

Faculty of Law,  
University of Niš

# **GLOBALISATION AND LAW**

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## Реч уредника Конференције

Међународна научна конференција “Глобализација и право”, одржана је на Правном факултету у Нишу 21-22. априла 2017. године. Тема Конференције је својом актуелношћу и могућношћу свеобухватног приступа, окупила велики број иностраних и домаћих стручњака. Глобализација је посматрана не само као глобализација тржишта већ као процес свеукупног друштвеног, културног, економског, политичког, војног и правног повезивања и интегрисања у међународну заједницу. Аутори радова презентованих на Конференцији анализирали су главне карактеристике глобализације, њене негативне и позитивне учинке, указујући да она са собом носи интеркативни однос са другим упоредним процесима трансформације светског система, као што су драматичан пораст неједнакости између богатих и сиромашних земаља, етнички сукоби, масовне миграције на међународном плану, организовани злочин на глобалном ниову. Интеракција и повезивање друштвених односа на светском ниову захтева и неку врсту правне глобализације: унификације и усаглашавања правних система.

Општи је утисак да је Конференција постигла висок научни ниво, што потврђује и објављивање седамдесет научних радова у два зборника: тематски зборник са радовима на енглеском језику и радови на српском језику у оквиру Зборника радова Правног факултета у Нишу. Објављивање наведених зборника има за циљ да резултате истраживања учесника Конференције учине доступним научној, стручној и широј јавности, како би се подстакла научна и стручна расправа о теоријским и практичним проблемима које глобализација са собом носи.

*УРЕДНИЦИ*

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## **Editors-in-Chief Introductory Note**

The International Scientific Conference “Globalization and Law” was held at the Faculty of Law, University of Niš on 21st-22nd April 2017. The contemporary nature of the Conference topic and the authors’ comprehensive approach to a wide range of contemporary issues has contributed to gathering a large number of foreign and domestic experts. Globalization has been observed not only as the globalization of the economic market but also as a process of overall social, cultural, economic, political, military and legal cooperation, interconnectedness and integration into the international community. The authors of the presented papers have analyzed the main characteristics of globalization, its negative and positive effects, and its interaction with other comparative processes related to the transformation of the world system, such as: a dramatic increase in inequality between the rich and poor countries, ethnic conflicts, mass migrations at the international level, organized crime on the global scale, etc. The interaction and social cooperation at the global level call for a kind of legal globalization, which is embodied in the unification and harmonization of legal systems.

There is a general impression that the Conference has been highly successful in terms of the attained level of scientific research, which is substantiated by more than 70 scientific papers published in two thematic Collections of Papers of the Law Faculty in Niš: a collection of papers in English and a collection of papers in Serbian. The publication of these collections of papers aims to make the the Conference participants’ research results available to the scientific, professional and general public, for the purpose of encouraging scientific and professional discussion on the theoretical and practical issues underlying the globalization process.

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# Public Law Session

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## **GLOBALISATION AS A FACTOR OF NORMATIVE CONTENT OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL PUBLIC LAW**

**Abstract:** *In this article, we observe the role of the perception of sustainable development as a universal value on the development of international public law. The mentioned perception is problematic from the aspects of creating rules and stipulating legal rights and obligations concerning environment, economy and social dimensions of sustainable development at the international level. In that context, we find that international public law does not provide a coherent normative order, nor explicit rules, related to sustainable development, which is nevertheless considered to be a desirable goal that the subjects of international law should be aspiring to. To address the problem, we examine the legal conceptualisation of sustainable development through interpretations, soft law and the doctrine. We establish the tendency towards a global normative concept, which does not rely on international public law, nor is it confirmed in the jurisprudence of international courts. Underlying this tendency is the concept of universal values concerning human and natural environment, which are exploited as principles predominantly on political level. The exploitation of universal values in the normative content of sustainable development has facilitated globalisation process on many levels, primarily concerning the role of the state, hegemony and common law practice in international public law. We conclude that globalisation, as a political process based exclusively*

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*on a value construct, leads to de-legalisation of international public law through voluntary imposing of standardisation, based on the discourse of sustainable development.*

**Keywords:** *common heritage, right to development, international organisations, environment protection, international investment law.*

## **1. Introduction**

Today, the development of a normative framework for sustainable development relies on globalised networks of interdependencies, values and practices. Generally, globalisation is a process of shaping the world community of, currently, liberal-democratic, market-oriented States in the economic, political, cultural and every other field (Simeunović, 2014: 108, 111). The obstacle for this process, which is manifested in a decline of sovereignty and denationalisation, is the nation-state. Related to globalisation is the the universalisation, which implies a process of socialisation through generalisation, rather than subjugation.

On the political level, globalisation aims towards a system of values and behaviours, and ultimately a global society. For the time being, it dominantly relies on the economic mechanisms, whereas it encounters resistance in other fields. The main goal of globalisation ideology is an open market, whose proponents are transnational companies and the most powerful States. These goals are achieved through a global order, which involves the political, economic and military domination of the industrialised States, assembled around the international organisations of economic, political or military character, over other States (Qi, 2014: 39).

Sustainable development involves national and supranational actions, rational from the standpoint of the environment. Broader global interdependencies have led to an increase of security challenges for a wider range of social groups. In turn, globalised security affects sustainable development. The mechanisms for sustainable development include two conceptual frames: human security developed within the United Nations Development Programme and operationalised within the Organisation for Economic Cooperation and Development (Van Eekelen, 2012: 278).

Globalisation provides opportunities for trade, investment and capital flows, and the advance of technology. At the same time, it generates challenges in terms of financial instability, insecurity, poverty, exclusion and inequality within and between societies. This undermines the feasibility of sustainability and thus imposes the need for policies and measures to be formulated and implemented with the full and effective participation of all States, to enable them to effectively respond to challenges and opportunities.

Many authors claim that sustainable development has had a major influence on public international law and international relations in recent decades. But, the principle of sustainable development is still non-binding in international law. This inconsistency raises a question of constraints in articulating commonly acceptable value statements (priorities and beliefs) - sustainability and development, and their normative expression (what is desirable and what should be) into rules (sanctioned behaviour) at the international level.

The international law principles, soft law, declarations and the general tendency to generate sanctioned behaviour based on the sustainable development, phenomenologically observed, lack the hypothesis for disposition, i.e. the relevant facts under which it is intended to guide addressees towards required or desired behaviour. In line with that methodological approach, we observe the impact of globalisation.

## 2. Globalisation of the environment-related rights

Some dispositions aimed to enforce the protection of the environment, like liability for damage, the right of access to relevant information and the right of access to judicial and administrative proceedings, proclaimed within the principles of the Rio Declaration<sup>1</sup> were previously protected in national legal systems of the developed industrial States. The effort to articulate them as international rules, however, has been met with distrust.

The Rio Declaration recognises joint responsibility of States for the protection of environment and sustainable development<sup>2</sup> Many international treaties accept the concept of joint responsibility in environmental relations. Tuna and other fish are considered the object of common interest of States, on the ground that they were constantly economically used by the parties.<sup>3</sup> The Moon is proclaimed the province of mankind concerning the activities of States in Outer Space;<sup>4</sup> wetlands are treated as an international resource, in the context of their international importance as a natural habitat for waterfowls;<sup>5</sup> natural and cultural heritage

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1 United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, A/CONF.151/26 (14 June 1992), 31(4) ILM 874, Principles 2, 10.

2 *ibid*, Principle 7

3 *Convention for the Establishment of an Inter-American Tropical Tuna Commission*, 80 UNTS 3, Preamble.

4 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 610 UNTS 205, Art. 1.

5 *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 996 UNTS 245, Preamble.

is part of the world heritage of humankind as a whole;<sup>6</sup> wildlife conservation is for the good of humanity;<sup>7</sup> resources of the seabed and the ocean and their underworld are the common heritage of mankind as a whole;<sup>8</sup> and plant genetic resources are the common concern of all countries.<sup>9</sup> The legal concept of common concern was developed concerning the climate change and its impacts,<sup>10</sup> as well as the conservation of biological diversity.<sup>11</sup>

The legal interest of a State in the environment, as a good of common interest, can be reflected in the claim for equitable access and use of environmental resources, and the responsibility to prevent the damage. In the implementation of national policies and laws related to environment, States have a duty to take into consideration the needs of all other States (Pierik, 2015: 103). The articulation of this normative approach encounters an obstacle in the neo-liberal ideology, which does not recognise concepts of social or environmental instability (Granter, 2016: 160). Normatively framing the concern for the environment can potentially limit the discretionary actions of the industrially developed States. It implies a more communitarian approach, and hence their reluctance to accept binding international rules concerning the environment (Mbenque, 2015: 401).

The precautionary principle, which arises from the epistemic stimulation for anticipative regulatory and other actions when facing scientific uncertainty concerning the environment, has met the opposition in negotiating international agreements related to the application of new technologies, processes and practices (Condon, Sinha, 2013: 30). Thus, the status of the precautionary principle in international law remains vague and utopian (Jaeckel, 2017: 35).

The principle of integration of environment and development, which entails considering the impacts on the environment when deciding on economic issues, is also contested, subject to interest-based deciding and the lack of clear content (Jans, 2011: 1545-1546).

The principle of common but differentiated responsibilities raises the requirement for the developed countries to assume a leading role in facing environmental degradation and involves different standards based on the degree of

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6 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1037 UNTS 151, Preamble.

7 *Convention on the Conservation of Migratory Species of Wild Animals*, 1651 UNTS 333, Preamble.

8 *United Nations Convention on the Law of the Sea*, 1833 UNTS 3, Preamble.

9 *International Treaty on Plant genetic Resources for Food and Agriculture*, 2400 UNTS 303, Preamble.

10 *United Nations Framework Convention on Climate Change*, 1771 UNTS 10, Preamble.

11 *Convention on Biological Diversity*, 1760 UNTS 79, Preamble.



development and real possibilities. It represents one of the most important developments, leading to the application of equity in international law and to the recognition that the special needs of developing countries should be taken into consideration in the international law rules relating to the environment (Honkonen, 2016: 164). Developed States bear the responsibility in the efforts towards sustainable development, due to the pressure their societies exert on the environment, their technologies and financial resources. This principle is disputed its effectiveness, due to the unclear criteria of its implementation (Ferreira, 2016: 342-343), as well as because it does not differentiate obligations within the developing countries, which has been reflected in a failure to achieve precise obligations in reducing emissions (Huggins, Karim, 2016: 433).

The current doctrine on international environmental protection exposes the aim to introduce approaches based on market mechanisms (Daly, Farley, 2015: 184). The logic behind this seems to be an attempt to overcome the perception of a possible limitation of private property and technological innovation. These issues were explicated, for example, in the Convention on Biological Diversity (CBD), which exposed the lack of consensus on the need to consider the role of patent and intellectual property rights protection, especially in developing countries.<sup>12</sup> The problem is in the universally acceptable extent of the international limitations on intellectual property rights, if they may have negative impacts on the environment.<sup>13</sup> The CBD introduced a limit, by requiring “an agreement on prior notification, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity”.<sup>14</sup> The most developed States also objected to establishing any binding target and time-frames on the use of fossil fuels to reduce carbon dioxide emissions. Their motivation remains, despite the scientific certainty about the consequences of the current market economic order for the environment.

### **3. Value issues of globalised sustainable development**

Globalisation affects strategies for sustainable development through its political, cultural and economic consequences; the vulnerability of national economies; and the marginalisation of knowledge, States and cultures (Oyevaar, Vazquez-Brust, van Bommel, 2016: 262). To remedy the consequences of the shortcomings of the open market, the public authorities are expected to intervene, which shows

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12 *ibid*, Article 16.

13 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 UNTS 299, Article 31(1).

14 *op. cit.* (*supra* 11), Article 19(3).

that the role of the State for sustainable development remains immanent (Carter, 2013: 202). The impact of the market, however, leads to different views about the necessary measures. The core discrepancy remains between the premises that centralised planning and interventionism are necessary, on the one hand, and that central planning is not appropriate, on the other.

The feasibility of the proclaimed global development goals, as a mean of rationalising the relation between knowledge and power in the context of global management which is accompanied by the multicentric forms of governing, have problematized the ways of occupying the positions of power (Death, 2010: 15-16). The purpose of government becomes to ensure, besides compliance with the law, the public-interest orientated policies (Scharpf, 2010: 107). Therefore, governments mobilise techniques of power to influence behaviours. Managing individuals, in the aspect of the normative content of sustainable development, necessitates the use of a security apparatus (Fligstein, McAdam, 2012: 72).

Globalisation generates new challenges, stemming from uneven distribution. As the uneven distribution is a qualitative threat, it can be considered as a challenge generated by the global system. There are opinions that globalisation is a more robust process than the results show, and that market is a powerful instrument to deal with environmental problems. In this context, it is explicated that globalisation represents a novel challenge for the hegemony of the global North, in the sense that it exposes the need for a drastic structural adjustment, as undergone by the countries of the global South. These analyses attempt to quantify the sustainability of economic growth, and their important feature is the statistical projection of trends which, although denied the practice in matters of energy and debt restructuring, is rationalised as a market result at a point in time (Adger, Winkels, 2014: 208), thus leading to the conclusions in contrast to reality. The practical normative issue is the distribution of sustainable gains, i.e. allocating quotas of environment *per capita* for States (Vanderheiden, 2011: 329).

The premise of the compatibility between globalisation and sustainable development was conceptualised in the late XX century. After the failure of this discourse in practice, advocates of the neoliberal globalisation return to restoring the role of States, and claim that it is down to the governments to take sustainable development into account and, by providing the free trade and imposing rules, facilitate business in a rational manner for humankind (World Economic Forum, 2005: 13). This discourse ignores that the most developed States made the rules of trade, and the underdeveloped States are not in a position to change them. Another apologetic approach to the role of globalisation observes sustainable development as a concept that has a national and international framework. It views the problems as determinants of participation of national economies in

the international market, while the social dimension of sustainable development is reflected in the human well-being within States (Umberger, Anders, Goddard, 2016: 154-155).

The sustainable development concept is accepted in the practice of international financial institutions. Their goals coincide with those of transnational corporations and neo-liberal regimes in the North and the South, and they include economic growth and preservation of the capitalist economic development. It can be argued that for these organisations the concern for the environment is only a facade, in the absence of more appropriate means for the expansion of unrestricted open markets and free trade.

Globalisation contributes to cultural hybridisation. This results in the focus on the administration of complex connectivities, as an important feature of globalisation. Administering, thus, relates to a principal problem, since globalisation causes disparities, historic differences and temporality, and creates greater inequalities in resources, wealth, income, health, welfare, and cultural power, even of those it is supposed to overcome (Hall, 2010: xi). In that context, the discourse about the “creative class” is related to the attempts to retain and/or attract certain professional groups (Florida, 2012: 69).

Globalisation in the economy, finance, transport, tourism, information and media, human rights, ecology, and human health affects the character of the modern State. Firstly, a challenge for the modern State concerns the relationship between humans and nature. The State has to deal with the problems of nature, but it cannot solve global environmental problems. Secondly, a set of challenges comes from the cultural field. A counterbalance to globalisation and standardisation represents the preservation and development of national and ethnic identities. Thirdly, States face challenges in economic and financial crisis, massive unemployed, broadening of poverty and the rise in the level of conflict within societies.

Concerning the character of States, the end of the XX century was marked by two phenomena: the spread of the liberal democracy and the process of weakening the State, with a secondary trend towards a strong State (Sum, Jessop, 2013: 419-420). The impact of the synergetic effect of political, cultural and economic globalisation is undermined sovereignty of the States. Nation-state becomes too small and too large to optimally solve certain problems of globalisation and the transfer of management to regions and communities. The guiding principle of socialisation becomes the idea of social responsibility and the related paradigm of individual responsibility for social objectives (Kamens, 2012: 63), which further provides basis for concepts of organised individuals (polity) and reduced authority of hierarchical structures. Sustainable development is affected by the restructuring of State, through privatisation of public services (and the practice

of public-private partnerships), in an effort to make the public sector more competitive and less corrupt (Haque, 2004: 156). From the aspect of a State, the essence of this process is the level of control; from the aspect of public interest in sustainable development, the essence is the trend of shifting governing towards administering (Iwamoto, 2014: 89). In administering of the sustainable development, interactions reveal co-management, particularly in the crossing of social domains, primarily the market and civil society (Kooiman, 2003: 221), with the public sector showing little ability to resist the influence of business in public policies (Reilly, 2014: 71).

