partners to choose their relationship or cohabitation to be an alternative to marriage because they do not want marriage.
[14] М. Драшкић, *Породично право,*Београд, 2005, 164.
[15] Article 101 of the FL (2005).
[16] Article 152of the FL (2005).
[17] Article 191 of the FL (2005).

to protection from domestic violence.[18] Spouse and common-law partner are also equal in terms of the right to parenthood and paternity of a child conceived with biomedical assistance. The provision of Article 58, paragraph 2 of the FL (2005) stipulates that the mother's common-law partner shall be considered the father of a child conceived with biomedical assistance, provided that he has granted his written consent for the biomedically assisted fertilization procedure.

2.6. Although the Constitution of the Republic of Serbia (2006) equated marriage and common-law marriage in accordance with the law,[19] same as did the FL (2005) which treats them as two legal institutes, as well as formed marital and common-law family, the common-law partner still does not have all the civil subjective rights that can be acquired and exercised by the spouse. Thus, for example, in the domain of inheritance law, the common-law partner does not belong to the circle of regular legal heirs specifically listed in the law, unlike the common-law partners' children born out of wedlock who, both under the Constitution of the Republic of Serbia (2006) and the provisions of the Law on Inheritance (1995),[20] as descendants of the testator, are completely equal in terms of inheritance rights with the children born in a marriage and adopted children. The fact that there is no obstacle for the common-law partner to be the testamentary heir of the testator, but that in the sphere of acquiring the right to inheritance the common-law partner is denied inheritance rights based on the law regardless of the fact that he/she is a close member of the testator's family,[21] although the law is the most common basis for inheritance in relation to a will, is in conflict, on the one hand, with the family law nature of inheritance[22], and on the other hand, with the provisions of the Law on Prohibition of

[18] Article 197 of the FL (2005).

[19] Article 62, paragraph 5 of the Constitution of the Republic of Serbia.

[20] Law on Inheritance, "Official Gazette of the Republic of Serbia", No. 46/95, 10/03 – decision of the Constitutional Court of the Republic of Serbia, 6/15. Hereinafter referred to as "LI (1995)".

[21] It should be noted that the Commission for the Drafting of the Civil Code, which in 2011 prepared the Pre-Draft of the Civil Code of the Republic of Serbia, in the fourth book "Inheritance", did not change anything regarding the inheritance rights of a common-law partner. In the Draft Text of the Civil Code prepared for the public debate by the Commission for the Drafting of the Civil Code of the Government of the Republic of Serbia, published on May 29, 2015, the circle of regular legal heirs has not been changed. See provision of Article 2602, Draft text of the Civil Code, 641.

[22] See: Д. Ђурђевић, *Институције наследног права,* Службени гласник, Београд, 2010, 24.

Discrimination[23] and the ratified European Convention on Human Rights.[24] Considering the fact that the Proposal for amendment of the Law on Prohibition of Discrimination is being prepared in order to amend the individual legal solutions to ensure equal treatment of individuals and groups in various areas of social life, it is also an opportunity, although this law is not the main one for the domain of inheritance, to change the status of the common-law partner in terms of legal inheritance,[25] which is consistent with the recommendations of the EU Commission and the European Commission against Racism and Intolerance (ECRI).

According to the provisions of the LI (1995), common-law partner is also discriminated against when it comes to the separation of household items of lesser value that belong to members of the testator's immediate family who lived with him/her in a joint household. The right to separate household items, in addition to other heirs, has a spouse but not a common-law partner, although he/she was also in cohabitation and a joint household with the testator. In addition, under the amended provision of Article 113 of the LI (1995) of 2015, common-law partner, and even a former common-law partner, cannot be a testamentary witness regardless of the fact that he/she does not belong to the circle of legal heirs.[26]

Although the common-law partnership in civil court proceedings is a reason for exclusion of a judge, lay judge, notary public, public executor, his/her deputy and assistant, expert, interpreter, sign language interpreter and minute taker, as well as officials in the public sale procedure in the enforcement

[23] Law on Prohibition of Discrimination, "Official Gazette of the Republic of Serbia", No. 22/09.

[24] Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedom, "Official Gazette of Serbia and Montenegro – International Agreements", No. 9/03.

[25] In comparative law, there is a tendency for a common-law partner to enter the circle of legal heirs. In some regional legal systems, a common-law partner is equated with the spouse, as is the case, for example, in Slovenia (Law on Inheritance, Official Gazette of the Socialist Republic of Slovenia, Nos. 15/76, 23/78; Official Gazette of the Republic of Slovenia, Nos. 17/91, 13/94, 82/94, 117/00,67/01, 83/01, 73/04 and 31/13, Article 4a), Croatia (Law on Inheritance of the Republic of Croatia, Official Gazette of the Republic of Croatia, Nos. 48/03, 163/03, 35/05, 127/13, 33/15, Article 8), Federation of Bosnia and Herzegovina (Law on Inheritance of the Federation of Bosnia and Herzegovina, Official Gazette, No. 80/14, Article 19). Similar situation is in some European countries, such as the Netherlands, Norway, Russia.

[26] See more in: М. Трговчевић Прокић, *Наследно право и поступак за расправљање заоставштине*, Приручник за полагање правосудног испита, Правни факултет Универзитета Унион, Београд, 2020, 52.

procedure, common-law partner cannot be the party's attorney[27] in the legal protection procedure.[28] In the amendments to the Civil Procedure Law[29] of 2014, given the adopted principle of free representation, the legislator left out the common-law partner in the specific listing of persons who can be the party's attorney[30] even though without professional qualifications, probably due to difficulties in proving his/her status, which could lead to delays in the proceedings. Nevertheless, in the procedural literature, some authors[31] consider that the provision on attorneys should be interpreted in a broader, and not narrow, manner, and that given the provisions of the Constitution and the FL (2005), it should be possible for a common-law partner to be a party's attorney.

3. CONDITIONS FOR ACQUIRING THE RIGHT TO FAMILY PENSION OF A COMMON-LAW PARTNER

3.1. Surviving family members are entitled to a family pension under the conditions provided by law. Family members must meet the conditions relating to their age at the time of claiming this right and at the time of death of the insurance beneficiary. In certain situations, it is required that there are certain circumstances concerning the inability to live and work independently, as well as the fact that the deceased insured person supported the claimant of the right to a family pension. If the insured person's child requests to acquire the right to the family pension, the circumstance that he/she is still going to school is also important.

[27] The provision of the Civil Procedure Law (2011) on attorneys applies accordingly in all civil court proceedings, unless a particular procedural law provides otherwise.

[28] For more details see: Г. Станковић, З*акон о ванпарничном поступку, Објашњења, тумачења и стварни регистар*, четврто издање, Службени гласник, Београд, 2020, 44; Г. Станковић, *Грађанско процесно право,* прва свеска, *Парнично процесно право,* Београд, 2013, 206; Г. Станковић, В. Боранијашевић, *Грађанско процесно право,* Ниш, 2020, 172.

[29] Civil Procedure Law, "Official Gazette of the Republic of Serbia", Nos. 72/11, 49/13 – decision of the Constitutional Court, 74/13, 55/14, 87/18, 18/20. Hereinafter referred to as "CPL (2011)".

[30] Article 85, paragraph 2 of the CPL (2011).

[31] Г. Станковић, *Предговор, Закон о парничном поступку*, Службени гласник, Београд, 2014, 44.

3.2. The right to a family pension can be acquired by family members of the deceased, namely the spouse, children of the deceased insured person[32], and parents.[33]

3.3. The amendment to the LPDI of 2019, which, among other things, amended the social legislation provisions relating to the right to a family pension in accordance with the regulations governing family relations, stipulates that the right to a family pension may be exercised by the common-law partner of a deceased insured if the common-law marriage lasted at least three years or if the surviving common-law partner and a deceased insured or beneficiary, have a child together.[34] The amended provision of this law equates a spouse and common-law partner in terms of the right to a family pension.[35]

The stipulated minimum duration of a common-law marriage in Article 28 of the LPDI (2003) as one of the conditions for acquiring the right to a family pension, indicates the fact that the common-law marriage of common-law partners is founded with the intention to last, since the permanence of common-law marriage is its essential feature.

If the common-law partners have a minor child together, the duration of the common-law marriage of the common-law partners is not important, since in this way the common-law family of the deceased insured person is protected.[36]

[32] The following children can claim the right to a family pension: children born in a marriage, children born out of wedlock, adopted children, stepchildren supported by the insured or the beneficiary, grandchildren, siblings and other orphans or children with one parent or both parents who are completely incapable of work, and which is the insured or the beneficiary supported.

[33]These can be: father, mother, stepfather, stepmother and adoptive parents if the insured or the beneficiary supported them.

[34] Provision of Article 28, paragraph 3 of the LPDI (2003).

[35] It should be noted that during the historical development of society, the legislator, for socio-economic reasons, in certain situations equated spouses and common-law partners if the common-law marriage lasted for a certain period of time. Thus, the Law on Insurance of Workers of the Kingdom of Yugoslavia of 1922 ("Official Gazette of the Kingdom of Yugoslavia", No. 117/22), based on the principles of the German system of social order introduced in Germany in the late 19th century, which was considered one of the most advanced regulations of this kind in the then Europe, provided that the common-law wife of a deceased worker or a worker who is injured in an accident at work can receive material support provided that the common-law marriage lasted for at least a year and that a child was born in such a community.

[36] Given the wording of the provision and condition that common-law partners should have joint child, several questions arise. First of all, the question arises as to what if the joint child was born but is no longer alive at the time of applying for recognition of the right to a family pension and whether joint child can be their child who is over 18 to whom a measure has been imposed to an extension of parental rights but who is able to work because he/she has partial legal capacity. The question also arises as to whether the common-law partner is entitled to a family pension even when the joint child is

The provision related to the recognition of the right to a family pension is more favorable for a common-law partner who had a child together with the insured, but is unfair to those common-law partners who could not have children together, even when they have exercised the right to parenthood and conception with biomedical assistance in the biomedically assisted fertilization procedure.

3.4. If there has been a termination of cohabitation, the dependent common-law partner[37] may exercise the right to a family pension[38] even after the termination of the cohabitation of the common-law partners, provided that the court decision has established his/her right to support.

3.5. When the cohabitation of common-law partners was terminated before the death of the deceased insured, and he/she, as a provider of support, was obliged to support the former common-law partner in accordance with the provisions of the FL (2005), in the procedure for the recognition of the right to family pension, the common-law partner who wishes to acquire this right to provide existential means because he/she was left without support, needs to prove his/her common-law status and the fact that his/her right to support was established by a court decision.

3.6. The surviving common-law partner proves the existence of the right to support regularly with a final court decision. A problem may arise if, at the time of the support provider's death, contentious proceeding was to extend the common-law partner's right to support after the expiration of a five-year period that has not ended, was in progress.

3.7. In the provision of the amended Article 28, paragraph 4 of the LPDI (2003), the legislator provided that the "support obligation" can also be determined in non-contentious proceedings, which is an obvious editorial terminological professional error. The editors overlooked, on the one hand, that support between family members is a legal duty of the support provider arising

emancipated – when he/she has been emancipated by a court decision or when he/she has entered into marriage with the court's permission of.

[37] Support between common-law partners was provided for the first time in our law and regulated by the provisions of the Marriage and Family Relations Act (1980). Unlike the said law, the FL (2005) provides for the support of common-law partners during the existence of the common-law marriage and after its termination. After the termination of the common-law marriage, the common-law partner has the right to support which he/she can acquire through the courts, by filing a lawsuit within a year from the date of the termination of the cohabitation of the common-law partners or from the day when the last support was given. The support of a common-law partner established by a court decision lasts for a certain period of time, and for a maximum of five years after the termination of the common-law marriage. However, the right to support may be extended even after the expiration of the five-year period for especially justified reasons for which the common-law partner, as a recipient of support, cannot make a living.

[38] Paragraph 3 of Article 28 of the LPDI (2003).

from the imperative norm when conditions provided by law are met and that it is not an obligatory, contractual relationship as is the case with a lifetime support contract which provides for the support provider's obligation. On the other hand, the editors also overlooked that the right to support could be decided only in civil proceedings and only if a support provider is alive, because the right to support is of strictly personal nature.[39]

4. PROCEDURE FOR ESTABLISHING THE COMMON-LAW STATUS

4.1. Procedure for establishing the common-law status of a common-law partner represents a new special non-contentious procedure that is provided by the Amendments to the LPDI (2003) of 2019. The legislator has explicitly provided for this method of legal protection of the common-law partner when there is a need to establish his/her common-law status, because in our law, unlike marriage which is concluded formally, common-law marriages are not register anywhere.

Status rights are regulated by various substantive provisions of certain laws. The common-law partner status is recognized in our legal system and is regulated by the provisions of the FL (2005) which regulated a common-law marriage as a separate legal institute, but it did not provide for a method of legal protection when a common-law partner has a need and legal interest to prove his/her status in order to be able to exercise and acquire certain civil subjective rights, because common-law marriage is not registered in public books. Records on status rights are regularly kept by administrative bodies that keep certain public books and in a special procedure make entries, registration, etc., and at the request of interested persons issue prescribed public documents or make certain decisions regarding status and status rights. If no public books are kept on certain status rights, the status rights are regularly and, as a rule, acquired in the non-contentious procedure[40] because it is, among other things, intended for such type of legal protection.[41]

4.2. Given that legal life is evolving, the legislator, for preventive reasons, reasons of legal certainty or the need for cooperation of the courts in obtaining and providing protective legal assistance to legal entities, regularly prescribes the provision of legal protection in non-contentious proceedings, and

[39] З. Поњавић, (2005), 326 .
[40] For example, that a missing person died, determining the day of death, determining the birth, etc.
[41] Г. Станковић, В. Боранијашевић (2020), 584.

for that reason the number of non-contentious proceedings in domestic law is not constant.[42]

4.3. Procedure for establishing the common-law status of a common-law partner is not regulated by the provisions of LPDI (2003), given that it represents, by its legal nature, a special non-contentious status-related proceedings. In the domain of non-contentious procedure, non-contentious proceedings also differ in the fact that, as methods of non-contentious legal protection, they are regulated by the application of various normative techniques. Some special non-contentious proceedings are fully regulated by law,[43] while others are only named as non-contentious, or from the very nature of proceedings stems that they are non-contentious.[44]

4.4. Given that the procedure for establishing the common-law status of a common-law partner is not fully regulated by law because the legislator named it non-contentious procedure, in non-contentious legal matters for which the legislator has not prescribed special rules of procedure, the general rules of non-contentious procedure apply, [45] contained in general provisions[46] of the Law on Non-Contentious Procedure (1982).[47]

4.5. The provision of Article 28, paragraph 4 of the Amendment to the LPDI (2003), in which non-contentious procedure as a method of legal protection is provided, was not precisely formulated because the legislator wrongly formulated the subject of legal protection, that is, the subject of decision-making of a non-contentious court. The provision of this article stipulates that the existence of a common-law marriage is determined in a non-contentious procedure. There is no doubt that in legal matters in which declarative legal

[42] Г. Станковић, Љ. Мандић, *Ванпарнично процесно право,* Косовска Митровица, 2013, 16.

[43] This is the case, for example, with the rehabilitation procedure, the compulsory hospitalization procedure, a trial procedure within a reasonable time or with proceedings related to bills of exchange or checks. See more in: Г. Станковић, М. Трговчевић Прокић, *Коментар Закона о ванпарничном поступку*, друго измењено и допуњено издање, Службени гласник, Београд, 2019, 25.

[44] Г. Станковић, Љ. Мандић (2013), 5; Г. Станковић, *Грађанско процесно право,* друга свеска, *Ванпарнично и извршно процесно право,* Ниш, 2007, 4.

[45] See: Г. Станковић, Љ. Мандић (2013),15; М. Трговчевић Прокић, Г. Станковић, *Ванпарнични и јавнобележнички поступак Републике Србије*, Службени гласник, Београд, 2018, 14.

[46] In addition to the basic principles of non-contentious procedure, the general provisions of the LNCP (1982) also regulate the so-called process statics and process dynamics.

[47] Law on Non-Contentious Proceedings, "Official Gazette of the Socialist Republic of Serbia", Nos. 4/82, 48/88, "Official Gazette of the Republic of Serbia", Nos. 46/95 – state law, 18/05 – state law, 85/12, 45/13 – state law, 55/14, 6/15,106/15, hereinafter referred to as: "LNCP".

protection is provided, the existence of legal relations both in the past and present can be established. The provision of this article states that “the existence of a common-law marriage is established”, which means that it is established that a common-law marriage exists in the present, and not that it existed in the past. Editors of the legal text overlooked that by the death of the insured that occurred naturally, the common-law marriage ended and that it no longer existed, and in order for the surviving common-law partner to acquire the right to the family pension, the only thing he/she can do is to prove that he/she acquired and had the common-law status in the past as a common-law partner of the deceased insured person, if the common-law marriage existed in accordance with the law.

4.6. Non-contentious procedure for establishing the common-law status of a common-law partner belongs to the circle of non-contentious proceedings in which a non-contentious court provides protective assistance[48] because it declares the status of a person so that this person can acquire or exercise the rights that belong to him/her by the law.

4.7. This procedure is one-party and is initiated by a common-law partner as proposer to determine that he/she has the common-law partner status even though the common-law marriage ended due to the death of the other common-law partner, or he/she was, as an ex common-law partner, after the common-law marriage ended, a supported common-law partner (recipient of legal support according to the decision of the civil court) because he/she had the right to legal support from the deceased common-law partner under the conditions provided by law.

4.8. The procedure is unofficial because it is initiated by a proposal of a participant who has a legal interest to establish his/her status. The legal interest of the proposer arises from the law itself, because the law provides for a method of legal protection for establishing the common-law status.

4.9. Although this procedure is status-related and one-party, there was a dilemma in court practice as to whether it was one-party or two-party.[49] Although a common-law partner claiming his/her status to be established has an active legitimacy in legal proceedings, the issue of passive legitimacy occurred in court practice because there were claims in which the Republic Pension and Disability Insurance Fund was designated as a participant with passive legitimacy.[50] Given that the LPDI (2003) provided for the right to a family pension to the common-

[48] М. Трговчевић Прокић, Г. Станковић, (2018а), 2; Г. Станковић, М. Трговчевић Прокић (2019, б) 157; Г. Станковић, Љ. Мандић (2013), 12.

[49] It could possibly be two-party if it is conducted during the life of the common-law partner and then it would have the character of a contentious non-contentious procedure.

[50] See the decision of the Second Basic Court in Belgrade, R-2 219/20 of 18 December 2020.

law partner, it was concluded that the Republic Pension and Disability Insurance Fund is the opponent of the proposer and that it has a passive legitimacy in the procedure, because it should establish the fact concerning the common-law status of the party in order to recognize his/her right to a family pension. However, the Republic Pension and Disability Insurance Fund is not a participant in the procedure, nor is it an opponent of the proposer, because it does not have an actual passive legitimacy, since it is not a subject of common-law marriage as a party in a family relationship.[51] Given that this procedure is a status-related, it is one-party by its nature, and in one-party non-contentious proceedings there is no passive legitimacy. In this non-contentious status-related procedure, the status of the proposer is established, and the Republic Pension and Disability Insurance Fund, as the body that decides in the administrative procedure, decides on the right to family pension only on the basis of a final decision made in the non-contentious procedure which established the status of a common-law partner.

4.10. According to the provision of Article 30a, paragraph 2 of the LNCP (1982), non-contentious court cannot entrust the conduct of this non-contentious procedure to the public notary, because it is a non-contentious status-related procedure.[52] This provision of the LNCP (1982) excluded the possibility for a notary public to be entrusted with non-contentious status matters in which cooperation of courts is necessary in terms of providing legal protection, since they are of public interest. When deciding on the status of a certain person, more intensive judicial protection in the public interest and in the interest of the person in question is necessary, and not only a legal certainty achieved by preventive legal protection provided by notaries public.[53]

4.11. The common-law partner, as the proposer, submits the proposal to the basic court in whose territory he/she has a permanent or temporary residence, as it has real and territorial jurisdiction.[54] An individual judge acts in this legal matter.

4.12. Given that the procedure for establishing the status of a common-law partner is status-related by its legal nature, the common-law partner as a

[51] On procedural and actual legitimacy in non-contentious proceedings, see: Г. Станковић, В. Боранијашевић (2020), 607.

[52] On the competence and authorizations of notaries see more in: М. Трговчевић Прокић, *Овлашћења јавног бележника и организација бележништва,* Службени гласник, Београд, 2012, 203; Г. Станковић, Љ. Мандић, *Организационо грађанско процесно право,* Косовска Митровица, 2013, 169.

[53] See more in Г. Станковић, М. Трговчевић Прокић, (2019б), 157 ; Г. Станковић, М. Трговчевић Прокић, „Измене и допуне Закона о ванпарничном поступку“, Зборник *Нови прописи у Републици Србији*, Глосаријум, Београд, 2015, 180; Трговчевић Прокић, М., „Породичноправна заштита у ванпарничном поступку”, Зборник *Систем породичноправне заштите у Србији,* Глосаријум, Београд, 2009.

[54] Article 13, paragraph 2 of the LNCP (1982).

proposer cannot waive his/her claim for establishing the common-law status, but has the right to dispose of the claim and withdraw it.[55]

4.13. In this procedure, in terms of collecting procedural material, in addition to the adversarial principle, the investigative principle is applied as well, regardless of the fact that the procedure is not official, because the procedure is unilateral, and as a status-related procedure, it is conducted in the public interest.

4.14. In one-party official status-related proceedings the investigative principle[56] regularly dominates, because the court that initiated the non-contentious status-related procedure "replaces" the participant with the opposite interest, and the court must establish all legally relevant facts through investigation, since there is no other participant that would present the procedural material. In this informal procedure, in addition to the adversarial principle, investigative principle is also applied, because the court is obliged to establish all the relevant facts important for decision-making, including those whose presenting the party did not propose.

4.15. In the procedure for establishing the common-law status of a common-law partner, the public is excluded by law.[57]

4.16. In this procedure, an oral hearing must be scheduled. A hearing is necessary to establish and clarify important, legally relevant facts necessary for decision-making. At the scheduled hearing, the court conducts the evidentiary procedure by examining witnesses and the proposer, as a party, and presents other evidence related to legally relevant facts.

If the court accepts the claim, it will issue a declarative decision establishing the common-law status of a common-law partner. If the court finds that the party's claim is unfounded, it will reject the claim, and the party has the right to appeal against this decision, as well as the right to a review.

4.17. A common-law partner will be able to use the final decision of the non-contentious court which established his/her common-law status as a public document, not only when acquiring the right to pension, but also in other proceedings in which his/her status is a legally relevant fact, of whose existence the acquisition or exercising of certain civil subjective rights depends. The fact that there is a public document establishing the common-law status will make it unnecessary to conduct an adhesive procedure in which the issue of status has been raised as a preliminary issue, which will certainly speed up the procedure.

[55] Article 8 of the LNCP (1982).
[56] Article 8, paragraph 2 of the LNCP (1982).
[57] Article 9 of the LNCP (1982).

5. CONCLUDING REMARKS

5.1. Although both the Constitution of the Republic of Serbia (2006) and the FL (2005) equated marriage and common-law marriage, and marital and common-law family, establishing the status of a common-law partner at the current stage of development of procedural law was not normatively formulated, as regular legal path for its establishment was not explicitly provided for and prescribed, and common-law status cannot be proved by any legal document. Although the common-law partner was granted many rights, he/she regularly encountered the problem of proving his/her status in every legal protection procedure in which he/she acquired his/her rights, and the issue of his/her status was always a preliminary legal issue resolved in the adhesion procedure.

5.2. The legislative procedure in the domain of substantive family law did not completely follow the simultaneous process of standardization in the domain of procedural law. The procedure for establishing the status of a common-law partner is not regulated in the provisions of the FL (2005) which regulate certain special civil court proceedings, and there is even no provision that would regulate that a common-law status could be established in non-contentious proceedings. It is obvious that due to the editor's omission, family procedural law was objectively delayed in relation to the development and achievements of substantive family law.

The problem of the procedure for establishing the status of a common-law partner was not resolved with the amendments to the Law on Non-Contentious Procedure in 2013, when the status-related procedure for establishing birth was regulated, nor with the amendments from 2014, when only a partial reform of non-contentious procedure was carried out[58], because the legal and political focus was on efforts to partially reform the procedure for deprivation of legal capacity in order to harmonize it with the Constitution (which treats legal capacity as one of basic human rights), certain domestic laws, as well as with the Recommendation of the Committee of Ministers of the Council of Europe of 1999.

5.3. Only with the provisions of the amended LPDI (2003) at the end of 2019, fourteen years after the equation of marital and common-law family, the problem of the legal way to establish the status of a common-law partner was solved at the normative level regarding the realization of the right to a family pension in terms of its harmonization with the substantive law and family law regulations, because the legislator has explicitly prescribed that common-law

[58] On the motives, goals and scope of the non-contentious procedure reform see more in: Г. Станковић, З*акон о ванпарничном поступку, Објашњења, тумачења и стварни регистар*, четврто издање, Службени гласник, Београд, 2020, 39.

status is determined in non-contentious proceedings, although this law is not the main law on this issue.

5.4. Given that the procedure for establishing the status of a common-law partner is, as a rule, governed by the rules of non-contentious procedure, non-contentious procedure for establishing the common-law status is an adequate method for providing legal protection, because it allows the common-law partner to obtain a court document by which he/she can always prove his/her status in any proceedings in which a decision is made on recognized civil subjective rights, because it is a public document.

REFERENCES:

Драшкић, М., *Породично право,* Београд, 2005. [Draškić, M., *Family Law*, Belgrade, 2005.]

Ђурђевић, Д., *Институције наследног права,* Службени гласник, Београд, 2010. [Đurđević, D., *Institutions of Inheritance Law*, Official Gazette, Belgrade, 2010.]

Поњавић, З., *Породично право,* Правни факултет у Крагујевцу, Крагујевац, 2005. [Ponjavić, Z., *Family Law*, Faculty of Law in Kragujevac, Kragujevac, 2005.]

Преднацрт, Грађански законик Републике Србије, четврта књига, *Наслеђивање*, Влада Републике Србије, Београд, 2011. [*Preliminary Draft, Civil Code of the Republic of Serbia*, fourth book, Government of the Republic of Serbia, Belgrade, 2011.]

Радни текст Грађанског законика Републике Србије, припремљен за јавну дискусију, Влада Републике Србије, Комисија за израду Грађанског законика, Београд, 29. маја 2015. [*Draft text of the Civil Code of the Republic of Serbia, prepared for public discussion*, Government of the Republic of Serbia, Belgrade, May 29, 2011.]

Станковић, Г., *Закон о парничном поступку, Објашњења, тумачење и стварни регистар*, четрнаесто издање, Службени гласник, Београд, 2020. [Stanković, G., *Law on Civil Procedure, Explanations, Interpretations and Actual Register*, Fourteenth Edition, Official Gazette, Belgrade, 2020.]

Станковић, Г., *Грађанско процесно право,* прва свеска, *Парнично процесно право,* Београд, 2013. [G. Stanković, *Civil Procedure Law*, first volume, *Civil Procedure Law*, Belgrade, 2013.]

Станковић, Г., *Грађанско процесно право,* друга свеска, *Ванпарнично и извршно процесно право,* Ниш, 2007. [Stanković, G., *Civil Procedural Law*, second volume, *Non-Contentious and Executive Procedural Law*, Nis, 2007.]

Станковић, Г., Боранијашевић, В., *Грађанско процесно право,* Ниш, 2020. [Stanković, G., Boranijašević, V., *Civil Procedural Law*, Nis, 2020.]

Станковић, Г., *Предговор, Закон о парничном поступку*, Службени гласник, Београд, 2014. [Stanković, G., *Preface, Law on Civil Procedure*, Official Gazette, Belgrade, 2014.]

Станковић, Г., *Закон о ванпарничном поступку, Објашњења, тумачења и стварни регистар*, четврто издање, Службени гласник, Београд, 2020. [Stanković, G., *Law on Non-Contentious Proceedings, Explanations, Interpretations and Actual Register*, Fourth Edition, Official Gazette, Belgrade, 2020.]

Станковић, Г., Мандић, Љ., *Ванпарнично процесно право,* Косовска Митровица, 2013. [Stankovic, G., Mandic, Lj., *Non-Contentious Proceedings,* Kosovska Mitrovica, 2013.]

Станковић, Г., Мандић, Љ., *Организационо грађанско процесно право,* Косовска Митровица, 2013. [Stankovic, G., Mandić, Lj., *Organizational Civil Procedure Law*, Kosovska Mitrovica, 2013.]

Станковић, Г., Трговчевић Прокић, М., „Измене и допуне Закона о ванпарничном поступку“, Зборник *Нови прописи у Републици Србији*, Глосаријум, Београд, 2015. [G. Stanković, G., Trgovčević Prokić, M., “Amendments to the Law on Non-Contentious Proceedings”, Collection of Papers *New Regulations in the Republic of Serbia,* Glosarijum, Belgrade, 2015.]

Станковић, Г., Трговчевић Прокић, М., *Коментар Закона о ванпарничном поступку*, друго измењено и допуњено издање, Службени гласник, Београд, 2019. [Stanković, G., Trgovcevic Prokic, M., *Commentary of the Law on Non-Contentious Proceedings,* Official Gazette, second amended edition, Belgrade, 2019.]