In its social dimension, sustainable development includes issues such as inclusion and intergenerational relations. The modern State still has a responsibility for the social security, but post-industrial society and globalisation reform the welfare State into social Well-being State, conditioned with the achievement of factors of social equality (Beck, Maesen, Laurent, 2001: 305). Accordingly, the key areas of intervention became the spheres of work, employment, education, health, housing, social security and social protection of the poor and powerless. A State is no longer based on the pursuit of high standards of living but, instead, on the institutionally regulated level of implementation of social policies to achieve social security. The institutional framework and structure of social well-being State generally includes four spheres of regulation and public policies: 1) social inequalities (poverty, unemployment, old age, disability, disease), mainly confined to individualisation of social problems and risk management; 2) social inequalities (age, gender, ethnicity), with subsidised services in education, health and social protection; 3) social equities, including security, safety, environmental and housing standards; and 4) as an extension in the global crisis, State intervention related to labour relations and employment. The institutional infrastructure of social well-being State is related to rationality and the availability of complete information; institutional constraints of individual activism; dependence on the path and the model (principles, objectives); etc. (Eisner, 2010: 4-11). Since a State can influence the administering in many complex ways, mostly unavailable to other participants, it retains a privileged position through its institutional infrastructure.

As a reaction to the modernist aspirations for progress and reason, which accepts the world dominated by mass media, globalisation and decentralisation, and advocate that everything, including experience, morality and culture, is relative and subjective, postmodernism debates the sustainability of plural rationalities and the possibility of consensus in contemporary societies. The consequence related to the essence of politics is that the governing focuses on designing the behaviour of individuals (governmentality) and people management, and thus a function of security becomes to frame the population. In this relationship,

governmentality allows the creation of docile bodies, to be functionalised as institutions (Dean, 2010: 6).

#### **4. Implications of globalisation in international system**

Globalisation affirms many issues which transcend national boundaries. At the international level, there are still no democratic institutions that could effectively face the problems created by globalisation. However, when issues require collective solutions, sovereignty is voluntarily and/or tacitly ignored. Peace, international security, illness, financial stability, trade, knowledge and the common good are the areas in which the multidimensionality of the problem requires concerted global policy. In these fields, States have vested certain powers in institutions within the UN system (International Task Force on Global Public Goods, 2006: 18). In comparison to the international financial institutions, which are the most influential centralised regimes, and the social ones which are less influential and centralised but with an access to a judicial mechanism for resolving disputes, the structures for administering the environment seem to be the weakest and most fragmented. Multilateralism is additionally threatened due to the leading democracies facing economic and social problems, as well as due to the North–South rift.

During the first decade of the XXI century, the weaknesses of the practically important but theoretically vague concept of global administration were exposed in international relations. The concept of global administering has developed from the idea of complex interdependence. During the 1980s, five elements modified the international system: 1) globalisation, as global integration which generates winners and losers; 2) fragmentation of identities, as a reactive phenomenon to globalisation; 3) reduced spatial differences, due to information technology; 4) development of the global interdependence and transnational issues; and 5) steady growth of technical skills of individuals (Rosenau, 2006: 147-162). Post-modern ideologies deconstructed the paradigm of rational State, but neorealism and institutionalism failed to anticipate trends. Western ideology has gone through criticism of positivism, and international system have been additionally modified by the following three ideas: 6) juxtaposition between international civil society and the State system, and the centrality of interstate relations; 7) dialogue with anti-globalisation ideas, as a new form of engagement; and 8) multiplication of perspectives and approaches in international relations (Sylvester, 2002: 189, 249, 291). Radical critique of modernist paradigms leads to the risk of deconstruction of the State, while at the same time postmodernists contribute to the recognition of the need to consider the ideas and beliefs to overcome the contradiction of the globalised world (Sakwa, 2013: 73-74).

At the end of the XX century and the beginning of the XXI century, theories of international relations rely on the globalisation. Based on these theories, globalised economy and open society become major factors in the global unification and the new ideas and beliefs (Telo, 2013: 50). This trend is consistent to the completion of State as a secularised entity. On the one hand, deterministic economic optimism appears in the new frame of a globalised world market, and the triumph of the "invisible hand" and the end "politics", as such, in the administration of the economy and social development (Telo, 2016: 115). On the other hand, global convergence of cultural resistance is manifested as a revolt against the pressure of globalisation. Unlike the realists, constructivists emphasise the structure as a constituent reality, which is an argument derived from the systems theory; but, contrary to that theory, they regard the mutual reaction between the structure and the intermediary as a necessary condition. Moreover, they consider structure primarily nonmaterial and ideological (social context, intersubjectivity, in the form of identity, norms, values, ideas, knowledge), and secondarily material (economy and weapons). Constructivism contributed to institutionalism, through recognising that knowledge and standards, as independent factors, cannot force States to change behaviours.

In many democracies, the authorities which respect transparency and democratic control coexist with decision-making characterised by secrecy and lack of transparency. The related doctrinal question is the impact of non-elected public officials, who create networks on the transnational level and often conduct foreign policy beyond democratic control. The triumph of liberal democratic values and market economy, trying to align economic and political philosophy around the idea of open market and liberal democracy, led to conflict on a global scale and the renewal of doctrines of a balance of power (Hurrell, Macdonald, 2013: 76) and to the new era of intercultural conflicts. Overall, the weakening of a State compromises the idea of cooperation since weak States can only generate weak organisations.

Globalisation entails two concepts: 1) it brings prosperity to some countries, while others are not necessarily poorer, and the shaping international structures responds to specific issues of globalisation, and 2) it is an objective process in the development of nature and society, including the global population dynamics (Krapivin, 2007: 2). In that context, globalisation is manifested as an economic phenomenon, which includes economic integration, international trade, investment and capital flows, and concurrently a cultural, political and technological exchange between the States. The pro-globalisation argument is based on the improvement of free trade, as a key to ending poverty and ensuring effective development, and thereby the environment protection, by advancing market-based instruments. As a counterweight, anti-globalists approach the dynamics

of the global structure differently. They recognise the importance of free trade and investment, but perceive the environment as crucial for the sustainability of development; they advocate concepts like sustainable development through integrated environmental protection, promotion of social justice; innovation as necessary to sustainable; and the transfer of power to the local level.

Majority of contradictions stems from three shortcomings of the globalisation paradigm: the lack of understanding of the role of economic freedom; the lack of understanding of the problems in the field of democracy and tolerance; and the inability to formulate an appropriate framework of interaction between public and private (Tausch, Heshmati, 2013: x1-x1i). The thesis underlying this paradigm, that globalisation favours countries that liberalise and, *vice versa*, ignores that the trade policies cannot be isolated *eo ipso* since they impact other policies (Lindert, Williamson, 2003:250).

The purpose of sustainable development, in the broadest sense, is to maintain the conditions for survival of the species. From the aspect of desirable behaviour, it primarily concerns rights and freedoms of all individuals. It does not mean that individual rights necessarily derogate legitimate interests of States, but it implies a need for an international order which would be a constraint for securitisation of states and administrative procedures aimed at attaining common values, instead being used for the purposes of para-legal global governance. In that context, instruments like institutional cooperation, commitments or incentives are not adequate to surpass the will of the privileged.

## 5. Conclusions

Globalisation appears *eo ipso* associated with challenges for sustainable development. This is the consequence of three problems which can be observed in globalisation: the demand for natural resources undermining the steady economic prosperity; the related processes of environmental degradation affecting the fragility of ecosystems and societies, and the consumption as a determinant of globalisation and global environment.

The consensus on establishing binding international rules to face these challenges in the environmental dimension of sustainable development is currently faced with the irreversible constraint for any potential barriers for dominance in the globalised World.

In today's dominant neoliberal ideological framework, the practice of sustainable development functionally resembles the dominance from the position of power, through globalisation. The concept of global administering, probably the most obvious in relation to sustainable development, entails the idea that

the transnational relations can replace international relations. In that context, globalisation primarily involves standardisation. Establishing control requires normative standardisation, which simplifies administering and is therefore suitable for establishing control, but not necessarily for solving problems. In the past four decades, it was not possible to reach a normative consensus through global administering for sustainable development, which is in practice manifested as a reflection of globalisation. Thus, the methods used in this context appear as methods of globalisation. They currently tend to institutionalise the practice of dominance and, despite the common rhetoric, it is unclear whether such methods substantially contribute to the normative articulation of the global strive towards sustainable development.

This analysis has avoided contemplating and making constructs on international and transnational law (the growing influence of the international field on domestic policy and the internal conduct of states: relations in which regulation is created in the international sphere, the interpretation of international norms and rules, regional economic integration and supra-national law, the growing number of settlement mechanisms and bodies – above all through their reviews and reports). The reason for this is that the proliferation of legal issues (in the area of sustainable development) reflects only the growing importance of the international arena in shaping the practices of states and the interconnection with globalisation, but not so much the development of international law.

There are no indications that globalisation changes the nature of international law, and compliance of national administrations to undemocratic global governance cannot be attributed to globalisation. On the practical level, the problem is that imposing unification is only an attempt to normatively create relations, which cannot be achieved through legal norms. Thus, international law should face globalisation by promoting the international protection of individuals from the administrative acts of their states, under the auspices of supranational commitments of political establishments undertaken through non-binding acts.

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## **ГЛОБАЛИЗАЦИЈА КАО ЧИНИЛАЦ НОРМАТИВНОГ САДРЖАЈА ОДРЖИВОГ РАЗВОЈА У МЕЂУНАРОДНОМ ЈАВНОМ ПРАВУ**

### **Резиме**

У овом чланку посматра се улога перцепције одрживог развоја као универзалне вредности на позитивни развој међународног јавног права. Поменута перцепција је проблематизована са аспекта стварања правила и успостављања права и обавеза везано за животну средину, економску и социјалну димензију одрживог развоја, на међународном нивоу. У том контексту, налазимо да међународно јавно право не обезбеђује кохерентан нормативни поредак, нити изричита правила у вези одрживог развоја, које се ипак сматра пожељним циљем којим треба да се руководе субјекти међународног права. У суочавању са овим проблемом, сагледана је правна концептуализација одрживог развоја кроз тумачења, меког права и доктрине. У том сегменту је приметна тенденција ка глобалном нормативном концепту, који се не ослања на међународно јавно право, нити је афир-мисан у јуриспруденцији међународних судова. У основи ове тенденције је концепт универзалних вредности које се односе на људску и природну околину, које се експлоатишу као принципи, углавном на политичком нивоу. Експлоатација универзалних вредности у нормативном садржају одрживог развоја подржава процес глобализације на многим нивоима, пре свега у вези са улогом државе, хегемоније и праксу општег права у међународном јавном праву. Може се закључити да је глобализација, као политички процес заснован искључиво на вредносном конструкту, доводи до де-легалација међународног јавног права, кроз волунтаристичко наметање стандардизације, на основу дискурса одрживог развоја.

**Кључне речи:** заједничка баштина, право на развој, међународне организације, заштита животне средине, међународно инвестиционо право.



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## **DIRECT DEMOCRACY AND EUROPEAN INTEGRATION**

**Abstract:** *The representative democracy was constructed as a normative model and theory during the Westphalian Modernity. It was put into practice during the "long XIX century" (Hobsbaum) and is presumed to have been the dominant model for organizing the institutional design since the second half of the XIX century. However, we are currently experiencing a crisis of both representation and democracy which produces the feeling that the representative democracy is nowadays a "shaken order" (Mishkova). Some of the most important determinants of the crisis of democracy and, more specifically, of representative democracy are the result of globalization. One of the basic challenges to constitutionalism and constitutional theory nowadays concerns the issue how to reestablish the conditions for democracy in the pluralist and multilevel constitutional setting of the EU supranational constitutionalism and the emerging global constitutionalism.*

*One of the main trends in that regard consists in launching and promoting the use of direct democracy for adopting fundamental decisions related to supranational constitutionalism and EU integration. Several types of EU-related referenda have been used during the last decades especially in the age of constitutionalization of the EU legal order. Referenda for EU accession and even for EU secession (the Brexit case), as well as for the ratification of EU law reforms and the key EU policies (such as: financial stability and migration issues) have been held in several EU member states. This paper will try to provide a critical analysis of the problem-solving capacity of such referenda, their impact on the "democratization of democracy" (Offe), and their capacity to serve as a viable form of democratic control and inclu-*

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*sion in the context of structural crisis of the Westphalian statehood and its democratic government model.*

**Keywords:** *direct democracy, representative democracy, crisis, globalization, EU integration, EU supranational constitutionalism, global constitutionalism.*

## 1. Introduction

Direct democracy is frequently conceived as radical theoretical and legal alternative to representative democracy. The perception that direct and representative democracy are a dichotomic couple typically leads to two opposite conclusions.

According to the first one, direct democracy is incompatible with representative democracy. It distorts its internal logic and impedes the proper functioning of democratic representation being obstructive to responsible and limited government as key normative ideologies of the representative democratic systems since the XIX century. A fully-fledged direct democratic system seems to be utopia whereas the use of specific direct democratic institutes in the context of representative democracy is, in the words of the first president of the Federal Republic of Germany T. Heuss, a "bonus for the demagogues" (Bachmann 1999: 77).

From that viewpoint, the referenda on EU issues are tools for populism (e.g. the Greek bailout referendum or the Hungarian migration quota referendum) or devices for impeding the proper functioning of the parliamentary system with doubtful constitutionality (e.g. the Brexit referendum). Direct democracy on EU level is impossible due to the lack of European demos<sup>1</sup> and the fear that it will foster the appreciation of the EU as a quasi-state system based on the principle of people's sovereignty. Direct democracy related to EU issues (e.g. national referenda for ratification of EU law reforms or on other topical matters) produces misunderstandings, stalemates and is much more related to national political party battles than to the EU issue at stake.

According to the second viewpoint, direct democracy is a radical remedy for the dysfunctionalities of representative democracy. It is reserve for re-democratization of the system, for enhancement of its democratic legitimacy and responsiveness, and for channeling both the will of the people and the popular dissatisfaction with politics in general or concrete important decisions in particular. That perspective is fundamental for the perception of the EU related referenda as limited but important occasions of genuine civic engagement serving as direct democratic sanctions on elitist and even oligarchic decision making, and as a

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1 For the 'no demos' thesis see e.g. Jolly, M. (2005) A Demos for the European Union? Politics 25 (1), 12-18.



check on the territorially disentangled European elites and on the irresponsible national politicians. In that context, the referenda on EU issues are presented as ultimate expression of the residual national sovereignty and radical democracy striving at survival in the context of elitist-driven supranational constitutionalization.

This paper is grounded on the belief that there is no “Grand Canyon” between direct and representative democracy (Belov, 2014). Direct democracy is just supplement for both representative democracy and authoritarian regimes. It offers additional opportunities for civic engagement in the general framework of the representative system. It is frequently also a device for establishment of authoritarian regimes and for illiberal democracies. The latter case is of special importance due to the rise of populist-based illiberalism during the last years in the EU, in Europe and in the world, which is partially fostered by the enhanced recourse to referenda and to other forms of direct democracy.

What is peculiarly interesting is the increase of direct democratic engagement and the rise in the number and importance of EU related national referenda in times of crisis of representation, representative democracy and democracy. Hence, the question is whether this phenomenon is an attempt to remedy the structural crisis experienced on both EU and national level, or whether it is evidence of the emergence of new perception of politics leading to fragmentation of the public sphere and legitimation of populism.

## **2. Direct democracy, supranational constitutionalism of the EU and the shift of constitutional paradigms in early post-Westphalian modernity**

### ***2.1. Direct democracy, sovereignty and constitutional identity***

Direct democracy in general and the referenda in particular are sometimes praised in the constitutional theory as a genuine expression of the people’s sovereignty and, thus, as a true and authentic form of democracy. The immediate decision of the people, functioning as both source and addressee of policy making, seems to be appealing from the viewpoint of radical democratic theory. However, it is misleading in many aspects.

The first problem is who are ‘the people’? Is it just and proper to subsume the people who have signed the petition for initiation of citizen’s or people’s initiative (usually amounting to low percent of the electorate), the members of the initiative committees or even the people who have cast their vote under the concept of ‘people’ as a holistic category pretending to encompass the collective ‘Self’ of the whole population?

This problem is definitely reinforced in the context of the EU supranational constitutionalism. The 'no demos' thesis is rather popular in the literature on European constitutionalism and constitutionalization of the EU<sup>2</sup>. It is evident that neither 'socio-cultural' and 'substantial' nation based on common social features and beliefs of the people of Europe nor a viable 'civic nation' can be expected to emerge on EU level at least in the forthcoming decades.

At the same time, in a complex supranational polity dependent on mutual recognition and toleration, one should be cautious in enhancing the direct democratic decision making related to EU matters in the distinct EU member states. Such presumably democratic approach additionally fragments the EU public space and produces stalemates and decision-making impasses<sup>3</sup>. It seemingly reinforces the sovereignty of the nation state conceived as a 'closed territorial container' (Brenner 1999: 55) and including homogeneous nation. However, both the territorial closure and the national homogeneity are categories of the Westphalian constitutionalism which are impossible under the current post-Westphalian conditionality produced by globalization.

Hence, the direct democratic decision making on EU level is difficult to be conceptualized in the categories of the Westphalian constitutional law. This is due to the fact that EU does not possess sovereignty and there are no 'European people' which may ideologically and practically serve as referential social group for constitutional ascription of general political will. At the same time, direct democracy on EU issues in the distinct EU member states is increasingly problematic due to the crisis of territoriality and the 'global fluidity of the demos' (Belov 2016: 53 - 81). In other words, the globalization and the subsequent mobility revolution produce an increasing mismatch between state power, state people and state territory as the main components of the state which changes also the conceptual framework for implementation of direct democracy in general and of EU related referenda in particular.

The EU member state's citizens living abroad and being part of the state as post-territorial 'imagined community'<sup>4</sup> may be adversely affected by the decisions taken by their compatriots living within the boundaries of the state as 'territorial container', if deprived of political rights for participation in forms of direct democracy. And vice versa, the increasing numbers of foreigners (including EU

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2 For a critical approach to this thesis, see Habermas, 2011.

3 These issues are taken into consideration by J. Habermas who has proposed the accomplishment of pan-European referenda on EU level instead of EU related referenda on a state-by-state basis.

4 For the concept of imagined communities, see Anderson, B. (2016) *Imagined Communities. Reflections on the Origins and Spread of Nationalism*. Verso, 1 – 256.

citizens) in other EU member states are not permitted to vote and directly engage in decision making which is immediately affecting them. A clear example is the situation of the EU citizens living in the UK in the context of Brexit referendum.

According to S. Benhabib, 'democratic laws require closure precisely because democratic representation must be accountable to a specific people' (see Benhabib, 2005: 675). However, the nature of the European project enhancing openness and mobility and the lack of clear territoriality concept of the EU make such closure difficult and sometimes even impossible. The emerging supranational constitutionalism, the EU being its most advanced manifestation, is increasingly departing from traditional Westphalian constitutional categories such as sovereignty, territoriality, closed statehood and territorial nation-state. Hence, we need reconceptualization of democracy in general and its particular manifestations as representative and direct democracy in particular.

The particular problem is whether a post-Westphalian concept of direct democracy freed from its inevitable link to the demos and the territorial statehood can be developed. Such concept may be preconditioned upon the dispersed model of networked democracy (Blokker 2014: 13-44, 42) providing the chance for the development of civic citizenship and constitutional patriotism (Müller, 2009). Currently, the chances for such post-Westphalian concept of direct democracy seem rather immature and low due to the lack of sufficient solidarity, constitutional and political culture proximity and mutual emotional comprehension of the peoples of Europe.

A global sector-based networked participatory democracy grounded on expert but also civic engagement-driven deliberation and participation, and rooted in a societal constitutionalism approach (Teubner, 2012), seems to be a more realistic option. However, such type of engagement can neither be immediately related to statehood and public power, nor can it be conceptualized in the classical terms of the Westphalian state-centered constitutionalism. Moreover, the forms of direct democracy concerning EU integration which have been recently accomplished in several EU member states cannot be conceived as part of such post-modern and post-national shift towards supranational societal constitutionalism.

The direct democracy is also inappropriate device for expression of the national constitutional identity. The national constitutional identity seems to be among the early post-Westphalian concepts serving as alternative to the holistic and rigid versions of sovereignty. To some extent paradoxically, it is impossible to be expressed by virtue of forms of direct democracy, e.g. by referenda.

It seems logical that it is the people who should be capable of possessing best knowledge about their constitutional traditions and common elements of the constitutional axiology and institutional design that constitute them as constitu-

tional polity and as a nation. Although such suggestion possesses high legitimacy, it is incorrect and fictitious from epistemological perspective.

The tension between the presumed and *de facto* general will of the people has been politically adjusted and partially reconciled in the framework of the nation state and the Westphalian constitutionalism. The Westphalian ideology presumed the existence of common good and common will of the nation capable of being expressed through either representative or direct democratic manner. However, this process of elitist ascription of will to an imagined political community<sup>5</sup> reaches its limits if the people should define themselves the key constitutional principles, values and institutions which make them distinct and different from the people of the other EU member states as well as from the EU constitutional design.

The impossibility of durable, viable and clear constitutional self-definition of the people is demonstrated by the recourse to 'judicial dialogue'<sup>6</sup> as an instrument for drawing 'counter-limits'<sup>7</sup> to the primacy of the EU law and to the EU integration and as a tool for definition of the national constitutional identity. The incapability of the political community, which is supposed to be both coherent and rational, to draw its 'constitutional Self' and the use of purely elitist devices for achievement of this purpose expose the clash between democratic legitimacy and political rationality. It reinforces the 'democratic deficit' of the EU, but also fosters the crisis of the Westphalian conceptions of constitutional policy making.

## **2.2. Direct democracy and representation**

The recourse to direct democracy for solving, approving and legitimating of EU issues enhances the fragmentation of the public sphere in the EU and fosters the distortion of the representation. Thus, it does not solve the crisis of representation but brings it to a new level. There are several factors which produce this phenomenon. The case-by-case recourse to national referenda on EU issues makes their application unpredictable, irregular and uneven. The only EU member state constitution which provides for compulsory constitutional referenda is Ireland. Thus, the constitutional viewpoint of the Irish citizen should always be immediately exposed by the citizen themselves whereas the rest of the EU

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5 For the concept of imagined communities, see Anderson, B. (2016) *Imagined Communities. Reflections on the Origins and Spread of Nationalism*. Verso, 1 – 256.

6 For the concept of judicial dialogue, see Claes, M., de Visser M. (2012) *Are You Networked Yet? On Dialogues in the European Judicial Networks*. *Utrecht Law Review*, 8, p. 100–114.

7 For the concept of counter-limits, see Martinico, G. (2007) *Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma*, *German Law Journal* 8, 205-230.

citizen should rely on the representation of their interest by the politicians. The contrary example to Ireland is Bulgaria where referendum for EU accession, for ratification of the EU Treaties or for constitutional amendments stemming out of the EU membership is neither compulsory nor has been accomplished.

Thus, it is questionable how representative of the will of the people are referenda accomplished in distinct member states in the context of elitist decision making elsewhere. This is due to the fact that the expressions of the interests and the views of the EU citizen in the political process of distinct member states in direct democratic, participatory or representative ways produce distortions in the overall political representation in the EU.

Another aspect of the problem is embodied in the fact that the recourse to referenda for key issues which is not paralleled by a developed culture for civic engagement proved in persistent direct democratic practice may lead not to enhancement of the democratic legitimacy, but to disruptions in the anyway problematic functioning of the system of representative democracy inherited by the late Westphalian modernity. Clear examples of such distortions are the mismatch between responsive and responsible government (e.g. in the context of the Brexit referendum) and the misuse of the electorate for tactical purposes (in case of the Greek bailout referendum).

The Hungarian migration quota referendum demonstrates another peril of EU related direct democracy. It exemplifies the fundamental tension between illiberal leadership legitimated by majority voting and huge minority dissent oppressed by formally democratic means. Thus, the bargaining and the finding of compromise solutions usually accomplished in the framework of representative democracy allowing for representation of the political minority views remains impossible in the context of immediate plebiscitarian dialogue between the leader and the majority of the nation.

### **3. Functions of direct democracy in the context of the EU constitutionalism**

#### ***3.1. Direct democracy and (de)legitimation of EU constitutionalism and EU integration***

The legitimation function of direct democracy in general and of referenda in particular is widely discussed in the constitutional theory and in the political science literature (Rommelfanger, 1988: 36–40). With regard to the EU matters, the national referenda are supposed to legitimate key reforms of EU law and to approve other important EU matters, such as the EU enlargement, the EU accession and less frequently – the EU secession. The logic behind the legitimation

function of EU related referenda is seemingly clear. It is based upon the suggestion that the engagement and the participation of the citizen in decision-making typically enhances their knowledge on the subject-matter, increases the overall satisfaction with the EU decision-making political process and the EU membership, and fosters the "input" democratic legitimacy<sup>8</sup>.

However, two objections can be made to this rather straightforward logic that is based on the belief in the citizens' desire to participate in politics and to engage in the production of public understanding on central matters of common concern. Firstly, there is no empirical evidence of growing satisfaction of the citizens with the EU, produced by their participation in EU related referenda. On the contrary, in many instances, the incapability of the politicians who have initiated the referendum to adequately address the issues that were of particular interest for the voters and to enhance their proper knowledge of the issue at stake increased the concerns of the citizens as a result of the referendum process.

Secondly, some of the EU related referenda in fact produced dissatisfaction instead of satisfaction with voters and people in general. Clear examples are the referenda on ratification of the Treaty of the Constitution of Europe held in France and Netherlands. They triggered and exposed a wave of discontent with the federalization via constitutionalization of the EU and produced demise in the EU optimism which was on the rise until the collapse of the Constitutional Treaty.

Third, some of the EU related referenda were actually driven by populist movements or leaders who have instrumentally misused the voters in order to achieve particular elitist and lobbyist goals or to reinforce their own democratic standing. Such a role has been played by the Brexit referendum in the UK, the migration redistribution quota referendum in Hungary and the Greek bailout referendum.

The legitimation function of repeated referenda for ratification of EU reforms, e.g. the cases of the two Maastricht Treaty referendums in Denmark and the two Lisbon Treaty referendums in Ireland, is also very doubtful. Holding several subsequent referenda on the same matter while trying to convince the electorate of the appropriateness of the positive vote on the measure proposed by the political elite creates the impression of direct democratic entrapment of both citizens and the political elite.

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<sup>8</sup> For the input democratic legitimacy, see: Craig, P., De Burca, G. (2008) *EU Law. Text, Cases and Materials*. Oxford: Oxford University Press, 65, and Kiiver, P. (2006) *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*. The Hague: Kluwer Law International, 95.

### ***3.2. Direct democracy and European (dis)integration***

Direct democracy has usually been used for the purposes of European integration. Most of the EU related referenda concern the ratification of reform treaties, the adoption of important EU related measures and much less frequently – the approval of the accession of new EU member states. Ratification of treaty reforms has been accomplished via referendum in Denmark and Ireland with view to the Single European Act, in Italy, Ireland, France and Denmark with view to the Maastricht Treaty, in Ireland and Denmark with regard to the Amsterdam Treaty, in Ireland with regard to the Nice Treaty, in Spain, Luxembourg, France and Netherlands for the Constitutional Treaty and in Ireland for the Lisbon Treaty and the European Fiscal Compact. The most important national referenda on specific EU measures, some of which took the form of EU law reform, are the referenda on the adoption of the Euro and membership in the Eurozone in Denmark and Sweden, the Greek bailout referendum and the Hungarian migration redistribution quota referendum.

Furthermore, the EU accession referenda have been of two main types: referenda for accession of its own state to the EU and referenda for approval of the EU accession of foreign member states. Most of the EU member states have held referenda for their own EU accession. The exceptions are UK, Greece, Cyprus and Bulgaria. France held a referendum for the accession of several states to the European Communities in 1972 whereas Netherlands rejected the EU association agreement with Ukraine in 2016.

There are several determinants for the use of referenda for approval of EU related issues and for ratification of EU law reforms. Sometimes they are result of the domestic constitutional requirements providing for compulsory referenda on constitutional issues. This is the case of Ireland. Moreover, the national politicians wanted to present these decisions not as purely expert and elitist measures but also as reforms and innovations backed up with popular support. However, a common denominator for most of these referenda has been the perception that a genuine ‘union of states and peoples’ (van Gerven, 2005) can be achieved by the inclusion of the citizens in the decision-making process on key issues through the instrument of referendum.

Indeed, on many occasions the referendum device produced a seemingly democratic results demonstrating sufficiently high degree of EU friendliness of the peoples of Europe and the existence and continuation of a permissive consensus for further EU integration. However, there have been cracks here and there in this broader Euro-optimist framework. The need for the accomplishment of new referenda that finally ratify treaty reforms after non-successful initial referendum, e.g. in Denmark for the Maastricht Treaty and in Ireland for the Nice

and the Lisbon Treaties, were actually first warnings for the eventual mistrust of the citizens in the European project and for the potential of the referenda to serve as instruments for European disintegration. In addition, some of the referenda exemplified well the detachment of the people from the high constitutional politics on EU level, their mistrust in EU and the spillover effects of the dissatisfaction of the people from domestic policy and politicians that has been transferred in a detrimental way to the EU. For example, the negative referenda regarding the Treaty on the Constitution of Europe in Netherlands but especially in France show the great risks to the EU integration generated by the lack of sufficient understanding of the nature of the EU law reforms and the merger of the domestic and the supranational problems in the perception of the voters.

Finally, there have been referenda which demonstrated the risks of populism and instrumental misuse of the people by the politicians. The Hungarian migration quota referendum, the Brexit and the Greek bailout referendum are paramount examples of this type of risks the EU related referenda pose to the EU integration. Indeed, the EU secession triggered by the Brexit referendum is a clear case of EU disintegration which may eventually cause spillover effects to other EU member states. However, the Greek bailout referendum has also been conducted in an unfair manner for the electorate, in terms of the wording and the type of the referendum question, the extreme speed with which it was conducted and the way the government used the result of the referendum for its tactical purposes actually neglecting the will of the voters.

In the context of the increasing complexity of the EU law and EU integration, the rise of populism, the crisis of representation and democracy and the populist potential of the new Internet-based media, one can expect a growing importance of the disintegrative function of the EU related referenda. On the other hand, the decline of representative democracy has triggered rise in recourse to referenda and other forms of direct, participatory and deliberative democracy as suggested means for "re-democratization of democracy"<sup>9</sup>. These two inter-related and paralleled processes simultaneously contribute for the advance of populism and illiberal democracies.

### ***3.3. Direct democracy as 'a pressure valve' for letting off the steam of public discontent on EU issues***

The functions of referenda as blame-shifting devices and as safety valves in the course of the political relationship between the political elite and the people on sensitive issues is widely discussed and exposed in the constitutional and politi-

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<sup>9</sup> For the need for re-democratization of democracy, see Offe, C. (2003) *Demokratisierung der Demokratie. Diagnosen und Reformvorschläge*. Frankfurt am Main: Campus Verlag.



cal science literature on direct democracy<sup>10</sup>. This general conclusion regarding these typical (mis)uses of direct democracy have particular manifestations in the context of EU integration. The policy of the British Prime Minister David Cameron during the final years of his term of office was to try to pacify traditional tensions in the British society related to the Scottish independence and to the EU membership and, thus, to provide for anticipatory remedy for eventual political pressure for Scottish secession from the UK or for British secession from the EU. While the pro-integration forces won with small margin in the Scottish referendum, the British voters surprised the Prime Minister with their predominant will to depart from the EU.

The Greek bailout referendum is usually interpreted as a device for legitimation of the policy of the Tsipras government in front of the 'Troika' and the international creditors. Inverse interpretation, however, can define it in terms of being an instrument for pacification of the electorate by channeling the public discontent with the austerity measures through procedural and thus peaceful and controllable channels.

Hence, both the Brexit referendum and the Greek bailout referendum have performed the function of a safety valve. However, while the Greek bailout referendum proved to be a successful device for removing and channeling the pressure, the Brexit referendum has produced results which have been unexpected by its initiators, and will have tremendous external effects outside of the limits of the British polity. This proves the fact that the attempt to surpass and prevent revolutions by suggesting a procedural way for the citizens to express their dissatisfaction with EU related policies and politics and even to participate in 'legal rebellion' against the EU or other factors of supranational constitutionalism may produce tricky and controversial results. In some cases, it really substitutes the factual with legal revolt, e.g. in the case of the Greek bailout referendum. However, on other occasions, as shown by the Brexit referendum, the procedure triggers major factual disruptions which eventually could not have occurred without the recourse to referendum on EU issues.

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<sup>10</sup> See, for example, Jung, O. (2002) Direkte Demokratie – Forschungsstand und Perspektiven. In: Schiller, T., V. Mittendorf. (Hrsg.) Direkte Demokratie. Forschung und Perspektiven. Wiesbaden: Westdeutscher Verlag, 56–57, and Schaal, D., Habermann, G. (1999) Pro and Contra Direkte Demokratie. In Heussner, H. O. Jung. (Hrsg.) Mehr direkte Demokratie wagen. Volksbegehren und Volksentscheid: Geschichte-Praxis-Vorschläge. München: Olzog, 339.

#### **4. Instead of conclusion: direct democracy, societal constitutionalism<sup>11</sup> and dispersed civic engagement in supranational constitutional context**

The democracy in the EU is in crisis. This crisis is experienced at the supranational but also at the national and sub-national levels. There are many factors contributing to the emergence and fostering of the crisis of democracy, which is at the same time the crisis of representation and, as a result, the crisis of representative democracy. Inefficiency of representation based on traditional cleavages and especially on the 'left-right' divide, de-parliamentarisation, executive federalism (Maurer 2002, Habermas, 2011), judicialization of politics (Hirschl, 2008), demise of sovereignty, territorial irresponsibility of financial capital (Belov, 2016: 53), demise in trust and responsibility and rise of populist and anticipated responsiveness based regimes are just some of the most important determinants of the crisis of representative democracy.