Трговчевић Прокић, М., „Породичноправна заштита у ванпарничном поступку,“ Зборник *Систем породичноправне заштите у Србији,* Глосаријум, Београд, 2009. [Trgovčević Prokić, M., “Family Law Protection in Non-Contentious Proceedings”, Collection of Papers *The System of Family Law Protection in Serbia,* Glosarijum, Belgrade, 2009.]

Трговчевић Прокић, М., *Овлашћења јавног бележника и организација бележништва,* Службени гласник, Београд, 2012. [Trgovčević Prokić, M., *Powers of the Notary Public and Organization of the Notary Public*, Official Gazette, Belgrade, 2012.]

Трговчевић Прокић, М., Станковић, Г., *Ванпарнични и јавнобележнички поступак Републике Србије*, Службени гласник, 2018. [Trgovčević Prokić, M., Stanković, G., *Non-Contentious and Notarial Proceedings in the Republic of Serbia,* Official Gazette, Belgrade, 2018.]

Трговчевић Прокић, М., *Наследно право и поступак за расправљање заоставштине*, Приручник за полагање правосудног испита, Правни факултет Универзитета Унион, Београд, 2020. [Trgovčević Prokić, M., *Inheritance Law and Probate Procedure,* Bar Exam Preparation Manual, Faculty of Law, Union University, Belgrade, 2020.]

LEGAL DOCUMENTS:

Закон о ванпарничном поступку, *Службени гласник Социјалистичке Републике Србије*, бр.4/82, 48/88, *Службени гласник Републике Србије*, бр. 46/95 – др. закон, 18/05 – др. закон, 85/12, 45/13 – др. закон, 55/14, 6/15,

106/15. [Law on Non-Contentious Proceedings, *Official Gazette of the Socialist Republic of Serbia*, Nos. 4/82, 48/88, *Official Gazette of the Republic of Serbia*, Nos. 46/95 – state law, 18/05 – state law, 85/12, 45/13 – state law, 55/14, 6/15,106/15.]

Закон о забрани дискриминације, *Службени гласник Републике Србије*, бр. 22/09. [Law on Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, No. 22/09.]

Закон о наслеђивању, *Службени гласник Републике Србије*, бр. 46/95, 10/03 – УС, 6/15. [Law on Inheritance, *Official Gazette of the Republic of Serbia*, Nos. 46/95, 10/03 – decision of the Constitutional Court, 6/15.]

Zakon o dedovanju, *Uradni list Socijalističke Republike Slovenije*, br. 15/76, 23/78; *Uradni list Republike Slovenije*, br. 17/91, 13/94, 82/94, 117/00, 67/01, 83/01, 73/04, 31/13. [Law on Inheritance, *Official Gazette of the Socialist Republic of Slovenia*, Nos. 15/76, 23/78, *Official Gazette of the Republic of Slovenia*, Nos. 17/91, 13/94, 82/94, 117/00, 67/01, 83/01, 73/04, 31/13.]

Zakon o nasljeđivanju Republike Hrvatske, *Narodne novine*, br. 48/03, 163/03, 35/05, 127/13, 33/15. [Croatian Law on Inheritance, *Official Gazette of the Republic of Croatia*, No. 48/03, 163/03, 35/05, 127/13, 33/15.]

Zakon o nasljeđivanju Federacije Bosne i Hercegovine, *Službene novine*, br. 80/14. [Law on Inheritance of the Federation of the Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 80/14.]

Закон о осигурању радника Краљевине Југославије, *Службене новине*, бр. 117/22. [Law on Insurance of Workers of the Kingdom of Yugoslavia, *Official Gazette of the Kingdom of Yugoslavia*, No. 117/22.]

Закон о парничном поступку, *Службени гласник Републике Србије*, бр. 72/11, 49/13 – УС, 74/13, 55/14, 87/18, 18/20. [Civil Procedure Law, *Official Gazette of the Republic of Serbia*, Nos. 72/11, 49/13 – decision of the Constitutional Court, 74/13, 55/14, 87/18, 18/20.]

Закон о пензијском и инвалидском осигурању, *Службени гласник Републике Србије,* бр. 34/03, 64/04 – одлука УСРС, 84/04 – др. закон, 85/05, 101/05 – др. закон, 63/06 – одлука УС, 5/09, 107/09, 101/10, 93/12, 62/13, 108/13, 75/14, 142/14, 73/18, 46/19 – одлука УС и 86/19. [Law on Pension and Disability Insurance, *Official Gazette of the Republic of Serbia*, Nos. 34/03, 64/04 – decision of the Constitutional Court of the Republic of Serbia, 84/04 – state law, 85/05, 101/05 – state law, 63/06 – decision of the Constitutional Court, 5/09, 107/09,101/10, 93/12, 62/13, 108/13, 75/14, 142/14, 73/18, 46/19 – decision of the Constitutional Court, and 86/19.]

Породични закон, *Службени гласник Републике Србије,* бр. 18/05, 72/11, 6/15. [Family Law, *Official Gazette of the Republic of Serbia*, Nos. 18/05, 72/11, 6/15.]

Устав Републике Србије, *Службени гласник Републике Србије*, бр. 98/06. [Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/06.]

Закон о потврђивању Европске конвенције о људским правима и основним слободама, *Службени лист Србије и Црне Горе – Међународни уговори*, бр. 9/03. [Law on Ratification of the European Convention on Human Rights and Fundamental Freedoms, *Official Gazette of Serbia and Montenegro – International Agreement*, No. 9/03.]

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ПОСТУПАК ЗА УТВРЂЕЊЕ СТАТУСА ВАНБРАЧНОГ ПАРТНЕРА

Резиме

У раду се излажу и критички анализирају одредбе новелираног Закона о пензијском и инвалидском осигурању (2003) из 2019. којима је предвиђен поступак за утврђење статуса ванбрачног партнера као нов статусни ванпарнични поступак у нашем правном систему. Новелама овог закона прописано је да право на породичну пензију, поред супружника, може остварити и ванбрачни партнер под условима који су предвиђени законом. Основна новина је у томе што је предвиђено да се ванбрачни статус надживелог ванбрачног партнера осигураника, који претендује да оствари право на породичну пензију, уврђује судском одлуком у ванпарничном поступку тако да се решењем ванпарничног суда доказује његов ванбрачни статус који представља један од услова за стицање права на породичну пензију с обзиром на то да се ванбрачно партнерство не региструје у јавним књигама, за разлику од брачног односа. Поступак у коме се утврђује ванбрачни статус ванбрачног партнера са осигураником, који законодавац погрешно именује као поступак за утврђивање постојања ванбрачне заједнице, статусни је и једностраначки ванпарнични поступак у коме суд поступа по општим правилима ванпарничне процедуре.

Кључне речи: статус ванбрачног партнера, посебан статусни ванпарнични поступак.

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LGBT COMMUNITY'S MEMBERS AS VICTIMS OF ARTICLE 3 OF EUROPEAN CONVENTION ON HUMAN RIGHTS' VIOLATIONS

Abstract

The authors present characteristic cases from the case law of the European Court of Human Rights in which members of the LGBT community appear as victims of (alleged) violations in Article 3 of the European Convention on Human Rights. The starting point for this was the Identoba and Others v. Georgia case, in which the Court established sexual orientation as the grounds for prejudice for the first time, alongside with many other cases arising from the aforementioned judgment. Special attention is paid to cases where there is a risk of deportation of homosexuals, which may result in a violation of Article 3 of ECHR.

Key words: LGBT community, European Court of Human Rights, European Convention, ECHR, Article 3;

1. INTRODUCTION

While trying to establish international legal protection of individuals, Council of Europe has adopted Convention for the Protection of Human Rights and Fundamental Freedoms, also known as European Convention on Human Rights (hereinafter referred to as "the Convention" or "ECHR") on 4th of November 1950. It guaranteed every concerned individual would have a right to address European Court of Human Rights (hereinafter referred to as "the Court" or "ECtHR") in case of alleged violations of its rights set forth in the Convention.

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Among many others, sexual minorities are one of the distinctive victims of various rights guaranteed by the Convention.

However, neither the adoption and ratification of the Convention, nor its long-term application were able to remove deeply rooted prejudice against members of sexual minorities. Mainly due to the long history of hateful and/or harmful prejudice and its various expressions, members of this community have suffered violations of various rights, making them particularly vulnerable group. Even though they can theoretically be victims of any Convention right, we shall be presenting cases in which Article 3 of the Convention is concerned, due to the seriousness of the enjoyed right, as well as the fact that prejudice towards this group plays crucial role in its violation.

Prior to any further case analysis, the attention should be primarily drawn to states' obligation arising from Article 3 of ECHR. Namely, this article prescribes that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In the case of Çakici v. Turkey, the Court has stressed that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. This Article knows no exceptions, even in the most difficult of circumstances, and irrespective of the conduct of the person concerned, the Convention prohibits torture and inhuman or degrading treatment and punishment in absolute terms.

There are three different obligations upon High Contracting Parties arising from Article 3 of the Convention: 1) Negative obligation – obligation to refrain from acts of torture, inhuman or degrading treatment or punishment; 2) Positive obligation – duty to take appropriate steps to safeguard and provide effective protection to those within their jurisdiction, and 3) Procedural obligation – duty to conduct an effective, official investigation once there is a reasonable suspicion that a person has been a victim of treatment contrary to the Article 3 of the Convention.

In order for an Article 3 to come into play, the alleged conduct must attain so-called "minimum level of severity". However, the assessment of this minimum is relative, and is done by the Court in each case. Naturally, this standard depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, as the Court established in Ireland v. UK. Additionally, the Court has established a three-tier hierarchy of ill-treatment forms, with torture, inhuman treatment or punishment and degrading treatment or punishment, which differ from one another depending on the intensity of the treatment in question, as well as its effects and consequences

2. ECtHR'S CASELAW OVERVIEW ON VIOLATION OF ARTICLE 3 WITH RESPECT TO LGBT COMMUNITY'S MEMBERS

In the case of Identoba and Others v. Georgia, the applicants were a Georgian NGO – Identoba, which promotes and protects the rights and freedoms of LGBT people in Georgia, as well as 14 other applicants, who are LGBT activists. The applicants have organized a demonstration in the center of Tbilisi on 17 May 2012, to mark the International Day Against Homophobia, with prior notification of the event submitted to the authorities and request of protection being provided to the participants, due to foreseeable protests from those opposed. However, on the day of the incident, the counter-demonstrations were organized as well. Even though police force members were present, they failed to react, in spite of demonstrators requests for protection. In addition, several participants of the demonstration have been arrested, as one of the alleged means of their protection, with numerous participants sustaining physical injuries.

The Court has conducted that there were discriminatory motives played crucial role in this incident, since many slogans with homophobic connotations were shouted at the time, alongside with death threats shouted at the participants. Regarding this atmosphere of participants being surrounded by the antagonistic and violent mob, the Court has established that applicants have experienced intense fear and anxiety. Furthermore, the Court observed, the aim of that verbal, and sporadically physical, abuse "was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community".

The Court has also noted that the State authorities had been informed well in advance of the LGBT community's intention to hold a march in the center of Tbilisi on 17 March 2012, with specific requested for the police to provide protection against foreseeable protests by people with homophobic views, due to history of public hostility towards the LGBT community in Georgia. This was also confirmed by the Study on Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe, which was conducted under the patronage of the Commissioner for Human Rights of the Council of Europe. The Court further noted that domestic authorities knew or ought to have known of the risks associated with any public event concerning that vulnerable community, but they failed to fulfill its positive obligation under Article 3 of the Convention, since limited number of police officers was present at the demonstration. Additionally, those police officers present distanced themselves from the scene when the verbal attacks started, thus allowing the tension to degenerate into physical violence, only intervening when the participants of the march had already been

bullied, insulted or even assaulted. Accordingly, the Court established that domestic authorities failed to provide adequate protection to the applicants from the bias-motivated attacks of private individuals. This was the first time that the Court has recognized homophobia as a motive for hate crime.

Although the applicants requested official investigation of the event in question, on the one hand, as well as some of the perpetrators being caught on camera, the Court has concluded that domestic authorities narrowed the scope of the investigation, launching only two separate investigations on physical injuries of only two applicants. Besides, that investigation lasted for more than two years, with only minor administrative fines of 45 euros being issued upon the two of the perpetrators. The Court has drawn particular importance of the effectiveness of the investigation in such cases, which should entail all reasonable steps to unmask the role of possible homophobic motives in these events. Without such strict approach, the Courts stressed, such crimes that were prejudice-driven would unavoidably be treated just the same as ordinary cases without such motives, which would be equivalent as the connivance with hate crimes themselves. This was due to the Court's standard that state authorities have the duty to take all reasonable steps to unmask possible discriminatory motives for a violent act, meaning to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, with special focus on violence motivated by discrimination. Accordingly, the Court has established that both positive and procedural obligations under Article 3 were breached, thus finding violation of Article 3 taken in conjunction with Article 14 of the Convention.

The case of M.C. and A.C. v. Romania was not very different in nature from the Identoba case. It also regarded gay march, organized by a local NGO in Bucharest in June 2006. Since the police protection was afforded to the participants, several most active individuals were stopped and identified by the police, alongside with their pictures taken. After the event was over, the participants headed home after the event was over, using recommended routes and means of transport by the authorities. However, in a metro train they were attacked by a group of young people with hooded sweatshirt, even though the march participants did not wear any distinctive clothes which would associate them with the earlier protest. Even though they filed criminal complaints against the attackers later that very evening, no apparent progress in the investigation was made for several years, irrespective of applicants' efforts to seek information from the police on various occasions in between 2007 and 2011.

Applicants' main submission was that the investigations into the allegations of ill-treatment were ineffective, thus violating their right under Article 3 taken in conjunction with Article 14 of the Convention in its procedural limb. The Court has accepted all the difficulties in conducting such an investigation, especially with police force reorganization. However, as the Court has stressed, organizational changes and restructuring do not suspend the State's obligations under the Convention. Nevertheless, the Court noted numerous shortcomings of the investigation concerned, since the police only heard from one witness with couple of random checks at metro stations and football matches, while, at the same time, disregarded evidence adduced by the applicants, even though the applicants had identified some of the attackers. The Court has underlined that at no point did the authorities initiate criminal investigation against the alleged culprits, while allowing the statute of limitation to come into play.

Finally, the Court reaffirmed aforementioned importance of the examination of the possible homophobic motives behind the attack. The Court particularly noted that despite the fact that incitement to hate speech was not punishable at the time when the incidents occurred, the crimes could have been assigned a legal classification that would have allowed the proper administration of justice. As can be seen from the Court's standpoint, in cases that have hate-driven violence involved, the administration of justice in such cases is of utmost importance, and cannot be undermined with technical issues. This due to the importance of the rights concerned, as well as protecting public confidence in the State's anti-discrimination policy. As a result, the Court found that investigations into the allegations of ill-treatment were ineffective due to various reasons: they lasted too long, had serious shortcomings, and failed to take into account possible discriminatory motives. Hence, the Court found a violation of Article 3 (procedural limb) taken together with Article 14 of the Convention.

In the case of X v. Turkey, the applicant was a homosexual, who confessed and was accordingly sentenced to prison sentences for having committed various fraud and forgery related crimes. While sharing his prison cell in detention with other detainees, he was harassed by other detainees in his cell, after which he requested a transfer to a different cell, the one where other homosexual detainees were held, even though it wasn't clear that such cell actually existed. Instead, he was placed in a small individual cell, not much different from solitary confinement, due to 7 m2 area, with very few light and much dust, even rats. He was also been unable to have access to other detainees or even open air. He then unsuccessfully requested to be transferred back, after

which he was diagnosed with depression from a health institution he was later referred to.

The Court acknowledged all of the above mentioned detention circumstances were stricter than in most solitary confinement that other detainees have in Turkey. It then concluded that all of these conditions, alongside with lack of access to an effective remedy, which would provide the applicant to contest such conditions, constitute inhuman and degrading treatment, thus violating Article 3 of ECHR.

However, the Court went even further. It established a violation of Article 3 taken in conjunction with Article 14 of ECHR, since the prison authorities had failed to properly assess the situation and that the measures taken were not aimed at protecting the physical integrity of the applicant but were taken because of the sexual orientation of the applicant. ECtHR also reaffirmed its standard that the authorities have an obligation under Article 14 combined with Article 3 to take all possible measures to verify whether a discriminatory attitude to the applicant had played a role in his complete exclusion from the activities of the prison. Although they had legitimate concerns about potential threats to the applicant's integrity, these threats were not sufficient to justify the measure of total excluding him from the prison community. Hence, it found a violation of Article 3 taken in conjunction with Article 14 of Convention.

Similar situation was also in Stasi v. France, where the applicant was convicted for several crimes in a row, and served his first of his sentences within a penitentiary Saint Paul. After he finished his first term, he was transferred to another penitentiary called Villefranche-sur-Saone. During his stay at the second institution he reported that he was raped while being in the previous one, where among other assaults, another inmate and his cellmate M. P. has harassed him due to his homosexuality. The applicant even stated his intentions of suicide on 9 July 2007, after which he was put under supervision until 26 June 2007. After a journal Liberation published an article on the applicant on 23 October 2008, the official investigation was launched by the Lion District Attorney. Acting on the instructions of DA, police has taken statements from the penitentiary's Deputy Director, main supervisor and an inmate M. P. with whom the applicant shared cells.

While assessing the merits of the case, the Court acknowledged that the authorities could not have known that the applicant was ill-treated before he came to Villefranche-sur-Saone institution, since he made no previous complaints on rape committed by the M. P, neither did he produce any evidence in that regard. However, with other reported assaults in prison, the authorities

were aware of them, hence the he was placed in a special unit for vulnerable prisoners. On the other hand, ECtHR noted that even though official investigation was launched, it failed to produce any outcome with regard to rape and assault in the first penitentiary. With respect to violence during the second sentence's term, the Court noted that the authorities had reasonable grounds to launch preliminary investigation, but the applicant failed to submit a criminal complaint. It also found no reason to believe that such complaint would not have reasonable prospects of success. Therefore, it found that the domestic law provided efficient and sufficient protection from physical injuries, and concluded that no violation of Article 3 took place.

Article 3 of the Convention is also applicable in cases of asylum seekers, usually where there is a risk of the person concerned to be submitted to the ill-treatment upon their expulsion from a respondent State due to their homosexuality. In the case of M.E. v. Sweden, Lybian applicant was seeking asylum in Sweeden, since he stated that he would be tortured and ill-treated upon his return to Lybia, due to his previous participation in arms trade for which he was already put into a military prison and tortured. He further maintained risk of ill-treatment due to his homosexuality.

Upon his arrival to Sweden, he lived with another man, with a wedding scheduled for September 2011. The Migration Board and Migration Court both reviewed his case, finding that his claims have no credibility and that he can temporarily be expelled to Libya, from where he can later apply for a family reunion. However, this decision went unenforced due to the appellate proceedings and violent events in Libya in 2014. Consequently, Migration Board granted the applicant a permanent residence permit in Sweden.

Since the applicant submitted that his removal to Libya would expose him to a real risk of inhuman or degrading treatment, the Court reaffirmed its well established case-law in expulsion cases. Once the applicant no longer risks being expelled from that State, it considers the case to have been resolved and strikes it out of its list of cases, whether or not the applicant agrees. This was also the case in Paez v. Sweden , Sarwari v. Austria, M.A. v. Sweden, Isman v. Switzerland and others . This was because the threat of a violation is removed by virtue of the decision granting the applicant the right of residence in the respondent State concerned. Hence, Article 3 would not be violated since the applicant no longer faced a real and imminent risk of being expelled. That was the reason why ECtHR finds such matters as resolved with within the meaning of Article 37 § 1 (b) of the Convention, and the reason why the Court decided to strike the application out of the list of cases.

Another aspect of potential violation of Article 3 towards LGBT persons can be seen in the cases like L. v. Lithuania, where the applicant was registered as female at birth, but regarded himself as a male from an early age. He sought medical advice and was diagnosed as transgendered. Lithuania's newly adopted Civil Code provided that unmarried adults had the right to undergo medically endorsed gender reassignment surgery. Following several years of hormonal treatment, the applicant underwent a partial reassignment surgery, namely a breast removal. He was reassured that further surgeries were soon to follow, as soon as appropriate regulation on the proceedings and conditions is adopted.

However, a delay in implementing the legislation and its procedures due to strong opposition to the Bill in the Parliament meant that the applicant would not be able to complete gender-reassignment surgery. According to the applicant, this led him to feelings of personal inadequacy and an inability to accept his body, which caused him feelings of great anguish and frustration. Furthermore, the applicant was unable to change his gender on several documents, including his birth certificate and passport, which identified him as female. He maintained that he was unable to apply for a job, pay social security contributions, consult a doctor, communicate with the authorities, obtain a bank loan or cross the State border, without disclosing his female sex. He suffered from depression and suicidal inclinations as a result. The applicant claimed that his rights under Articles 3, 8, 12 and 14 of the ECHR are violated, i.e. prohibition of torture, right to respect for private life, right to marry and prohibition of discrimination, respectively.

The Court observed that Article 3 entails a positive obligation on the part of the State to protect the individual from acute ill-treatment, whether physical or mental, whatever its source. However, this applies if the source is a naturally occurring illness, the treatment for which could involve the responsibility of the State but is not forthcoming or is patently inadequate, like in the cases of D. v. the United Kingdom or Pretty v. the United Kingdom. Nevertheless, while recognizing the applicant's understandable distress and frustration, ECtHR fount that it does not indicate such an intense degree, involving the exceptional, life-threatening conditions found in these comparative cases of Mr. D. and Mrs. Pretty, as to fall within the scope of Article 3 of ECHR. That was the reason why the Court found no violation of Article 3, but decided it was it more appropriate to analyze this aspect of the applicant's complaint under Article 8, which guarantees right to respect for private life.

Even though violations of rights guaranteed by Article 8 of the Convention are not analyzed as a part of this overview of cases concerning

violation of Article 3, it should be pointed out that it is not a rare occasion for the Court to assess a case within Article 8 of the Convention where the degree of a treatment did not suffice Court's minimum level of severity criteria needed for Article 3 to come into play. Accordingly, in this part of its judgement, the Court reiterated that this case engages State's positive obligation to ensure respect for private life, including respect for human dignity and the quality of life in certain respects.

In the present case, the Court established that there was a gap in the relevant legislation, with no law regulating full gender reassignment surgery. Consequently, the applicant was put into the intermediate position of a preoperative transsexual, having undergone partial surgery, with certain important civil-status documents having been changed. However, his personal code will not be amended until he undergoes the full surgery, thus affecting significant situations in his private life, such as his employment opportunities or travel abroad, since he remains a woman until then.

Regarding this legislative gap in gender reassignment surgery, where the necessary legislation, although drafted, had yet to be enacted, the Court drew special attention to the situation of applicant's distressing uncertainty vis-à-vis his private life and the recognition of his true identity, since more than four years have elapsed since the relevant provisions came into force. Consequently, the Court considered that a fair balance has not been struck between the public interest and the rights of the applicant and found that there has been a violation of Article 8 of the Convention.

Interestingly enough, the Court found that the applicant's complaint that his right to marry is violated since he was unable to legalize his long-lasting relationship with his girlfriend through marriage as a man, and thus establish a family through adoption, was in fact premature. The Court reasoned that if the applicant completes full gender reassignment surgery, his status as a man would be officially recognized, alongside with the right to marry a woman. The Court emphasized that the key issue is the gap in legislation, which has been analyzed under Article 8 of the Convention, where the Court has already found a violation of Article 8. Consequently, it found it unnecessary to examine applicant's allegations separately under Article 12 of the Convention.

3. CONCLUSION

Authors presented an overview of several distinctive and attention worthy cases of European Court on Human Rights concerning prohibition of

torture, inhuman or degrading treatment or punishment with respect to applicants being members of LGBT community. Given cases present a fraction of various types of difficulties that their members experience in enjoying the rights guaranteed by the ECHR. As opposed to most Article 3 cases which engage negative obligation of the state to refrain from ill-treatment, presented cases show that the positive obligation to take appropriate steps to provide effective protection to those within their jurisdiction from third persons and procedural obligation to conduct an effective, official investigation, are just as important. However, it can be noted that applicants' homosexuality or transsexuality significantly affects conduct of the domestic authorities, who are much less hesitant to safeguard LGBT persons from their jurisdiction or to investigate allegations of their ill-treatment, mostly due to their sexual orientation. Such failures are especially sanctioned by the Court in cases where homophobia is a key motive driving hate crimes. Thus, the Court's standard that all reasonable steps to unmask the role of possible homophobic motives must be taken, so that the hate crime doesn't get the same treatment as ordinary crimes, is worth every praise since it helped developing the awareness of significance and dangerous of hate crime, as well as importance of it being sanctioned. That would be the key legacy of the Court when dealing with LGBT people under Article 3, since other alleged violations that don't attain the minimum level of severity standard get assessed under other articles of the ECHR.

REFERENCES

1. Çakici v. Turkey, application no. 23657/94
2. D. v. the United Kingdom, application no. 30240/96
3. I.A. v. the Netherlands, no. 76660/12;
4. Identoba and Others v. Georgia, application no. 73235/12
5. Identoba and Others v. Georgia, application no. 73235/12
6. Ireland v. UK, application no. 5310/71
7. Isman v. Switzerland, application no. 23604/11
8. L. v. Lithuania, application no. 27527/03
9. M.A. v. Sweden, application no. 28361/12
10. M.C. and A.C. v. Romania, application no. 12060/12
11. M.E. v. Sweden, application no. 71398/12
12. Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, application no. 71156/01;
13. Mudric v. the Republic of Moldova, application no. 74839/10;
14. Nachova and Others v. Bulgaria [GC], application nos. 43577/98 and 43579/98;
15. O.G.O. v. the United Kingdom, application no. 13950/12
16. Paez v. Sweden, application no. 29482/95
17. Perry, J.,, Franey, P., "Policing Hate Crime against LGBTI persons: Training for a Professional Police Response", Council of Europe, Strasbourg, 2007
18. Pretty v. the United Kingdom, application no. 2346/02
19. Sarwari v. Austria, application no. 21662/10
20. Stasi v. France, application no. 25001/07
21. X v. Turkey, application no. 24626/09

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ПРИПАДНИЦИ ЛГБТ ЗАЈЕДНИЦЕ КАО ЖРТВЕ ПОВРЕДЕ ЧЛАНА 3 ЕВРОПСКЕ КОНВЕНЦИЈЕ О ЗАШТИТИ ЉУДСКИХ ПРАВА

Резиме

Аутори су у раду представили карактеристичне случајеве из праксе Европског суда за људска права код којих се као жртве (наводне) повреде јављају припадници ЛГБТ заједнице код члана 3 Европске Конвенције за људска права. Као полазна основа послужила је пресуда у којој је Суд по први пут констатовао сексуалну припадност као основ предрасуде Identoba and Others v. Georgia, а предмет обраде били су и случајеви проистекли из наведене пресуде. Посебна пажња посвећена је случајевима у којима постоји опасност од депортације хомосексулаца услед чега може доћи до повреде права из члана 3.

Кључне речи: ЛГБТ заједница, Европски суд за људска права, Конвенција, члан 3.

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NEIGHBOR RELATIONS IN MACEDONIAN PROPERTY LAW

Abstract

The paper analyzes the regulation of neighbor relations in contemporary property law, particularly in Macedonian law and generally in laws and codes of EU member states, and states aspiring for EU membership. Development of the so called "neighbor's law" is followed from its historical roots in the Roman law until the present day. Main focus of the paper is to examine the different approaches in regulating neighbor rights dependent on the different ways that neighbor's law is understood and defined in the legal texts of the laws and codes regulating property relations. Basic principles for exercising neighbor rights found in Macedonian law and comparatively are also presented and analyzed in the paper, as well as the types of neighbor rights regulated in the Macedonian Law of Ownership and Other Real Rights.
Key words: property, real rights, ownership, neighbor rights.

1. HISTORICAL DEVELOPMENT OF NEIGHBORS' LAW

Neighbor relations have a long history of development that dates as early as the Law of XII Tables where certain aspect of neighbor rights and obligations were regulated such as: the right to remove branches or entire trees that overhang on one's land, the right to gather fruits fallen on the neighbors land, the duty to

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maintain certain distance between two buildings or adjoining fields and etc[1]. These rules were later accepted in the codification of the Roman law.

According to scholars the early development of neighbor's law resulted from the need to regulate relations between neighbors who often entered into disputes related to the use of land. The predial servitudes have shown to be ineffective legal instrument when it came to regulating neighbor relations since there was no interest between the neighbors to reach an agreement on the use of adjoining lands by instating servitudes on the land[2]. There was also the growing need for mutual encumbrances of adjoining lands with predial servitudes. So as a result of these circumstances the need for creating a set of rules that will regulate relations between neighbors on compulsory bases emerged. The created set of rules regulating relations between neighbors became known as neighbor's law[3].