It should be stressed that this crisis is structural and not just functional. It is not only sector-specific, e.g. related to financial and migration crisis, but also general. The crisis is at the same time conceptual, normative and factual. The main reason behind it is the impossibility to conceptualize and frame the new post-modern, post-national, supra-national, transnational and thus post-Westphalian reality in terms, concepts, paradigms and institutional schemes of the traditional Westphalian constitutional law. The EU itself is a post-national, supranational and post-Westphalian regime which is predominantly institutionalized as a Westphalian multilevel quasi-federal constitutional construction. Hence, many of the dysfunctions of the supranational constitutionalism of the EU are a result of the mechanical transplantation<sup>12</sup> of theories, concepts and institutions which are typical for the nation state constitutionalism.

The use of direct democracy in the EU member states and the general design of the instruments for civic participation and engagement in the EU are suffering from the same conceptual outdatedness and deficits produced by their inadequacy to the new post-Westphalian reality. Playing 'nested games' (Tsebelis 1990) and engaging in supranational decision making, with apparatus created and adequate for the closed territoriality constitutionalism of the states during the 'long XIX century' and the 'short XX century' (Hobsbawm, 1996), results in increasing dysfunctionality of pivotal constitutional concepts and paradigms, such as representation, parliamentarism, sovereignty and democracy, but also of the referendum as classical alternative path for decision-making.

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11 For the concept of societal constitutionalism, see Teubner, 2012.

12 For the legal transplants, see Watson, A. (1993) *Legal Transplants: An Approach to Comparative Law*. Atlanta: University of Georgia Press.

The direct democracy's Westphalian institutional design relies heavily on feasible national and people's sovereignty, closed territoriality and active engagement of homogeneous citizenship shaped as a nation. Consequently, all its structural premises are suffering a crisis in the current early post-Westphalian situation. Moreover, the proposals to have pan-European referenda based on civic engagement, civic nation and constitutional patriotism launched by several authors (the most prominent of which is Jürgen Habermas) did not materialize so far. They may have a chance for implementation only if there is a political will for further substantial EU integration based on enhanced civic solidarity.

Alternative views of direct and participatory democracy as instruments for expression of the 'negative sovereignty' of the people as core element of a 'counter-democracy' (Rosanvallon, 2008) seem to have already been put in practice. The Brexit referendum, the Greek bailout referendum, the Hungarian migration quota referendum, as well as the French and the Dutch Constitutional Treaty referenda and the first negative referenda on the Maastricht Treaty in Denmark and on the Lisbon Treaty in Ireland, may be perceived in terms of 'negative sovereignty' and 'counter-democracy'. This is also the case with the two Norwegian referenda on the membership in what was then the European Communities, in which the citizens rejected the governmental proposal.

The main issue regarding the theory of counter-democracy accomplished via negative EU related referenda is how the national and the European politicians should provide for responsible, strategic and in some cases even counter-majoritarian governance when they would be exposed to the permanent risks of being blocked by populist and proactively responsive political proposals. The contrary problem is that the recourse to 'negative sovereignty' may not prove sufficient for the citizens to feel as real masters of their destiny and, thus, of believing to be in possession of their full sovereignty.

In the context of crisis of representative democracy, direct democracy as eventual remedy is frequently perceived in two contradictory ways. First, it may be proposed as a Westphalian remedy for the crisis of representative democracy in the EU. In that case, direct democracy should be based on the ideas of nation, people's sovereignty and common will of the nation.

In its Westphalian outlook, it seems that direct democracy related to EU issues is much more a trouble-maker than a problem-solver. It produces European disintegration, fosters the crisis of legitimacy of the EU without enhancing the legitimacy of the nation state, provides instruments for illiberal populist policy, allows for escapes from the limited and responsible government and reinforces crisis of representation and representative democracy. Even in the still predominant cases, in which EU related referenda have been used successfully by the

national politicians in order to enhance democratic policy making in the EU, the elitist-triggered referenda were still conceived by the population as 'business as usual' and as rather routine devices for legitimation of political decisions proposed by increasingly infamous politicians to increasingly disinterested voters.

Second, direct democracy may also be launched as a post-Westphalian remedy to the crisis of representative democracy. Thus, it should be interrelated with post-Westphalian concepts such as supranational dispersed constitutionalism, post-national and post-territorial constitutionalism and sector-based post-national communities acting as functional equivalent to the state-based civic society and accomplishing 'quasi-democratic' global citizen's control over supranational decision making.

Direct democracy related to EU issues and accomplished on the level of the nation state seems to be successful only as obstructionist device providing for the expression of the 'negative' sovereignty of the nation in the context of a 'counter-democracy' (Rosanvallon, 2008) and allowing the people to function as 'reactive' veto players (Tsebelis, 2002). Direct democracy is also important device for legitimation of fundamental decisions of the political communities related to EU accession or EU secession. However, direct democracy in general and the referendum in particular do not seem to be proper instruments for decisions on other more sophisticated and complex issues, such as treaty reforms. These issues require information and expertise going well beyond the knowledge and experience of the citizens. Furthermore, pan-European referenda seem to be again a concept ignoring not only the expertise of the voters and the lack of European people but also shaping the direct democracy as an elitist device for mobilizing popular support, legitimating crucial but frequently problematic decisions and a game broadly fostering the EU integration.

If the democratic input of direct democracy rests in its capacity to enable the civic society to exercise control over the political elite and to make it more responsible and responsive, then it seems that a dispersed model of pan-European participatory and deliberative democracy may serve better this role than direct democracy, which is usually reduced to national EU related referenda. The existence of well-connected, well-informed and mobilized networks of citizens and experts tracing, observing and criticizing the sector specific policies proposed and accomplished by the EU institutions and the national institutions when acting on EU matters may indeed serve as a necessary counter-balance to the political elite and the professional politicians. The combination of input, advice and pressure by such pan-European networked communities with deliberation polls, citizens' and people's initiatives as devices of participatory and direct democracy on EU level may contribute to the establishment of a pan-European

set of checks and balances. Thus, a pan-European and societal approach to direct democracy related to EU integration may prove to be more beneficial to the increase of governability, democratic inclusiveness and controllability of the EU than a state-centered system of EU related referenda.

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## **НЕПОСРЕДНА ДЕМОКРАТИЈА И ЕВРОПСКЕ ИНТЕГРАЦИЈЕ**

### **Резиме**

Представничка демократија је створена као нормативни модел и теорија у периоду Вестфалске Модерне. Почела је да се примењује током „дугог 19. века“ (Хобсбаум) и сматра се да постала доминантан модел организовања институционалног оквира од друге половине 19. века. Међутим, и деморатија и престававички систем су тренутно у кризи, што буди осећај да је представничка демократија данас „уздрман поредак“ (Мишкова). Неке од најважнијих одредница кризе демократије, или прецизније репрезентативне демократије, су последица глобализације. Један од главних изазова конституционализму и конституционалној теорији данас тиче се питања како поново успоставити услове за демократију у плуралистичком и вишеслојном уставном амбијенту наднационалног конституционализма ЕУ као и глобалног конституционализма који је у процесу настајања.

Један од главних трендова у том погледу је покретање и промовисање употребе непосредне демократије у процесу доношења суштинских одлука које се односе на наднационални конституционализам и Европске интеграције. Током последњих неколико деценија, одржано је неколико врста референдума, нарочито у доба конституционализације правног поретка Европске уније. Референдуми за улазак у ЕУ, па чак и за отцепљење од ЕУ (случај Брезит), као и референдуми одржани поводом ратификације реформи законодавства и кључних јавних политика ЕУ (као што су питања финансијске стабилности и миграција) одржани су у неколико држава чланица ЕУ. Овај рад има за циљ да критички анализира реалне могућности референдума у решавању проблема, њихов утицај на „демократизацију демократије“ (Офе) и развојне капацитете да служе као одржив модел демократске контроле и укључивања, у контексту структуралне кризе вестфалске државности и вестфалског модела демократске власти.

**Кључне речи:** непосредна демократија, представничка демократија, криза, глобализација, Европске интеграције, наднационални конституционализам ЕУ, глобални конституционализам.



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## **MUTUAL ASSISTANCE BETWEEN EU MEMBER STATES IN RECOVERY OF PUBLIC CLAIMS**

**Abstract:** *The issue of effective enforcement of public obligations is of the essence in the circumstances of the increasing migration of people, as well as the intensifying flow of international capital. For these reasons, it was necessary to establish legal frames for the assistance between the EU member states for the recovery of public claims. The main aim of this paper is to show the development of recovery of public claims in EU member states. The first part of paper provides a brief historical outline of European regulations concerning international mutual assistance for the recovery of public claims. The main part of paper will focus on current legal frames regulating forms of mutual assistance. Current EU regulations include three forms of mutual assistance: provision of information by one member state, notification of an interested party or other persons about legal acts, and enforcement or indemnification of public claims. The most significant form of mutual assistance, specified as the fundamental one, is the assistance for the recovery of claims. A wider analysis of the discussed issue shows that international mutual assistance of the EU member states for the recovery of public claims will further deepen.*

**Keywords:** *EU, mutual assistance, EU Member States, recovery of public claims.*

### **1. Introduction**

The flow of capital among states and continents has entailed that states must establish legal regulations that prevent fraud and budget losses. Europe witnessed such actions primarily consisting in establishing legal mechanisms aimed at avoiding double taxation.

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The issue of the effective enforcement of public obligations is of the essence in case of the increasing migration of people to various directions, as well as the intensifying flow of international capital. For these reasons, it was necessary to establish legal frames for the assistance between the EU member states for the recovery of public claims.

International mutual assistance to the discussed extent between the European states was still held in the mid-war period (Cannes, 2013: 18-22). The first normative act adopted by the present European Union that directly governed mutual assistance of the Member States for the recovery of public claims was the Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties. This act was implemented as a consequence of the failure to enforce the claim for recovering public claims that emerged prior to its enactment.

From 1976 until now, cooperation between the EU Member States has been gradually strengthened. The intensification of the flow of capital between the member states and the increase in migration of people resulted in the growing significance of the discussed regulations. This was expressed by the intensification of works aimed at deepening the mutual assistance of the member states and the growth in efficiency of the actions taken. It was stated that there was a risk that problems with the trans-border recovery of claims may hinder the proper development of the internal market. It was caused through expanding the subjective scope to new categories of public claims. Legal frames have established three separate cooperation forms, most notably the possibility to recover claims arising in one state by authorities of another state, and establishing separate institutional frameworks of cooperation.

Due to social and economic changes, the gradual expansion of the EU, as well as due to the willingness to secure financial interests of Member States and the neutrality of the internal market, it has turned out to be exceptionally important to exceed the scope of mutual support, the result of which is supposed to be increased efficiency. Regulations already in force were replaced by the 2010/24/UE European Council Directive of 16<sup>th</sup> March 2010 on mutual support in reclaiming outstanding debts in the form of taxes, custom fees, and other claims<sup>1</sup>. The adoption of the legal act in question opened new, currently enforceable, ways of cooperation for the development of the idea of collecting outstanding social

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1 2010/24/UE European Council Directive of 16<sup>th</sup> March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (The Journal of Laws of the UE L 84/1 of 31.03.2010), hereinafter referred as 2010/24/UE.

and legal claims, regardless of the place of residence or operation of an entity required to fulfill them<sup>2</sup>. In comparison to the former framework of cooperation specified in 2008/55/WE Council Directive and (WE) 1179/2008 Ordinance, the expansion of mutual support-related undertakings is based on:

1. extension of the very cooperation subject. According to Article 2 paragraph 1 of the 2010/24/UE Directive, it applies to all the claims relating to:

a) all types of taxes and customs fees collected by a Member State, on behalf of it, or by its administrative or territorial bodies, including local authorities, as well as on behalf of said authorities or bodies and on behalf of the EU,

b) refunds, interventions, and other resources being part of a comprehensive or partial European Agriculture Guidance and Guarantee Funds (EAGGF) and European Agricultural Fund for Rural Development (EAFRD) financing systems, including amounts to be collected in relation to the performance of the indicated actions,

c) fees and other claims resulting from the joint organization of the sugar production and distribution market,

2. setup of a separate institutional cooperation framework:

The enforcement of Article 4 paragraph 2 of the 2010/24/UE Directive that predominantly governs contacts with other Member States with regard to mutual support specified within the scope of the directive is the responsibility of a central liaison office that is a separate entity created by an authorized body of each and every Member State. In other words, in the case of the current legal situation, in every country being the member of the European Union, there are specific authorities, the aim of which is to communicate with their counterparts in other countries and coordinate mutual collaboration. Aside from that, the provisions of the 2010/24/UE Directive inform about the possibility of creating liaison offices responsible for contacts with regard to mutual support with regard to one or more types or categories of taxes and customs fees in each of countries.

3. intensification of process-related framework of mutual cooperation:

It is defined by the individual provisions of the 2010/24/UE Directive which, in comparison to 2008/55/WE Directive, are a step forward when it comes to relations between Member States. The most important sign of improving cooperation

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<sup>2</sup> Notification of the European Commission addressed to European Council and Parliament – Operational plan assuming the increase of effectiveness of undertakings oriented towards the elimination of tax-related frauds and tax evasion, KOM (2012), 722, <http://eur-lex.europa.eu>.

in the discussed field is the introduction of the so-called uniform instrument allowing for direct law enforcement in a cooperating Member State. According to Article 12 section 1 of the 2010/24/UE Directive, the uniform instrument reflects the essence of the initial instrument allowing for law provision enforcement and being the only legal basis for collecting claims and safeguard measures in a cooperating Member State. It cannot be confirmed, amended, or replaced in the said state. It means that the uniform instrument constitutes a direct basis for collection of claims by authorized governmental bodies that does not need to be additionally confirmed or acknowledged. The former Article 8 of the 2008/55/WE Directive informs about the acceptance of a uniform instrument introduced in a Member State in which an applicant authority has its seat or the acknowledgement of the instrument as a uniform one allowing for recovery of public claims within the borders of a country where the cooperating body has its seat.

Detailed principles of the execution of the provisions of the new Directive of 2010 were set forth in the Committee's Executive Ordinance (UE) No. 1189/2011<sup>3</sup>. The aforementioned ordinance also incorporates two attachments. The first of them provides a template of a unified notification form incorporating crucial pieces of information on documents being the subject for notification (that are presented to the addressee of the notification). The second annex is a template of the discussed uniform instrument allowing for recovery of public claims in a Member State being the applicant.

The consequence of the engagement of Poland of the EU integration-related undertakings<sup>4</sup> was the introduction of the aforementioned legal solution to the domestic legal order. It was possible thanks to the adoption of the amendment act of 2000<sup>5</sup>, which entered into force on 15<sup>th</sup> January 2001. Thanks to the novelization, it was possible to add Chapter 7, section I to the Act on Enforcement

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3 Executive Ordinance of the European Commission (UE) no. 1189/2011 of 18<sup>th</sup> November 2011 on detailed principles of certain law regulations set forth in the 2010/24/UE European Council Directive on mutual support in reclaiming outstanding debts in the form of taxes, custom fees, and other claims (The Journal of Laws of the EU L.2011.302.16), hereinafter referred to as the 1189/2011 Ordinance.

4 See: Article 68 of the European Agreement of 16<sup>th</sup> December 1991 inaugurating a mutual cooperation between the Republic of Poland on one hand and European Union Member States on the other, the Journal of Laws of. 1994, no. 11, pos. 38 with amendments.

5 Act of 8<sup>th</sup> December 2000 on the amendment of the Act on Executive Administrative Ordinance, Act on Taxes and Local Fees, Act on Interest Rate Subsidies for Some Bank Loans, Act on Public Trading in Securities, Act on Tax Ordinance, Act on Public Finances, Act on Corporate Income Tax, and Act on Commercialization and Privatization of State-run Enterprises – as a part of proceedings aimed at the adjustment of domestic legal order to the legal order of the European Union, The Journal of Laws of 2000., no. 122, pos. 1315, with amendments.

Proceedings entitled: “Providing support to a foreign country with regard to the collection of financial claims on its territory and seeking assistance of a foreign country while collecting such claims on the territory of the Republic of Poland.” Further changes of the domestic legal order in the analyzed area were connected with the initiation of the consecutive stages of integration of the EU Member States in the analyzed area. The last important amendment introduced to Polish regulations on mutual support while collecting due claims took place in 2013. It was connected with the introduction of the 2010/24/UE Directive to the domestic legal order. The legislator decided to adopt a separate act on mutual support, within the scope of which the principles of mutual support provision by the Republic of Poland, Member States, and third party countries in terms of the collection of taxes, customs fees, and other financial claims, as well as the principles of utilizing information received in connection with mutual support for purposes other than the collection of taxes, customs fees, and other financial claims were set forth. At the same time, the legislator repealed the provisions of chapter 7 section I of the Act on Enforcement Proceedings governing mutual support, as well as all other legal provisions relating to the principles of its provisions, which had been made a part of the Act on Mutual Support. The new act is not only a faithful translation of the 2010/24/UE Directive. One should also focus on its complexity based on the act not being limited only to international cooperation between the EU member States, as it also covers support provided to third parties not being EU members<sup>6</sup>. It has to be indicated at this point that it was adopted with almost two-year delay. According to Article 28 paragraph 1 of the 2010/24/UE Directive, its introduction to domestic legal orders of individual countries should have taken place up to 31<sup>st</sup> December 2011<sup>7</sup>. Unfortunately, Poland was the last Member State to implement the 2010/24/UE Directive, which is not something to be proud of.

## 2. Range of cooperation

Mutual cooperation of EU Member States with regard to the collection of taxes, custom fees and other measures has three major forms: information exchange, documentation-related notification issuing, and recovery of public claims. Even though the last form is strictly connected with the necessity to take advantage of debt enforcement methods, it has to be stated that it is frequently the only

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6 For more information see: J. Olszanowski, W. Piątek, *Współpraca państw członkowskich UE w świetle ustawy o wzajemnej pomocy przy dochodzeniu podatków, należności celnych i innych należności pieniężnych*, EPS 2014, s. 8, pp. 29-36.

7 It should be, however, noted that delays were identified in the case of legislation adoption in other EU countries, as it was with Austria, where the Directive was adopted on 1<sup>st</sup> January 2012. See: B. Ludwig, *Das neue EU-Vollstreckungsamtshilfegesetz*, SWI 2012, s. 7, pp. 323.

way to ensure due liability repayment. What is more, the cooperation should be considered executive in character, as it is focused on the protection of financial interests of Member States and especially – on performing after-effect actions leading to the collection of indebtedness. Even the very name of the 2010/24/UE points to mutual cooperation in recovery of public claims. The executive character of the aforesaid support is not altered by ascertainment, according to which two of the enlisted collection forms are not connected with the performance of execution-related proceedings. However, they frequently serve a preparatory role, allowing for the execution of more complex undertakings resulting in recovery of public claims. In other words, the performance of execution-oriented proceedings is always preceded by the realization of preparatory actions aiming at the specification of the amount and location of assets, as well as at the notification of the debtor about the initiation of executive procedure.

The analysis of Article 2 paragraphs 1 and 2 of the 2010/24/UE Directive shows that when it comes to mutual support subject, the focus is on specific categories of financial claims, with the most important ones being tax and custom fee-related ones. Article 2 *ab initio* of the Act on Mutual Cooperation explicitly states that the said act should be relied on while attempting to collect financial claims. *A contrario*, it does not cover non-financial claims. In other words, the international cooperation between European Union Member States in the discussed area is oriented only towards the protection of financial interests of individual countries. Therefore, while applying for the collection of financial claims by Polish public authorities, the provisions of the third section of the Act on Enforcement Proceedings.

### 3. Rules of cooperation

Mutual support in terms of reclaiming tax claims in EU member states is governed by the principles of the 2010/24/UE Directive, which was introduced to national legal orders in all EU countries and the Ordinance No. 1189/2011. The analysis of the applicable legal act together with the effects of its adoption makes it possible to distinguish basic rules presented below which, while understood as directive-like statements, may lead to the specification of legislative actions, nature of legal provisions interpretation process, specification of law enforcement paradigms, and ways of taking advantage of various rights granted to certain entities<sup>8</sup>. In other words, general principles of cooperation between EU member states in relation to tax-related claims are legal norms of basic, key importance for the adopted collaboration model and the mode of its operation.

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<sup>8</sup> S. Wronkowska in: S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznan 2001, pp. 186-187.

Both in the case of the 2010/24/UE Directive and the Act on Mutual Cooperation, in spite of devoting separate chapters to provisions regulating all types of support applications and general principles of mutual cooperation, as it is with section II title II of the Act on Mutual Cooperation, there is no general principle catalogue based on which mutual support can be provided. Nevertheless, there are attempts to set forth such a catalogue made by the representatives of the doctrine<sup>9</sup>. Leaving aside legal principles resulting from the Constitution of the Republic of Poland and general principles of Administrative Proceedings Code and Act on Enforcement Proceedings and focusing on legal framework already in place, one has to highlight the following principles:

- a) trust,
- b) providing support on request of a Member State
- c) equal treatment of national and foreign claims,
- d) application of country's own procedural law,
- e) confidentiality,
- f) digital communication form,
- g) indirectness.

#### 4. Forms of cooperation

Directive No 2010/24/EU retains three forms of mutual assistance specified in previous regulations, *id est* the provision of information by one member state, notification of an interested party or other persons of legal acts, and enforcement or indemnification of public claims (Paduch, 2012: 44), whereas the scope of mutual assistance was expanded and, in general, it covered any and all public claims (Craig, 2012: 21). Concurrently, it is necessary to add that albeit the directive does not specify it directly, the mutual assistance may only apply to pecuniary claims<sup>10</sup>.

The very first of the existing cooperation methods is the exchange of information between Member States, which covers all types of data on facts and legal circumstances relating to the attempt to collect claims discussed in detail in Article 2 of 2010/24/UE Directive. It is the least demanding form of cooperation,

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<sup>9</sup> R. Seer, *Die Vollstreckungsamtshilfe in Steuersachen nach der neu gefassten Beitreibungsrichtlinie 2010/24/EU*, IWB 2011, s. 4, pp. 147-149; E. Cisowska-Sakrajda in: red. J.P. Tarno, *Doradca podatkowy w egzekucji administracyjnej należności pieniężnych*, Warsaw 2012, pp. 236-243.

<sup>10</sup> A. Skoczylas in: *System Prawa Administracyjnego. Prawo procesowe administracyjne*, R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), Warsaw 2010, pp. 304, 338.

the utilization of which may lead either to resorting to more advanced cooperation instruments, mainly focused on effective recovery of public claims, or to withdrawing cooperation with a given Member State.

The second form of cooperation is the so-called notification. This form of mutual support is taken advantage of if there is the need to deliver or inform the second party about any documents, including those of judicial character, issued by authorized authorities of the Member State applying for support and relating to claims covered by the 2010/24/UE Directive. This form of cooperation ensures the proper execution of administrative proceedings in the applying Member State by allowing the notification sender to be granted the confirmation of its reception and, in some cases, taking legal actions.

The third cooperation form is the collection of a specified liability by the cooperating Member State on request of the country applying for support. In such a case, recovery of public claims proceedings are initiated against a passive entity on the area of a foreign country which has applied for support of a Member State. The said form of support is the most comprehensive one, which also results in most significant procedural consequences. In the discussed scenario, there is a remarkable engagement of the employees of the cooperating body. What is more, the realization of an application to collect due liability may result in the necessity to resort to forceful recovery of public claims methods. It has to be pointed out once again that the basic premise for the effectiveness of the discussed method (similarly to the two aforementioned ones) is the treatment of the foreign claims in the same manner as the domestic ones are treated.

## **5. Conclusion**

The legal bases presented within the scope of this paper with regard to the collection of tax-related claims are part of comprehensive collaboration scheme involving administrative bodies of Member States attempting to work together with regard to tax collection. The international mutual assistance is one of the fundamental principles of the international tax law (Ruiz, 2003: 15). The said cooperation is mainly based on providing support in forms allowed by applicable law regulations in order to achieve a set goal, be it data collection or liability reclaiming. The aforementioned collaboration takes place on various legal levels within the scope of the Organization for Economic Co-operation and Development, the NATO, and the European Union. The cooperation being the major subject of this paper belongs to the last of the specified levels. It is based on mutual service and support provision by the EU member states in three forms allowed by law: information exchange, mutual notification on issued documentation, as



well as collection and securing claims in order to protect financial interests of Member States and ensure the neutrality of the internal market.

Cooperation understood in the said way is based on several basic assumptions that are considered to be general principles within the scope of this paper. Among them, there are: trust principle, support provision on request rule, equal treatment of foreign and domestic claims rule, application of country's own procedural law rule, confidentiality principle, digital communication rule, as well as indirectness principle. The majority of the enlisted rules relate to the same process of cooperation between Member States. The first and supposedly the most important rule is the trust-based one, in the case of which, aside from normative undertakings, the factual trust of employees of authorities of individual Member States towards each other is of utmost importance. The said trust depends on the very attitude of the employees towards new cooperation mechanisms and their willingness to truly engage in helping other countries while at the same time not being sure if similar support would be provided if claims had to be collected by the other Member State. Trust may be increased or decreased by the level of efficiency of provided help, which is mainly manifested in the amount of collected financial claims.

An indirect indicator of building trust in the reasonability of mutual cooperation aiming at recovery of public claims and its effectiveness is the creation of separate bodies engaged in mutual help fostering. The level of trust can be increased by extending the competences of the already existing bodies, as well as by creating completely new ones the major aim of which is to collect claims. Such entities may be, for example, Central Liaison Office and local liaison offices, which serve the role of intermediaries between parties expressing the need or willingness to cooperate in one of the discussed forms.

Cooperation mechanisms discussed within this paper and relating to recovery of public claims are, unfortunately, not efficiently taken advantage of in practice. Even though the number of issued applications is remarkably high and tax-related claims that should be collected amount to billions of Euro, the due tax-related claims reclaiming coefficient is on a dramatically low level as it is equal to 5 %. While taking the said fact into consideration, one may ask why the outcome of mutual cooperation-related undertakings is so far from being satisfactory.

Tightening procedural bonds of cooperation, including the elimination of barriers connected with the necessity to mutually accept official documents issued in one country by the representatives of another member states, it may be assumed that major cooperation effectiveness-related limitations are not procedural in character, as there is a remarkable possibility in this area for the development of further cooperation schemes and paradigms. It has to be mentioned that a

country applying for support should be in possession of efficient tools allowing for the realization of the application. An important role should also be played by the European Commission, which should monitor the level of efficiency of recovery of public claims, diagnose disproportions between countries, and look for adequate solutions for countries which provide support in the least satisfactory manner. It has to be stated at this point that according to Article 27 paragraph 1 of the 2010/24/UE Directive, the European Commission is informed by all the Member States about the number of applications issued, as well as about the amounts to be collected by cooperating entities.

While looking for the reasons of such a low effectiveness of cooperation between EU countries in the discussed area, one should also take into account that in individual countries, there are highly specific data gathering and both civil and legal recovery of public claims, which may greatly impact the usefulness of offered help. On the one hand, the effectiveness is connected with the factual engagement of administrative workers in collaborating country; on the other hand, it is also affected by the existing legal possibilities of acquiring certain data or starting debt collection procedures. In other words, the efficiency of legal cooperation is to a notable extent affected by the success rate of recovery of public claims undertakings executed in individual countries.

When it comes to further cooperation prospects of EU Member States with regard to recovery of public claims, it will surely be developing both in terms of improving procedural regulations and socio-economic aspects, mainly due to the constantly increasing rate of migration in Europe. The proper application of currently existing collaboration tools, as well as the elimination of possible problems strictly connected with their use, are also of utmost importance. Only then can the level of trust between individual EU Member States be increased. Aside from a legal dimension, it has also a real, social one that is difficult to verify. It strongly depends on the effectiveness of mutually provided support.

To sum up, it has to be pointed out that trust building process can be increased by a higher transparency of quantitative data relating to cooperation. Some countries are unwilling to share any pieces of information strictly connected with collaboration, even though they do not include exact data of supervised entities or quantitative data of particular companies or organizations. In the said aspect, one can notice remarkable differences between internal regulations of individual countries defining tax-related and national confidentiality.

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## **УЗАЈАМНА ПОМОЋ ИЗМЕЂУ ЗЕМАЉА ЧЛАНИЦА ЕУ У НАПЛАТИ ЈАВНИХ ПОТРАЖИВАЊА**

### **Резиме**

*Питање ефикасног принуденог извршења јавних обавеза је од суштинског значаја у околностима повећаног обима миграција, као и интензивнијег протока међународног капитала. Из тих разлога било је неопходно да се успоставе правни оквири за пружање узајамне помоћи између држава чланица ЕУ у наплати јавних потраживања. Главни циљ овог рада је да прикаже развој система наплате јавних потраживања у земаљама чланицама Европске уније. Први део рада даје кратак исто-ријски преглед европских прописа који регулишу међународну узајамну помоћ у процесу наплате јавних потраживања. Централни део рада даје приказ важећих правних оквира који уређују облике међусобне помоћи. Позитивноправни прописи ЕУ уређују три облика међусобне помоћи: пружање информација, обавештавање заинтересованог лица или других лица о позитивноправним актима, и принудно извршење, обештећење или наплата јавних потраживања. Најзначајнији (основни) облик узајамне помоћи је помоћ у наплати јавних потраживања. Подробна анализа овог питања указује да ће међународна узајамна помоћ и сарадња међу државама чланицама ЕУ у погледу наплате јавних потраживања наставити да се продубљује.*

**Кључне речи:** Европска унија, узајамна помоћ, земље чланице ЕУ, наплата јавних потраживања.

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## **AN ATTEMPT TO CONTRIBUTE TO THE THEORY OF ACQUIRED RIGHTS AND (NON)RETROACTIVITY OF LAW**

**Abstract:** *The essential condition for the rule of law is not only a consistent application of laws, which are in the interest of the majority of citizens, but also the need to ensure legal certainty in terms of time validity of laws. Therefore, in order to ascertain the citizens' legal status and enable them to live in the circumstances of legal and general social certainty, it is essential to ensure that the laws do not have a retroactive effect. The prohibition of retroactivity of laws had existed way back in Ancient Rome. In the contemporary legal theory and practice, retroactivity is precluded by the institute of acquired rights. The most reliable criterion for defining acquired rights, which is taken from the theory of Ferdinand Lassalle, is embodied in the fact that the acquired rights are those rights which are based on the acts of free will of individuals. Therefore, the acquired rights are express acts of free will, accompanied by recognized legal consequences. These are finite acts, given that individuals' subjective rights are recognized on the basis of these expressed final acts of free will.*

*However, the express act of free will does not exist only in case of acquired rights. It is also present in some other legal situations, for example: in pending cases and "expectatives" (legitimate expectations); but, in contrast to the acquired rights where the legal consequence ensues, the legal consequence is absent in pending cases and "expectatives" due to changes in the law. Therefore, we believe that pending acts and "expectatives" should also be granted protection against retroactivity, considering the fact that the absence of legal consequence is due to the will of the legislature rather than the will of individuals. Any other solution is contrary to the principles of legal certainty.*

**Keywords:** *legal certainty, law, retroactivity, acquired rights, pending cases, "expectatives".*

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## 1. Introduction

As compared to the society where legal certainty does not exist, where citizens' rights are only declaratively respected and where many legal gaps in the legal system allow for different forms of abuse, there is the society where laws are consistently applied, where the principle of legality is respected and where the legal system does not allow for legal uncertainties of any kind. However, such society still does not necessarily imply that citizens' rights are guaranteed and exercised at the highest level.

In history, there were different forms of authoritarian political regimes, such as the police states, where the laws as such were mostly implemented but these regimes were certainly not democratic as they applied laws which did not protect the interests of the majority of citizens but of the minority in power. Obviously, in order to ensure legal and general social security, the consistent application of laws is insufficient. Even if such laws did not imply the protection of the interest of the minority in power but the interests of the majority of citizens, it still does not mean that there is general security and the rule of law in such a society, given that legal security is certainly not a characteristic which can depend only on the quality of legal acts, their content and the consistency of their application! Legal security is a quality which also depends on the time validity of laws, i.e. on whether the laws apply to cases which occur after the laws were adopted, and whether they also apply to cases which occurred before certain laws were adopted.

Accordingly, it is insufficient to have good laws and apply them consistently; it is necessary to apply the enacted laws in a manner that does not jeopardize legal certainty and cause the feeling of insecurity among citizens in terms of exercising their acquired rights as well as the rights they are entitled to under the law. In effect, good laws and their application will be of little benefit if an individual has to be concerned for her/his legal position due to ensuing legal changes, whereby the individual is a law-abiding citizen who has fully observed the applicable law and in no way contributed to the situation which has given rise to being deprived of his/her legally acquired rights.

The basis of such insecurity is related to time validity of laws, i.e. the possible retroactivity of laws and the related respect for the acquired rights. For, if the acquired rights are nullified or abrogated due to the retroactivity of laws, citizens will have no benefit even from the best laws. Thus, if any new law calls into question the citizens' acquired or guaranteed rights, the citizens' position of insecurity will give rise to legal uncertainty, in which case there will be no big difference between bad and good laws because the retroactivity of laws will annul the positive effects of the good laws. In this way, instead of protecting

the values for which they were adopted and contributing to the progress of the society in general, the retroactive application of laws will generate insecurity and legal uncertainty, which ultimately leads to the situation which is contrary to the reasons for which laws and legal system are created and exist.

## **2. The principle of prohibition of retroactivity: a historical overview**

The principle of prohibition of retroactivity has its basis in the fact that citizens adjust their actions with the applicable laws, with intention to comply with the law and use the possibilities offered by laws, and thus reduce the uncertainty of their status when acquiring rights or being released of certain obligations. With the retroactivity of laws, citizens would not be certain that their current rights will not be taken away or their obligations increased.