With respect to Macedonian legal history one of the earliest noted legal sources for regulating neighbor relations was the Nomos Georgikos, also known as the Farmer's Law, which was enforced on the territory of the Byzantine Empire[4]. During the period when Macedonia was under the rule of the Ottoman Empire the legal text that regulated neighbor relations was the Kanun for the common people intended for the Christian and Jewish people under Ottoman rule[5]. Other relevant source for regulating neighbor relations in Macedonia was the Serbian Civil Code from 1844[6]. This Code was enforces on Macedonian territory as late as 2001 when the Law of Ownership and Other Real Rights was

[1] G. Mousourakis, *Fundamentals of Roman Private Law*, Springer, 2012, 154; R. Domingo, *The Law of Property in Ancient Roman Law*, 20 (1-27)<https://ssrn.com/abstract=2984869> 27 march 2021; P. Birks, "The Roman Law Concept of dominium and the Idea of Absolute Ownership", *Acta Juridica*, volume 1, 1985, 16 -17.

[2] Z.P. Rashovich, *Stvarno pravo*, drugo izdanje, Beograd, 2005, 357; Р. Ковачевић-Куштримовић, "Стварни службености и соседско право", *Зборник во чест на Асен Групче,Универзитет" Св. Кирил и Методиј", Правен Факултет- Скопје*, Скопје, 2001, 89-90.

[3] Р. Ковачевић- Куштримовић, *op. cit.*. 90.

[4]Б. Поповска, *Државноправна историја на Македонија,7- хх век*, Скопје, 2010, 66-6.

[5] K. Inan, *The Making of Kanun Law in the Ottoman Empire, 1300-1600*, Using and Resisting the Law in European History, G. Lottes, E. Medijainen & J.V. Sigurdsson (ed), Pisa 2008, 65-75.

[6] P. Guzina, "Istorijski osvrt na karakter i znacaj srpskog gradjanskog zakonika iz 1844 godine", *Istorijski glasnik*, Belgrad, 1949/1, 28; E. Stanković, The *Serbian Civil Code – The Fourth Codification in Europe*, Unisa Press 2014, 881-890, 884-885 < http://www.scielo.org.za/pdf/funda/v20n2/36.pdf>

passed[7], because the Law of Basic Property Relations from 1980[8], which was enforced in Macedonia during socialistic regime, never regulated neighbor relations.

2. REGULATING NEIGHBOR RELATIONS IN MACEDONIAN LAW AND COMPARATIVELY

In contemporary property law neighbor relations are regulated by the laws regulating property relations or in the civil codes, where such codifications exist. In some of the legal text the so called "neighbor's law" is regulated in the parts where the right of ownership is regulated, and other legal texts contain special chapter regulating neighbor's law. The legal texts of European laws and codifications also differ in the way they define neighbor's law. Some define neighbor's law as limitation of the right of ownership, while others define it as a set of rules referring to every real-estate owner.

The fact that the land is consisted of great number of land parcels connected to each other but belonging to different owners is the core reason for regulating the relations between the owners of those interconnected land parcels. The connection between the land parcels is natural and in no way conditioned by property law regulations. Quite the opposite, the existence of natural connection between the land parcels affect the way that property relations are regulated and how rights over the land parcels are enjoyed[9]. Landowners are obliged to endure, abstain or to undertake actions in favor of owners of the adjoining parcels so that all property rights can be enjoyed under mutually beneficial conditions. The limitations imposed over landowners concerning the enjoyment of their right of ownership, according to scholars do not modify the content of that right (possession, use and disposition) rather they determine the extent to which that right can be freely enjoyed[10] . Viewing neighbor relations in this manner means that modern scholars have abandoned the idea that neighbor's law consist of special limitation of person's right of ownership, and instead accent the general and reciprocal character of those limitations that affect every owner and limit

[7] Official Gazette of RM, N^0 18/01, 92/08, 139/09 and 35/10. This Law was passed by the Macedonian Parliament on 20th of February 2001. It was published in the Official Gazette on 5th of March 2001. The Law came in force 8 days after its publication but started to be enforced 6 month after.

[8] Official Gazette of SFR Yugoslavia, N^0 8/80 and 36/90.

[9] N. Gavella, *Stvarno pravo*, Zagreb, 1998, 469.

[10] Р. Ковачевић- Куштримовић, М. Лазић, *Стварно право*, Ниш, Зограф, 2004, 90; N. Gavella, *Op. cit.*, 469-470.

every right under equal conditions. Having this in mind we define neighbor's law as set of rules that enable one person to ask of another to act, to abstain or to endure something in his or her favor related to the enjoyment of the right of ownership over real-estate. Since neighbor rights are determined by law, when they are violated on the detriment of a certain person, that person has the authority to seek judicial protection.

In continuance we will analyze the regulation of neighbor's law in Macedonian legal system and comparatively.

1. In the Macedonian legal system the neighbor's law is regulated by the Law of Ownership and Other Real Right. These regulations are placed in the First Part of the Law named - *Right of Ownership*, in its Second chapter named – *Neighbor's law*. The fact that neighbor's law is not part of Chapter one that regulates the content, effects, limitations and object of the right of ownership leads us to the conclusion that the Macedonian legislator doesn't consider neighbor's law as a form of limitation of the right of ownership, but rather it considers it as a set of rules regulating the extent to which the right of ownership over real-estate can be enjoyed. This treatment of neighbor's law becomes even more evident if we consider the way neighbor rights are defined by article 17 of the Law of Ownership and Other Real Rights: *Neighbor's law is mutual and considered exercise of the right of ownership determined by this and other law, which empowers the owner of one real-estate for the sake of enjoyment of his or her right of ownership to ask the owner of the adjoining real-estate to endure, to abstain or to do something related to the real-estate, and to ask as well for the boundaries to be placed between the adjoining real-estates.* Considering the cited provision we can distinguish five characteristics of neighbor's law: a) mutual exercise of neighbor rights, b) considered exercise of rights c) power to ask for neighbor rights to be observed by every owner of real-estate, d) duty to respect neighbor rights and e) the right to ask for placement of boundaries between real-estates.

a) Mutual exercise of neighbor rights entails the need for cooperation between the owners of the adjoining real-estates in order for those rights to be observed in favor of one or both of the owners. The cooperation consist of enduring, abstaining of acting in favor of the neighbors interests.

b) The considered exercise of neighbor rights means that every real-estate owner should chose to exercise those rights in a manner that is less burdensome for his or her neighbor or in a manner that is least inconvenient for the neighbor.

c) The power to ask for neighbor rights to be observed is afforded to every real-estate owner with respect to his or her neighbor. This means that the real-estate owners are empowered to ask and to expect for their neighbors to undertake action, or to endure or abstain from actions that are contrary to neighbor's law.

d) Duty to respect neighbor rights is complementary to the authority belonging to each real-estate owner to ask of his or her neighbor to observe the afforded neighbor rights. The neighbors are legally bound to respect each other's neighbor rights that are legally attributed to them as owners of adjoining real-estates. Failing to do so could lead to legal sanctions against the person who has violated those rights.

e) The right of neighbors to ask for placement of boundaries between the adjoining real-estates is part of neighbor's law in all the legal texts subject to the comparative analysis in this paper. However, what is specific about the Macedonian Law of Ownership and Other Real Rights is that it includes this right in the definition of neighbor's law, which is not done in other legal text we have analyzed. We assume that this approach in the Macedonian Law of Ownership and Other Real Rights is due to the mark left on property relations by the feudal system that persisted for a long time on Macedonian territory.

2. Croatian Law of Ownership and Other Real Rights[11] regulates neighbor's law in the Third part of the Law called *Right of Ownership* in separate Chapter 5 – *Neighbor rights* (art. 110-113), right after the chapter about condominium property. The location of the provisions referring to neighbor's law in the Croatian Law indicates that neighbor's law is not understood as limitation of ownership, but as a independent legal institute consisted of rules regulating relations between real-estate owners.

The definition of neighbor's law is contained in article 100 of the Law: *Neighbor rights are authorizations prescribed by this or other law afforded to the owner of a real-estate for mutual and considered enjoyment of the right of ownership that consist of authority for the owner of a real-estate to ask the owner of another real-estate to endure, abstain or to do something on his or her property in favor of the other in a manner prescribed by law.* It can be noted that the Croatian Law doesn't strictly refer to adjoining real-estates when regulating the authority of the real-estate owner to ask something form his or her neighbor in accordance with neighbor's law. This is due to the understanding that real-

[11] Official Gazette of R. Croatia, N^0 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12 and 152/14.

estate owners can potentially direct such authority against any real-estate owner in the neighborhood and not exclusively against the owner of the adjoining real-estate, since the natural connection between real-estates is not limited only to real-estates that are directly linked one to the other. What is also evident about the Croatian Law is that, unlike Macedonian Law, it doesn't explicitly mention the right of neighbors to place boundaries as part of the definition of neighbor rights. This is a completely justifiable approach since neighbor's law includes all kinds of neighbor rights, and the right of placing boundaries between real-estates is just one of them.

3. Slovenian Property Code[12] regulates neighbor's law in part IV of the Code named – *Right of Ownership* in Section 4 named - *Neighbor's law* (art. 73-91), that is found right after the section – *Right of Ownership of Multiple Persons*. The location of the neighbor's law in the Slovenian Property Code attests to the fact that Slovenian law also treats neighbor's law as separate set of rights, and not as form of limitation of the right of ownership over real-estate.

Definition of neighbor's law is found in article 73 of the Code named – *Prohibition of Mutual Nuisance*. The provisions of article 73 accent the duties of each owner of real-estate to refrain him or herself from causing nuisance of damages: *Due to neighbor relations and the spatial connection of real-estates, the real-estate owners are obligated to exercise their right of ownership in a manner that won't cause nuisance or damages for others*. As it is evident from the provisions, the Slovenian Property Code considers neighbor's law to be set of rules imposing legal obligations for every real-estate owner.

4. The Law on Property of Montenegro[13] places neighbor's law in Chapter IX – *Neighbor Rights* (art. 259-268) after the chapter regulating servitude. By doing so the Law gives neighbor's law treatment of separate legal institute that regulates relations between neighboring owners of real estate. Much like the other mentioned legal texts, this Law also makes a clear distinction between limitations of the right of ownership and the neighbor rights.

Article 250 of the Law on Property of Montenegro defines neighbor rights as: *legal authorization of the real-estate owner to use the adjoining real-estate or to ask the owner of the adjoining real-estate to act or to abstain from doing something that he or she would normally be able to do.* The definition of neighbor rights in this Law incorporates two basic rights: the right to use the

[12] Official Gazette of R. Slovenia, N^0 87/02, 91/13 and 23/20.
[13] Official Gazette of R. Montenegro, N^0 19/2009.

adjoining real-estate and the right to ask for the owner of the adjoining real-estate to do or to abstain from doing something in favor of his or her neighbor interests.

5. In the Swiss Civil Code[14] neighbor's law is situated in the Chapter Two: *Substance and Limitation of Land Ownership*, Title III: *Law of neighbors* (art. 684-698). Unlike the previously analyzed legal text, the Swiss Civil Code places neighbor's law in the part regulating the limitation of the right of ownership on land. This clearly shows that the Swiss Civil Code views neighbor's law as a set of rules intended to limit the exercise of the right of ownership of land owners. The limitations include: the ban for causing excess detriment, rules for excavation and construction on one's land, rules concerning plants, rules for managing flowing waters and drainage, duty to permit placement of pipes, cables and conduits on one's land, duty to safeguard the interest of the servient landowner, the rights of way, the right of enclosure and the duty to maintain.

6. The German Civil Code[15], much like the Swiss Civil Code, includes neighbor's law in the Book 3: *Law of Property*, Division 3: *Ownership*, Title 1: *Subject matter of ownership* (art. 903-924). In Title 1 of Division 3, the German Civil Code, among other matters relating to the right of ownership, regulates neighbor right as well. More precisely neighbor rights include: duty to tolerate emissions, the right to place facilities on neighbors land, the right to ask for precautions in case there is danger of imminent collapse of buildings, rules for excavation, rules for treatment of overhanging branches, intruded roots and fallen fruits, duty to tolerate encroachment, right of way of necessity and boundary marking (joint use of boundary installations and maintenance)[16].

7. The Draft of the Civil Code of the Republic of Serbia from 29 of May 2015[17] regulates neighbor rights in Book 3 – *Property Law* in the First part named *Right of Ownership* in a separate Section 6 called *Neighbor Rights* (art. 1903-1912). The placement of the provision regulating neighbor rights leads to the conclusion that in the Draft of the Civil Code neighbor's law is treated as a separate legal institute. This legal institute is consisted of various types of authorizations for real-estate owners. Definition on what are neighbor rights in

[14] Status as of January 2021 <https://lawbrary.ch/de/browser/ZGB/210__3/?plang=en>.
[15] https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3710.
[16] German Civil Code, Section 906-923.
[17] Available at: < https://www.mpravde.gov.rs/files/NACRT.pdf>.

general is found in the provision of article 1903 where it is stated that: *In neighbor relations every owner of real-estate is obliged to behave as a reasonable and cautions individual and to act with due diligence with respect to the rights and interest of his or her neighbors.* From the definition we can see that the Draft of the Civil Code accents the law imposed duties for real-state owners that they must observe in relations with one another.

We note that the Draft of the Civil Code of Republic of Serbia, just like the Macedonian and the Croatian Law, regulates neighbor's law based on the principles of mutual and considered exercise of rights between neighbors.

3. BASIC PRINCIPLES FOR EXERCISING NEIGHBOR RIGHTS IN MACEDONIAN LAW

The Law of Ownership and Other Real Rights regulates neighbor rights as special authorization for the real-estate owners. These authorizations under equal terms belong to all real-estate owners, empowering the owners to ask of their neighbors to undertake a certain action, or to endure or abstain from action that they would able to do under different circumstances. Exercising such neighbor rights needs to be done following some basic principles that can be derived from the provisions of the Law of Ownership and Other Real Rights regulating neighbor's law such as: a) the principle of mutuality, b) the principle of consideration, c) the principle of compulsivity and d) the principle of restriction.

a) The first basic principle for exercising neighbor rights that can be derived from the provision of article 17 of the Law of Ownership and Other Real Rights is the principle of mutuality. According to this principle the neighbors are mutually responsible for ensuring the exercise of neighbor rights. When the circumstances call for it, one of the neighbors is obliged to act in the interest of the other or others by doing something that he wouldn't otherwise be obligated to do, by enduring something that otherwise he won't need to endure, or by abstaining from doing something that he otherwise would be able to do. The mutuality also means that the neighbor who has acted in the interest of his or her neighbors has the right to demand and to expect the same in return[18].

b) Second principle regarding the exercise of neighbor right is also derived from the provisions of article 17, paragraph 1 of the Law of Ownership and Other Real Rights. It is the principle of consideration. This principle means

[18] The principle of mutuality is found in the Croatian Law of Ownership and Other Real Rights (art. 100, par. 1).

that the real-estate owners are obliged to act in consideration of the other party (the other neighbor or neighbors) towards whom they have directed demands emerging from neighbor's law. In other words, the principle of consideration instructs real-estate owners to be as least intrusive as possible when they ask of their neighbors to act in their interest[19].

c) Third principle that is implied in the provision of article 17, paragraph 2 is the principle of compulsivity. What this principle accents is the compulsory nature of neighbor rights. When the circumstances are such that one real-estate owner needs to act in the interest of another (his or her neighbor) he is bound by law to do so. That duty imposed by the provisions of neighbor's law, as we have stated, can take on a form of a positive or a negative obligation for the obligated party. Whatever the type of obligation, the neighbor must obey by it, and by doing so to enable the exercise of neighbor rights. Should the obligated neighbor fail to do so, the affected party or parties have the right to seek protection before the courts under the provision of neighbor's law.

As the Law of Ownership and Other Real Rights states, primary means for protection in case of violation of neighbor rights are the legal actions before the courts. The Law however doesn't exclude the possibility for other forms of protection to be enacted, such as the protection before other public authorities for example. It is debatable however if the Law leaves an opportunity for self-protection on part of the affected party. It is our opinion that even if the Law doesn't explicitly mention self-protection as means for protection of neighbor rights there is no legal impediment for self-protection to be enacted since self-protection is one of the recognized means for protection of property rights under the Law of Ownership and Other Real Rights. Naturally, neighbors can resort to self-protection only if the circumstances under which the violation of their neighbor rights has taken place are such that all other forms of protection would be inadequate.

With respect to judicial protection of neighbor rights we would like to point out that the courts afford such protection with declaratory judgments. This is because under the neighbor's law the rights of neighbors are afforded to every real-estate owner by the power of the law, so there is no need for them to be individually recognized with constitutive court decision, an act of public authority or a contract. The courts intervention in cases of violation of neighbor rights comes down to declaring that the legal relation between neighbors exists,

[19] The principle of consideration is present in the Croatian Law of Ownership and Other Real Rights (art. 100, par. 1) and in the Draft of the Civil Code of the Republic of Serbia (art. 1903).

and that it constitutes authority for one real-estate owner to ask of his or her neighbor to act a certain way that is in the owner's interest. Once a violation of neighbor rights has been declared by the courts the defendant is obliged to remedy the situation, meaning he is obliged to adjust his or her behavior in accordance to the neighbor's law.

d) Forth principle for exercising neighbor rights derived from the provisions of article 17, paragraph 3 is the principle of restriction. This principle imposes restriction for the real-estate owners on the exercise of neighbor rights to a measure that is the least burdensome for the neighbor that is obliged to do something, or to endure or abstain from doing under neighbor's law[20].

Regarding the principle of restriction we would like to point out that it shouldn't be confused with the restriction in exercising servitudes. Although the essence of the restriction is the same, to insure that the obliged person is not excessively burdened by the rights of others affecting his or her property, the nature of servitudes differs from the nature of neighbor rights. Servitudes are real rights that encumber the property of an individual person in favor of the holder of the right of servitude. If servitudes are predial, they encumber one individual real-estate (serviant property) in favor of another individual real-estate (dominant property). As for neighbor rights they are authorizations for every real-estate owner and under circumstances determined by law they can affect any neighboring real-estate, or multiple neighboring real-estates. The affect can be one sided or reciprocal, again depending on the circumstances.

By comparative analysis of other laws and codes regulating neighbor's law we note that they incorporate other principles for exercising of neighbor rights that can't be found in the Macedonian Law of Ownership and Other Real Rights. The Slovenian Property Code implements the principle of peaceful exercise of rights, which means that the right of property should be enjoyed without interferences and without causing damages (art. 73, par. 1), the principle of bona fide in exercising neighbor rights and also calls for respect of local customs (art. 73, par. 2). The Montenegro's Property Law prescribes the bona fide principle in neighbor's law that obliges neighbors "*to act in the spirit of good neighborly relations*" and also calls for respect of local customs.

The implementation of the bona fide principle in the laws and codes regulating property relations is of great importance because it sets the base for how all property rights should be exercised in order for conflicts to be avoided.

[20] Principle of restriction is reflected in the provisions of the Croatian Law of Ownership and Other Real Rights (art. 100, par. 3), Montenegro's Law on Property (art. 250, par. 2) and also in the Slovenian Property Code (art. 73, par. 2).

As for the provisions calling for respect of local customs, they attest to the fact that every country, including member state of the European Union, continue to regulate property relations in accordance to national interests and customs.

In determining the scope of neighbor rights we note that some laws such as the Macedonian Law of Ownership and Other Real Rights and the Croatian Law of Ownership and Other Real Rights, Montenegro's Law on Property, and the Draft of the Civil Code or the Republic of Serbia explicitly state that neighbor rights exist on all types of real-estate, not just land. The German Civil Code and the Swiss Civil Code on the other hand recognize neighbor rights only in reference to land, and not in reference to other types of real-estate. As for the question who can exercise neighbor rights, the German Civil Code, the Swiss Civil Code and the Draft of the Civil Code of the Republic of Serbia refer only to owners, while the Macedonian Law of Ownership and Other Real Rights and the Croatian Law of Ownership and Other Real Rights recognize neighbor rights for possessors of real-estate as well as for owners. The Slovenian Property Code and Montenegro's Law on Property sate that neighbor rights are recognized for owners and also for immediate possessors of real-estate.

4. TYPES OF NEIGHBOR RIGHTS IN MACEDONIAN LAW

The Law of Ownership and Other Real Rights regulates eight types of neighbor right which are: a) rights concerning property lines, b) rights on trees grown on property lines, c) rights on fences d) right of entrance on neighboring real-estate, e) right of use of neighboring real-estate for performance of work, f) rights concerning placement of conducts and other appliances, g) rights concerning acts that cause danger or damages on neighboring real-estate and h) rights concerning drainage and flowing waters.

a) Property line, according to the provisions of article 18 of the Law of Ownership and Other Real Rights, is the border line that divides one land parcel from another. In theoretical sense the property lines determine where the right of ownership on land ends for one and begins for the other owner, limiting the exercise of the ownership rights whiting the determined property lines.

In the Macedonian legal system the property lines are determined by cadastre surveys and graphically presented in the cadastre plans. Upon the full implementation of the new Real-Estate Cadastre in December 2012 we can state that almost every land parcel on Macedonian territory has been surveyed and the property lines determined in the cadastre plans (excluding the parcels subject to

disputes)[21]. The property lines as they are defined and understood in the theory represent imaginary lines created by use of survey instrument. In reality what is visible are the property line markings that are usually artificial made from concrete 70 cm high and 20 cm wide, but they could also be natural such as rocks and stones, then they are 20 cm high and wide, or in some cases 10 cm wide on the top end of the marking[22].

Neighbor rights concerning property lines involve duty for the neighbors to respect the property lines and to protect the property line makings from being damaged or lost. If the property markings have been lost, have become unrecognizable or if the property line has been disputed, than it is the duty of each of the neighbors to ask for their reinstatement. The reinstatement of property lines is done in non-litigious civil procedure in accordance to the Law for Non-litigious Civil Procedure (art. 228-240)[23]. One issue regarding property lines that has not been regulated by the Law of Ownership and Other Real Rights it is the issue of determining ownership over the land between two land parcels that are on different levels. Judges and scholars share the opinion that in such cases the land between the two differently leveled land parcels belongs to the owner of the higher land parcel[24].

b) Neighbor relations concerning trees found between two land parcels are regulated by article 21 of the Law of Ownership and Other Real Rights. When determining who is entitles to the right of ownership on the trees the principle of superficies solo cedit is observed[25]. In accordance to this principle the Law determines that the owner of the tree is the owner of the land where the stem has grown, regardless were the branches or roots expand. If the stem has grown on

[21] Р. Живковска, Т. Пржеска, С. Димова, Н. Петрушевска, *Коментар на Законот за катастар на недвижности*, Европа 92, Скопје, 2013, 113.
[22] Р. Живковска, Т. Пржеска, С. Димова, Н. Петрушевска, *Op. cit.*, 113.
[23] Official Gazette of RM, N^0 9/08. Subject matter in the proceedings for reinstatement of property lines is for the exact location of the property line to be determined and adequately marked. What can't be brought for argument before the courts in this non-litigious civil procedure is the dispute concerning the right of ownership over the adjoining land parcels. А. Јаневски, Т. Зороска – Камиловска, *Граѓанско процесно право, книга втора, Вонпарнично право*, Скопје, 2010, 160.
[24] А. Групче, *Обичајното право во областа на стварното право - во минатото и денес*, МАНУ, 290-293; К. Чавдар, Ки. Чавдар, *Закон за сопственост и други стварни права, Закон за договорен залог, коментари, објаснувања, практика, предметен регистар*, Академика, 2012, 87-88; Р. Максимовски, "Соседското право во правниот систем", *Судиска ревија*, Здружение на судиите на Република Македонија, Декември 2004, бр. 4, година X, 50.
[25] More on the principle of superficies solo cedit in property relations see: Р. Живковска, *Стварно право,* Европа 92, Скопје, 2005, 159.

the property line then the tree is co-owned by the neighbors. With respect to branches that overhang or roots that protrude on the neighboring land, the Law prescribes that the affected landowner has the right to cut the branches and roots and to keep them or to use the parts of trees that overhang on his or her land. The affected landowner can also claim damages against the owner of the tree if the damages emerge from the branches or roots as result of his or her negligence. The same applies if the affected landowner was forbidden by law to cut the branches (art. 22). Application of these provisions is excluded if the land in question is a forest land.

In the provisions of article 21 the Law of Ownership and Other Real Rights uses the term "real-estate" which we consider it to be inadequate for this provision because generally speaking when the Law uses the term "real-estate" it refers to all types of real-estate (land, buildings, infrastructure and etc.). For this particular provision the more adequate term is "land".

c) The Law of Ownership and Other Real Rights recognize the right of each neighbor to place fences on one's land as long as it is not done contrary to the law or the local customs. The fence placed on one's land is exclusively owned by the owner of that land, and it is the owner's duty to maintain the fence so that it doesn't cause damages on the neighbor's land (art. 20). When the fence has been placed on the property line between two land parcels then, according to the provision of the Law of Ownership and Other Real Rights it is co-owned by the owners of the adjoining land parcels. Both owners have the right to use the fence and the obligation to maintain it, barring the maintenance costs in equal parts. The co-owned fence can't be subject of division between the co-owners (art.19). The Law of Ownership and Other Real Rights doesn't specify the conditions under which co-owned fence can be removed. Considering how co-ownership is regulated by the Law we conclude that the co-owned fence can be removed if there is an agreement between the co-owners. If an agreement can't be reached the interested party may plead the case before the courts.

d) Right of entrance on neighboring real-estate is afforded so that a person may retrieve his or her movable property (animal, bees and other things) that has accidently crossed or has been driven by outside forces into the neighboring real estate (art. 23). The right of entrance is complementary to the duty of the landowner to allow entrance. However, the Law gives the landowner a choice to forbid entrance as long as he or she is prepared to personally return the movable property. If as a result of the event damages have been caused to the landowner, than the owner of the movable property is obligated to compensate the damage, as well as all expenses for maintenance of the movable property

while it was in the landowner's possession. As insurance that damages and expenses will be paid, the landowner has the right to exercise ius retencionis over the movable property.

e) The right of use of neighboring real-estate for performance of work can be exercised under two conditions: if the work is necessary and if it can't be otherwise performed (art. 24). Usually the work consists of placing scuffles or other installation needed for construction or reparations. The real-estate owner is obliged to endure the performance of the necessary work, for which the owner is entitled to compensation in an amount no less than compensation paid for partial expropriation according to the Law of Expropriation[26]. Upon termination of the necessary work, the neighbor is obligated to return the real-estate in its previous condition and to compensate its owner for any damages that have been caused as the result of the work.

f) Placement of conducts and other appliances under the neighbor's law is permitted if it is in public interest (art. 25). If the placement of such appliances is solely in private interest, then the placement may be performed in accordance to the provisions regulating predial servitudes.

g) The Law of Ownership and Other Real Rights prohibits neighbors to undertake activities such as construction, excavation or other works that may cause danger or damages for the adjoining real-estate if the necessary precaution measures haven't been taken (art. 26). If the precaution measures are ineffective the concerned neighbors may ask for the activities to be stopped. When the danger for the adjoining real-estates lies in the possibility for a building or other structure to fall, the affected neighbor is entitled to ask the owner of the building or the structure to undertake all necessary measures in order to prevent the damages from occurring (art. 27).

h) According to the Law of Ownership and Other Real Rights neighbors are obligated to ensure that the drained water from their real-estate doesn't enter on the adjoining real-estate unless there is a different agreement between the neighbors, or if the drainage is preformed in accordance to local customs (art. 28). With respect to flowing waters, the Law of Ownership and Other Real Rights explicitly prohibits landowners to interfere with the natural flow of waters above or beneath the ground by placing dams or other installations that impede the flow of water, by changing the direction of the flowing water or by damaging or

[26] Official Gazette of RM, N^0 95/12, 131/12, 24/13, 27/14, 104/15, 192/15, 23/16 and 178/16. More on the issue of compensation for partial expropriation see: Р. Живковска, Т. Пржеска, В. Димитровска, *Коментар на Законот за експропријација*, Европа 92, Скопје 2013, 51-58.

polluting the shore, the water through or the structures along the shoreline (art. 29).

5. CONCLUSION

Neighbor relations have a long history of development that dates as early as the Law of XII Tables. In Macedonian legal history the Nomos Georgikos, the Kanun for the common people and the Serbian Civil Code from 1844 are recognized as legal sources for regulating neighbor relations.

In contemporary property law neighbor's relations are regulated by the laws regulating property relations or in the civil codes. The legal texts of laws and codifications differ in the way the neighbor's law is defined. Some define neighbor's law as limitation of the right of ownership, while others define it as a set of rules referring to every real-estate owner.

Macedonian legislator doesn't consider neighbor's law as a form of limitation of the right of ownership it considers it as a set of rules regulating the extent to which the right of ownership over real-estate can be enjoyed.

According to the provisions of the Law of Ownership and Other Real Rights exercising neighbor rights is conducted following the basic principles of neighbor's law: a) the principle of mutuality, b) the principle of consideration, c) the principle of compulsivity and d) the principle of restriction.

The Law of Ownership and Other Real Rights regulates eight types of neighbor right which are: a) rights concerning property lines, b) rights on trees grown on property lines, c) rights on fences d) right of entrance on neighboring real-estate, e) right of use of neighboring real-estate for performance of work, f) rights concerning placement of conducts and other appliances, g) rights concerning acts that cause danger or damages on neighboring real-estate and h) rights concerning drainage and flowing waters.

REFERENCES

Birks P, “The Roman Law Concept of dominium and the Idea of Absolute Ownership”, *Acta Juridica*, volume 1, 1985;

Domingo R., *The Law of Property in Ancient Roman Law*,
<https://ssrn.com/abstract=2984869> 27 march 2021;

Draft of the Civil Code of the R. Serbia
< https://www.mpravde.gov.rs/files/NACRT.pdf>;

Gavella N., *Stvarno pravo*, Zagreb, 1998;

German Civil Code – BGB,
<https://www.gesetze-im internet.de/englisch_bgb/englisch_bgb.html#p3710>;

Guzina P., “Istorijski osvrt na karakter i znacaj srpskog gradjanskog zakonika iz 1844 godine”, *Istorijski glasnik*, Belgrad, 1949/1;

Inan K., *The Making of Kanun Law in the Ottoman Empire, 1300-1600, Using and Resisting the Law in European History*, G. Lottes, E. Medijainen & J.V. Sigurdsson (ed), Pisa 2008;

Law of Basic Property Relations, Official Gazette of SFR Yugoslavia, N^0 8/80 and 36/90;

Law of Expropriation, Official Gazette of RM, N^0 95/12, 131/12, 24/13, 27/14, 104/15, 192/15, 23/16 and 178/16;

Law of Ownership and Other Real Rights of Croatia, Official Gazette of R. Croatia, N^0 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12 and 152/14;

Law of Ownership and Other Real Rights of North Macedonia, Official Gazette of RM, N^0 18/01, 92/08, 139/09 and 35/10;

Law on Property of Montenegro, Official Gazette of R. Montenegro, N^0 19/2009;

Mousourakis G., *Fundamentals of Roman Private Law*, Springer, 2012;

Property Code of Slovenia, Official Gazette of R. Slovenia, N^0 87/02, 91/13 and 23/20;

Rashovich Z.P., *Stvarno pravo, drugo izdanje*, Beograd, 2005;

Stanković E., *The Serbian Civil Code – The Fourth Codification in Europe*, Unisa Press 2014, 881-890 < http://www.scielo.org.za/pdf/funda/v20n2/36.pdf>;

Swiss Civil Code - ZGB,
Status as of January 2021
<https://lawbrary.ch/de/browser/ZGB/210__3/?plang=en>;

Групче А., *Обичајното право во областа на стварното право - во минатото и денес*, МАНУ;

Живковска Р., Пржеска Т., Димитровска В., *Коментар на Законот за експропријација*, Европа 92, Скопје 2013;

Живковска Р., Пржеска Т., Димова С., Петрушевска Н., *Коментар на Законот за катастар на недвижности*, Европа 92, Скопје, 2013;

Живковска Р., *Стварно право*, Европа 92, Скопје, 2005;

Јаневски А., Зороска – Камиловска Т., *Граѓанско процесно право, книга втора, Вонпарнично право*, Скопје, 2010;

Ковачевић - Куштримовић Р., Лазић М., *Стварно право*, Ниш, Зоограф, 2004;

Ковачевић- Куштримовић Р., "Стварни службености и соседско право", *Зборник во чест на Асен Групче,Универзитет" Св. Кирил и Методиј",Правен Факултет - Скопје*, Скопје, 2001;

Максимовски Р., "Соседското право во правниот систем", *Судиска ревија*, Здружение на судиите на Република Македонија, Декември, бр. 4, година X, 2004;

Поповска Б. , *Државноправна историја на Македонија,7- xx век*, Скопје, 2010;

Чавдар К., Чавдар Ки., *Закон за сопственост и други стварни права, Закон за договорен залог, коментари, објаснувања, практика, предметен регистар*, Академика, 2012.

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СУСЕДСКИ ОДНОСИ У МАКЕДОНСКОМ СТВАРНОМ ПРАВУ

Резиме

У раду се анализира правна регулација суседских односа у савременом грађанском праву, посебно у македонском Закону о власништву и другим стварним правима, а пре свега у законима и кодексима који уређују грађанске односе у вези суседства држава чланица ЕУ и држава које теже чланству у ЕУ. Развој такозваног „закона комшије“ прати се од његових историјских корена у римском праву до данас. Главни фокус рада је испитивање различитих приступа у регулисању права суседа зависних од различитог начина на који се право суседа разуме и дефинише у правним текстовима закона и законика који регулишу имовинске односе. У раду су такође представљени и анализирани основни принципи за остваривање права суседа присутни у македонском Закону о власништву и другим стварним правима, као и врсте суседских права регулисане овим Законом.

Кључне речи: имовина, стварна права, власништво, суседска права.

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MANDATORY REPRESENTATION OF THE LAWYER IN THE PROBATE PROCEDURE: CURRENT ISSUES AND DILLEMAS

Abstract

Macedonian inheritance law has not undergone major changes for decades. The announced reforms and the codification of the civil law remained an unrealized project of the legislator. Weather the Civil Code will be enacted the future will show. Despite the Commission's ten years of work, there is no civil law reform. However, recently in the Law on Notaries, the legislator indirectly made a certain reform in the inheritance law by prescribing the mandatory presence of a lawyer as a proxy for the heirs in the inheritance procedure. In the paper, the authors analyze the problems of such a solution in terms of civil law theory, comparative law and practice, in order to answer the question whether the exercise of inheritance rights is facilitated.
Key words*:* inheritance, mandatory representation, advocacy, notary public

1. INTRODUCTION

Macedonian inheritance law has not undergone significant reforms for more than seven decades.[1] The Law on Inheritance from 1996 took over the most part of the solutions from the former inheritance legislations, which do not

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[1] See more: Lj. Spirovic Trpenovska, D. Mickovik, A. Ristov, On necessity for reforms in the inheritance law in Republic of Macedonia, *Proceedings of the Law Faculty Iustinianus Primus in honor of prof. Ganzovski,* Skopje, 2011; Lj. Spirovic Trpenovska, D. Mickovik, A. Ristov, *Inheritance Law in Republic of Macedonia,* Shine, Skopje, 2010, p. p. 15-16; M. Hadzi Vasilev, *Inheritance Law,* Kultura, Skopje, 1983.

correspond to the new capitalist relations[2] and the transformations in the family relations. [3] It has passed 10 years since the work of the Civil Code began.[4] The fate of this important project is still uncertain! The future will show whether the Civil Code will be enacted. In the meantime, the Inheritance Law Commission has prepared several versions of Book 4 - Inheritance Relations, predicting a great number of reforms to improve the legislation and overcome existing problems. Despite public debates, scholarly papers, and monographs on inheritance law reform, the legislature remained lethargic on the issue. [5] The significance and importance of the Civil Code, as well as the reforms in the inheritance law, unfortunately remained unknown to the legislator! [6]

Despite this, with the enactment of the new Law on Notaries (LN) in 2016, the legislator indirectly introduced a novelty in the inheritance law according to which: "When discussing the bequest, the presence of a lawyer as a proxy for each of the parties is mandatory" (art. 147 par. 2). This solution from a theoretical and practical point of view opens many dilemmas and questions in the practice. Has this innovation facilitated the exercise of inheritance rights and reduced the number of unresolved probate cases or the aim was something else? In the text that follows we will try to answer this question and to give our proposal according to the civil law theory, positive and comparative law.

[2] See A. Ristov, Legal un/certainty in the Macedonia Family and Inheritance Law, *Ohrid School of Law*, Iuridica Prima, Tom 3, Skopje, 2016.

[3] D. Mickovik, A. Ristov, Les changements dans les rapports conjugaux et familiaux dans les pays européens et dans la République de la Macédoine, *Facta Universitatis*, Pravni fakultet Nis, 2013.

[4] The Commission for the preparation of the Civil Code was founded by the Government of the Republic of Macedonia in December 2010. The president of the Commission is professor Gale Galev.

[5] More on this issue see: D. Mickovik, A. Ristov, *The Reform of the Inheritance Law in Republic of Macedonia*, *Stobitrade*, Skopje, 2016; D. Mickovik, A. Ristov, *Inheritance Law*, Stobitrade, Skopje, 2016, 51-73.

[6] On the importance and the role of the civil codifications see more: G. Galev, *Project on preparation of the Civil Code of Repubic of Macedonia*, Government of RM, Skopje, 2009; D. Pop Georgiev, *Civil Law*, University in Skopje, 1966, 11-17.

2. THE PRINCIPLE OF FREE INITIATIVE (DISPOSITION) IN THE CIVIL LAW

The principle of free initiative, also known as free disposition or autonomy of the will, is one of the most important principles of civil law. [7] This principle means that the subjects themselves, at their own will, freely decide whether to enter into a certain civil relationship, with whom and in what relationship they will enter, how to regulate its content, under what conditions, how long that relationship will last and end. [8] Upon this principle subjects in the civil law are in the true sense of the word "masters" who regulate their civil law relations on the basis of their equal free will.

Free initiative is an assumption, *conditio sine qua non*, without which legal transactions and estate relations cannot be imagined. [9] This is because "the normal conduct of those relations, in addition to requiring their parties to be equal and with equal wills, also requires that the parties be left to regulate those relations themselves, and often decide for them when and with whom they will enter into those relations." [10] Otherwise, their free initiative is limited. Therefore, as one of the basic principles of the method of coordination and regulation of civil law relations, free initiative is expressed in all parts of civil law. In property law relations, free initiative is expressed as freedom of using and disposing with

[7] The free initiative of the parties is reflection of one of the legal and philosophical principles – autonomy of the will. It means that the parties with their will create, abolish and change their rights. Reflection of this principle are the dispositive norms as a characteristic of the civil law. A. Gams, *Introduction in the Civil Law*, Naučna kniga, Belgrade, 39.

[8] See more: A. *Grupche*, *Estate (Civil) Law*, Kultura, Skopje, 1983, p.p. 26-27; D. Pop Georgiev, *Obligation Law*, University Cyril and Methodius, Skopje, 1990, 22.

[9] Without such initiative economy could not exist upon the law on value. And opposite in the level in which the free relations are restricted, the free initiative is restricted as well. D. Pop Georgiev, *Basics on Estate Law*, Kultura, Skopje, 1977, 13.

[10] *Ibidem.*

the things. [11] In obligation relations it is known as freedom of contracting, [12] while in inheritance relations it is known as freedom of disposing by will. [13] [14]

Besides the civil law, the principle of free initiative is also applied in the civil procedure, in the sphere of legal protection.[15] It is up to the right holders whether they will seek legal protection in case of violation or endangerment of their rights. In principle the legal protection in the civil procedure is given at the request of the parties (*ex privatu; nemo iudex sine auctore*), and with the exception when it comes to the public interest *ex officio*. Due to the importance and significance of the principle of free initiative in the field of legal protection, in the theory it has been raised as a special principle of protection based on a private request. Thus, according to Vodinelic, "civil law norms determine in most cases the subjective civil right, obligation or status to be discussed in court or other proceedings only if such a procedure is initiated by a person whose right, obligation or status is in question." [16] The right holder is free to decide whether to seek protection of his right when it is violated or endangered. It depends on him whether his endangered and violated right will be protected. *Argumentum a fortiori*, in civil law depends on the will of the subject whose right is violated or endangered whether in the procedure before the court or a person with public authority, he will undertake and perform the procedural actions himself or through a proxy. [17]

The legal inability of the party to perform procedural actions itself is a negation of the postulation capacity of the party. The legislator thus limits the

[11] See: A. Grupche, *Estate (Civil) Law..*, 26; R. Zivkovska, *Property Law*, Europe 92, Skopje, 2005.

[12] More on the autonomy of the will in the obligations see: G. Galev, The origine of the freedom of the agreements, *Proceeding in honor of Aleksandar Hristov*, University Ss. Cyril nad Metohdius Skopje, 1996, 33; G. Galev, The freedom and its general boundaries, *The Progress of the political and legal system in Republic of Macedonia*, University Ss Cyril and Methodius, Faculty of Law, Skopje, 105; G. Galev, Some theoretical standpoints on the nature of the freedom of contracting, *Yearbook of the Faculty of Law in Skopje*, 1994-95, 34.

[13] A. Grupche, *Estate (Civil) Law..*, 26. Also see more n this M. Hadxi Vasilev, *Inheritance Law*, Kultura, Skopje, 1983.

[14] As the old latin maxim says *nulla regula sine exeptione,* there are exeptions from the principle of free initiative in all the parts of civil law. In the property relations there are many general and special restrictments of using the things. In the obligations exception are the torts, negotiorum gestor, condiction sine causa. In the inheritance law exception is the compulsory right on inheritance.

[15] See more: S. Triva, *Civil Procedure Law*, Narodne novine, Zagreb, 1972, 94-104.

[16] V.V.Vodinelić, *Civil Law*, Nomos, Belgrade, 1991, 68.

[17] S.Georgievski, *Non Litigation Law*, Kutura Skopje, 1975, 50.

will of the parties and denies the postulation ability of the party itself to perform procedural actions in the legally relevant express form without the mediation of other persons (proxy). [18] In this sense, the theory rightly states that, "postulation ability always presupposes that the party is procedurally capable. In case the party is postulating incompetent, he/she undertakes the procedural actions through a proxy."[19]

With the legally obligation of the heirs to take the non-litigation actions before the notary public exclusively through a proxy lawyer, the legislator declared all the heirs incompetent to realize their own inheritance rights! In other words, unable to exercise their inheritance rights on their own! This solution of the legislator is unique not only in domestic but also in comparative law!

3. MANDATORY REPRESENTATION BY A LAWYER AS A PROXY IN MACEDONIAN LAW

With the anticipation of the novelty for mandatory presence of a lawyer as a proxy for each of the participants in the inheritance procedure in our civil law was introduced, for the first time, the institution of mandatory representation of heirs by professional proxies - lawyers. The institution of mandatory representation by a lawyer *(Advokatenzwang)* in our legal system was abandoned after the Second World War. [20] The main argument of the then communist government was "the need to abolish the monopolistic position of certain professionals (lawyers) and the need to prevent discrimination against those who, due to inability to pay the remuneration of their representatives, cannot equally participate in litigation against those who can." [21]

After almost eight decades, it astonishes the approach of the legislator that regulates this important issue in the LN, instead of in the general procedural laws. The motives why the legislator envisaged the obligatory representation in a non-litigation procedure such as inheritance procedure, but not for the other non-litigation procedures, are not completely clear! It would have been more logical and justified for the legislator to regulate the obligatory representation, following the example of the Western European legislations, in the litigation procedure!

[18] In the German theory the right of the party to represent itself at front of the court is known as right of selfrepresentation - *Selbsvertretungsrecht. Ibid,* 52-53.
[19] *Ibidem.*
[20] See more S. Triva, *Civil Procedure Law,* Narodne Novine, Zagreb, 1980, 248-249.
[21] Triva, Belaec, Dika, *CPL,* 261.

In the inheritance procedure, as an official non-litigation procedure, the notary public as a trustee of the court determines the inheritance of the principal, the heirs and their inheritance parts. [22] The notary public is obliged to instruct the heirs when giving the inheritance statement, and if a dispute arises for facts, the right to a legacy or other right to the bequest and the application of the right, to terminate the procedure and refer the parties to the dispute. Considering that the court decides on the appeal of the notary public, the question arises about the expediency and the role of the obligatory presence of the lawyer in the probate procedure! Was the idea of the legislator, in addition to the court, supervision and control to the work of the notary public to be performed by the lawyer? Is this justified given the extremely small number of objections to inheritance decisions to the court in the period 2008-2016? [23] Finally, is the role of the lawyer in the inheritance procedure satisfactorily fulfilled by the mere presence at the hearing to discuss the inheritance, without additional actions?

The role of a lawyer is extremely important in the protection of rights, proving disputed facts and rights, which in the case of an indisputable procedure such as a bequest do not come to the fore. Are the lawyers satisfied with their passive role in the probate procedure? Finally, are the parties satisfied with the lawyer's forced engagement in the probate procedure? They know the answer to these questions best.

Having in mind the limitation and exclusivity of the provision for mandatory presence of the lawyer as a proxy for the heirs in the inheritance procedure, in practice paradoxical cases arise in which other profesionals in law cannot independently exercise their inheritance rights, such as: judges, public prosecutors, state attorneys, notaries, enforcement agents, bankruptcy trustees, a law graduate persons /with passed bar exam, masters of law, law professors and doctors of law, etc.! Are the mentioned person’s postulation incapable of performing the procedural actions for themselves in inheritance procedure? According to the LN, the answer to this question is positive.

In contrast to this exclusive “monopoly” provision, the Law on Civil Procedure (LCP)[24] regarding the question of who can be a proxy determines that

[22] *Ibid,* 74.

[23] According to the statistic data number of the appeals in the inheritance is symbolic and it is constantly decreasing from 0,53% in 2013 to 0,37% in 2016. See official annual reports of the Ministry of justice. Also see *Analyze of the progress and work of the notaries’ in the exercising public authorities to the efficient legal system and legal certainty,* Notary Chamber of Republic of Macedonia, Skopje, 2017, 37-41.

[24] *Official paper of Republic of Macedonia* no. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015.

it can be: a lawyer, a person - a law graduate who is employed and a blood relative in a straight line, brother , sister or spouse, if they are fully legally capable (Article 81 paragraph 1 LCP). Based on this comparison, it can be concluded that the LCP provides wider opportunities, disposition of the parties and the right to choose, unlike LN.

The provision of the LN is in contradiction with the general provision of the Law on Non Litigation Procedure (LNP), [25] according to which the participants in the procedure undertake the actions in person, through a proxy or legal representative, in accordance with the LCP (Article 3 paragraph 4 LNP). [26] In our law, the LCP does not recognize the institute of mandatory representation of the parties. Unlike LN, which contains the provision for mandatory presence of a lawyer in the capacity of proxy for each of the participants in the inheritance procedure, the LCP accepts the *principle of free representation.* [27] According to the provisions of this Law, the litigant-capable party is free to decide whether the litigation actions in the procedure will be undertaken in person or through a proxy (Article 80 paragraph 1 LCP). The party is not obliged to appoint a proxy, nor is the court obliged to force it.[28] In case the party and the legal representative are not able to state clearly and definitely about the case under discussion, and they do not have authorized attorney, the court may indicate the need to take attorney (Article 273, paragraph 3 LCP). But the court cannot force the parties to do so.

The determination of the institute of obligatory representation by a proxy is also contrary to the essence of the contractual representation which arises from the principle of free regulation of the contractual relations. In this case, the basis for concluding the agreement for authorization of the attorney is not the will of the heir as a represented person, but the law! Did the legislator have a justifiable reason for such legal intervention by denying the procedural and postulation capacity of the heirs, placing them by the force of law under the cases of "legally incompetent persons"? In theory, such representation is what Professor Gams calls a form of "forced representation".[29] But when it is without rational justification then it is a flagrant violation of the principle of free disposition on which all private law is based.

[25] *Official paper of Republic of Macedonia* no. 9/08.
[26] K. Cavdar, *Law on Non-Litigation Procedure,* Akademik, Skopje, 2008.
[27] See more A. Janevski, T Zoroska Kamilovska, *Civil Law Procedure*, Jugoreklam, 2009, 233-236.
[28] *Ibid*, 234.
[29] According to A. Grupce, *Estate (Civil) Law..*, 298.

The institute of obligatory representation by a lawyer in our legal system is not accepted in the criminal procedure either. [30] Namely, in Article 74 of the Law on Criminal Procedure,[31] the obligatory defense with a defense counsel or *ex officio* is provided only in the cases predicted by the law, when the person is deaf, incapable for self defending, or accused for a crime punished by life imprisonment punishment etc. If in the protection of the freedom the defendant in the criminal procedure is allowed to represent himself, what is the logic in an indisputable inheritance procedure for this right to be limited to the heirs!

The Law on General Administrative Procedure (LGAP) [32] also does not recognize the institute of compulsory representation by a proxy lawyer. According to the provisions governing representation: 1) A party may perform the actions in the procedure alone or through a representative as provided by this Law. (2) A party that is fully legally capable may perform the actions in the procedure on its own (procedural ability). (3) The provisions of this Law regarding the parties shall be appropriately applied for their representatives (Article 32 LGAP). Regarding the issue of a proxy, it is prescribed that the party, or its representative by law may authorize a lawyer or another person[33] who has procedural ability (proxy) to represent him in the procedure, except when the law requires the party to give statements (Article 35 paragraph 1 LGAP).

Having in mind the presented legal solutions, the need for harmonization of the legal solutions regarding this very important issue, which is a precondition for achieving quality and efficient legal protection, inevitably arises. Therefore, the legislator needs to address this issue comprehensively, rather than partially, based on the needs and interests of the citizens. Imposing the mandatory presence of a lawyer in the inheritance procedure as a proxy for the heirs as an essential condition for division of the bequest, in practice had increased the number of cases when the heirs do not want to hire a lawyer. In such case, the notary public cannot distribute the bequest despite the fact that all other legal conditions are fulfilled!

[30] The choice of defender depends on the free decision of the accused person. See more G.Lazetic, G.Kalajdziev, B.Misoski, D.Ilic, *Crminal Procedure Law,* University Ss. Cyril and Methodius, Faculty of Law Iustinianis Primus Skopje, 2015, pp. 96-98.

[31] *Official paper of Republic of Macedonia* no. 150/10, 100/12 and 198/18.

[32] Legal representation is possible for the persons that by the law are determined as process incapable, juvenile and mentally ill. A. Hristov, *Administrative Law,* Selfruling practice, Skopje, 1984, 405. Also see B. Davitkovski, A. Pavlova, *Administrative Law – second part (Process Law),* University Ss Cyril and Methodius Skopje, 2019.

[33] See more: S.Lilić, *Administrative Law,* Savremena administracija, Beograd, 2007, 272.

The latest annual reports of the basic courts show a constant increase of unresolved inheritance cases. In 2015 there were 10419 unresolved cases, and in 2016 - 10765. With the application of the new LN in 2017 there were 11374 unresolved cases, in 2018 - 11269, 2019 - 12436 and in 2020 - 12503. From the conducted research for the period from 2015 to 2020 there are a total of 68802 unresolved inheritance cases! Recently, the Ministry of Justice has noticed cases in practice when, in order to avoid the legal obligation to hire a lawyer in the inheritance procedure, the heirs implement its inheritance procedure at the court. This endangers the legal security and the public interest for the continuation of the civil law relations. One of the reasons for unresolved inheritance cases is the fear of the citizens for additional costs that burden their budget by the duty to hire a lawyer as a proxy. That is why in practice there are cases when in order to avoid the legal obligation to hire a lawyer in the inheritance procedure, the heirs implement it before the court! As a result of this problem judicial practice points that in such cases the notary public should resolve the inheritance upon the legal provisions without the possibility of the heirs to give their inheritance statement.

4. MANDATORY REPRESENTATION BY A LAWYER IN COMPARATIVE LAW

The question whether and to what extent the free disposition should be limited and the right to self-representation and free choice of a proxy in the litigation procedure is issue of great importance for the realization of the legal protection.[34] There are no unified solutions in the comparative law regarding this issue. Traditionally, in almost all Western European countries, such as Austria, Germany, Italy, Switzerland and others in which the German concept of *Anvaltszwang* is accepted, *Advokatenzwang* (forced engagement of a lawyer) only a lawyer can represent before a court.[35] The parties cannot represent themselves in court, nor can the lawyers employed by the legal entities.

Unlike the western European countries, in countries under the influence of socialist law, the mandatory representation by a lawyer as a proxy was abandoned after the Second World War. Apart from the parties, lawyers and non-lawyers also had the right to represent. Such a tradition has been retained by

[34] J. Kos, About the proposal of the Novelty in the Law on civil procedure, *Law and Taxes* 12/1997, pp. 38-42; M. Kovac, Expensive and cheep, *Company*, 9/96, 51-53.

[35] More on this see M. Hanzekovic, About the proposal Novelty in the Law on Civil Procedure, *Law and Taxes*, 11/97, 1127-1129; A. Uzelac, *Mandatory representation by lawer?* www.alanuzelac.from.hr

many post-socialist states. Countries around us, with which we have a close legal tradition, such as Serbia, Montenegro, Bosnia and Herzegovina, Slovenia, Croatia, Kosovo*, etc., do not predict the institute mandatory representation by a proxy lawyer.

In theory and comparative law there are arguments for and against compulsory advocacy. They are related to the question of who can best protect the interests of the parties. According to the principle of free disposition the party, masters the litigation *(dominis litis)* and the development of the procedural actions depends exclusively on her will. In that sense, the party is free to represent and defend its interests before the court. The party is most interested and motivated to protect her interests. However, if the party is without legal knowledge then with great possibility it cannot be guaranteed realization of its rights with success. For that reason, there is a need for legal assistance from experts - lawyers, who specialized in the field of legal protection. They will assist the party and the court in better, faster and more efficient legal settlement and dispute resolution.

The arguments for the obligatory representation by a lawyer are the qualifications of legal education, years of professional experience, professional rules of conduct, as well as continuous professional development. These arguments are objected by the fact that lawyers are not the only ones qualified to provide professional legal assistance. There are other categories of people with education in law. In certain countries, such as Italy, France, Bulgaria, Croatia, etc., professors in law also have the opportunity to represent in court if they are registered in the Bar chamber. In addition, not all lawyers are qualified to represent in all cases (criminal, administrative, civil). There is specialization in certain legal areas. In that sense, Uzelac points out that “according to the theory of a liberal state, the state can persuade someone to do something that is good and useful for him, but he must not, invoking his own good, force him to do so. If it did, it would be a case of impermissible state paternalism characteristic of collectivist ideologies (socialism, totalitarianism, national socialism).”

Other arguments for the introduction of mandatory representation by a lawyer are the protection against judicial arbitrariness, the speed and economy of the procedure, the ethics and the responsibility of the professional representatives. Also, the participation of the lawyer in the procedure reduces the need for judicial activism in order to teach the ignorant party. This will allow the court to devote more time to litigation and the evaluation of evidence, which simplifies the procedure. The role of the lawyer is important because he can act as a kind of “filter” preventing unfounded litigation or initiating lawsuits that are

doomed to failure from the beginning. Such action relieves the court of legally unfounded cases, and the parties of unnecessary costs. It requires the representation of high moral values, respect for ethical rules and professionalism of the lawyer, things that build the trust of the client. Exactly these qualities indicate that even in countries where the principle of mandatory legal representation is not provided, as is the case with the Scandinavian countries, even in 4/5 of the total number of cases the parties voluntarily choose to be represented by a lawyer.[36] This indicates the presence of a high degree of legal culture.

In comparative law, apart from the division of restrictive and permissive systems of representation before the court, there are significant differences within the national legislation itself depending on the affiliation of European-Continental law or Anglo-American law.[37] Thus, in Brazil the right to compulsory representation by a lawyer is predicted in the Constitution and applies to all proceedings before the court. In contrast to this solution, there is no law in Malta that regulates the advocacy, regardless of profession and qualifications, anyone can practice law. There are also big differences in the regulation of advocacy within the European EU member states.[38] In the Scandinavian countries (Sweden, Denmark, Finland) advocacy is very permissive. It is restrictively regulated in Austria and Germany, while less restrictively regulated in Italy, Switzerland and France. Based on that, the theory builds four models: 1) unlimited free self-representation and representation by proxy (Finland, Croatia, Serbia, Slovenia, Bulgaria, Montenegro, etc.), 2) free self-representation with a ban on representation by non-professional representatives (Denmark , Switzerland), 3) free self-representation, restrictions on the choice of attorney - lawyer or other professional monopoly of representation (Swiss cantons, Anglo-American states) and 4) mandatory representation by an authorized representative (Austria, Germany, France). However, globally, according to Walter - author of the overall report on the organization of the advocacy at the World Congress Taormini, the model of the legal monopoly of advocacy is more prevalent, rather than the system of forced advocacy by a lawyer.[39] This attitude is justified by the idea that everyone is most interested and able to represent themselves in the proceedings, but still for

[36] A. Uzelac, *op.cit.*, 11-12.
[37] *Ibidem.*
[38] *Ibidem.*
[39] Walter, „Generalbericht", *Professional Ethics and Procedural Fairness,* Stuttgart, 1991, 19.

pragmatic and protective reasons should be limited the circle of persons who could appear before the court on behalf and at the expense of the party.

5. CONCLUSION

Having in mind the above, it can be concluded that Macedonian legislator is inconsistent in his attitude towards the institute of mandatory representation by a proxy in our law. This is due to the fact that such an institute foresaw only in an indisputable and official procedure such as the inheritance procedure. Why did he not foresee this possibility for the other non litigation procedures? In our opinion, it would be more justified to introduce mandatory representation by a proxy lawyer in litigation because the role and significance of the lawyer in proving and convincing the court of the disputed facts is extremely important.

It is known that ignorance of the law harms and does not justify anyone *(Ignorantia iuris nocet et nemimen excusat),* therefore the professional help is needed by the lawyer of the uneducated party who does not know the law in litigation from the very beginning. This would give the parties better protection of their rights, more efficient and faster justice. If the legislator still decides to change the concept of representation, he should do so in the procedural laws, but not in the indisputable inheritance procedure. Given the fact that the obligatory representation of the lawyer in the inheritance procedure has increased the number of unresolved inheritance cases it is a sufficient indicator *(ceteris paribus)* that this solution creates problems in practice. Therefore, the legislator should abolish it sooner. Sincerely we hope that he doesn’t want to be the only example in the comparative law. In future legal changes, the legislator should be guided primarily by the needs and interests of the majority of citizens, legal principles and common sense, if he wants the law that he creates to be qualified as a righteous.

The need for private law reform remains essential and necessary in our legal system. That is why it should be comprehensive, thorough and well-argued. *Ad hoc* changes of the legislator done to satisfy certain groups and interests do not solve the problems of the citizens in the legal life. History has confirmed this many times. Reforms in the civil law legislation have always had and will have in future an exceptional importance for the social progress and welfare. The only way to fulfill these aims is the enactment of the Civil code.