For this reason, there is a prohibition of retroactivity of laws, which may be traced back to Roman law as the cornerstone of modern law. Thus, in one of his speeches, Cicero accused Veres who as a pretor had given a retroactive effect to his edict (Perović, 1995: 13-14). "The norm of Theodosius" (Constitution of Theodosius II and Valentian III of the year 440 from the Codex of Justinianus) also contains the principle according to which the law cannot be related to the past but it allows for the possibility of exceptions provided that it is explicitly prescribed by the law, even though in this period the prohibition of retroactivity was not envisaged as a separate principle but only foreseen as a rule applicable in specific cases (Perović, 1995: 16-17).

The principle of prohibition of retroactivity of laws was first explicitly prescribed in the codifications of Iustinianus (in Novel 22), which relates to the factual situation which existed during the time validity and application of that law. Yet, in Roman law, the principle of prohibition of retroactivity of laws was not proclaimed as a principle; consequently, this issue was solved on the merits of each case, by taking into account that general legal acts should have effect *pro futuro*, especially in cases involving final facts, i.e. in legal situations which ended before the new law had come into effect (Perović, 1995:18, 21).

The subsequent barbarian laws (*leges barbarorum*) resolved the issue of time validity of laws by envisaging that new laws did not apply to the acquired rights but only to current cases, given the fact that the new law was considered as interpretative law and was thus applied only to cases in progress (Perović, 1995:23).

In contrast to Roman law, the issue of retroactivity in canon law was resolved in line with the fundamental categories of canon law. As a right which is based on universal principles that exist beyond time and space, the issue of retroactive power of law was resolved as follows: given that divine laws (*ius divinum*) were

considered to be above human laws (*ius humanum*), canon law could encompass previously completed (final) acts, where such acts are deeply contrary to the canons; however, in practice, the rigidity of this principle was constrained by the benevolence of the Pope, aimed at preserving the Christian legal order (Perović, 1995: 24).

The medieval theory of statutes resolved the issue of retroactivity by enacting the rule that law can have retroactive effect only if it is explicitly prescribed in the law, and the legislator could provide it only if it is in the public interest and if it is not related to final acts (*causae finitae*), which shall not be affected. According to this theory, given the nature of things, only interpretative laws should have retroactive effect, considering that interpretative laws are not new laws but involve the interpretation of the existing law (Perović, 1995:27).

The general Land law of Prussia from 1794 (*Landrecht*) resolved the issue of retroactivity of law by prohibiting the retroactive effect of law on previous acts and facts, and envisaging that the retroactive effect can be attributed only to interpretative laws (designated as laws which interpret the previous laws), whereas legal transactions which were annulled under the old law due to a lack of form may become valid if they have no formal deficiencies under the new law (Perović, 1995:31).

The Declaration on the Rights of Man and Citizen of 1793 envisaged that it would be an act of violence if the law would impose punishment for acts committed before its adoption; thus, the retroactivity of the law is regarded as a crime. The *Code Civil* proclaimed the prohibition of retroactivity of laws (Perović, 1995:33, 34).

The principle that acquired private rights of individuals are considered to be private rights which cannot be subsequently taken away was a consequence of the position created under the influence of the *bourgeoisie* understanding of security of legal transactions, which thus rejected the theory of rights as *directa universalia* (under which all rights belong only to the sovereign who can attribute them to individuals or take them away as he pleases). These rights cannot be taken away in any social interest, unless there is a cause to believe that these rights were flawed *ab initio*. As their substance cannot be changed, the only changeable element is the form, for instance, to compensate the value of the expropriated good (Bartoš, 1930:8).

### **3. Contemporary theories on the retroactivity of law**

The supporters of the statute theory considered that the principle of prohibition of retroactive effect must not be installed as an absolute rule because it "prevents



the free development of law". The school of statute theory further elaborated the issue of acquired rights and retroactivity of laws, the result of which was the distinction between the completed or final facts, and the acts which are expected and should happen in the future (Ćorić, 2011:59, 61).

The French scholar Tullier designated the retroactivity of law as "a trap which was set to individuals by the legislator". No matter how great the power of the legislator is, he rightly noted that it must not reach such a high level as to make that an individual do what he/she had never actually wanted. Such law would be a form of violence against an individual, and it would be contrary to the very essence of the law, which implies that the applicable law is a secured and well-regulated area which ensures the exercise of free will. Such law is not a legislative act; it is the abrogation of legal concepts of free will, awareness and the individual in general (Geršić, 1995:381).

Savigny says that it is "very important and highly desirable" that the laws do not have a retroactive effect because it is essential: a) to preserve the unwavering faith and trust in the rule of applicable law; and b) to maintain the established legal and proprietary state of affairs (Geršić, 1995:364). According to Savigny's theory on the retroactive effect of law, all rules should be divided into two groups: the rules pertaining to the acquisition of rights and the rules related to the existence of rights. In light of such classification, new law must not affect the acquired rights, i.e. must not have the retroactive effect on the first group of rules, but the new law can be related to or have the retroactive effect only on the second group of rules, which are in relation to existence of certain rights, which is the continuation of the old formula of French jurisprudence that the legal rules of public law have the retroactive power (Geršić, 1995:371, 372). However, such classification is not sustainable *inter alia* because, as rightly noted by Geršić, there are public laws, such as criminal law, which in no way can have retroactive effect or be applied to acts committed before the law was adopted (Geršić, 1995:374).

The theory which had the most significant influence on understanding the retroactive effect of law and the notion of acquired rights was the theory of Ferdinand Lassalle. He connects the issues of validity of laws with the autonomy of will; in his opinion, the autonomy of will is the limit of the time validity of laws. Therefore, he defines the limit of retroactive effect of law in such a way that the law must not have retroactive effect on acts which have arisen as a result of the will of an individual, while the law could have retroactive effect on acts which have not arisen as a result of the will of an individual (Lassalle, 1861, cited from: Geršić, 1995:376).

Lassalle's notion of acquired rights was embedded in the concept of political and economic liberalism of the 19<sup>th</sup> century, and it implies that an individual undisputedly enjoys the acquired rights which the legislator could not alter with his acts (Perović, 1995:47).

What should be noted in terms of acquired rights is that there are no acquired rights in the field of public law, i.e. the laws which have absolute effect, but only in the field of private law;<sup>1</sup> moreover, according to actual theory and practice,

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1 Acquired rights can also be discussed within in the field of private law. It is considered that there are no acquired rights in the area of status rights, for which reason a new legislative act may have a retroactive effect. For instance, the legal age or business capacity is not the right acquired by voluntary act and, thus, it is not an acquired right; so, a new law will have retroactive effect regardless of whether it reduces or increases the legal age limit.

Regarding real rights, the regime of a new law is applied to all matters which are subject to civil law relations; thus, in case the law would pronounce certain things to be *res extra commercium*; the regime established by the new law would apply to all possessors who acquired those things during the time validity of the old law.

In terms of possession, ownership and right of servitude, the conditions of acquiring and losing these rights are always assessed under the law based on which these rights were created. When one acquires ownership on some property, this right remains even in case if the new law provides for more strict conditions for acquiring ownership.

As for contractual obligations, they are assessed under the law which was applicable when these obligations were created. However, when it comes to imperative norms, it is disputable in theory whether those have retroactive effect on already concluded contracts. According to some authors, a new law should not have retroactive effect; thus, if the new law would reduce the interest rate, the debtor would be obliged to pay the higher interest rate (if so concluded) even though such higher interest rate is forbidden by the later law. On the other hand, according to some other authors, if an issue from the contractual relation is regulated by the imperative norm, such a norm must be also applied to contracts concluded during the validity of the previous law.

As for disputes brought before courts, the applicable rule is that the new law is applied immediately, unless the proceeding is brought before the second instance court, when the previous law is also applied, whereby the court only assesses whether the first instance court correctly applied the old law.

Considering the obligations stemming from tortuous damage, the applicable law is the law which was in force at the time when the tort was committed.

With regard to testament, the applicable rule is that its validity is assessed according to the law which was in force at the moment when the testament was made; yet, according to some authors, the testament will be valid if it meets the criteria under the new law even though if it did not meet the criteria at the moment when it was made. In case of intestate succession, the applicable law is the law which was in force at the time of inheritance, even if the decedent died before the law entered into force.

When it comes to marriages, the rules differ for the validity of marriages and for divorces. So, the validity of marriage is assessed according to the law which was in force at the time when the marriage was concluded, while the conditions for divorce are assessed according

these rights cannot be part of the “*expectatives*” (legitimate expectations) as they are already acquired rights.

In the theory of retroactivity of law, a particular difference is made between acquired rights which must not be affected with the retroactive effect of laws and legal expectations (*expectatives*), i.e. the situation when a person did not acquire a right due to a deficiency of certain legal fact which was a condition for acquiring the right and which the person expected to be established, but the fact was missing without the person’s fault (Perović, 1995:50, 67, 68).

The basis of the institute of acquired rights is closely related to security, i.e. the order which has to the law has to establish and maintain in the society. Without the theory of acquired rights, the order of things and processes would have to be established over and over again, and the society would live in discontinuity, where the will of an individual would have no significance because his/her acts would be annulled with each change of law; thus, acquired rights represent the final safeguard of societal and state continuity. Acquired rights are a condition for the very existence of the legal order; consequently, without acquired rights, the society would have to start its legal civilization over again with each amendment of law.

The arguments against Lassalle’s theory of acquired rights, which is based on individual will and which (as cited) sublimates and symbolizes the whole theory

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to the law which was in force at the time of the divorce, even if the marriage was concluded when other law was in force.

The law which regulates relations among extramarital children and their parents is also applied to all extramarital children, including those who were born before, because such law was adopted to “satisfy certain general moral directions”. When it comes to adoption and guardianship, the applicable rule is that all new laws are applied to all adoptions and guardianships no matter when they were established.

In line with the rule *tempus regit actum*, the validity of the form of legal transaction is always assessed according to the law which was in force at the time when the legal transaction was done.

Finally, the question of retroactive effect of the law is raised in case of acquiring rights (*usucapio*) or losing rights (obsolescence) due to a time flow. Here, situations may differ, depending on whether the new law provides for new conditions which the previous law did not envisage (for instance, legal possession) or whether it provides for a different time limit from the one in the previous law. In the former case, when the law provides for different conditions, the applicable rule is that the new law applies to all situations in progress, considering that no rights was acquired under the old law and that there were only legal expectations involved. In the latter case, when the time limit is changed, it is first assessed whether the legislator has regulated this issue; if not, either the old law or the new law may be applied, or the solution under which the time limit is calculated proportionally to validity of both laws to each part of the time limit which elapsed under the regime of both laws respectively, which is considered to be the most acceptable solution (Perović, 1995:67-75).

of acquired rights, are that the individual will is above the law and public interest, and that it represents artificial shield which serves the purpose of maintaining the current order; thus, instead of "answering many questions of conflict of law in time, this theory examines which rights are acquired in such way that must not be "touched" by any reform of the future legislator" (Perović, 1995:76). It is further emphasized that Lassalle's theory is based on abstract notion of human freedom, whereby this theory does not take into account a series of factors which condition and limit such freedom; thus, instead of finding (through the state) the "linking points" between individuals and the organized society, this theory juxtaposes the acquired right of an individual to the power of the legislator, putting this right above the will of the legislator (Perović, 1995:76, 77). It also points that the maintenance of individual rights in a way suggested by Lassalle's theory "should be observed through social interests which are reflected in the need for social, economic and legal security", which is not addressed in Lassalle's theory because such "approach is limited by the frames of individualistic conception" (Perović, 1995:63, 64).

Arguments against the theory of acquired rights, and in particular against this theory as proposed by Lassalle, can also be observed in the "theory of social interest". According to this theory, social interest is in accordance with the principle of constitutionality, legality, freedoms, rights and obligations of humans and citizens, whereas the forced power of a "legal situation" must be based on the law as a general act of collective conscience and public needs, and "not on abstractly understood will of an individual". According to this theory, given that social interest includes all social determinations stated in the constitutional order, including the individuals' will and the general interests as a whole, in order to answer the question on the retroactive effect of law it is completely irrelevant whether a right is acquired by a willful act of an individual; what matters is the fact whether the retroactivity of law impairs the general principles on which the legal and social organization of a community is based. Accordingly, the law can have a retroactive effect only if it is in the social interest which is determined by the legislature through adoption of laws, by giving higher importance to retroactivity of law than to the legal security, which would exist if the law was not given the retroactive effect! (Perović, 1995:131, 132)

Furthermore, it is stated that the social interest is subject to certain restrictions, as it can be determined only by the body which passes the laws; thus, with regard to the role and authority of the institution which passes laws, it is stated that we can consider that such fact bring enough confidence in the adequate application of the theory of social interest. It is accepted that the assessment of the necessity of the retroactive of laws should be left to the legislator, in order to allow the legislator to determine the necessity of social interest in comparison

to the principle of social, economic and legal security. Therefore, according to this conception, it should be determined that the retroactivity is imposed as an imperative of the social interest, due to which the principle of legal and other security is intentionally sacrificed (Perović, 1995:137-142).

Considering the solution that the issue of retroactivity of law should be resolved by stating that the applicable law is embodied in the will of the legislator, Gligorije Geršić rightly notes that if the will and the intention of the legislator resolves this issue, then legal science has no role there except to interpret the law! (Geršić, 1995:365) Savigny also thinks that the issue of retroactive effect of law could not be reduced to the legislator's will but to the internal nature of those rights that the new law refers to (Geršić, 1995:370).

#### **4. Final considerations**

Certainly, the acquired rights represent the boundary line between the society of legal civilization and the society in which property, destiny and values of individuals and the society depend on the will of the legislator. Considering the available solutions, we think that the most acceptable definition of acquired rights was given by Lassalle in line with the criterion of individual will, as the only criterion that can offer reliable grounds for defining acquired rights.

However, we note certain inconsistencies in applying the criterion of acts of will of individuals to legal situations which must be excluded from the retroactive application of law. Namely, it is noted in theory and practice that acts in progress and *expectatives* (legal expectations) should not be excluded from retroactivity, unlike the acquired rights.

An acquired right is certainly a completed act which represents the legal consequence created on the basis of a stated will. As a completed act, it must be excluded from the retroactivity of law. In case of acts in progress, there was also undisputedly expressed will but the law was amended before the occurrence of the legal consequence; thus, as compared to the acquired rights, the legal consequence which would have occurred under the old law is missing.

In case of legal expectations (*expectatives*), the legal consequence still has not occurred, but it is expected to occur. In relation to expectatives, there are three possible situations: firstly, due to the nature of expectatives, an individual may not have taken any action although he/she might have expected the occurrence of legal consequence; secondly, an individual may have taken certain actions which were the expression of his will (for example, when a person has possession of a thing in case of acquiring ownership through *usucapio*); and thirdly, an

individual did not take any legally relevant action based on which he/she would indicate the interest to acquire certain right although he/she could have done it.

Considering all the above stated cases: the acquired rights, acts in progress and expectatives, we do not consider it fair and just that law should not have retroactive effect only in case of acquired rights whereas it may have a retroactive effect in the other two cases, involving acts in progress and expectatives. Such a position may be justified on two grounds.

Firstly, if an act which occurred through an expressed will is taken as a criterion, which is accepted as a general solution, then this condition is met not only in case of acquired rights but also in case of acts in progress and in case of expectatives (except in the third case, i.e. when a person in no way has shown an interest to acquire rights); however, in contrast to acquired rights, in case of acts in progress and expectatives (except in the third case of expectatives), the legal consequence was missing due to amendments of the law. In all these cases, an individual did everything that was in his/her power, i.e. he/she took appropriate action which is legally considered to have the significance of a legally relevant fact; however, his/her individual rights was not recognized due to the change of the law, which is the fact that he/she could not have influenced. Therefore, we cannot consider as just a solution under which certain right was not recognized to an individual only because the law was amended, whereas it is certain that such right would have been recognized (based on the acts of will and consequences attributed to those acts under the law) if the law had not changed. We consider that the retroactive effect of the law should exist only in the third case of *expectatives*, given that the individual in no way expressed a will to acquire certain subjective right and, consequently, there will be no damage if the law is retroactively applied, i.e. if the subjective right under the old law is not recognized. Thus, in case of extension of time limit of *usucapio*, if none of the potential owners has taken actions based on which the start of time flow could be calculated, then there is no basis to recognize one's acquisition of ownership according to a shorter time limit provided by the previous law.

The second reason, which rests on the first one, is legal security. The retroactivity of the law would call into question the principle of legal security, which refers to both personal and property security, and which implies that no person who obeys the law shall sustain damage. Legal security is defined as "a public interest to enact clear and predictable norms which would tell the citizens how to behave in order to avoid conflict with legal norms or to predict their chances to win a dispute" (Neuhaus, 1963:795-807, cited from: Ćorić, 2011:226). By the change in legislation, a person who was not in conflict with the law, who abided by the law and expected legal consequences which were recognized to others

in the same or similar situations, was thus (without his/her fault) brought into an inferior position as compared to others who were in the same position but whose subjective right had been recognized before the change in legislation.