REFERENCES

Cavdar K., *Law on Non-Litigation Procedure,* Akademik, Skopje, 2008;

Davitkovski B., Pavlova A., *Administrative Law – second part (Process Law),* University Ss Cyril and Methodius Skopje, 2019;

Galev G., The freedom and its general boundaries, *The Progress of the political and legal system in Republic of Macedonia,* University Ss Cyril and Methodius, Faculty of Law, Skopje,1998;

Galev G., The origine of the freedom of the agreements, *Proceeding in honor of Aleksandar Hristov,* University Ss. Cyril nad Metohdius Skopje, 1996;

Galev G., *Project on preparation of the Civil Code of Repubic of Macedonia,* Government of RM, Skopje, 2009;

Galev G., Some theoretical standpoints on the nature of the freedom of contracting, *Yearbook of the Faculty of Law in Skopje,* 1994-95;

Gams A., *Introduction in the Civil Law,* Naučna kniga, Belgrade;

Georgievski S., *Non Litigation Law,* Kutura Skopje, 1975;

Grupche A., *Estate (Civil) Law,* Kultura, Skopje, 1983;

Hadzi Vasilev M., *Inheritance Law,* Kultura, Skopje, 1983;

Hanzekovic M., About the proposal Novelty in the Law on Civil Procedure, *Law and Taxes,* 11/97;

Hristov A., *Administrative Law,* Selfruling practice, Skopje, 1984;

Janevski A., Zoroska Kamilovska T., *Civil Law Procedure,* Jugoreklam, 200;

Kos J., About the proposal of the Novelty in the Law on civil procedure, *Law and Taxes* 12/1997;

Kovac M., Expensive and cheep, *Company,* 9/96;

Lazetic G., Kalajdziev G., Misoski B., Ilic D., *Crminal Procedure Law,* University Ss. Cyril and Methodius, Faculty of Law Iustinianis Primus Skopje, 2015;

Lilić S., *Administrative Law,* Savremena administracija, Beograd, 2007;

Mickovik D, Ristov D., Les changements dans les rapports conjugaux et familiaux dans les pays européens et dans la République de la Macédoine, *Facta Universitatis,* Pravni fakultet Nis, 2013.

Mickovik D., Ristov A., *Inheritance Law,* Stobitrade, Skopje, 2016;

Mickovik D., Ristov A., *The Reform of the Inheritance Law in Republic of Macedonia, Stobitrade,* Skopje, 2016;

Pop Georgiev D., *Basics on Estate Law,* Kultura, Skopje, 1977;

Pop Georgiev D., *Civil Law,* University in Skopje, 1966;

Pop Georgiev D., *Obligation Law,* University Cyril and Methodius, Skopje, 1990;

Ristov A., Legal un/certainty in the Macedonia Family and Inheritance Law, *Ohrid School of Law,* Iuridica Prima, Tom 3, Skopje, 2016;

Spirovic Trpenovska Lj., Mickovik D., Ristov A., On necessity for reforms in the inheritance law in Republic of Macedonia, *Proceedings of the Law Faculty Iustinianus Primus in honor of prof. Ganzovski,* Skopje, 2011;

Spirovic Trpenovska Lj., Mickovik D., Ristov A., *Inheritance Law in Republic of Macedonia,* Shine, Skopje, 2010;

Triva S., *Civil Procedure Law,* Narodne novine, Zagreb, 1972;

Triva S., *Civil Procedure Law,* Narodne Novine, Zagreb, 1980;

Vodinelić V. V., *Civil Law,* Nomos, Belgrade, 1991;

Uzelac A., *Mandatory representation by lawer?* www.alanuzelac.from.hr

Zivkovska R., *Property Law,* Europe 92, Skopje, 2005;

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ОБАВЕЗНО ЗАСТУПАЊЕ АДВОКАТА У ОСТАВИНСКОМ ПОСТУПКУ: АКТУЕЛНА ПИТАЊА И ДИЛЕМЕ

Резиме

Македонско наследно право деценијама није претрпело велике промене. Најављене реформе и кодификација грађанског права остали су нереализовани пројекат законодавца. Да ли ће бити донет Грађански законик будућност ће показати. Упркос десет година рада Комисије реформа грађанског права није ни на помолу. Међутим, недавно је у Закону о нотаријату законодавац индиректно извршио одређену реформу у наследном праву прописујући обавезно присуство адвоката као пуномоћника наследника у оставинском поступку. У раду аутори анализирају проблеме таквог решења у светлу теорије грађанског права, упоредног права и праксе како би одговорили на питање да ли је са тиме олакшано остваривање наследних права.
Кључне речи: наслеђе, обавезно заступање, адвокат, јавни бележник.

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THE GORING BULLOCK IN THE SERBIAN NOMOCANON AND THE BIBLICAL LAW

Abstract

In the first part of the article the author presents ancient Near Eastern provisons concerning goring ox and stresses the singularity of the Biblical legislation especially under two points: 1) the ox must be stoned to death 2) its flesh may not be consumed. Compared to Moses` legislation, in the *Zakonopravilo* of Saint Sava (chapter 48 paragraph 21) there is very importaint modification. The ox (bullock) has to be stoned but its flesh may be eaten. The same wording is found in the Ilovica transcript (ca. 1262), the oldest trancript preserved and also in the Sarajevo transcript (ca. 1371) and in the Belgrade transcript (ca. 1470). The author gives several hypothesis in order to try to explain the digression from the Biblical text.

Key words: Nomocanon (Zakonopravilo) of Saint Sava. – Ilovica transcript. – Goring ox (bullock). – Old Testament. –

1. INTRODUCTORY REMARKS

Famous legislation concerning goring ox which existed in the ancient Codes of Near Eeast found its place also in the Nomocanon (*Zakonopravilo*) of Saint Sava. The main results of my research have been presented for the first time in September 2016, at the 70th session of the SIHDA congress in Paris in the communication entitled „Goring Ox in the Nomocanon of Saint Sava“. The article was then published in 2017, in the Annals of the Faculty of Law in Belgrade in Serbian language[1].

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[1] Милена Полојац, “Јунац који боде у Законоправилу Светога Саве“*Анали Правног факултета у Београду,* LXV, 2/2017, 43-69. (Milena Polojac, „Junac koji

The article is now improved on the basis of my additional research. It has been adopted and translated into English to make it available to a wider range of readers. This was exactly the suggestion of professor Hans Ankum (1933-2019) to whom I dedicate this paper.

2. THE GORING OX IN THE BIBLE AND OTHER ANCIENT NEAR EASTERN CODES

The legislation concerning the goring ox in the ancient Near Eastern provisions of the Law of Eshnunna, the Code of Hammurabi and Moses' legislation has attracted considerable interest among legal historians and comparatists.[2]

The Biblical case of the goring ox appears in a section of the so-called Covenant Code of Exodus which is considered to be one of the oldest sections of the Bible. The ancient Jewish law specifies several cases. The best known among them is certainly the case discussing the goring ox that kills a free man or woman:

> Exodus, 21, 28: If an ox gored a man or a woman, who died, the ox shall surely be stoned and his flesh shall not be eaten; but the owner of the ox shall be quit. 29. But if the ox was a gorer from beforetimes and it has been testified to his owner, and he did not keep him in and he killed a man or a woman, the ox shall be stoned and his owner also shall be put to death.[3]

bode u Zakonopravilu Svetoga Save“, *Anali Pravnog fakulteta u Beogradu*, LXV, 2/2017, 43-69).

[2] A. van Selms, „The Goring Ox in Babylonian and Biblical Law“, *Archiv Orientalni* 18/4, 1950, 321-330; Reuven Yaron, „The Goring Ox in Near Eastern Laws“, *Israel Law Review*, vol 1, 3/1966, 396-404; Reuven Yaron, *The Laws of Eshnunna*, Jerusalem, 1969, Chapter Eight, Delicts. „The Goring Ox and Comparable Cases“, 291-303; Jacob J. Finkelstein, „The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty“, *Temple Law Quarterly*, vol 46, 2/1973, 169-290; Bernard S. Jackson, "The goring ox again", *The Journal of Juristic Papyrology* 18 (1974), 55-93; Bernard S. Jackson, „The Goring Ox“ (Chapter Five), *Essays in Jewish and Comparative Legal History*, Leiden, 1975, 108-152; Marilyn A. Katz, „Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice and Judicial Process, *Yale Journal of Law & the Humanities:* Vol 4, Iss 2, Article 3, 1992; also http://digitalcommons.law.yale.edu/yjlh/vol4/iss2/3. Joseph Mélèze-Modrzejewski, „Hommes libres et bêtes dans les droits antiques“ , *Statut personnel et liens de famille dans les droits de l'Antiquité*, Variorum, GB-USA, 1993.

[3] Translation by R. Yaron (1966), 398.

The same is prescribed also if an ox gores a son or a daughter (*Exodus*, 21,31), while a fine along with the stoning of the ox, is prescribed for killing a slave (*Exodus*, 21,32). If there is no master's fault, the animal itself shall be stoned to death. If, however, the master is guilty because of having been familiar with that dangerous characteristic of the ox, capital punishment by stoning is pronounced against both the master and the ox.

The old Jewish law is closely related to the rest of the ancient laws of the Middle East. It has its parallels among the law codes of ancient Mesopotamia. A remarcably analogous set of regulations appears in the Laws of Eshnunna (ca. 1770. b. c) and the Code of Hammurabi (ca. 1750. b.c), both written in the Acadian language.

> 250: If an ox, passing along a street, gored a man and caused him to die, that suit has not a claim. 251: If a man's ox (was) a gorer and the ward (authorities) have had made known to him that (it was) a gorer, but he did not screen its horns, (or) did not tie up his ox and that ox gored a son of a man and caused him to die, he shall give 1/2 of a mina of silver. 251: If (the victim was) a slave of a man, he shall give 1/3 of a mina of silver.[4]

All three sets of laws are phrased in casuistic form and all three foresee the same sets of circumstances. While in Biblical law, the ox or both the ox and its owner are punished by death, the Code of Hammurabi, for example, prescribes a fine for the owner in the same case. A similar regulation exists in the laws of the Mesopotamian city of Eshnunna. A fine is imposed also in the case of a slave's death, but to a lower amount.[5]

Only the laws of Eshnunna contain a provision which is identical to Biblical legislation, regulating liability in the case of oxen or bulls in fight. Both legislations have arrived here at a unique solution. There is a live ox, the price of which can be divided, and there is the carcass, to be disposed of in the same manner:

[4] *Ibid.*, 402.

[5] Laws of Eshnunna, 54-55: "If an ox (was) a gorer and the ward (authorities) have had it made known to its owner, but he did not guard his ox and it gored a man and caused him to die, the owner of the ox shall weigh out 2/3 of a mina of silver. If it gored a slave and caused him to die, he shall weigh out 15 shekels of silver." Laws of Eshnunna contain no provision concerning a man killed by an ox which was not known as a gorer before.

> *Laws of Eshnunna*, 53: “If an ox gored an ox and caused it to die, both ox owners shall divide the price of the live ox and the carcass of the dead ox.”
> *Exodus* 21.35: “And if a man’s ox gored his fellow’s ox and it died, then they shall sell the live ox and divide the silver of it: and the dead (ox) also they shall divide.” [6]

It is difficult to deny that the solutions in all three legislations are closely similar in substance and in formulation. All three legislations use casuistic provisions with the same sets of circumstances: the goring ox caused a free man, a son, or a slave to die. In all three codes the owner’s liability for the fatal outcome depends on whether he knew or did not know of the dangerous habits of his animal.

However, the legal sources of Mesopotamia show a higher degree of rationality compared to Moses’ legislation. In the Mesopotamian regulations, the absence of any notion of the animal’s liability reflects the general disposition in this culture toward an instrumental treatment of beasts.[7] The Biblical law was religiously inspired, while the Mesopotamian laws are interested only in the economical aspects of the cases.[8]

The matter of interrelationship among the ancient Oriental legal systems has been extensively disputed. Reuven Yaron stresses their similarity in disagreement with Van Selms who argues that the Israelite law was wholly unique.[9] Yaron pointed out that this sort of ruling could not have been reached independently. This common approach was rather the result of borrowing from a common source, „a kind of ancient Eastern *ius gentium.*“[10]

[6] R. Yaron, (1966), 398. It is worth mentioning the solution provided by Roman law concerning the application of the *actio de pauperie*. The same situation was regulated in a different way: D.9.1.1.11: *Cum arietes vel boves commisissent et alter alterum occidit, Quintus Mucius distinxit, ut si quidem is perisset qui adgressus erat, cessaret actio, si is, qui non provocaverat, competeret actio: quamobrem eum sibi aut noxam sarcire aut in noxam dedere oportere.* In Quintus Mucius` opinion, it is important to know whether the animal which has been killed started the fight or whether it was provoked by another animal. In the first case the *actio de pauperie* is not applicable, whereas in the second case the owner of the dead animal can bring the *actio de pauperie* against the owner of the ram or the bull that provoked the fight.
[7] M. A. Katz, *op. cit.*, 260.
[8] A. van Selms, *op. cit.*, 327-329.
[9] *Ibid.*, 327 etc.
[10] R. Yaron, (1966), 398-399, 406.

Alan Watson shares the opinion of Yaron, taking the provisions concerning the goring ox as an introduction to his theory of legal transplants. He explains: „Now these five provisions which we have looked at from Eshnunna, the Code of Hammurabi and Exodus show such similarities of formulation and of substance that some connection, though distant, must exist between them. The nature of the similarities of style and substance is such that they exclude the possibility of parallel legal development. Probably they share an ultimate common source. Thus, legal transplants are already to be found in remote antiquity and were probably not uncommon.“[11]

Marylin Katz argues that a strict comparability between the Biblical and the Mesopotamian laws exists only with regard to the disposition of an ox which kills another ox. However, in other cases the singularity of the Biblical legislation can be stressed in four points: 1) the offending animal must be stoned to death; 2) its flesh may not be consumed; 3) the owner of a dangerous ox is subject to capital punishment; 4) such an owner may ransom his own life.[12]

3. INTERPRETATION OF THE BIBLICAL PROVISIONS IN LITERATURE

Commentators have expressed highly divided opinions, trying to explain the Biblical provisions, particularly the stoning of the animal and the proscription of eating the animal's flesh.

Some authors explain the stoning of an animal in the context of trials and punishment of animals, a widespread practice in ancient, medieval and even modern times.[13] The Bible regarded the ox as criminally liable and executed it as a murderer. The ox committed the crime of homicide, and therefore, stoning is prescribed as a method of execution for homicide. The main objection to this theory is that execution for homicide in Biblical times

[11] A. Watson, *Legal Transplants. An Approach to Comparative Law*, second edition, Athens, 1993, 24.
[12] M. A. Katz, *op. cit.*, 261.
[13] Karl von Amira, *Thierstrafen und Thierprocess.* Innsbruck, 1891; C. d'Addosio, *Bestie Delinquenti*, Napoli, 1892; Oliver Wendell Holmes, *The Common Law*, Boston-Toronto-London, 1963 (first published 1881); E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals*, London-Boston, 1987 (first published 1906), Foreword by Nicholas Humphrey XIII-XXXI, Intorduction, 1-17; J. Girgen „The historical and contemporary prosecution and punishment of animals“, *Animal law* 9 (2003), 97-133; J. Bondeson, *The Feejee Mermaid and Other Essays in Natural and Unnatural History*, Cornell University Press, Ithaca and London, 2014, first published 1999.

was a private revenge. Private execution was left to the relative of the man killed. Stoning, however, involved a collective element. It was an execution by the whole community. It required the cooperation of a number of people for its efficacy, and was a natural method which provided a sense of personal involvement for each member of the group. Furthermore, stoning was never the prescribed method of execution for homicide. It was reserved for the crimes affecting the wellbeing of the community, such as the worshipping of alien gods or sexual delicts committed by a woman who was betrothed, for example.[14]

Another explanation involves specific Biblical categories of purity and pollution. The animal is stoned, not because it has committed homicide, but because it is the instrument through which blood-guilt has entered the community. The stoning is the result of a characteristically Israelite religious concept which values human life so highly that it demands retribution even from animal. The ox which shed human blood became polluted. The lifeblood of human beings may not be shed without punishment. [15] Stoning was used in order to avoid physical contact with the offending beast.

A more complex variant of the previous explanation was given by Marylin Katz: The stoning of the ox can be explained by comparison with the case of the unknown murderer (Deuteron. 21.1-9). In that case blood-guilt falls on the community as a whole. It was expiated by exacting a penalty on an animal, a heifer, instead of the murderer. „In the case of the goring ox, the animal does not, like the heifer, substitute for the actual agent guilty of homicide, since it is itself the agent. But on the other hand, while the animal has shed the blood of a human being, it cannot be regarded as equivalent to a murderer – i.e., as having itself incurred blood-guilt. As in the case of an unknown murderer, blood-guilt attaches to the community as a whole. The ox, as the instrument of communal pollution, is executed in a manner that absolves the community as a whole....The goring ox, then, would at one level be regarded as equivalent to an unknown murderer.“[16]

[14] M. A. Katz, *op. cit.*, 262; B. Jackson, (1975), 112. It is prescribed as a sanction for idolatry (Deuteronomy, 13.10, 17.5), for a stubborn and rebellious son (Deut., 21.19-21), for sexual delicts of unmarried women (Deut., 22.21), or for sexual delicts with betrothed women (Deut., 22.24) for example.

[15] J. J. Finkelstein, *op. cit.*, 180-181; J. Mélèze Modrzejewski, *op. cit.*, 99 etc. However, Bible makes reference to cases of legal homicide like for example killing the thief who steals by night.

[16] M. A. Katz, *op. cit.*, 264.

Some authors stress that the Biblical legislator shows an aversion towards the possibility of monetary compensation for human life. "Human life was so transcendent a value that no pecuniary equivalent could be assigned to it."[17]

The goring of a person to death by an ox is a kind of „high treason" against the divinely ordained hierarchy of creation. The shedding of human blood is an insurrection against the hierarchic order established by Creation. That is why the ox was not left to a private act of justice, but was stoned by the community as a whole.[18]

According to Jackson, stoning was the early method of lynching. It was a utilitarian, extra-juridical measure of self-protection by the community against the danger of a religious contagion, rather than a punishment. The stoning was a measure to protect the community by eliminating the source of danger. It was not necessarily mortal.[19] Jackson concludes: "It thus seems likely that the law of the goring ox, in origin a utilitarian measure designed to protect the community, was instrumental in the creation, within the Biblical period, both of the idea of the divine accountability of animals, and thence of the idea of their punishment at human hands." [20]

To some, the stoning was not a punishment of the ox but of its owner, who had not guarded it properly. The liability of the owner is indirect and consists of the loss of the animal and the prohibition of the consumption of the animal's flesh.[21]

Another question which deserves particular attention is why eating the ox`s flesh is proscribed. The most common explanations include the following: the killing of a man by an animal rendered that animal taboo, the animal is unclean and not to be used by mortals for profane purposes such as eating, the

[17] J. J. Finkelstein, *op. cit.*, 173.

[18] "While the shedding of the blood - accidentally as well as intentionally - results in a pollution of the earthly community in a religious sense, it is not "high treason", and the mode of execution is never by stoning, which is an act participated in by the entire community. It is a private act of "justice" preferably carried out by the blood-relative of the murdered person." *Ibid.*, 181.

[19] „A semi-nomadic community might be satisfied by driving the animal away into the desert. This may help to explain the absence of a comparable provision in the Babylonian source. The threat to human life posed by a vicious animal is thus proportionately less." B. Jackson, (1975), 115.

[20] *Ibid.*, 120.

[21] *Herders Theologischer Kommentar zum Alten Testament,* herausg. Erich Zenger, Herder-Freiburg-Basel-Wien, Exodus 19-40, übersetzt und ausgelegt von Christoph Dohmen, 166.

ox may not be consumed because it is laden with guilt and is therefore an object of horror.

M. A. Katz presents a complex explanation again, underlying the complementarity between the slaughter of animals by men, and the killing of human beings by animals. [22] She proceeds from Greek mythology and the ritual of ox-sacrifice – βουφόνια described in Porphyry's *De abstinentia.*[23] The legal way of slaughtering an animal is through the rite of sacrifice. Through this ritual of purification, the animal is prepared for consumption and its parts are distributed between the gods and human beings. The Bible restricts the consumption of flesh to those animals whose lifeblood is shed through sacrifice. The animal could be consumed if it could be sacrificed. Sacrifice is a purifying and inclusionary procedure: „it renders an animal's flesh fit to eat and brings it within the compass of the permitted. Stoning, by contrast, is an exclusionary procedure: it expels the animal from the human community and consigns it to the category of the inadmissable. The ox's flesh, then may not be consumed because the animal cannot be sacrificed.“[24]

4. SAINT SAVA`S NOMOCANON (*ZAKONOPRAVILO*)

The Serbian Nomocanon (*Zakonopravilo*), also known as Krmčija, is the oldest and the biggest Serbian mediaeval legal work.[25] It contains Byzantine texts with various contents. It contains 64 chapters altogether, with provisions of dogmatic, canonical, moral, liturgical and legal contents. Chapter 48 is a collection of Moses' legislation.

Saint Sava (Rastko at birth) was the third son of the Stefan Nemanja, founder of the Serbian mediaeval dynasty. He became a monk at Mount Athos receiving his monastic name Sava, and devoting himself to spiritual asceticism. However, with his diplomatic skills he prepared and secured the independence and autonomy of the Serbian Christian Orthodox Church. In 1219, in Nicaea,

[22] M. A. Katz, *op. cit.*, 254 etc.

[23] "The bouphonia is structured around three specific mythical moments - the crime of the ox, the crime of the ox-slayer, and the crime of the ax/knife….The slaughter of animals by human beings is first criminalized and then legitimized by means of its transfer into the judicial realm. In this way, the judicial procedure divides the world of men from that of beasts, and it serves also as the means for establishing the proper, hierarchical relation between them." *Ibid.*, 256.

[24] *Ibid.*, 267.

[25] Сергије В. Троицки, „Како треба издати Светосавску крмчију (Номоканон са тумачењима)“, *САНУ, Споменик СII,* Одељење друштвених наука, Нова серија 4, Београд 1952, 1.

Sava was ordained archbishop of the autonomous and autocephalous Serbian Church. In that period of time, Sava began his work on the compilation of the Nomocanon, at Mount Athos, finalising it in Thessaloniki. The Serbian monastery of Chilandar on Mount Athos in Greece, immediately after its foundation, became the most important centre of Serbian literacy in general. With the Chilandar Typicon – foundation chapter from 1199, Saint Sava established the translation, redaction and editorial basics of the Chilandar scriptorium.

The language in which the *Zakonopravilo* was written was the old Serbian literary language, also known as Serbian-Slavonic. In the afterword to his book, Saint Sava explains: „These God-inspired books called the Nomocanon have now appeared in the light of the Slavonic language.“ [26]

After ordaining the Serbian bishops, Sava gave each one of them authentic copies of the *Zakonopravilo* and ordered that copying in the bishoprics could be done only on the basis of those books. The original (protograph) was placed in the monastry of Žiča, the seat of the Serbian Archbishopric at the time. However, it disappeared after the Bulgarian and Kuman invasion in the end of 13th century. The original manuscript as well as the authentic copies have never been found.

5. ILOVICA MANUSCRIPT

The oldest copy of Sava's Nomocanon is the Ilovica transcript. It was one of the eleven existing manuscripts in the Serbian redaction of the book, dating from the 13th to the 17th centuries, with textual differences.[27] The original manuscript has been kept in Zagreb as the property of the Archives of

[26] *Законоправило Светога Саве 1*, приредили и превели Миодраг М. Петровић, Љубица Штављанин-Ђорђевић, Историјски институт, Београд, 2005; *Zakonopravilo of Saint Sava 1*, edited and translated by Miodrag M. Petrović, Ljubica Štavljanin-Đorđević, Institute of History, Belgrade, 2005, Preface XXXI-L.

[27] Other extant manuscripts are the following: Raška ca. 1295-1305 (in Moscow, Historical Museum and Lenin Library) Dečani ca. 1340 (Monastery Dečani); Pčinja ca. 1360 (Serbian Academy of Sciences and Arts); Sarajevo, before 1371 (Museum of the Old Church in Sarajevo); Belgrade ca. 1470, (Serbian National Library in Belgrade); Chilandar ca. 1500 (National Library in Vienna); Savina ca. 1510 (Monastery Savina near Herceg Novi, Montenegro); Mileševa ca. 1550 (National Museum in Bukurest); Peć ca. 1552 (Serbian Academy of Sciences and Arts); Morača, 1615 (Museum of the Serbian Orthodox Church). С. В. Троицки (1952), 67.

the Croatian Academy (formerly named the Yugoslav Academy) of Sciences and Arts.[28]

It arrived there as the property of Antun Mihanović, Austrian consul in Thessaloniki, in the first half of 19th century. The first description of the manuscript was given by the Croatian Slavist Vatroslav Jagić. First, he sent his description to St Petersburg where it was completed and published by Sreznjevski, a member of the Russian Academy.[29] The idea about publishing the Ilovica manuscript in Zagreb, within the framework of the Yugoslav Academy of Sciences and Arts, advocated by the then president of the Academy, Franjo Rački, failed.[30] In the first half of the 20th century, the work on editing the *Zakonopravilo* was transferred to Serbia. The Ilovica manuscript was selected as the basis for the future critical edition of the Nomocanon of Saint Sava with a translation into the modern Serbian language, because it is considered to be the closest to the lost original. The Ilovica manuscript was accessible, at first, only in the facsimile edition.[31] In 2005, the first part of the *Zakonopravilo* was translated and published in the modern Serbian language. This edition contains the first 47 out of 64 chapters in total – including both the original text and the translation into the modern Serbian language.

The Ilovica manuscript from 1262 is chronologically fairly close to Saint Sava's autograph: it dates from the period not more than forty years later. It is not the closest to Sava's autograph only in the chronological sense, but probably also textually. The note concerning the origin of the book is written at the end of the manuscript. It was made by the scribe Bogdan who copied most of the codex. The copy was commissioned by Neophite, the Bishop of Zeta, for the Church of the Holy Archangel Michael, in a place referred to as Ilovica. This is assumed to have been the present monastery of the Holy Archangels at Prevlaka, in the Boka Kotorska bay near Tivat, Montenegro.

[28] Signature III c 9.

[29] Vatroslav Jagić, „Opisi i izvodi iz nekoliko južno-slovinskih rukopisa. Krmčaja ilovička godine 1262.“, *Starine VI,* Jugoslavenska akademija znanosti i umjetnosti, Zagreb, 1874, 60-111. Also, Vladimir Mošin, *Ćirilički rukopisi jugoslavenske akademije,* I dio, opis rukopisa jugoslavenske akademije znanosti i umjetnosti, Zagreb, 1955, „Krmčija ilovička, Raška redakcija 1262. god.“ III c 9 (Mihan. 26), 48-54.

[30] Ватрослав Јагић, *Спомени мојега живота,* II дио (1880-1923), Српска краљевска академија, посебна издања, књига CIV, друштвени и историјски списи, књига 45, Издање Задужбине д-ра Николе Крстића 12, Београд, 1934, 174-175.

[31] *Законоправило или Номоканон светога Саве: Иловички препис 1262. године* (пиредио и прилоге написао М. Петровић, Дечје новине, Горњи Милановац: Историјски институт САНУ, Републички завод за међународну научну, просветну, културну и техничкку сарадну: Народна библиотека Србије, 1991.

The orthography in the Ilovica manuscript is typical of the Raška school. However, numerous Russian words in the first part of the manuscript were for a long time interpreted as indications of Russian models. This fact called Sava's authorship into question.[32]

Saint Sava, working on the codification and translation of nomocanons from Greek, might have had some collaborators from among the Russian monks on Mount Athos. He lived in a Russian monastery at the beginning of his stay on Mount Athos. He continued to collaborate and maintain close links with some Russians in later times too. Recent research discovered, however, why the Ilovica manuscript contains features specific to the Russian language, the so-called Russisms**.** They are attributed to an unknown scribe of Russian (Novgorod) origin, and his share in the copying of the Serbian manuscript.[33]

Testimony about the existence of Sava's protograph can also be found in the epilogues of the four manuscripts that have been preserved: the ones from Ras, Peć, Mileševa, and Morača, however, not in the Ilovica manuscript.[34]

[32] С. Троицки, „Ко је превео Крмчију са тумачењима?", Глас Српске академије наука CXCIII, Одељење друштвених наука, 96, Београд, 1949, 119-142. (S. Troicki "Who translated Krmčija with interpretations*?", Glas akademije nauka CXCIII,* Department of Humanities, 96, Belgrade 1949, 119); Миодраг М. Петровић, „Свети Сава као састављач и преводилац Законоправила – српског Номоканона", *Историјски часопис,* књ. XLIX (2002), 40. (Miodrag M. Petrović, "Sveti Sava as the compiler and translator of Zakonopravilo – the Serbian Nomocanon", *Istorijski časopis,* Vol. XLIX (2002).

Apart from the issue of authorship, which was the subject of a lively discussion from the 19th century till the mid-20th century, topics of academic interest also involved issues such as the relationship between Sava's Nomocanon and the later Dušan's legislation, particularly the nomocanonic compilation – The Syntagm of Matija Vlastar. Stojan Novaković considers that Dušan's legislation substituted the Nomocanon. Sergije Troicki criticizes such view, considering that Dušan's Code and Vlastar's Syntagm did not repeal Krmčija, or supercede it and it remained as the major, fundamental legal code, while new compilations acquired only a subsidiary and supplemenatry significance. S. Troicki (1952), 12 etc.

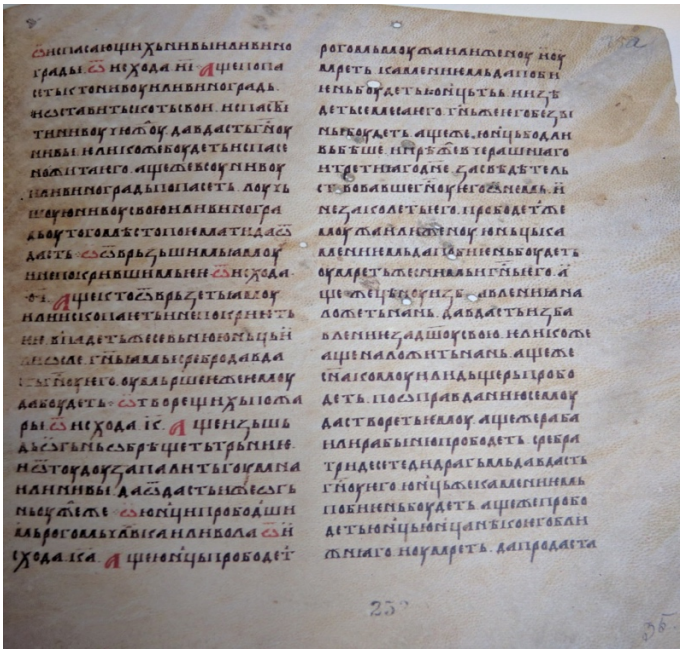
[33] „The first part of the manuscript, as far as f. 53, was copied by a scribe of Russian, or, more precisely, Novgorod origin. This scribe has been identified, on the basis of his penmanship, as the copyist of a Novgorod Gospel, which dates from about the same time and which is similar to the text of the Ilovica Transcript not only in handwriting, but also in certain linguistic and orthographic features." *Законоправило Светога Саве 1, Zakonopravilo of Saint Sava,* preface, XLIV.

[34] М. М. Петровић (2002), 40.

6. THE GORING BULLOCK IN THE *ZAKONOPRAVILO* OF SAINT SAVA

Chapter Forty-eight recites parts of Moses's legislation. Paragraph 21 includes the provision regarding the goring ox (bullock):

> „If a bullock gores a man or a woman and they die, the bullock shall be stoned, and his flesh eaten. His master shall be quit. If the bullock was a goring bullock before yesterday and from beforetimes, and his master was provided with tesimony about this, but did not slay it, and the bullock gored a man or a woman, the bullock shall be killed by stoning, and his master shall be put to death with it. If a price is set for his ransom, he shall provide for the price he has been ordained for the redemption of his soul. If the bullock gores a son or a daughter, it shall be punished in the same manner. If it gored a male slave or a female slave, the master of the bullock shall pay thirty didrahmas to their master. And the bullock shall be killed by stoning. If the bullock gored a fellow's bullock, and it died, the goring bullock shall be sold alive, and the silver from him shall be divided. And the dead bullock shall be divided. If the bullock is known to have gored in the past, and his master did not slay it, he is to surrender his bullock in return for the one killed, and he shall keep the bullock killed.“



The text can be found on leaf 252a (*recto*) of the Ilovica manuscript. It starts in the last line of the first column, extending through the entire second column, and ending on the next sheet. The text basically follows the Biblical model. However, there is a noticeable difference in the terminology. Namely, the Biblical text uses the terms ox or bull, [35] while the Nomocanon refers to a bullock. Nevertheless, a more conspicuous difference in relation to the Biblical text is that there is no proscription on consuming the meat of the stoned animal, like in the Old Testament. By contrast, according to the text of the Ilovica Krmčija, the meat of the stoned bullock is to be eaten (transcription: „и изједет се меса јего"), which is opposite to the original:
ка. а□е юнц прободет рогомь моужа или женоу и оумреть. камениємь да побиєнь боудеть юнць тьь. и изѣдеть се меса ѥго.

Apart from the Ilovica edition, the phototype edition of the Sarajevo transcript from the 14th century has also been analysed[36], as well as the Belgrade transcript from the third quarter of the 15th century, which has been kept in the National Library of Serbia. [37] Both of these manuscripts include the same digression from the Biblical text, just like the Ilovica manuscript: the flesh of the bullock stoned is to be eaten.

The Sarajevo manuscript, just like the Ilovica transcript, was written in two columns. The text starts at the end of the first column, leaf 239a. The content as well as the wording do not differ from the Ilovica transcript. The Sarajevo transcript contans no Russisms. The book was copied by two scribes. One transcribed the text to p. 191 without leaving any trace of himself, while the other, continuing to the end, recorded only his name on p. 192, „the sinful Miroslav". It contains some additional provisions and glosses not found in the other manuscripts. The Sarajevo manuscript has been assessed as highly significant for establishing the content of the original. In the genealogy of the

[35] In all of the various English translations of the Bible both *ox* and *bull* could be found.
[36] *Сарајевски препис Законоправила Светог Саве из XIV вијека*, фототипија, приређивачи проф. др Станка Стјепановић, Јеромонах Серафим (Глигић), „Дабар" Издавачка кућа Митрополије дабробосанске, Лакташи 2013. It is now kept in the Museum of the Old Church in Sarajevo, no. 222. It is written on vellum and has 370 leaves. Also, *Сарајевски препис Законоправила Светог Саве из XIV века (превод),* превели *Слободан Продић, Станка Стјепановић,* „Дабар" Издавачка кућа Митрополије дабробосанске, Ужице, 2015, 254.
[37] The manuscript is kept in the National Library of Serbia, No. 48. The ortography is that of the Raška school, without Russisms. С. Троицки, (1952), 48-50. The description in: Љубица Штављанин-Ђорђевић, Мирослава Гроздоворић-Пајић, Луција Цернић, *Опис ћирилских рукописа Народне библиотеке Србије,* (прва књига), Београд, 1986, 108 etc.

manuscripts, it has been classified in the group closely related to Sava's protograph, including only a minor number of mistakes of an accidental type.
The Belgrade manuscript is incomplete, however; it is also considered to be of importance for determining the text of the protograph. The text concerning goring bullock starts in the 8th line from above, on the leaf 260b (*verso*).

7. SOURCES OF *ZAKONOPRAVILO*

The question about the role of Saint Sava in the creation of the book is difficult one. Nobody contests the fact that Saint Sava brought the nomocanon from Thessaloniki to what was then Serbia (Raška), a fact referred to by Domentijan in his "Life of Saint Sava". However, no agreement has been reached with regard to how this book was created and what was the role of Saint Sava in the drawing up of the compilation. As regards the role of Saint Sava in the drawing up of this compilation, the question has been raised as to whether he only organized the transcription and translation, with his compilers (or scribes) just working under his supervision, or was his role much more important? Was Saint Sava only a translator, or was he also a compiler, commentator and author? Scholarly opinions range from recognizing Saint Sava's crucial and multifarious creative role in the creation of Nomocanon with interpretations, to the view that he only brought the book from Mount Athos, i.e. from Thessaloniki to the Serbia of the time.[38]

Also, the question about the sources of the Nomocanon of Saint Sava is a difficult one. A particularly difficult question is, which Greek sources were used. Is the Nomocanon by Saint Sava altogether a translation of an extant Greek compilation, or is it a compilation of different Greek texts?
According to one opinion, Sava's Nomocanon was only a transcript of an earlier Slavonic compilation, or if nothing else, certain parts of an already extant Slavonic nomocanon had been used in Sava's legislative work.[39]

The German scholar Ludwig Burgmann drew attention to the *Codex Vaticanus graecus 1167*, the manuscript which is, according to him, closer to the Serbian Nomocanon than any other Greek manuscript preserved. In his conclusion he puts: „Ist also der serbische Nomokanon vielleicht sogar aus nur einer einzigen grichischen kanonistichen Handscrift übersetzt?...Wenn

[38] С. Троицки, (1949), 119-126.
[39] А. Соловјев, А., Светосавски Номоканон и његови нови преписи (сепарат из часописа Братство XXVI), Београд 1932, 42.

demnach auch wenig Aussicht besteht, positiv zu beweisen dass der serbische Űbersetzer lediglich einen einzigen griechischen „Nomokanon“ übersetzt hat, gibt es doch andererseits keine Indizien, die gegen eine derartige Annahme sprächen.“ [40]

Miodrag M. Petrović opposed this opinion: “The assumption of some scholars about the existence of a single Greek nomocanon as the source of the *Zakonopravilo* is unfounded. The very structure of the Zakonopravilo excludes such a hypothesis, for its compilers used several heterogeneous nomocanonical Greek texts, often transposing, combining and merging their contents into new wholes.“[41]

As far as chapter 48, it is likely that parts of Moses’ legislation have not been taken over directly from the Old Testament but from the early byzantine compilation entitled: Ἐκλογαὶ τοῦ παρὰ θεοῦ διὰ τοῦ Μωυσὴ δοθέωτος νόμοι τοῖς Ἰσραηλίταις (Ecloge legis quae a Deo per Moysem data est Israëlitis).[42] The compilation has the same title as chapter 48 of Sava`s Nomocanon and the content of both texts is very similar. In the available printed editions of the byzantine compilation, however, there is no modification compared to the original text of the Old Testament with regard to the goring ox: eating the flesh of the stoned animal is prohibited:

> 21. Τῆς Ἐξόδου κεφ.ξη (21.28-32, 35-36).- Περὶ ταύρου κερατίσαντος ἄνθρωπον ἢ βοῦ Ἐὰν. Εαν κερατίση ταῦρος ἄνδρα ἢ γυναὶκα καὶ αποθάνη, λίθοις λιθοβολήθησεται ὁ ταῦρος **καὶ οὐ βρωθήσεται τὰ κρέα αὐτοῦ**....[43]

However, it cannot be excluded that an error existed in the copy of the byzantine compilation which was used in drawing up the *Zakonopravilo.*

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[40] Ludwig Burgmann, „Der Codex Vaticanus graecus 1167 und der serbische Nomokanon“, *Зборник радова Византолошког института* XXXIV, 1995, 102. Ludwig Burgmann, „Der Codex Vaticanus graecus 1167 und der serbische Nomokanon“, *Receil des travaux de l`Institut d`etudes byzantines*, XXXIV, 1995, 103-104.

[41] *Законоправило Светога Саве 1 (*2005), preface XXXV.

[42] The byzantine compilation with the parallel translation into Latin, first edited by Johannes Baptista Cotelerius (Jean Baptiste Cotelier) *Ecclesiae Graecae Monumenta*, Tomus primus, 1677. (Ecloge Legis Mosaicae. Ex MS Codice 2336. Bibliotheca Regia). Another edition, “Ecloga ad Prochiron mutata”, ed. C.E. Zachariae von Lingethal, *Jus graeco-romanum*, Lipsiae, 1865, 154. The text is most recently edited by L. Burgmann and Sp. Troianos, “Nomos Mosaikos”, *Fontes Minores III*, Frankfurt am Main, 1979, 126-167.

[43] “Nomos Mosaikos“, *Fontes Minores III*, ed. L. Burgmann, Sp. Troianos, Frankfurt am Main, 1979, 151.

8. CONCLUSION

Saint Sava, undoubtedly, felt profound reverence for the Biblical text, as the word of God. It would be difficult to imagine that he might have deliberately changed or modified the text.

Therefore, it may be assumed that an error had been made already in the model which was used in drawing up the *Zakonopravilo.*

Likewise, one may also assume that Sava himself inadvertently made a mistake in translating and transcribing these provisions, or that, more likely, this might have been done by one of his collaborators. Namely, despite the skills and diligence of his scribes, who spent days transcribing long texts, any one of them might have made an inadvertent error, slipping a letter or a word here and there. The inadvertent omission of a negation consisting of only two characters, however, resulted in a modification of the text with regard to a material detail: allowing the consumption of the flesh of the stoned animal instead of proscribing it.

The next possible assumption is that the modification did not exist in the protograph, but rather, that it appeared initially in the first copies of *Zakonopravilo,* which have not been preserved to this day. These transcripts were created on the basis of the original, for the needs of the existing bishoprics after their acquiring autocephality, considering that, upon ordaining the bishops, Saint Sava gave each one of them an authentic transcript, ordering that transcripts in each bishopric be made only on the basis of the aforementioned bishopric copies. As a result, mistakes must have been rare, yet possible, considering the special tradition in transcribing, as well as the supervision being carried out on that occasion. „As opposed to other Slavonic Nomocanons, the manuscripts of Saint Sava's Krmčija, which were remarkably older, are highly similar amongst themselves, both in terms of their contents and their organization and language. This is due to the fact that the first copies of Krmčija , most likely 8 or 9 of them, according to the number of bishoporics of the new Serbian Church, were transcribed from the same original and at the same place, and perhaps by the same scribes and under the supervision of the same person – Saint Sava, himself. Apart from this, the great practical significance of Krmčija, as the fundamental eclessiastical and civil code and factor of church unity, created the tradition of extraordinary accuracy in

copying that book, which allowed no changes whatsoever in comparison to the original."[44]

This tradition had been perpetuated as confirmed by the record made by Bishop Grigorije in the Raška (Ras) manuscript (ca. 1305). „Grigorije's note at the end of the text underlines the devotion of the scribe to the copying and editing of books with a particular emphasis on the authority of the models (archbischopric books) after which the copy was made. This note not only reveals the responsibility of the copyist towards the codex he is copying but also stresses the need to preserve the tradition of St Sava:"[45]

It is highly unlikely that the first time the mistake occurred was in the oldest preserved Ilovica manuscript, and that it was made by the scribe 'the sinful' Bogdan. This statement is based on the fact that the same mistakes can also be identified in the Sarajevo transcript (which was transcribed in this segment by the scribe Miroslav). Namely, it is assumed that both manuscripts originate from a source which was close to the original. The mistake also exists in the later Belgrade manuscript. It is difficult to imagine that three different scribes made an identical mistake in three different transcripts, which were distant one from the another both in terms of time and space.

In view of the aforementioned, it may be assumed that the digression from the original Biblical text existed already in Sava's protograph. It is more likely that this was the result of an inadvertent mistake, considering the reverence that monks had for the Biblical text.

Nevertheless, one cannot exclude the possibility of the text having been modified by Saint Sava himself, or by his collaborator, due to a lack of understanding of the Jewish religious concepts regarding the prohibition of consuming the flesh of a stoned animal.

Another explantion seems equally conceivable; Saint Sava and his disciples did not want to intruduce new restrictions concerning abstinence from food strange to the Christian traditional teaching on fasting and the age-old practice of the Church to use fasting as one of the important means of spiritual growth. Though the rules on abstaining from food, particularly meat, during fasting periods are quite strict in the Christian Orthodox Church (a strict

[44] С. Троицки (1952), 18.

[45] Давидовић, М., „Српски скрипторији од XII до XVII века", *Свет српске рукописне књиге (XII-XVII век),* (Галерија Српске академије науке и уметности, 137), Београд, 2016, 59. = Davidović, M., „Serbian scriptoria – twelfth to seventeenth century",*The World of Serbian Manuscripts (12th-17th Centuries),* Belgrade, 2016, 59.

fast every Wednesday and Friday, the forty day fast before Pascha, monks do not eat meat at all etc.), for the Christian, all foods are clean. When no fast is prescribed, there are no forbidden foods.

SOURCES AND LITERATURE

Burgmann, L., „Der Codex Vaticanus graecus 1167 und der serbische Nomokanon“, *Зборник радова Византолошког института* XXXIV, 1995, 91-106. (Ludwig Burgmann, „Der Codex Vaticanus graecus 1167 und der serbische Nomokanon“, *Receil des travaux de l`Institut d`etudes byzantines,* XXXIV, 1995, 91-106).

Bondeson, J., *The Feejee Mermaid and Other Essays in Natural and Unnatural History*, Cornell University Press, Ithaca and London, 2014, first published 1999.

Amira, von K., *Thierstrafen und Thierprocess.* Innsbruck, 1891.

Burgmann, L., Troianos, Sp., “Nomos Mosaikos”, *Fontes Minores III*, Frankfurt am Main, 1979, 126-167.

Cotelerius, J. B., (Jean Baptiste Cotelier) *Ecclesiae Graecae Monumenta*, Tomus primus, 1677.

Давидовић, М., „Српски скрипторији од XII до XVII века“, *Свет српске рукописне књиге (XII-XVII век),* (Галерија Српске академије науке и уметности, 137), Београд, 2016, = Davidović, M., „Serbian scriptoria – twelfth to seventeenth century“,*The World of Serbian Manuscripts (12th-17th Centuries)*, Belgrade, 2016.

Evans, E. P., *The Criminal Prosecution and Capital Punishment of Animals*, London-Boston, 1987 (first published 1906);

Finkelstein, J. J., „The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty“, *Temple Law Quarterly*, vol 46, 2/1973, 169-290;

Girgen, J. „The historical and contemporary prosecution and punishment of animals“, *Animal law* 9 (2003), 97-133;

Holmes, O. W., *The Common Law,* Boston-Toronto-London, 1963 (first published 1881);

Jackson, B. S., “The goring ox again”, *The Jurnal of Juristic Papyrology* 18 (1974), 55-93;

Jackson, B. S., „The Goring Ox“ (Chapter Five), *Essays in Jewish and Comparative Legal History*, Leiden, 1975, 108-152;

Jagić, V., „Opisi i izvodi iz nekoliko južno-slovinskih rukopisa. Krmčaja ilovička godine 1262.“, *Starine VI,* Jugoslavenska akademija znanosti i umjetnosti, Zagreb, 1874, 60-111.

Јагић, В., *Спомени мојега живота,* II дио (1880-1923), Српска краљевска академија, посебна издања, књига CIV, друштвени и

историјски списи, књига 45, Издање Задужбине д-ра Николе Крстића 12, Београд, 1934.

Katz, M. A.. „Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice and Judicial Process, *Yale Journal of Law & the Humanities:* Vol 4, Iss 2, Article 3, 1992; http://digitalcommons.law.yale.edu/yjlh/vol4/iss2/3.

Lingethal, von C.E. Z., *Jus graeco-romanum,* Lipsiae, 1865.

Mélèze-Modrzejewski, J., „Hommes libres et bêtes dans les droits antiques“ , *Statut personnel et liens de famille dans les droits de l'Antiquité,* Variorum, GB-USA, 1993,

Mošin, V., *Ćirilički rukopisi jugoslavenske akademije,* I dio, opis rukopisa jugoslavenske akademije znanosti i umjetnosti, Zagreb, 1955, 48-54.

Петровић, М. М. „Свети Сава као састављач и преводилац Законоправила – српског Номоканона“, *Историјски часопис,* књ. XLIX (2002), Београд, 2003, 27-45. (Miodrag M. Petrović, “Sveti Sava as the compiler and translator of Zakonopravilo – the Serbian Nomocanon”, *Istorijski časopis*, Vol. XLIX [2002], Belgrade, 2003, 27-45).

Полојац, М.,“Јунац који боде у Законоправилу Светога Саве“*Анали Правног факултета у Београду,* LXV, 2/2017, 43-69. (Polojac, M., „Junac koji bode u Zakonopravilu Svetoga Save“, *Anali Pravnog fakulteta u Beogradu*, LXV, 2/2017, 43-69).

Троицки, С., „Ко је превео Крмчију са тумачењима?“, Глас Српске академије наука CXCIII, Одељење друштвених наука, 96, Београд, 1949, 119-142. (Troicki, S., „Ko je preveo Krmčiju sa tumačenjima?“, Glas Srpske akademije nauka CXCIII, Odeljenje društvenih nauka, 96, Beograd 1949. S. Troicki “Who translated Krmčija with interpretations*?”, Glas akademije nauka CXCIII,* Department of Humanities, 96, Belgrade, 1949, 119-142);

Троицки, С. В., „Како треба издати Светосавску крмчију (Номоканон са тумачењима)“, *САН, Споменик CII,* Одељење друштвених наука, Нова серија 4, Београд, 1952, 1-114.

Сарајевски препис Законоправила Светог Саве из XIV вијека, фототипија,

(прир. проф. др Станка Стјепановић, Јеромонах Серафим [Глигић]), „Дабар“ Издавачка кућа Митрополије добробосанске, Лакташи 2013.

Сарајевски препис Законоправила Светог Саве из XIV века, (превели *Слободан Продић, Станка Стјепановић*), „Дабар“ Издавачка кућа Митрополије добробосанске, Ужице, 2015.

Selms, van A.„The Goring Ox in Babylonian and Biblical Law“, *Archiv Orientalni* 18/4, 1950.

Штављанин-Ђорђевић, Љ., Гроздоворић-Пајић, М., Цернић, Л., *Опис ћирилских рукописа Народне библиотеке Србије,* (прва књига), Београд, 1986.

Watson, A., *Legal Transplants, An Approach to Comparative Law*, second edition, Athens, 1993.

Законоправило Светога Саве 1, приредили и превели Миодраг М. Петровић, Љубица Штављанин-Ђорђевић, Историјски институт, Београд, 2005; (*Zakonopravilo of Saint Sava 1*, edited and translated by Miodrag M. Petrović, Ljubica Štavljanin-Đorđević, Institute of History, Belgrade, 2005).

Законоправило или Номоканон светога Саве: Иловички препис 1262. године (приредио и прилоге написао М. Петровић, Дечје новине, Горњи Милановац: Историјски институт САНУ, Републички завод за међународну научну, просветну, културну и техничкку сарадну: Народна библиотека Србије, 1991.

Yaron, R., „The Goring Ox in Near Eastern Laws“, *Israel Law Review*, vol 1, 3/1966.

Yaron, R., *The Laws of Eshnunna*, Jerusalem, 1969.

Соловјев, А., Светосавски Номоканон и његови нови преписи (сепарат из часописа Братство XXVI), Београд 1932, 21-43. (Solovjev, A., Svetosavski Nomokanon i njegovi novi prepisi (separat iz časopisa Bratstvo XXVI), Beograd, 1932, 21-43).

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ЈУНАЦ КОЈИ БОДЕ У ЗАКОНОПРАВИЛУ СВЕТОГА САВЕ И БИБЛИЈСКО ПРАВО

Резиме

Први део рада посвећен је архаичним законодавствима Блиског истока и одредбама које се односе на бика који убоде рогом. Подвлачи се специфичност Мојсијевог законодавства која се огледа у томе да се бик који на смрт убоде човека или жену каменује те да је забрањено конзумирање меса каменоване животиње. Одредбе Старог завета реципиране су у српско средњовековно право: налазе се у глави 48, параграф 21 Законоправила Светог Саве. Међутим, библијски текст је преузет уз одступање: дозвољено је конзумирање меса каменованог бика односно јунца. У раду се износи неколико хипотеза о томе како и зашто је дошло до овог одступања.

Кључне речи: Законоправило Светог Саве. – Иловички препис. – Јунац (во, бик) бодач. – Стари завет. –

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INTERNATIONAL LAW AND DIPLOMACY TRANSNATIONAL REGIME AS A SOFT LAW IN THE EU

Abstract

The traditional and most common instrument of polities to conduct public policy is legislation. Even policy-making by the use of norms (hard law) is increasingly being replaced by other instruments, such as the establishment of standards, good practices and guidelines, which rely on the ability of states and organizations to achieve by themselves certain goals and to maintain a level of performance that can be asserted from the use of objective indicators. The use of such instruments, commonly known as soft law, comes from the realization that 1) international interdependence demands coordination of policies, and 2) the complexity of the issues calls for cooperation and exchange of experiences among actors in order to better address them, rather than rely on the ability of a certain actor to impose a solution by judiciable norms.

The basis of this development is the soft law in Europe, his models, then soft law as policy – decision making instrument and design and dynamics of the open method of Coordination (OMC). Most important in this development is Monetary and Interdependence.

Key words: law, models, policy, transnational, coordination

1. INTRODUCTION

Rules and administrative law obligations are not only violated by nationals and legal entities based in the state where these rules and obligations apply, but also by foreigners and companies with their seats abroad. These infringements could be committed during a short visit which was ended before

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the procedure imposing or even executing an administrative sanction was completed. It is also possible that these infringements were committed from abroad.

In the single market of the European Union the free movement of goods, services, capital and persons is ensured. The resulting free movement of person has consequences for the affectivity of law enforcement. Normally national law enforcement authorities can only execute their powers on their own territory. From this legal point of view their freedom of movement is limited. National law enforcement authorities are confronted with the limits of their jurisdiction resulting from the traditionally strongly nationally organized law enforcement systems in the EU Member States. Without effective international or European legal instruments to cooperate in extraterritorial law enforcement, infringing mobile citizens and companies get away unscathed too easily. As we will see below, both private international and international or European criminal law instruments have developed into an advanced legal system, whereas international administrative law instruments have advanced much less.[1]

One of the basic rules of international law is that States enjoy full sovereign powers within their territories. The exercise of extraterritorial jurisdiction clashes with the prohibition of interference in another State's internal affairs or violate its sovereignty and its right to territorial integrity and political Independence. This is the principle of territoriality, apparently a Frisian invention. The general principles on territoriality are still derived from the 1927 judgment of the Permanent Court of International Justice (PCIJ) in the *Lotus Case*. The first uncontroversial principle is that whether a State may lawfully exercise extraterritorial jurisdiction is a matter of international law. The second principle is that as a general rule, law prohibits the exercise of extraterritorial enforcement jurisdiction unless this is specifically permitted. The PCIJ's decision was focused on '*enforcement jurisdiction*'.

2. SOFT LAW IN EUROPE

The traditional and most common instrument of polities to conduct public policy is legislation. By issuing norms, states can frame the way citizens and organizations behave and interact, providing for ways of securing that the common interest is protected. Norms can be enacted because they result from the imposition of a formal authority legitimized (usually) by the democratic choice

[1]R. Cecile, "L'impossible Modele Social Europeen," *Actes de la Rechercheen Sciences Sociales* (166–67), 2007, 94–109.

of the people, and infringements can be prosecuted in a court of law. However, issuing norms is only part of policy-making; one has to ensure that norms are enacted, which involves also the development of administrative action and governance.[2]

Even policy-making by the use of norms (hard law) is increasingly being replaced by other instruments, such as the establishment of standards, good practices and guidelines, which rely on the ability of states and organizations to achieve by themselves certain goals and to maintain a level of performance that can be asserted from the use of objective indicators.

The use of such instruments, commonly known as soft law, comes from the realization that 1) international interdependence demands coordination of policies, and 2) the complexity of the issues calls for cooperation and exchange of experiences among actors in order to better address them, rather than rely on the ability of a certain actor to impose a solution by judiciable norms.

This way, the outcome of policies is increasingly becoming framed by standards that are deemed to be good because they result from expertise and experimentation, rather than from the imposition of authority. Regulation, as well as policy-making, is becoming more concerned with the ability to convince than the ability to impose. The effectiveness of such methods relies essentially on reputation, which can be considered in two dimensions: the reputation that a certain practice holds, and the reputation that an organization can claim by following a certain practice because it is deemed to be a good one.[3]

The use of soft law instruments by states, international organizations and private actors, can prove efficient in addressing problems and inducing policy advancement, but it also raises issues of legitimacy and political significance. The aim of this paper is to provide an outlook of the use of soft law instruments and mechanisms in policy making by the European Union, and to address some of the issues that are at stake. The use of soft law will be approached both in terms of policy-making and of implementation of policies already established by law.[4]

[2] G. Sacriste, A. Vauchez, "The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s", *Law and Social Inquiry*, 2007, 32, 83–107.
[3] J. H. H. Weiler, "The Reformation of European Constitutionalism," *Journal of Common Market Studies*, 35 (1), 1997, 97–131.
[4] W. Yondorf, "Monnet and the Action Committee: The Formative Period of the European Communities," *International Organization* 19 (4), 1965, 885–912.

3. MODELS OF SOFT LAW

The realization of the EU Lisbon Strategy relies on a particular soft-law implementation model -Open Method of Coordination (OMC). This model presents the most flexible approach in managing the EU. It relies on a set of mutually agreed indicators and metrics that allows the members to pursue the realization of the defined goals in different ways, the latter not being legally prescribed at the EU level. The model has been applied (differently) to various issue-areas, such as the employment, social inclusion and health protection. The differences in its application include a varying time table, types of the expected results, number of participants and role of the common institutions, as well as the level of already existing harmonization in the issue-area.[5]

It is possible to identify another model of supranational governance through soft law in the area of the EU fiscal coordination (EUFC), regarding the implementation of the Lisbon Treaty (which is itself considered a hard law). The EUFC system relies primarily on the soft-law instruments, such as general guidelines for the members' economic policy and the multilateral surveillance of their fiscal policy. However, certain regulatory elements in the fiscal area are of a binding-nature, for example the level of fiscal deficit (Lisbon Treaty: Excessive Deficit Procedure) and the EC's actions when this level is exceeded. In this way, the model is a specific combination of hard- and soft-law instruments, called the theory of hybridity.