Consequently, in the context of the stated legal relations where acquired rights exist, we consider unjust to apply the new law to these legal disputes because the parties relied on the old law, assessed their chances for success in line with the old law, and maybe they would not have started the proceeding if they had known that the law would change. This may significantly aggravate the legal position of some parties in the dispute, as they were unable either to predict or to avoid the change in legislation. Such solution is an example of unjust solution which leads to a lack of legal security.

If we look back to more concrete relations, we consider unjust a solution under which conditions for the divorce of marriage are assessed in accordance with the law which is in force at the time of the divorce, and not in accordance with the law which was in force at the time when the marriage was concluded. This is because the law may be changed in relation to the law which was in force at the time when the marriage was concluded to such an extent that it is possible that one of the parties would not have accepted to conclude the marriage if such conditions for a divorce had existed at the time when the marriage was concluded. Thus, if legal amendments would aggravate or facilitate the divorce, or if changes were introduced to resolve the property relations of the spouses in a different way, it is possible that one of the parties would not accept to conclude the marriage if he/she had been aware of such a possibility when the marriage was concluded.

Likewise, we cannot consider as a just solution the change of the time limit for *usucapio*, which is cited as an example of the expectative (legal situation which should not be afforded legal protection in an unmodified form). If a person has met all conditions provided by the current law, expecting to become the owner when the time limit expires, we do not see any reason why such a person should not become the owner and why he/she should sustain damage due to the legislative acts of others (the legislator) which include extending the time limits. For these reasons, we also consider unjust the aforesaid modified solution, under which the past and remaining time period are calculated in proportion to the length of the time limit from both laws.

Therefore, if the acts which occurred as a consequence of expressed will are taken as the criterion and the limit of the retroactivity of law, then we think that that criterion should be applied consistently, even if the legal consequence is missing due to the change in legislation. This is essential for attaining the minimum of legal security.

Also, we cannot agree with the theory of social interest, under which there is a conflict between the public interest (reflected in the retroactivity of law) and the personal interest (in the form of the acquired right) in terms of the time validity of law, whereby the preference should be given to the public interest, i.e. the retroactivity of law. In our opinion, legal certainty should be the ultimate principle in the society because this principle ensures the protection of the rights of the minority in relation to the majority, and the rights of the weaker party against the stronger one. By allowing for the retroactivity of law, i.e. by narrowing legal certainty, the society would go back to a level which existed before the creation of laws, when the rule of the strongest prevailed. Thus, the theory of social interest is *contradictio in adjecto* because the arguments of this theory supporting the retroactivity of laws are actually arguments in favor of the status which had existed before the creation of the law, i.e. they are arguments against the existence of laws.

Moreover, this theory states that the retroactivity of laws protect the public interest. If there is a public interest in the retroactivity, then it is only an abstract, hypothetical interest of the majority. On the other hand, in case of acquired rights, acts in progress and expectatives, there is the most concrete interest of an individual; thus, by envisaging the retroactivity of laws in these cases, only concrete damage would be imminent. Between the abstract and the hypothetical interest of the majority (on the one hand) and the concrete and actual damage which would be sustained by individuals due to retroactivity (on the other hand), this theory gives preference to the hypothetical interest of the majority, which certainly cannot be considered fair and just.

The majority should be given preference over the interests of individuals only in case the damage which the majority would sustain by respecting the rights of the minority would be much bigger than the benefit which would be attained by individuals. Only then would it make sense to apply retroactivity, whereas the damage which individuals might sustain in such case should be compensated in the just manner.

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## **ПОКУШАЈ ДОПРИНОСА ТЕОРИЈИ СТЕЧЕНИХ ПРАВА И (НЕ)РЕТРОАКТИВНОСТИ ЗАКОНА**

### **Резиме**

*Услов постојања правне државе није само доследна примена закона који су у интересу већине грађана, него је неопходно да постоји и правне сигурности у смислу временског важења закона. То значи, да би грађани били сигурни у свој правни положај, односно да би живели у стању правне и опште друштвене сигурности, неопходно је да закони немају ретроактивно дејство. Забрана ретроактивности закона је постојала још у Риму. Начин на који је у савременој теорији и пракси онемогућена ретроактивност закона пронађен је у институту стечених права, а као најпоузданији критеријум у дефинисању стечених права, који је преузет из теорије Фердинанда Ласала, састоји се у томе да су стечена права она права која су настала на основу аката воље појединаца, тако да стечена права представљају акте воље појединаца којима је призната правна последица. То су свршени акти, с обзиром да су на основу аката воље појединцима призната субјективна права. Међутим, чињеница изјављених аката воље појединаца не постоји само код стечених права, него постоји и код још неких правних ситуација, као што су акти у току и експектативе (легитимна очекивања), само што је, за разлику од стечених права, код аката у току и експектатива правна последица, услед промене закона, изостала. Зато сматрамо да актима у току и експектативама, такође треба признати заштиту од ретроактивности, с обзиром да је код њих правна последица изостала вољом законодавца, дакле независно од воље појединаца. Свако другачије решење је у супротности са принципима правне сигурности.*

**Кључне речи:** *правна сигурност, закон, ретроактивност, стечена права, акти у току, експектативе.*

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## **UNION SECURITY CLAUSES VERSUS FREEDOM OF TRADE UNION ASSOCIATION**

**Abstract:** *The paper analyzes the freedom of trade union association and organization in light of the union security clauses with particular focus on their admissibility in the Macedonian labour law system and the level of their compliance/non-compliance with the Macedonian labour legislation.*

*The union security clauses are reviewed in terms of the initiative for the establishment of a Fund for promotion of social dialogue in the Republic of Macedonia which is supposed to provide for the possibility of "obliging" the non-unionized workers to pay an agency fee in order to be subsumed under the normative content of the concluded collective agreements. Starting from this, the paper discusses the possible resolution of issues concerning the interpretation of the workers' freedom of association as well as the applicability of collective agreements.*

*In the paper, the authors provides an analysis of the "union security clauses" from the perspective of comparative labour law and comparative judicial practice of certain countries where such clauses are envisaged, as well as the countries where they are prohibited.*

**Key words:** *collective agreements, union security clauses, trade union, agency, freedom of association.*

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## 1. Introduction

Trade union security clauses are consequentially related to the recognition of the right to union association toward the end of the XIX century. They appeared as a result of the need to strengthen and consolidate the position of trade unions and their relationship with the employers. The reasons for enacting these security clauses are rooted in the need for the trade union to develop a self-defence mechanism, which would provide them with stable and strong organization, and enable them to face the serious challenges in the protection and promotion of the workers' rights (Cordova, Ozaki, 1980: 20). Trade union security clauses are usually defined as contractual provisions for the benefit of the trade unions, based on which, the *employment* or the *work* of employees with an employer (*i.e.* branch or sector) directly depends on their membership in a trade union or providing a monetary fee to the union.<sup>1</sup> In any case, in order for contractual provisions to be treated as "union security clauses" they must contain the following characteristics: organizational purpose (*i.e.* clear purpose, directed towards strengthening the security and power of the trade union as a workers' organization), the element of compulsion (*i.e.* compulsory application for the employer and/or workers), and direct application to all workers covered by the collective bargaining (*i.e.* to workers who are members, and those who are not members of the trade union signatory of the collective agreement) (Cordova, Ozaki, 1980: 26).

In theory and practice, there are different classifications within the structure of different types and forms of union security clauses, such as: "closed shop" clauses, "union shop" clauses, "agency shop" clauses, "membership" clauses, "union hiring hall" clauses, and many other union security clauses. For the purpose of our analysis, we have considered the "closed shop" clauses (clauses for mandatory trade union membership) and "agency shop" clauses (clauses on mandatory payment of fees for using the benefits of the concluded collective agreement, which would be paid by workers regardless of their union status).

## 2. Clauses on mandatory trade union membership ("closed shop" clauses)

The clause on mandatory trade union membership (the "closed shop" clause) is a contractual provision, which obliges the worker *to be* or *become* a member of a trade union, as a necessary precondition for exercising the worker's rights of employment and work (Lockton, 2003: 390-391). The clause on mandatory trade union membership obliges the workers to be members of a trade union (as

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<sup>1</sup> See: Gotovac, V., *Ukidanje Instituta Doprinosa Solidarnosti – posljedica utvrđenja postojanja negativnog aspekta slobode udruživanja u ustavnopravnom poretku Republike Hrvatske* (Radni i službenički odnosi, Zagreb 2005), p.55.

early as in the phase of applying for a vacancy), as a precondition for employment with the employer or to successively become members of the trade union (upon conclusion of the employment agreement) as a condition for existence and/or continuation of their employment relationships (Barrow, 2002: 263-264). In the case of “closed shop” clause, the termination of the status “member of a trade union” results automatically in termination of the worker’s employment relationship with the employer, i.e. cancelation of their employment contracts. If we take in consideration the *criterion “previous” or “successive” mandatory membership of the worker in the trade union*, the theory recognizes two types of clauses on mandatory trade union membership, such as: *clauses on mandatory trade union membership before concluding the employment relationship (pre-entry closed shop)* and *clauses on mandatory trade union membership upon concluding the employment relationship (post-entry closed shop)* (Sargeant, Lewis, 2010: 326). The clause on mandatory trade union membership obliges all potential employees (i.e. employment candidates) to become members of the trade union before they conclude employment contract with the employer. Actually, this clause provides the trade union with the competence of an “employment mediator”, i.e. entity which “controls” the offer of workforce and, thus, future employments with the employer. As opposed to the clause on mandatory trade union membership before employment, the clause on mandatory trade union membership after employment obliges workers who have concluded employment contracts with the employer to become members of the trade union immediately after being employed or upon certain period of time from the moment of employment. The clause on mandatory trade union membership upon employment is also called “union shop” clause.

In theory, there are different opinions and arguments “for” and “against” the clauses on mandatory trade union membership (“closed shop”). The *supporters* of these clauses underline their role in strengthening trade union solidarity among workers with their final objective: a stronger position of trade unions in the process of collective bargaining with employers. The greater the number of workers’ members of a trade union party in the collective bargaining or party of the concluded collective agreement, the lesser the probability that the employer (objectively the stronger contractual party) would neglect the demands and interests of workers for betterment of their working conditions (Lockton, 2003: 390-391). Clauses on mandatory trade union membership also affect increasing the stability and probability in the industrial relations. They create “the adequate channel of communication” between the employer and the employees, based on which the employer exercises its managerial, normative and discipline prerogatives. Still, it seems that modern systems of industrial relations are dominated by arguments “against” this type of union security clauses. Argu-

ments "against" are usually expressed by supporters of the idea for individual rights as the foundation of the modern liberal and democratic societies. In this context, "the crucial argument" is the argument expressing the individual and irrevocable workers' right to decide whether they wish to become members of a trade union. If workers have a guaranteed fundamental right to be *associated* with a trade union, their fundamental right *not to associate* with a trade union must also be guaranteed. Actually, the right of workers *not to be* members of a trade union or the trade union signatory of the collective agreement points out the "negative" aspect of the freedom of trade union association.

### **3. Clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement of non-unionized workers (agency shop clauses)**

The clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement (agency shop clauses) do not oblige a worker who is not member of the trade union signatory of the collective agreement to become member thereof; however, they oblige the worker to pay at least a certain fee, identical, or similar to the one paid by workers who are members of the trade union (Cihon, Castagnera, 2011:450). Compared to the clause on mandatory membership in a trade union ("closed shop" clause), the clause on mandatory payment of a fee for using the benefits of the concluded collective agreement regardless of the trade union status of the worker is a more acceptable clause for trade union security, both theoretically and from the aspect of the applicable legislation. Clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement are rooted in the premise that collective agreements concluded at a certain level oblige all workers regardless whether they are members of a trade union or not. Thus, just like those workers who are members, non-members shall be obliged to pay a certain amount/contribution, intended to "cover" the costs of the trade union incurred in the collective bargaining procedure and in the implementation of the concluded collective agreement.

In practice, regulation and application of the clauses on mandatory payment of a fee for use of the benefits of the collective agreement pose the following dilemmas: *Should the fee for using the benefits of the collective agreement be treated as a "duty" (mandatory obligation imposed by the clause) or a "possibility" (option available to the worker not member of the trade union, to be able to enjoy the benefits arising from the collective agreement)? How should we interpret and what should be covered with the "benefits arising from the collective agreement" when their acceptance by the worker who is not member of the trade union is a precondition for introduction of the obligation for payment of the fee? Should the*

*obligation for payment of the fee apply only to the “new” collective agreements, i.e. amendments and additions to the collective agreements which enhance economic and social rights of the workers, or should it also apply to the existing collective agreements? What is the status of workers paying a fee for using the benefits arising from the concluded collective agreement compared to the trade union members (i.e. do these persons have some kind of a “pseudo-trade union” status)? Finally, does the imposition of an obligation to non-unionized workers to pay a mandatory fee arises from an implicit “obligation” for workers to become members of the relevant trade union, since, regardless thereof, they are obliged to pay a sort of trade union membership fee?*

Previous issues and dilemmas only reiterate the thesis that, in general, clauses on union security (including clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement) regulate an exceptionally sensitive matter, often bordering constitutionality and admissibility in the labour related legal system of a country. Theory refers to several legal propositions whose application could mitigate the perception of unconstitutionality and illegitimacy of the agency shop clauses. Such propositions could be the following: *the general support of the clauses expressed by workers employed at a certain “collective bargaining level” (sector, branch, department, employer) in a workers’ referendum or the very acceptance of the benefits arising from the collective agreement by the workers concerned* (Cordova, Ozaki, 1980: 20).<sup>2</sup>

### ***3.1. Clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement by non-unionized workers (agency shop clauses) viewed from the perspective of the ILO International Labour Standards***

The matter of the union security clauses, including clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement (agency shop clauses) regardless of trade union membership are not subject of the international labour standards, i.e. the ILO Conventions and Recommendations. In the ILO frames, the matter of these clauses is directly interpreted through the regulations for guaranteeing the freedom of union association, i.e. the right to union organization and collective bargaining. The main (fundamental) ILO conventions regulating the matter on the freedom of association and collective bargaining are the Convention on freedom of association and protection of the right to organize (No. 87, 1948) and the Convention on the right to organize and collective bargaining (No.98, 1949). Analysing the content of these Conventions, one may conclude that they take a neutral stance as regards regulation

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2 See in: Cordova, Ozaki, 1980: 20.

of the admissibility of the union security clauses, as a part of the scope of the freedom of union association.<sup>3</sup> If the clauses on union security are recognized and admissible in the national labour related legislation or practice in an ILO member country, such country shall not have any limitations to ratify and apply the Conventions No. 87 and 98 (Šunderič, 2001:199). However, the ILO provides for principal legal opinions which may serve as a foundation in adopting a decision on regulating the matter of the union security clauses in domestic labour related systems. In this context, further on, we provide for several prominent positions of the Committee on freedom of association, which introduce the principal ILO approach regarding the legal treatment of the union security clauses, with special emphasis on the agency shop clauses.

In relation of the general union security clauses, the Committee on freedom of association provides for the following principal position: *One should make a difference between clauses on union security admissible by law from those imposed by the law. Only the latter are opposite to the principles of freedom of association and bring to creation of a trade union monopoly.*<sup>4</sup>

The International Labour Organization (through the Committee on freedom of association) expresses its position in many other cases closely related to the clauses on mandatory payment of a fee for using the benefits of a concluded collective agreement (i.e. agency shop clauses). In one such case, the Committee determined that *if the legislation recognizes the possibility for introduction of clauses on union security such as those by which membership fee is withheld from the salaries of workers not members of the trade union and who benefit the concluded collective agreement, such clauses should have legal effect only through the collective agreement.*<sup>5</sup> A similar approach of the Committee is found in its decision on withholding trade union membership fee by the employer and transferring it on the account of the trade union, which is an issue to be resolved through the process

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3 It is worth noting that as early as 1927 the idea for adoption of a Convention which would cover the "main elements" of the freedom of association, including the "negative" aspect of the freedom of association (i.e. the right not to be a member of a trade union) was presented in front of the ILO bodies. The representatives of governments and employers put efforts for integral regulation of the scope of freedom of association (covering the affirmative and the negative aspects). Nevertheless, this approach was qualified as unacceptable by trade unions. It resulted in the adoption of Conventions no. 87 and 98 which stipulate a neutral approach regarding the "negative" aspect of the freedom of association, i.e. they neither prejudice, nor obstruct the legal foundation and admissibility of the union security clauses. (See: Gotovac.V, *Ukidanje Instituta Doprinosna Solidarnosti – posljedica utvrđenja postojanja negativnog aspekta slobode udruživanja u ustavnopravnom poretku Republike Hrvatske* (Radni i službenički odnosi, Zagreb 2005), p.60.