Another example of soft law implementation is the 2003 EU's Forest Law Enforcement Governance and Trade Action Plan (FLEGT), aiming at improving forest sustainable management and reducing illegal logging. It includes numerous private and public actors, as well as actors outside the EU through Voluntary Partnership Agreements (VPAs). The initiative covers a number of interrelated issues, such as legal forest management, improved governance, trade in legally produced timber, promotion of public procurement policies and private sector's voluntary codes of conduct, appropriate finance to support such conduct and procedures, etc. This model of soft law implementation has been emphasized as an example of an effective supranational regulation of a complex issue-area. From the experimentalists' view, FLEGT is an example of a new governance model that might prove useful also for other transnational issue-areas, due to its particular nature. Such a governance architecture is highly flexible and a "learning" one: common, provisional goals are set and revised if

[5] K. Abbott, Duncan. Snidal, "Hard and Soft Law in International Governance", *International Organization*, Cambridge Journal, Vol. 54, 2000, 421-456.

necessary, based on the experience of the governance subjects in reaching the goals by alternative routes. In the case of FLEGT, common, broad goals have been set and progress metrics developed.[6] Local subjects (i.e. lower than-central, regulatory actors) from both public and private sector enjoy a high level of discretion to pursue the agreed goals. Monitoring and reviewing processes have been established to compare progress achieved through different routes taken by local actors. Finally, the goals, metrics and procedures are revised and new actors brought in, if necessary. Beyond the forest sector, the EU uses this model also for the regulation of energy, telecommunication, food safety, etc. The relation between such a soft-law model and the traditional hard-law governance is exemplified by the VPA component of the initiative: these legally binding international agreements are concluded with non-EU stakeholders.

From the presented models, one can conclude that soft law certainly provides a framework for new, transnational governance concepts to emerge. Although the examples may seem quite similar, there are significant differences among them. The OMC and FLEGT models do not feature explicit and concrete goals and the related rules, as the model of the EUFC does (Theory of Hybridity), but only overall goals (the OMC) and provisional, not precisely defined goals (FLEGT). The OMC and FLEGT also do not rely on formal binding documents, with defined standards and prescribed instructions to be deployed at the national level, as does the EUFC. The EUFC does not include various types of actors and stakeholders, as the other two models do (particularly FLEGT which heavily relies on private actors), but depends on states and their hard-law implementation force. The EUFC is a highly centralized and structured model that draws its efficiency from the state power and hard-law norms.

However, it does not always function with high effectiveness because it does not take into greater account national goals/contexts, and is only exceptionally open for revision. Contrary to that, the other two models seriously consider local conditions (to a different extent) and are open to revision of the goals and methods, but sometimes they are too slow to start and develop. So, each of the models has its positive and negative sides, but in comparing them one must bear in mind that they have been created for very different issue-areas and purposes.

[6] K. Dingwerth, P. Pattberg, “Global Governance as a Perspective on World Politics”,

3.1 Soft law as policy – making - the open method of coordination

As an international integration organization, the EU relies on binding, judiciable rules that emanate from institutions created by member states and to which they transfer the citizen's power to conduct common policies and to issue legislation that affect not only the states, but their citizens, in an immediate way, as well. These institutions hold a high degree of autonomy or independence from the states and decision-making can be performed by way of a qualified majority, rather than by unanimity. Integration organizations differ from cooperation organizations in that, in the former, the scope of action is broader and member states must abide to rules made by the institutions by taking into account the interest of the majority of the states, and not necessarily of all of them, while in the latter, the participation of member states refers essentially to cooperation to achieve better ways of addressing their problems in a narrower, more specific scope, that does not involve relinquishing sovereignty.[7]

Traditionally, the use of binding legislative acts in policy-making in the European Union is known as the Community Method: the Commission makes a proposal to the Council and Parliament who then debate it, propose amendments and eventually adopt it as EU law. The alternative to this common procedure is the establishment of common objectives and open-ended guidelines, based on the ability of states to cooperate with each other, by learning and experimenting, and essentially by putting in effect policy changes at the national and subnational level in order to achieve pre-established goals. This is due, mostly, to a growing concern on addressing certain subjects that the constituent treaties still regard as exclusively in the jurisdiction of the member states, but that are perceived as of needing to be addressed by the adoption of common policies, in order to promote a balanced outcome for all member states.

Aside from that, the use of soft law is also seen as a more effective way of involving both public and private actors in pursuing either shared objectives, or objectives that, despite being established unilaterally by public actors, are imposed to private actors in such a way that they will eventually prefer to comply and cooperate, rather than having to deal with legislation unilaterally imposed and in which they have little opportunity to influence the outcome (the shadow of hierarchy).

If policy-making cannot, or should not, be done by legislative acts produced by the European institutions, member states devise ways of policy-making that circumvent the formality of legislation and the necessity to abide

[7] S. Scott, '"Transnational Law" as Proto-Concept: Three Conceptions', 876.

rigid rules. These rigid rules are then replaced by new modes of governance, which include target definitions, publications of performance, voluntary accords with and by private actors, and codes of conduct.[8]

3.2 The design and dynamics of the open method of coordination

Unlike the rigidity of the Community Method, the OMC involves:

a) Fixing guidelines for achieving the goals set by member states in a given timetable, instead of creating a set of rules to be uniformly observed by all;

b) Establishing quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;

c) Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;

d) Periodic monitoring, evaluation and peer review organized as a mutual learning processes. No sanctions are established in case any of the objectives are not accomplished.

The preference for such forms of soft law instead of hard law may have been decisively influenced by the following factors:

a) The realization that changes were to be made in many areas of law and policy, ranging from rules governing welfare provisions to those structuring tax systems, being that the systems of employment and social protection that needed to be changed vary greatly among the member states. Therefore, even if the EU had legislative competence in the field of employment policy, it would be very difficult to craft uniform rules;

b) The fact that these are very sensitive policy areas in which reform have prompted the fall of more than one government

c) For many problems there was no ready-made set of solutions that could be legislated at any level of government, since no one was sure of the best way to deal with unemployment

As Dehousse points out, emphasis is placed on developing common interpretations of situations, common values and techniques, through an iterative learning process. Discussions about common objectives and the analysis of national policies are expected to lead to a mutual sharing of knowledge. There is

[8] G. de Burca, "The Constitutional Challenge of New Governance in the European Union" paper presented at workshop on New Governance and Law in EU, Minda de Gunzburg Center for European Studies, Harvard University, February 28, 2003.

a stressing of management by objectives instead of the harmonization by legislation resulting from the Community Method that echoes the influence of the New Public Management.

The OMC has a strong concern with the principle of subsidiarity, acknowledging the diversity of national traditions in the policy sectors in question and the desire to preserve member states' autonomy. The discussion of issues and the setting of strategic goals at a European level must later be enacted in some form by national, regional and local authorities, in partnership with the social partners and civil society.[9]

Due to the complexity of the issues at hand, the OMC calls for the intervention of expert public officials from national administrations, providing for network coordination and for the development of policy communities. The OMC relies on the work of these experts to formulate the actions to pursue in order to achieve the goals set, and to put in effect the guidelines drawn. This is in line with the work done in the traditional community policies, in which the formation of a cognitive convergence by these experts precedes the adoption of legislation in the Community Method. However, in the OMC the role of these experts is enhanced in that they assume a leading role in designing policy and in the implementation of the necessary reforms in their own countries, establishing with considerable autonomy which lines of action are to be pursued, as well as participating in the evaluation (and, accessorily, the definition) of the lines of action established by experts in other member states, assessing their success and failure, in a process of mutual learning. This makes the OMC essentially an horizontal (bottom-bottom), rather than a vertical (top-down) process of policy implementation, without a hegemonic player endowed with formal authority, such as the Commission or any given member state in the logic of the Community Method.

3.3. The European employment strategy and the emergences of the "open method"

The EU has begun to respond to this challenge by crafting a new governance model that differs radically from the top-down, rule-based, centralized approach used in social policy heretofore. Zeitlin and Sabel (2003) have summarized the essential elements of this method as follows:

[9] European Commission, (2001) European Governance — A White Paper, COM (2001), 428 Final.

a) Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines.
b) National reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly.
c) Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases.
d) Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.

The first and most developed example of this "open method of coordination" is the European Employment Strategy. The EES emerged in the 1990s when concern about unemployment was great and the EU was getting ready to launch the single currency. At that time, it was felt that for both political and economic reasons the EU had to tackle the growing problem of unemployment. This decision to Europeanize employment policy was a major change from the past. Theretofore, employment policy had been seen as the exclusive preserve of the Member States. But by the 1990s a consensus emerged that EU level action was needed.[10]

While the Member States saw they had common problems in the employment area, and agreed that this issue demanded attention at a European level, they also recognized that it would not be easy to craft common solutions or pass uniform rules . There were several reasons for this conclusion. First, it was understood that the employment problem would require changes in many areas of law and policy, ranging from the rules governing welfare provision to those structuring tax systems. In many of these areas the EU lacked legislative competence. Moreover, the systems that needed changing vary greatly among the Member States: there are at least three major types of welfare state structures in the EU and equally great variation in their industrial relations systems. So even if the EU had legislative competence, it would be hard to craft uniform rules for such diverse systems. Finally, no one was sure of the best way to deal with unemployment, so for many problems there was no ready-made set of solutions that could be legislated at any level of government. Faced with problems that were not well understood, whose solutions involved changes in many areas of law and policy and were sure to differ from country to country, and for which its legal competence was extremely limited, the EU could not rely exclusively on the Community Method. Instead, it had to craft another approach.

[10] M. Ferrera, A. Hemerijck, M. Rhodes, "TheFuture of Social Europe: Recasting Work and Welfare in the New Economy", *Oxford University Press*, Oxford, 2001.

4. MONETARY UNION AND INTERDEPENDENCE

Whatever may have been the way to deal with these issues in the past, the creation if of the single market and the single currency led to a new context for social policy, generating new constraints and creating new independencies. The constraints came from monetary integration. Because of the common currency, national governments no longer could use monetary policy as a tool for job creation. And because of the Stability and Growth Pact they were also constrained in their ability to use fiscal policy for the same ends. The increased interdependence derived both from the common currency and the single market. Each country in the euro has an interest in the fiscal stability of the others since major budget deficits anywhere would threaten the euro. And that gives them an interest in each other's social and employment policies.[11]

For most European countries, social costs represent a major part of state expenditures. These costs are already high as a result of generous income maintenance plans and state pensions combined with low levels of labor market participation and relatively early retirement ages. They will get higher as populations age unless policies are changed and labor market participation rates increased. So many countries face the need to change their policies on work and welfare to ensure fiscal sustainability in the face of these mounting costs.

While this is primarily a concern of the individual Member States, it has become a EU level issue because of the single market and common currency. The euro zone countries, at least, have an interest in ensuring that other countries in the common currency maintain fiscal sustainability. And all countries in the single market have an interest in ensuring that other countries do not achieve that sustainability by radically lowering standards and slashing social charges, thus setting off a race to the bottom.

These factors create significant functional interdependencies. At the same time, the emergence of a European context for discussion of social policy creates another, very different kind of "interdependence" – since there is great variation in the degree to which countries have solved these problems, Member States may see the possibility for mutual learning.[12]

[11]C. Kilpatrick, "Hard and Soft Law in EU Employment Regulation",paper presented at the 8th Biennal International Conference of the EU StudiesAssociation, Nashville TN, March 2003.

[12]D. M. Trubek, J.Mosher, "New Governance, EmploymentPolicy, and the European Social Model", in J.Zeitlin and D.M.Trubek (eds), GoverningWork and Welfare in a New Economy: European and American Experiments, *Oxford University Press*,Oxford, 2003.

5. CONCLUSION

The main concerns about the use of the OMC and soft law in general seem to be the effectiveness of the method, the legitimacy of the actors entrusted with policy decision making that affect a larger number of subjects not involved, and the possibility of soft law being increasingly used to circumvent the lack of consensus in delicate policy issues, thus voiding the role of political debate in European integration. Criticism seems to appear essentially at the theoretical level.

Regarding effectiveness, one must keep in mind that even the "hardest" law is not always able to ensure abidance per se – it needs to be complemented with administrative and political action in the everyday life of an organization. Furthermore, hard laws can be enacted without any concern for how they are to convey meaningful change for those affected, or with a merely symbolic purpose. On the other hand, soft law mechanisms focus on results, not institutional framework or symbolism. Legitimacy deficit – if it is to occur – can thus be an affordable, or simply an unavoidable, trade-off. For instance, in the case of rating agencies (in which, however, no public actors are involved), one can question their methods and even their motivations in the assessment of financial soundness of an organization such as a nation, and raise the issue of them being entrusted too much power in setting the standards that will constrain the action of a given state or organization. However, the need to have access to expert information that can assess the risk of doing business with someone is crucial in any decision making process.

As for an eventual political deficit, it must be stressed that soft law is still basically a method of policy-making oriented primarily for issues that cannot be effectively addressed by law-making, due to the nature of the institutional framework or the constraints deriving for political reasons. The Lisbon Council Conclusions that devised the OMC highlight that the OMC had to be combined with other available methods, depending on the nature of the problems to be solved. As Dehousse notes, "the OMC allows for the establishment of flexible forms of common action in policy areas where centralized decision-making is not possible or even desirable". And Trubek and L. Trubek stress that "the institutional debate should be about the relative capacities of different modes to handle specific certain governance tasks, and discussion should focus on evidence relating to those capacities". The literature on soft law aims for searching for the best of two worlds, seeking the enhancement of hybrid forms

of policy-making methods, as suggested above, and that have already been tried in the areas of environmental law and employment.

REFERENCES

Abbott, Kenneth and Duncan Snidal. “Hard and Soft Law in International Governance”, *International Organization*, Cambridge Journal, Vol.54, 2000, p.421-456

DE BURCA, GRAINNE, (2003), ‘The Constitutional Challenge of New Governance in the European Union” paper presented at workshop on New Governance and Law in EU, Minda de Gunzburg Center for European Studies, Harvard University, February 28 2003

Dingwerth, Klaus and Philip Pattberg. “Global Governance as a Perspective on World Politics”, *Global Governance*, No.12, 2006, p.185–203

European Commission, (2001) *European Governance — A White Paper.* COM (2001) 428 Final

FERRERA, MAURIZIO, ANTON HEMERIJCK, and MARTIN RHODES, (2001) *The Future of Social Europe: Recasting Work and Welfare in the New Economy. Oxford: Oxford University Press*

KILPATRICK, CLAIRE (2003), ‘Hard and Soft Law in EU Employment Regulation’, paper presented at the 8th Biennal International Conference of the EU Studies Association, Nashville TN March 2003

Robert, Ce´cile. 2007. “L’impossible ‘Mode`le Social Europe´en.’” Actes de la Rechercheen Sciences Sociales (166–67): 94–109

Sacriste, Guillaume, and Antoine Vauchez. 2007. “The Force of International Law: Lawyers’ Diplomacy on the International Scene in the 1920s.” *Law and SocialInquiry* 32:83–107

Scott, ‘”Transnational Law” as Proto-Concept: Three Conceptions’, 876

TRUBEK, DAVID M. and JAMES MOSHER, (2003) ‘New Governance, Employment Policy, and the European Social Model’, in J.Zeitlin and D.M.Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments.* Oxford:Oxford University Press

Weiler, J. H. H. 1997. “The Reformation of European Constitutionalism.” *Journal of Common Market Studies* 35 (1): 97–131

Yondorf, Walter. 1965. “Monnet and the Action Committee: The Formative Period of the European Communities.” *International Organization* 19 (4): 885–912.

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МЕЂУНАРОДНО ПРАВО И ДИПЛОМАТИЈА
ТРАНСНАЦИОНАЛНИ РЕЖИМИ SOFT LAW ПРАВА У ЕУ

Резиме

Традиционални и најчешћи инструмент спровођења политике је законодавство. Чак се и креирање политике употребом норми све више замењује другим инструментима, попут успостављања стандарда, добре праксе и смерница,које се ослањају на способност држава и организација да саме постигну одређене циљеве и да одржавају ниво учинка који се може утврдити употребом објективних показатеља. Употреба таквих инструмената, опште познатих као soft law, произилази из спознаје да: 1) међународна међузависност захтева координацију политика и 2) сложеност питања захтева сарадњу и размену искустава међу актерима у циљу њиховог бољег решавања, него да се ослањају на способност одређеног актера да наметне решење од стране судских норми.
Основа овог развоја је soft law у Европи, његови модели, затим soft law као инструмент доношења одлука и дизајн и динамика отвореног метода координације (ОМЦ).
Кључне речи: закон, модели, политика, транснационално, координација

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THE IMMUNITY OF STATES IN CONTEMPORARY INTERNATIONAL LAW

Abstract

The contemporary law of state immunity deals with the human rights exception in a limited and cautious way, if it does at all. The UN Convention on Jurisdictional Immunity of States and their Property was adopted in 2004 and to date is the only general convention in this field but is not in force. It did not include an exception that a state will not be immune when human rights violations are involved. This study aims to determine whether such an exception should be included and what are the odds of that happening. To test a hypothesis that such an exception will not be accepted, we analyzed the relevant conventions and the doctrinal studies. The results show that it is necessary to include it, but not in the form of a protocol, as some authors suggested. On this basis, future research in the International Law Commission should be conducted.
Key words: state immunity, contemporary international law, human rights violations.

1. INTRODUCTION

J. Craig Barker wrote that the issue of immunities from jurisdiction is one of the most controversial in contemporary international law for many

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reasons, including the advances in new and expanding areas of international law, such as human rights and international criminal law in the context of which the law relating to immunities from jurisdiction is increasingly challenged.[1] This specific context of immunity will be the central part of this paper. The research question that is trying to be answered here is whether there should be an exception included based on human rights violations. Given that the UN Convention on the Jurisdictional Immunities of States and their Property was adopted 17 years ago, but yet not in force, the question remains: did the topic of immunity of states mature enough for the international community to accept it? To find an answer, we must inspect the concept of state jurisdiction, the codification attempts in the past, the work of the International Law Commission and its reception in the international community. The focus of this paper is whether and how the human rights violations exception should be implemented.

2. THE CONCEPT OF STATE IMMUNITY

The immunity of states has always been one of the most important topics of public international law. Its importance comes from different factors. First of all, the principle of equality of states. The Charter of the United Nations in Article 2 enumerates the principles on which it is based, and one of them is equality.[2] In order to demonstrate that equality, it was necessary to establish a rule on which no foreign state can adjudicate against another state without its acceptance. One way to accomplish that was the negative territorial jurisdiction, upon which the state cannot use its jurisdiction on the territory of another state. The immunity is sort of a natural border for the internal jurisdiction of the state.[3] Secondly, the sovereignty of states had an essential influence on establishing this rule. Sovereignty is one of the three commonly recognised features of the state. The Montevideo Convention has established a rule saying that a state is based on its territory, population, government and capacity to enter into relations with other states in Article 1.[4] Sovereignty means that every state is independent, and no

[1] J. C. Barker, “Shared foundations and conceptual differentiation in immunities from jurisdiction”, A. Orakhelashvili (Ed.) *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015, 185.
[2] Charter of the United Nations, San Francisco, 1945, https://treaties.un.org/doc/publication/ctc/uncharter.pdf, 17.3.2021.
[3] Б. Милисављевић, М. Новаковић, *Имунитети у међународном праву*, Правни факултет Универзитета у Београду, Београд, 2020, 19.
[4] Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml, 17.3.2021.

other state can influence her in any way. That being said, the Latin maxim *par in parem non habet imperium* can be understood in a way that justifies state immunity – no force can be used between the equals. An even better one would be *par in parem non habet jurisdictionem*, meaning that an equal has no power over an equal, or "legal persons of equal standing cannot have their cases decided in the court of one of them".[5]

Another relevant factor is the competence of the state and its jurisdiction. A jurisdiction is a tool that a state uses to demonstrate its sovereignty. It allows the state to prescribe and enforce laws on its territory and its population. The immunity is a shield for enforcing the competence of one state upon another. It protects her from being sued. Also, the principle of non-intervention guarantees no intervention of another state in the internal affairs when it comes to public functions. Another argument for immunity is that it is one of the mechanisms that the state uses to obtain friendly relations with other states and prevent disputes. Hazel Fox says that there are "three main grounds that are given for the grant of immunity to foreign states: first, that the national court has no power of enforcement of its judgments against a foreign state; secondly, that the independence and equality of states prevent the exercise of jurisdiction by the courts of one state over the person, acts or property of another state, and finally, that foreign states ought properly to enjoy similar immunity to that accorded by national courts to their forum state". Additionally, justifications can be found in the territoriality of the jurisdiction of the courts of the receiving state and on reciprocity and international comity, as Rousseau had written.[6]

However, the history of state immunity predates the 14th century. A Latin quote, *rex gratia Dei*, meaning king by God's grace, described the importance of the ruler of the state, and it was used even during the feudal system. The king carried its title in God's name and was perceived as a personification of a state. Another quote, more important for this paper, was *rex non potest pecare*. It means that the king can do no wrong.[7] We could say that it is the perfect description of the rule of state immunity. Kings, emperors or any other rulers were seen as impeccable and could not be sued. This quote and the explanation are now known as the origin of the absolute theory of state immunity.

[5] A. Kumar, "Scope of Sovereign Immunity in International Law", *Romanian Journal of International Law*, 14-15, 2012, 107.
[6] H. Fox, *The Law of State Immunity*, Oxford University Press, New York, 2008, 55.
[7] C. Shortell, *Rights, Remedies and Impact of State Sovereignty*, State University of New York Press, Albany, New York, 2008, 13.

Nevertheless, the communication between the states in the Middle age was limited. It was not until the Renaissance period that the state immunity rules began to evolve. Above all, the main reasons for state immunity lie in the economy. In the centuries that followed, states have realised that cooperation with other states is necessary, especially in trade and economy. The first shift in the direction of restricting state immunity occurred regarding state-owned vessels that were engaged in trade activities.[8] Slowly, the absolute theory of state immunity began to lose its supporters. Nevertheless, the transition period from absolute to restrictive theory was neither easy nor fast. Let us remind ourselves about the significance and distinction between these two.

As the name itself declares, the absolute theory is based on the premise that it is legally impossible to have authority upon the other state on its territory. The state itself is sovereign, and therefore no other state can disrupt its sovereignty. The absolute theory could only be used in reciprocity conditions and before interstate communication began to develop. As mentioned, the economic development and communication between states led to developing another theory – the restrictive one. Also, it is worth noting that in the 19th century, state immunity rules derived mainly from national courts' judicial practice. Another factor in the 20th century is the communist States and the fact that they applied the absolute theory. In practice, that meant that, since these states were involved in trading, if any dispute arose, these states and their trading corporations could rely on the state immunity, so victim countries could not find any remedy in national law. Therefore, it was necessary to establish a legal regime.[9] Its central premise is that the activities of the state can be diversified as the public and the private ones. The distinction is made between acts *de jure imperii* and *de jure gestonis*. The state is immune only to public acts. However, the problem comes with the criteria for diversification of the acts – how does one decide which act is private or public? In a general sense, the commercial acts of state are perceived as private ones, and those are the cases when the state does not enjoy immunity. It should also be pointed out that the vital element for the transition from the absolute to the restrictive doctrine was a modification of the key question. The maxim *par in parem non habet imperium* would protect a state from foreign jurisdiction only if the concrete act was an exercise of sovereignty.[10]

[8] G. M. Badr, *State Immunity, An Analytical and Prognostic View*, Springer Science Business Media, M. V., 1984, 41.
[9] A. Kumar, *op. cit*, 111.
[10] A. Orakhelashvili, “State immunity from jurisdiction between law, comity and ideology”, chapter in A. Orakhelashvili (Ed.) *Research Handbook on Jurisdiction Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015, 159.

3. THE CODIFICATION PROCESS

When it comes to the codification process of state immunity, several attempts were successful to a certain degree. The sources of state immunity laws are legislation of states, international treaties, bilateral agreements, case law and doctrine. Case law, especially in the common law countries, is very abundant, but it exceeds this paper's limits to pay more attention to it. Several states have implemented in their legislative acts specifically dedicated to this topic. These are United States, United Kingdom, Singapore, South Africa and Canada. As for international treaties, the 2004 UN Convention on the Jurisdictional Immunities of States and their Property was the first general convention in this field. The 1972 European Convention on State Immunity came into force in 1976 and had only eight state parties. It was adopted by the Council of Europe and the committee that it had founded. This one was significant because it was the first attempt to codify state immunity law based on the restrictive doctrine. Fox sees the reason for its failure to be ratified by a more significant number in its complexity, its requirement that the specified activities which enjoy no immunity be intricately linked to the forum state and its cautious optional regime for the execution of judgments.[11] It is the only international convention that is now in force. Nonetheless, let us take a brief look back to the start of the codification.

The first-ever project was taken by the Institute de Droit international at the end of the 19th century, in 1891. Even in that resolution, also known as Hamburg Resolution, three exceptions to immunity were proposed. The second resolution was in 1954, and it, among others, separated states that apply the absolute and restrictive theory. The third and final one by the Institute de Droit international was adopted in 1991. The International Law Association researched in 1926. In that year, the Brussels Convention relating to the Immunity of State-Owned Vessels was adopted as the first one. It provided that state-owned or operated ships and their cargoes engaged in trade shall be subject to the operation of such vessels and the carriage of cargoes to the same jurisdiction of national courts as the private ones.[12] At the time, this was a revolutionary instrument. The ratification process was time-consuming and unsatisfactory, which led to adopting the Additional Protocol in 1934. It was the first to attempt to establish non-immunity in certain aspects of the trade, but it was thought that it was too complex. This convention had only 29 state parties and limited effect, but it had significant influence. Harvard Research was published in 1932. It was a report

[11] H. Fox, *op. cit*, 187.
[12] *Ibid*, 185.

on the "Competence of Courts in regard to the Foreign States", it advocated a restrictive approach to state immunity, and it had liberal rules. The International Bar Association held a symposium in 1956, which resulted in a resolution in 1960. The International Law Association also adopted a Convention at the Montreal Conference in 1982, and amendments to the text were adopted in 1994 at Buenos Aires Conference.

Given that state practice, immunity is so diverse and customary international law is the primary source, and the next logical step was to codify. Nevertheless, codification is not enough, but progressive development is also required. The main body at the United Nations that bears this task is the International Law Commission. It began its work on this topic back in 1977 when General Assembly decided to include it. Even though this paper's focal point is not the codification process, several aspects are worth mentioning. There were two Special Rapporteurs: professors Sompong Sucharitklul and Motoo Ogiso. In 1991 the draft articles were adopted by the International Law Commission and submitted to General Assembly. The Convention itself accepted the restrictive approach, even though it was not the generally accepted theory at the codification process.[13] After several years of discussion in working groups, in 2004, the Sixth Committee shared its view that the Convention should be adopted. Fox points that in the years around 2004, there were several proceedings about conflicting assertations of jurisdiction by national courts and that if the international agreement was not reached, the uncertainty would arise and risk of erosion of the existing law of immunity.[14] The UN Convention on Jurisdictional Immunities of States and their Property was adopted by resolution 59/38 of the General Assembly on 2 December 2004.[15] The Convention was open for signature from January 2005 until January 2007. It will come into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, approval, acceptance or accession with the Secretary-General of the United Nations.[16] The Convention is not in force, and there are 28 signatories. David Stewart, a professor from Georgetown University who has written continually about immunity, wrote that he believed that there will be a rapid adaption by the

[13] B. Milisavljević, „Imunitet države u međunarodnom pravu – osvrt na rad Komisije za međunarodno pravo“, *NBP – Žurnal za kriminalistiku i pravo*, Beograd, 2014, 24.
[14] H. Fox, *op. cit*, 379.
[15] General Assembly Resolution 59/38, “Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49”, A/59/49.
[16] United Nations Convention on Jurisdictional Immunities of States and their Property - Convention, Article 30, https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf, 10.3.2021.

considerable number of states that still do not have national legislation acts dedicated to sovereign immunity.[17] Soon it showed that he was wrong.

It is believed that the adoption of the Convention is a diplomatic achievement since it took 27 years of work in the General Assembly and its bodies. This is an instrument designed to unify a much-disputed area of international law and to produce a universally applicable legal regime on state immunity, a matter which is certainly of growing importance.[18] On the other hand, there are too little states that showed their support. "These numbers fall far short of what is typically considered reliable evidence that a treaty reflects customary international law binding on non-parties to the treaty," noted Lori Fisler Damrosch.[19]

4. THE HUMAN RIGHTS VIOLATIONS EXCEPTION

Nowadays, the doctrine of immunity has been challenged on the grounds of protection of the individual. In contemporary international law, when the law of state immunity is discussed, it is usually about protecting human rights. It is of the utmost importance for a court or a judge to know how to determine whether acts *de jure imperii* of a state involve international crimes or, concretely, whether a court can decide not to exercise its jurisdiction because of a state's sovereignty. This can also bar victims from receiving their reparation and satisfaction.[20] "Under customary international law as it presently stands, a State is not deprived of immunity because it is accused of serious violations of international human rights law or the international law of armed conflict" is how the present condition is described.[21] Namely, one of the postmodern world's main pillars is the protection and respect of human rights. Human rights law began to develop in the aftermath of World War II and even more after the Cold War, and nowadays, it is one of the most challenging and expanding fields of public international law. It has come a long way from being soft law and in the form of declaratory principles to becoming part of the *jus cogens*. So, the most challenging question

[17] L. F. Damrosch, "Changing the International Law of Sovereign Immunity through National Decisions", *Vanderbilt Journal of Transnational Law*, Vol. 44, 2011, 1189.
[18] State Immunity and the new UN Convention, Chatham House, 5 October 2005, 9, https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf, 10.3.2021.
[19] L. F. Damrosch, *op. cit*, 1190.
[20] O. Bakircioglu, "*Germany v Italy*: The Triumph of Sovereign Immunity over Human Rights Law", *International Human Rights Law Review*, 1, Martinus Nijhoff Publishers, 2012, 105.
[21] *Ibid*, 105.

regarding state immunity today is whether an exception in cases of violations of human rights should exist. This tension between state immunity and human rights is not yet resolved, but instead, it reinforced the policy argument for reconsidering the scope of application of the immunity rules in respect to violations of *jus cogens* norms.[22]

When it comes to the relationship between the state immunity and human rights violations of *jus cogens*, there are two schools of thought that are based on the question if the state can be considered to have immunity from national court's jurisdiction and the other school, whether a state is immune when it comes to liability for breach of the *jus cogens* and human rights. Usually, it is perceived that state immunity and *jus cogens* norms are competing. So, giving the fact that the UN Convention on Jurisdictional Immunities of States and their Property is created in a way that it gives us legislative exceptions of when a state cannot hold its immunity, the question arises: Should there be a human rights exception to state immunity in cases when a state had violated human rights? Furthermore, if so, should there be a human rights protocol? Reasons for this are preventing impunity, ensuring responsibility and redress for the victims, respecting the *jus cogens* norms and hierarchy of norms in the international legal system. Since the states responsible for the violations have failed to investigate and prosecute on their own, it enables and spreads impunity. In order to change that the legislative reform is required. The UN Convention on Jurisdictional Immunities of States and their Property is not yet in force, so the United Nations should recognise a human rights exception to state immunity when there is a *jus cogens* violation through legislation in this Convention is the opinion of some of the authors.[23]

During the negotiation process, some states and organisations that deal with human rights have requested an exception based on human rights violations to be implemented in the Convection text. If not, then an Optional Protocol was requested. Both requests were rejected.[24] Even during the drafting process in the International Law Commission, the Working Group had recognised the importance of the question of existence or non-existence of jurisdictional immunity in actions arising out of violations of *jus cogens* norms in 1993. The Working Group had then concluded that the issue was not ready enough for the Working Group to discuss its codification. The question was referred to the Sixth

[22] S. Ekpo, "Jurisdictional Immunities of the State (Germany v. Italy): The Debate over State Immunity and Jus Cogens Norms, *Queen Mary Law Journal*, 8, 2017, 164.
[23] *Ibid*, 163.
[24] J. C. Barker, *op. cit*, 202.

Committee, but it never considered it.[25] "The failure of the Convention to expressly exclude *jus cogens* norms from its coverage could potentially result in regressive development of international law" is the view of one of the authors that shows us the diverse understanding of this topic.[26] When the UN Convention was adopted in 2004, several states, such as Finland and Norway, had made declarations in which they said that the Convention is without prejudice to any future international development in protecting human rights. These declarations practically means that the Convention will never be able to have a full-fledged effect. It shows us that there is no uniformity in the application of the Convention.[27]

If we look at how the UN Convention is written (by providing a general rule of immunity and enumerating the exceptions), we can assume that States will be immune when there are violations of *jus cogens* norms. The Convention should be interpreted to exclude criminal proceeding from the Ad Hoc Committee's understanding that the General Assembly supported. This might have a regressive effect on the development of international law as a whole. The reason for that is this would mean that immunity would be available in civil proceedings but not in criminal proceedings, even though they both deal with the violations of *jus cogens* norms. This approach is not consistent with the rationale of state immunity. The application of immunity was always decided based on the nature or the purpose of the act, not the type of proceeding involved.[28]

However, what are the *jus cogens* norms? The *jus cogens* norms are also known as the peremptory norms, and those are the norms that are important for the international community as a whole and the public order. Every state has got to respect and follow them. Among the others, the function of *jus cogens* norms is to prevent impunity for severe breaches of human rights. The primacy of *jus cogens* norms is now widely accepted.

On the other hand, some authors support the view that the *jus cogens* norms deal with the substantive issue, while the state immunity is based on procedural norms. The fact that a norm is peremptory does not mean that the forum state must provide the victim remedies and reparations for acts committed abroad and by the foreign state. Orakhelashvili is one of the authors who do not

[25] L. McGregor, "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, 437.
[26] *Ibid.*
[27] A. Orakhelashvili, "Treaties on state immunity: the 1972 and 2004 Conventions", chapter in A. Orakhelashvili (Ed.) Research *Handbook on Jurisdiction Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015, 281.
[28] L. McGregor, *op. cit*, 444.

accept this kind of distinction to help this debate. One of the reasons is that international law does not recognise any clear distinction between procedural and substantive norms. There are no established criteria for distinction. The principal aim of the *jus cogens* norms is to impact the legal consequences of the breach of the specific peremptory norms; it is not limited to the substantive regulation. Also, immunity has a procedural character that does not prevent criminal proceedings for *jus cogens* crimes. It is accepted that it can prevent in civil, but not in criminal proceedings, but this solution's reasons are not clear. Many authors are supporters of the idea of spreading it on civil cases as well.

Additionally, it is widely accepted that torture, war crimes and similar conduct are not seen as acts *iure Imperii*, and therefore, the state is not immune when it comes to them. Finally, if this theory is accepted, then it will lead to impunity. All these arguments conclude that the perception of immunity as a procedural norm that is not affected by the substantive *jus cogens* norms is not consistent.[29]

The discussion about whether there should exist an exception on state immunity based on human rights comes from national litigation instances. There were several attempts made for national courts to interpret the national statutes so that they do not provide immunity for human rights violations. Under the restrictive theory, human rights violations cannot be perceived as sovereign act but as private acts. Therefore, Orakhelashvili concludes that "it is a methodologically false approach to specifically require the existence of a separate and discrete human rights exception concerning acts that the restrictive doctrine already considers not to be immune.”[30]

5. CONCLUSION

Several times in this paper, the outcome of the International Law Commission's work was pointed out. Some authors impose the question of the existence of a set of rules for this topic and are there any other solutions. Hazel Fox had proposed several alternatives to the present rule of the State immunity. First of all, there is total abolition proposed by Professor Falk in 1964, but the reasons he enumerated have been solved through either national legislation or the Convention. Apart from him, professor Lauterpacht believed that the plea of

[29] A. Orakhelashvili, “State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong”, *The European Journal of International Law*, Vol. 18, No. 5, 2007, 963-970.
[30] A. Orakhelashvili (2015a), 167.

forum non-conveniens would be a more flexible approach than State immunity and Greig in the late 1980s also favoured this approach. The second alternative is abolition and substitution by special regimes of immunities, which exists in the field of diplomatic immunity, but it is believed that it would not be possible for state immunity. The third one is abolition and substitution by a rule of deference based on an act of state and non-justiciability doctrines, and the final one is retention with the adoption of the UN Convention. The final one is the one that is currently adopted.[31]

When it comes to the questions related to state immunity, the International Law Commission has finished its study on State officials' immunity from the criminal jurisdiction of the national courts of other state in February 2020. The Secretary-General has recommended that the Council of Europe take the lead in adopting an instrument that would establish exceptions to State immunity in cases of serious human rights abuses in 2006. Amnesty International and Redress have called for an additional protocol to the UN Convention which would permit States to adjudicate in civil proceedings against a State regarding international crimes, such as genocide, war crimes, crimes against humanity and torture.

We can conclude that the UN Convention on Jurisdictional Immunity of States and their Property has limited applicability. There are very few states that expressed their participation in this critical topic. Any uniform vision is absent to the content of the Convention, which is demonstrated by the lack of uniform use of it by the national and international courts and the writings of the academics. We have seen that there are different, opposed rules on the question of human rights violations exception. We must keep in mind that these questions are highly political and, in a way, sensitive to the states. The fact that state immunity is political is one of the main reasons for the lack of more state-parties, in our opinion.

On the other hand, even though the human rights exception has recently been discussed thoroughly, it is only a doctrinal view. The state practice is not uniform, so we cannot conclude that the customary international law is formed. Our opinion is that the matter of the human rights violations exception is of the utmost importance for contemporary international law. It would help in fighting impunity and help the victims in their reparation and satisfaction. We are aware that it is not easy to form an exception as such. Therefore, we would suggest that the International Law Commission takes this task as a separate one, which would, hopefully, result in adopting a set of rules.

[31] H. Fox, *op.cit.*, 737-740.

REFERENCES

Badr G. M., *State Immunity, An Analytical and Prognostic View*, Springer Science Business Media, M. V., 1984.

Bakircioglu O., "*Germany v Italy*: The Triumph of Sovereign Immunity over Human Rights Law", *International Human Rights Law Review*, 1, Martinus Nijhoff Publishers, 2012, 93-109.

Barker J.C., "Shared foundations and conceptual differentiation in immunities from jurisdiction", A. Orakhelashvili (Ed.) *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015.

Charter of the United Nations, San Francisco, 1945, https://treaties.un.org/doc/publication/ctc/uncharter.pdf, 17.3.2021.

Damrosch L.F., "Changing the International Law of Sovereign Immunity through National Decisions", *Vanderbilt Journal of Transnational Law*, Vol. 44, 2011, 1185-1200.

Ekpo S., "Jurisdictional Immunities of the State (Germany v. Italy): The Debate over State Immunity and Jus Cogens Norms, *Queen Mary Law Journal*, 8, 2017, 151-164.

Fox H., *The Law of State Immunity*, Oxford University Press, New York, 2008.

General Assembly Resolution 59/38, "Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49", A/59/49.

Kumar A., "Scope of Sovereign Immunity in International Law", *Romanian Journal of International Law*, 14-15, 2012, 106-117.

McGregor L., "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, 437-445.

Milisavljević B., „Imunitet države u međunarodnom pravu – osvrt na rad Komisije za međunarodno pravo“, *NBP – Žurnal za kriminalistiku i pravo*, Beograd, 2014, 21-31.

Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml, 17.3.2021.

Orakhelashvili A., "State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong", *The European Journal of International Law*, Vol. 18, No. 5, 2007, 955-970.

Orakhelashvili A., "State immunity from jurisdiction between law, comity and ideology", chapter in A. Orakhelashvili (Ed.) *Research Handbook on*

Jurisdiction and Immunities in International Law, Edward Elgar Publishing, Cheltenham, UK, 2015.

Orakhelashvili A., "Treaties on state immunity: the 1972 and 2004 Conventions", chapter in A. Orakhelashvili (Ed.) *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015.

Shortell C., *Rights, Remedies and Impact of State Sovereignty*, State University of New York Press, Albany, New York, 2008.

State Immunity and the new UN Convention, Chatham House, 5 October 2005, https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf, 10.3.2021.

United Nations Convention on Jurisdictional Immunities of States and their Property - Convention, Article 30, https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf, 10.3.2021.

Милисављевић Б., Новаковић М., *Имунитети у међународном праву*, Правни факултет Универзитета у Београду, Београд, 2020.

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ИМУНИТЕТ ДРЖАВА У САВРЕМЕНОМ МЕЂУНАРОДНОМ ПРАВУ

Резиме

Савремено међународно право питањем имунитета држава бави се, осим код права људских права, на ограничен и опрезан начин, ако се уопште и њиме и бави. Конвенција УН о судском имунитету држава и њихове имовине усвојена је 2004. године и до данас је једина општа конвенција у овој области, али још увек није ступила на снагу. Не садржи изузетак да држава неће имати имунитет уколико се ради о кршењу људских права. Овај рад има за циљ да утврди да ли би такав изузетак требало укључити и какви су изгледи да до тога дође. Како би се проверила хипотеза да такав изузетак за сада неће бити прихваћен, анализирали смо релевантне конвенције и студије које је представила доктрина. Резултати показују да је неопходно укључити питање имунитета држава, али не у форми протокола, како неки аутори предлажу. На основу овога, Комисија за међународно право би требало да у будућности омогући и спроведе истраживање овог комплексног питања.

Кључне речи: имунитет државе, савремено међународно право, кршење људских права

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DOMESTIC VIOLENCE AND COVID-19 PANDEMIC*

Abstract

There is an abundance of research that confirms that a devastating wave of domestic violence is spreading alongside the COVID-19 pandemic. The literature points out that the reasons for such development of events are related to the specific joint action of psychological, health, housing, and economic factors. It is indisputable that unusual social circumstances require particular design and implementation of special measures of support, so that the victims would not be left to fend for themselves and so that the work on their empowerment could continue despite generally unfavorable social conditions at the moment. Research indicates that women and children are members of a particularly vulnerable group in pandemic circumstances. Therefore, the paper is dedicated to summarizing the key results of scientific research on domestic violence during the pandemic and the measures applied to combat it. The aim of the paper is to point out the key new problems that victims of domestic violence face nowadays and to the new methods that had to be designed in a short time in order to provide help, support, and the protection of the rights of victims.
Keywords: domestic violence, intimate partner violence, children, COVID-19

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1. GENERAL CONSIDERATIONS

Given the fact that the fight against the COVID-19 pandemic is going on at the moment, there is no reliable data on the impact of this new situation and the new circumstances on the phenomenon of domestic violence.

Domestic violence and gender-based violence are topics difficult to deal with even in regular circumstances, in which victims are at least able to leave their homes and immediately seek help from the relevant institutions. So, it is clear that the pandemic situation can not have a positive impact on the safety of victims, nor on the state of their rights. Unfortunately, the above said is also indicated by the data from different parts and states of the world. Thus, in France, the number of reports of gender-based and domestic violence has increased by as much as 30% since the introduction of lockdown and other measures in March 2020, while in Argentina the number of calls for emergency interventions has increased by 25% starting from March 2020.[1] A higher number of reports of domestic violence has also been recorded in Singapore, Canada, Germany, Spain, the United Kingdom, and the United States.[2]

When it comes to the situation in Serbia, we still do not have the relevant and accurate data, but the literature points out that the number of formally filed criminal charges has not been higher during the pandemic so far, but - on the contrary, that it has decreased, while the number of victims has actually increased. This paradox could be explained by the fact that in the state of the pandemic of Covid-19 victims have addressed the non-governmental organizations and the civil sector, which are considered to have done better in providing support to the vulnerable population in relation to the state reaction system, comprised of police, public attorneys and courts.[3]

The reasons why the position of persons victimized by domestic violence has deteriorated during the pandemic are complex and numerous, and in order to understand them, a detailed analysis has yet to follow. Some of these reasons concern the housing conditions and the fact that the ban on movement has put the victims in a position that they cannot move away from the abuser, which has created additional psychological pressure due to constant contact and closeness of household members. Additional pressure was created by the conditions of

[1] United Nations Development Programme, *UNDP Brief-Gender based violence, and Covid-19*, New York, 2020, 1,
[2] *Ibid*, 4.
[3] A. Čović, „Domestic violence in the age of Covid-19 pandemic“, Archibald Reiss Days-Thematic Conference Proceedings, Beograd, 2020, 494.

uncertainty, fear for the realization of existential needs, and the emergence of additional obligations regarding the satisfaction of children's educational needs in the absence of school attendance.[4] It was also noticed that the victims, due to the constant presence of abusers, have not been able to turn to competent services for help in a discreet way.

Brooks and co-workers point out that the ban on movement creates a number of negative psychological consequences that are reflected in the occurrence of stress, anxiety, trauma, and depression, which in turn can result in discharge through violent behavior.[5] Economic factors are also extremely important as the unemployment rate increases and the number of available employment options drastically decreases, which not only produces financial consequences for household members but also puts them in a situation where they are significantly more in a position of being forced to spend time together.

2. THE STATE OF AFFAIRS IN SERBIA

Pursuant to The Criminal Code ("*Official Gazette of RS*", No. 85/2005, 88/2005 - amended, 107/2005 - amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), art. 194, domestic violence is committed by a person who, by using violence, threatening to attack life or body, or by being rude and by insolent or reckless behavior endangers the peace, physical integrity, or mental state of a member of his family, for which he shall be punished by imprisonment from three months to three years. More serious forms of crime exist if a weapon, dangerous tool, or other means suitable for seriously injuring the body or seriously damaging health has been used in the commission of the crime when the perpetrator will be punished by imprisonment from six months to five years, or if the crime has resulted in serious bodily injury or severe impairment of health or if acts have been committed against a minor - the sentence is imprisonment from two to ten years.

The most severe form of domestic violence exists if the crime has resulted in the death of a family member, and then the perpetrator will be sentenced from five to fifteen years in prison, and if the family member is a minor, he will be sentenced to at least ten years in prison.

[4] M. Evans, M. Lindauer, M. Farrell, "A pandemic within a pandemic: Intimate partner violence during COVID-19", *The New England Journal of Medicine*, 383(24), 2020, 2302–4.
[5] United Nations Development Programme, *op. cit.*, 2.

A special form of the crime exists if the perpetrator has violated the measures of protection against domestic violence determined by the court on the basis of the law which regulates family relations, in which case he will be punished by imprisonment from three months to three years and a fine.

Specific measures for protection against domestic violence that were introduced with the entry into force of The Law on Prevention of Domestic Violence ("*Official Gazette of RS*", No. 94/2016) have been especially important for Serbia. The said law regulates the prevention of domestic violence and the actions of state bodies and institutions in preventing domestic violence, providing protection and support to victims of domestic violence. This law does not apply to minors who commit domestic violence, and when it comes to juveniles as perpetrators the provisions of The Law on Juvenile Offenders of Criminal Offenses and Criminal Protection of Juveniles shall be applied ("*Official Gazette of the RS*", No. 85/05).

The Law on Prevention of Domestic Violence stipulates that the police, public prosecutor's offices, courts of general jurisdiction and misdemeanor courts, as competent state bodies, and centers for social work, as institutions, are responsible for preventing domestic violence and for providing protection and support to victims of domestic violence. In addition to the competent state bodies and centers for social work, other institutions in the field of social protection, education, upbringing, and health, as well as other bodies, participate in the prevention of domestic violence, through the provision of assistance and information on violence, as well as in providing support to victims of violence. Support to victims of domestic violence and victims of criminal offenses determined by the law may be provided by other legal and natural persons and associations, in accordance with Article 7. The key role in terms of coordinated protection of victims of domestic violence is entrusted to the police authorities.
Emergency measures are especially important. Urgent measures are applied if, after the risk assessment, the immediate danger of domestic violence is established when the competent police officer will issue an order imposing an urgent measure on the perpetrator who was brought to the competent organizational unit of the police (Article 15, paragraph 1). Urgent measures are a measure of temporary removal of the perpetrator from the apartment and a measure of temporary prohibition for the perpetrator to contact the victim of violence and approach her. Both urgent measures can be imposed by the order. The order contains the name of the body that issues it, information on the person to whom the emergency measure is imposed, the type of emergency measure to be imposed and its duration, the day and time of the emergency measure, and the

obligation of the person to whom the emergency measure was imposed to report to the police officer. The order is served to the person to whom the emergency measure was imposed. If the person refuses to accept the order, the competent police officer shall draw up a note to that effect, which shall be deemed to have been served. The competent police officer submits the order, immediately after its delivery, to the public prosecutor in whose territory the victim's residence is located, the center for social work and the group for coordination and cooperation, and the victim of violence is informed in writing about the type of emergency measure imposed pursuant to Art. 17.

Given that even before the pandemic there have been certain doubts and problems in providing protection to victims of domestic violence, the logical question is how and whether this relatively new system of protection has functioned in the conditions of a specific crisis caused by Covid-19.

Firstly, even before Covid-19, it was noticed that emergency measures in the form of removal from the household and ban on communication with the injured party were applied in a considerable number of cases, which in itself may not be a bad thing, but may indicate a certain state of insecurity of police officers. One could say that they have decided on the application of measures based on the principle "better safe than sorry". Of course, this is not a satisfying state of affairs for a system that should be based on the principle of legality and respect for human rights, because potential perpetrators also have human rights that must not be endangered or damaged.

Namely, the analysis of data from 2017 and 2018 indicates that in about 2/3 of all cases of imminent danger of domestic violence, an urgent measure of temporary prohibition was imposed on the perpetrator to contact and approach the victim of violence, and in 1/3 of cases an urgent measure of temporary removal of the perpetrator from the apartment.[6] In this regard, referring to the data of the Autonomous Women's Center in the state of Covid-19, Čović states: according to the data of the Republic public prosecutor, during March 2020, the number of extended urgent measures fell by around 30% in comparison with the previous month, and the number of newly reported cases of domestic violence as deliberated upon at the Coordination and Cooperation Group meetings fell by 50%, which could be a consequence of the fact that there was a 40% decrease in the number of meetings held by the Coordination and Cooperation Group, and that there was a 60% decrease in the number of made individual plans for

[6] A. Bošković, J. Puhača, „Analiza praktične primene Zakona o sprečavanju nasilja u porodici, s posebnim osvrtom na primenu hitnih mera“, *Nauka, bezbednost, policija,* 2019, 24(1), 45.

protection and support. Six public prosecutor's offices in Serbia did not hold a single meeting of the Coordination and Cooperation Group during March 2020 although the state of emergency was introduced in the second half of the month, whereas the First Basic Public Prosecutor's Office in Belgrade and the Basic Public Prosecutor's Office in Kragujevac held 12 meetings each.[7]

3. CONCLUSION

Although at the moment there are no relevant statistical data about the increase/decrease in the number of criminal charges for the crime of domestic violence, a review of the situation in Serbia indicates a greater prevalence of this phenomenon. A comparative overview of the situation in many countries is pretty much the same. Even at this stage, when only more or less well-founded assumptions can be made, it is evident that the civil sector indicates an increased number of reports of domestic violence. For the sake of truth, the state officials do not disclose any optimistic assessments either.

Non-governmental organizations clearly state that victims of gender-based and domestic violence have been contacting them more frequently than before, which probably indicates that this sector has reacted more successfully and flexibly to the new circumstances. The reason for this state of affairs can be found in the fact that non-governmental organizations are open to receiving completely informal calls for help. It should be borne in mind that comparative data from almost all meridians also indicate an increase in domestic violence, and therefore one should be open to respecting other people's experiences and applying methods that have already proven to be somewhat effective in victim protection practice. Apart from the fact that the authorities should undertake actions in order to get closer to people in need in an efficient way, it is also necessary to constantly talk about the fact that combating domestic violence is still an important topic of general interest, and that the state of the global crisis has not changed the determination to provide victims with all kinds of support.
In this regard, authorities should think about how to facilitate the submission of reports of violence, and how to provide emergency support to the victims in the most difficult position, even in the conditions of the epidemic. If the use of such services by victims requires testing for Covid-19 infection, then these and other necessary medical procedures should be provided completely free of charge. Also, the use of modern technologies has proved to be especially important, both in the field of reporting domestic violence and in the field of providing support.

[7] A. Čović, *op.cit.*, 491-2.

That is why authorities need to increase the number of free telephone 24/7 SOS lines, and also to find ways to provide as many services as possible in online mode.

LITERATURE

Bošković A., Puhača, J., „Analiza praktične primene Zakona o sprečavanju nasilja u porodici, s posebnim osvrtom na primenu hitnih mera“, *Nauka, bezbednost, policija,* 2019, 24(1), 30-48.

Čović A., „Domestic violence in the age of Covid-19 pandemic“, *Archibald Reiss Days-Thematic Conference Proceedings*, Beograd, 2020, 489-500.

Evans M., Lindauer M., Farrell M., "A pandemic within a pandemic: intimate partner violence during COVID-19", *The New England Journal of Medicine*, 383(24), 2020, 2302–4.

United Nations Development Programme, *UNDP Brief-Gender based violence, and Covid-19*, New York, 2020.

The Criminal Code ("*Official Gazette of RS*", No. 85/2005, 88/2005 - amended, 107/2005 - amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

The Law on Prevention of Domestic Violence ("*Official Gazette of RS*", No. 94/2016).

The Law on Juvenile Offenders of Criminal Offenses and Criminal Protection of Juveniles shall be applied ("*Official Gazette of the RS*", No. 85/05).

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КРИВИЧНО ДЕЛО НАСИЉЕ У ПОРОДИЦИ И ПАНДЕМИЈА COVID-19

Резиме

Истраживања потврђују да се упоредо са пандемијом COVID-19 шири и разарајући талас насиља у породици. У литератури се истиче да се разлози оваквог развоја догађаја тичу удруженог деловања специфичних психолошких, здравствених, економских и просторно-стамбених чинилаца. Неспорно је да неуобичајене друштвене прилике у којима тренутно живимо изискују осмишљавање посебних мера подршке како жртве не би биле препуштене саме себи и како би се радило на њиховом оснаживању и поред постојања укупних неповољних околности. Истраживања указују на то да су жене и деца посебно вулнерабилна категорија у условима пандемије. Стога су излагања у раду посвећена сажимању кључних резултата научних истраживања о насиљу у породици током трајања пандемије и мерама за његово сузбијање. Циљ рада јесте да се укаже на нове проблеме са којима се жртве насиља у породици сусрећу, али и на неке од нових метода пружања помоћи и подршке који су силом прилика морали бити осмишљени у кратком року како би се заштитила права виктимизованих лица.

Кључне речи: насиље у породици, партнерско насиље, деца, COVID-19

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The paper must be computer processed using the WORD program, on A4 page format, in Times New Roman font (font size 12pt, line spacing 1.5), written in Serbian, in Cyrillic (Serbian, Cyrillic Serbia). If the paper is written in one of the foreign languages in wider use in international communication, it is necessary to contain a summary and key words in the Serbian language.

The scope of the paper is one author's sheet, which, according to the previous instructions, amounts to 16 pages of computer-processed text.

The paper is submitted in electronic form and is subject to mandatory anonymous review by two reviewers.

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In the upper left corner, before the title of the paper, the information about the author (authors) is stated: academic title, name and surname, title, affiliation (in the footnote and e-mail address). This information is also provided in English, with a summary.

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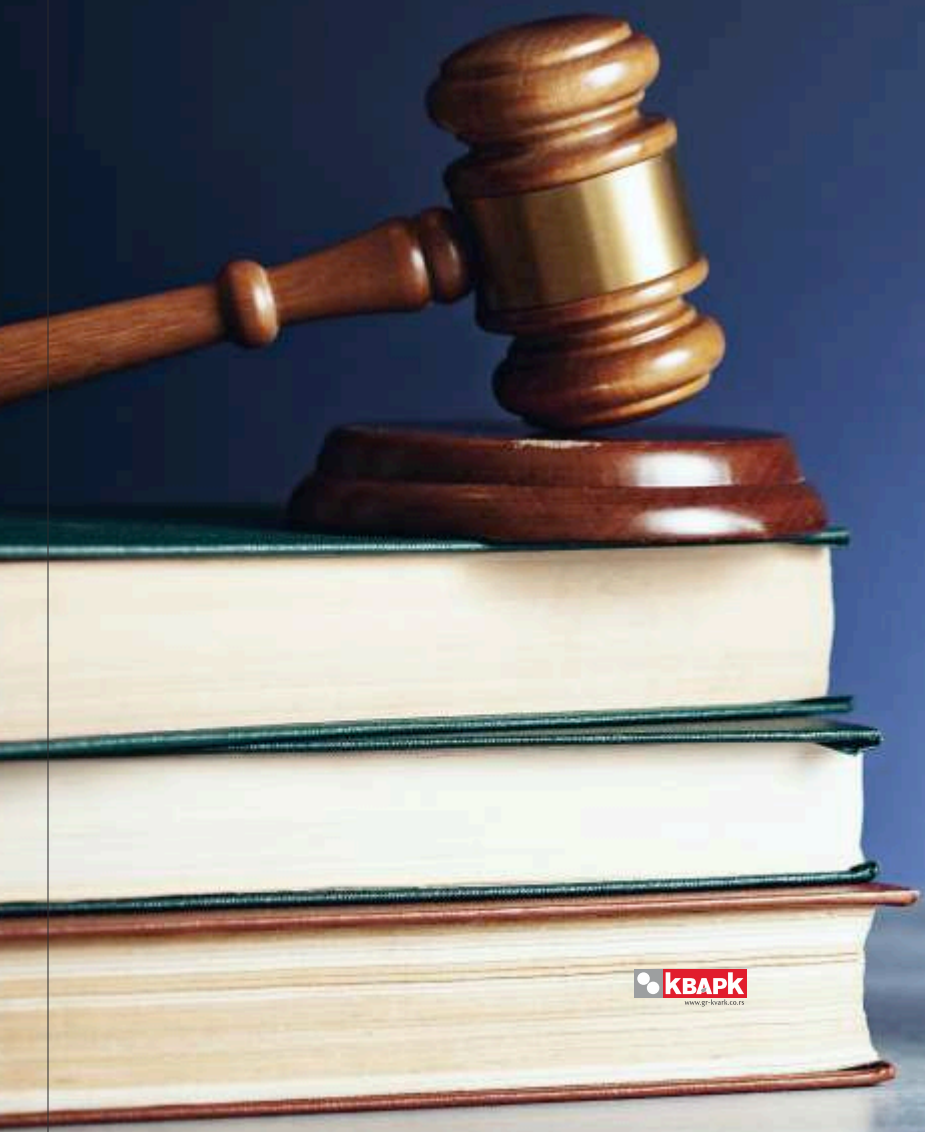

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