4 See: 259<sup>th</sup> Report, Case No.1385, para.551.

5 See: 290<sup>th</sup> Report, Case No.1612, para.27.



*of collective bargaining between employers and all trade unions, but without any legal obstructions.<sup>6</sup> Furthermore, taking in consideration the principles of freedom of association, the Committee on freedom of association establishes that it should be possible, via collective agreements, to implement a system for collection of fees intended for the trade union, without any interference of the public authorities.<sup>7</sup> The ILO interpretation of the scope of the freedom of union association and the union security clauses should be a clear guideline for the countries which have or are planning to introduce such a mechanism for implementation of a certain type of union security clause.*

### ***3.2. Clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement of non-unionized workers (agency shop clauses) in comparative labour legislation***

The agency shop clauses are found in the labour law systems of the following countries: Canada, USA, Colombia, Equator, Honduras, Panama, Antigua, Trinidad and Tobago, Guinea, Nigeria, Congo, South Africa, the Philippines and Switzerland. From a comparative point of view, especially interesting are the approaches of the labour systems of the Philippines, Israel and Switzerland. A special treatment is due for the legal approach in regulating the mandatory fee for non-union workers applied by these countries.

The interest for a more detailed analysis on the manner of regulation of the mandatory fee for using the benefits of a collective agreement in the Philippines arises from the significant legal debate on the introduction of this institute and its legal foundation. First, despite the fact that it was prescribed by the labour legislation of the Philippines, the mandatory fee was then revoked by the Supreme Court with the rationale that it is discriminatory to non-unionized workers who do not want to pay any fee for the trade union.<sup>8</sup> It was again introduced

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6 See: 287th Report, Case No.1683, para.338.

7 See: 289th Report, Case No.1594, para.24.

8 The Supreme Court of the Philippines stipulated that “regardless of the benefits realized by the majority trade union in the collective bargaining with the employer, which are intended both for the members and non-members, the justification for mandatory withholding of funds from non-unionized workers is unfounded, because the use of the concluded collective agreement should be extended to all workers regardless of their membership in a trade union. At the same time, we must take into consideration the fact that the mandatory withholding funds from workers, opposite to their will, would mean discriminating such workers”. Furthermore, the Court stated that “in case when the trade union intends to be the exclusive side in the collective bargaining, it voluntarily undertakes the responsibility to represent all workers at the level, i.e. area where the collective agreement is applicable. See: Vicente.A.Cruz, *Union Security Clauses in the Collective Bargaining Agreements*

with the new Labour Code of 1974, which tried to overcome the deficiencies of the previous law, stipulating that *workers belonging to the scope of application of the collective agreement who are not members of a union with recognized right to participate in the collective bargaining, may be obliged to pay a reasonable fee equal to the contribution and other fees payable by union members, in case they accept the benefits arising from the concluded collective agreement.*<sup>9</sup>

Israel is a country where there is a developed practice for application of clauses on mandatory payment of a fee for using the benefits of a collective agreement. Employers are authorized to withhold an amount from the salary of the workers for the account of the representative trade union. Payment of a fee from the salary of the non-unionized workers becomes their obligation if there is such provision in the collective agreement, or if employees have given individual consent to accept the collective agreement. In accordance with the applicable regulations, if 30% or 1/3 of the workers are members of the trade union and if there is a collective agreement concluded on a company level or on a branch level where the trade union is a member, it means that automatically the rest of the employees of such company shall be obliged to pay a fee for using the services and advantages acquired by union members as a result of the collective bargaining and the concluded collective agreement. Trade union members pay a membership fee of 0.95% of the net salary and thus use all services provided by the *Histadrut*, i.e. the trade union. The rest of the employees using the benefits of the collective agreement concluded on a company level are obliged to pay a fee to the trade union in the amount of 0.85% of the net salary to be able to benefit the collective agreement. For the payment of this fee, workers who are not union members do not receive the services offered by the trade union to its members.

Finally, Switzerland is a country with one of the oldest and most systematic ways of regulation of the clauses on mandatory payment of union contribution. Aside the lasting practical application, the legal regulation of the so-called "solidarity fee" in Switzerland dates back to 1949, as a result of the decision by the Federal Court.<sup>10</sup> In this case, the Federal Court decided upon two union security clauses: the clause on mandatory union membership (closed shop clause) and the clause on mandatory payment of union contribution for using the benefits of the concluded collective agreement, regardless of the membership of the worker (the so-called *solidarity fee*). The Court decided "against" the clause on

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*and the Agency Provision of the Labor Code: Some problems of interpretation and implementation*, Philippine Law Journal, Vol.49, 1974, pp.689-691.

9 Labor Code of the Philippines, Art. 247 (e).

10 Case „*Mueller und Landesverband Freier Schweizer Arbeiter v. Zuercher Autogewerbeverband und Schweizerischer Metall- und Uhrenarbeiterverband*“, BGE, Vol. 75 (1949), Pt. II, pp. 305. See: Dudra.M, *The Swiss System of Union Security*, Labor Law Journal, March, 1959, pp.167-168.

mandatory union membership, and it was affirmative in relation to the second clause, accepting the arguments that workers who are not union members must bear certain “financial sacrifice” in order to enjoy the benefits arising from the concluded collective agreement. In this context, the Court made a clear distinction between “compelling workers to become union members” and “obliging non-union workers to comply with the rules of the collective agreement”. After the Federal Court of Switzerland recognized the legal foundations of the “solidarity contributions”, it faced two additional dilemmas: *The amount of the solidarity contributions and the obligatory concept of payment of such fees by workers members of another trade union*, different from the one which participated in the collective bargaining and which concluded the collective agreement. As regards the first dilemma, the Court established that the amount of the solidarity contribution should be different (significantly less, for example 50%) of the regular union membership fee paid by the rest of the union members. Prevailing arguments in this case were the explanation that the function of the solidarity fee is proportional participation of workers who are not members of the trade union signatory of the collective agreement in the costs for collective bargaining and implementation of the collective agreement. As regards the second dilemma, the Federal Court established that the obligation for payment of a solidarity fee is also applicable for workers members of another trade union, not party of the concluded collective agreement. Frequent court cases related to “union security clauses”, “motivated” the Swiss legislator to adopt a special regulation to regulate the matter of the collective agreements. The Law from 1956, *inter alia*, regulates the “critical points” with the solidarity contributions. In the attempt to establish the amount of the fee, the Law stipulates that the solidarity contribution cannot be to excessive, in order not to “force” workers who are not members of the trade union signatory of the collective agreement to become its members. In practice, this contribution is less than the amount of the union membership fee paid by union members. As for their application, the Law stipulates that solidarity contributions must have a purpose, which is participation of the workers and covering the costs for conclusion and implementation of the collective agreement or use of the privileges that are in interest of all workers regardless of their union status. As opposed to the approach of the Federal Court of Switzerland, it seems that the Law prescribes a different approach regarding the obligation of those workers who are members of another trade union to pay solidarity fee. In such circumstances, the members of the other trade union (which is different from the union – party to the collective agreement) shall not be obliged to pay solidarity contribution; however, only if their trade union does not have the possibility to affiliate to the existing collective agreement or cannot conclude similar collective agreement (Dudra, 1959:167-171).

For the purposes of this analysis, especially important are the comparative experiences from labour systems of the countries with similar or identical legal tradition as the Republic of Macedonia. The comparative analysis of the labour related legislations of several countries from central and Eastern Europe (Albania, Bosnia and Herzegovina, Bulgaria, Hungary, Montenegro, Serbia, Slovakia, Ukraine, Croatia, Poland and Romania)<sup>11</sup> showed that in almost all of the countries the trade union security clauses are not subject to legal regulation and are not legally admissible.<sup>12</sup> This conclusion does not mean that in certain periods in the development of these countries' systems of industrial relations, labour legislations of some of them did not stipulate the possibility for introducing a type of clause on union security. Such are the cases of Croatia<sup>13</sup> and Bulgaria<sup>14</sup>.

#### **4. Fee for using the benefits from the Collective Agreements by non-unionized workers in the Republic of Macedonia and the Fund for Promotion of the Social Dialogue**

In accordance with the experiences of other countries, the social partners in the Republic of Macedonia initiated the idea for establishment of a Fund for promotion of the social dialogue, which shall implement the system of payment of a fee by non-unionized workers and employers for benefiting from the concluded collective agreement. However, a necessary precondition for establishing such

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11 The research was made based on data published in the data base of regulations in the field of labor in the countries of Central and Eastern Europe (CEELex).

12 According to the data of the CEELex data base, it seems that the only exception from this rule is the labor legislation of Romania, which generally allows for introducing clauses on union security within the collective agreements. This exception arises from emphasizing the "principle of mutual recognition" according to which *every trade union may conclude any other type of agreement, convention or treaty with the employer or employers' organization, which shall be the "law" for the contracting parties and whose provisions shall apply only to the members of the contracting parties.* SDL, Art.15320011.

13 See: Article 53 of the Act amending the Labour Act of Croatia of 2003 which introduced the "solidarity contribution". Two years upon their introduction, the "solidarity contribution" provisions were reviewed by the Constitutional Court of Croatia, who at the end found them to be unconstitutional and abolished them. See: Decision of the Constitutional Court of the Republic of Croatia, no. U-I-2766/2003, U-I-469/2004, U-I-1607/2004, U-I-2206/2004, U-I-4513/2004 and U-I-4768/2004 24 May, 2005.

14 In recent history (with the amendments to the Labour Code of 1992), Bulgarian labour legislation provided "room" for clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement. This resulted in many collective agreements implemented in practice, which conditioned non-unionized workers to pay a fee called "**accession fee**". This condition caused amendments in the Bulgarian labour legislation dating back to 1996, and afterwards in 2001.

a Fund and implementing its competences is a proper legal basis for establishing the system for payment of a mandatory contribution for using the benefits of concluded collective agreements and the manner of its funding. It raises the following question: *Is the establishment of a Fund for social dialogue based on the concept of “mandatory membership fee for all workers and employers who are not members of trade unions and respectively of associations of employers, i.e. for using the collective agreement in accordance with the Constitution and the labour legislation of the Republic of Macedonia?* This question is related to the resolution of several other previous dilemmas, a typical subject of the labour legislation. It is the issue of the interpretation of the freedom of union association in the Republic of Macedonia and the application (i.e. personal scope) of the collective agreements within the Macedonian labour-related legal system.

#### ***4.1. The freedom of (union) association and admissibility of the fee for using the benefits from the concluded collective agreements in the Macedonian labour-related legal system***

The Constitution of the Republic of Macedonia<sup>15</sup> guarantees the general freedom of association (as a civil and political right), and the freedom of union association (as an economic, social and cultural right). As regards the freedom of association, the Constitution of the Republic of Macedonia stipulates that *for the purposes of exercising their economic and social rights, citizens are entitled to form trade unions. Trade unions may establish their associations and be members of international union organizations. The conditions for exercising the rights to union organization of armed forces, the Police and authorities may be limited by law.*<sup>16</sup>

*Further consideration of the freedom of union association, organizing and collective bargaining in the Republic of Macedonia is subject to the Labour Relations Act (hereinafter: the LRA)<sup>17</sup> According to the LRA, the trade union is defined as an independent, democratic and sovereign organization of workers where they voluntarily join to exercise, represent, promote and protect their economic, social and other individual and collective interests.<sup>18</sup> Employees are entitled to freely establish a trade union and be members thereof, under the conditions prescribed in the Statute or the rules of such trade union.<sup>19</sup> Together with the freedom of union association, the LRA regulates the freedom of association of employers. In this context, the same as workers, employers too are entitled to freely estab-*

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15 Constitution of the Republic of Macedonia, *Official Gazette of RM*, No. 52/91.

16 Constitution of RM, Article 37.

17 Labor Relations Act (LRA), *Official Gazette of RM*, No. 62/05.

18 LRA, Article 184, paragraph 2

19 LRA, Article 184, paragraph 1

lish association and be members thereof, under the conditions prescribed by the Statute or the rules of such association.<sup>20</sup> A key component in guaranteeing and implementation of the freedom of association of workers and employers is the voluntary concept of their membership. The LRA stipulates that *a worker, i.e. employer may freely decide to join in or leave the trade union, i.e. employers' association.*<sup>21</sup> *No one should be put in a less favourable position as a result of their membership or non-membership in the trade union, i.e. employers' association, i.e. participation or not in the union or employers' association activities.*<sup>22</sup> *In the light of such constitutional and legal provisions, one should seek for the rightful arguments for resolving the dilemma whether to introduce membership fee for all workers (who are not unionized) and employers (not members of employers' associations). The main objective of this principle of freedom of association of workers and employers, as well as of the legal provisions treating and regulating this principle, is (above all) to guarantee the positive aspects of the freedom of association, the right to organize and collective bargaining, which should be interpreted in their "broader" sense. Yet, the freedom of union association also involves negative aspects which manifest themselves through the right not to be a member of a trade union. We may conclude that the "negative aspect" of the freedom of association (i.e. not being a member of a trade union) covers a "negative" dimension of trade union engagement of workers in the union activities and a "negative" dimension of funding such activities. The interpretation of the Constitution of the Republic of Macedonia and the provisions from the Labour Relations Act offers the conclusion that the Macedonian labour-related legal system provides for an explicit ban on "forcing" workers and employers to become members in trade unions and employers' associations. Any worker and employer are individually entitled to independently decide whether to become member of a trade union or employer association (i.e. which trade union or employer association to join in). In this case, first and foremost, we speak of a ban on introduction of a so-called clause on mandatory membership in a trade union, regardless whether before (pre-closed shop) or after employment (post-closed shop, i.e. union shop).*

However, identically, one cannot decide on the correct interpretation in relation to the second dimension which reflects the "negative" aspect of the freedom of association. Arguments "for" introducing an obligation for payment of a (membership) fee for using the benefits from a concluded collective agreement by non-unionized workers or workers not members of the trade union signatory of the collective agreement may be "defended" by pointing out the *positive aspects of the freedom of association and the need to establish "equal playing ground"*

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20 LRA, Article 185, paragraph 3

21 LRA, Article 185, paragraph 1

22 LRA, Article 185, paragraph 2

between workers/members of a trade union-party of the collective agreement and participating in funding its activities and the non-unionized workers not bearing costs for funding trade union activities for the collective bargaining and concluding a collective agreement. According to these arguments, “the lack of equal position” between workers who pay and who do not pay a membership fee should be in the fact that the former directly or indirectly participate in the process of collective bargaining, whereas the latter neither directly nor indirectly participate in this process but they completely or mostly enjoy the advantages arising from the concluded collective agreement. On the other hand, arguments “against” introducing the obligation for payment of a fee for using the collective agreement by workers who are not members of the trade union signatory of the collective agreement find support with the constitutional and legal order of the Republic of Macedonia, mainly, the Labour Relations Act. It seems that the legal provision (Article 185, para. 2 LRA), which bans “*imposing a less favourable position due to membership in a trade union...i.e. participation or non-participation in the union activities*”, may be important in (potential) examination of the constitutionality and legality of any amendments which might introduce the system of mandatory payment of a membership fee for enjoying the advantages of the concluded collective agreement by non-unionized workers, institutionalized through the establishment of the Fund for promotion of the social dialogue in the Republic of Macedonia. There is a further dilemma whether introducing such a financial obligation against the will of non-unionized workers would imply direct discrimination of workers, which is prohibited by law. In this context, the Labour Relations Act stipulates that *the employer must not put a candidate for employment or an employee in a less favourable position due to... membership in a trade union... or other personal circumstances.*<sup>23</sup>

#### ***4.2. The personal scope of application of collective agreements and admissibility of the fee for using the benefits from the concluded collective agreements in the Macedonian labour-related legal system***

The personal scope of the collective agreements within the Macedonian labour related legal system applies to persons obliged by collective agreements. The Macedonian labour legislation envisages three types of collective agreements: General, Special and Individual collective agreement. In accordance with the Labour Relations Act, the general collective agreement is concluded on a national level; the special collective agreement is concluded on a branch level, according to the National classification of activities, and the individual collective agreement is concluded on a company level.<sup>24</sup>

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23 See: LRA, Article 6, paragraph 1.

24 See: LRA, Article 203.

#### 4.2.1. Personal scope of application of the General Collective Agreements

There are two types of General Collective Agreements that are concluded on a national level, i.e. on the level of the Republic of Macedonia: General Collective Agreement for the private sector in the field of economy and General Collective Agreement for the public sector.<sup>25</sup> The General collective agreement for the private sector in the field of economy *is directly applied and mandatory for employers and employees in the private sector.*<sup>26</sup> The General Collective Agreement for the public sector *applies to public authorities and other State bodies, the local self-government units, institutions, public enterprises, bureaus, agencies, funds, and other legal entities conducting public interest activity.*<sup>27</sup> *It applies directly and is mandatory for the employers and employees in the public sector.*<sup>28</sup> As regards the persons obliged by the collective agreement, it is evident that the General Collective Agreements are directly applied and are mandatory both for all employers and employees in the public, i.e. private sector (depending on the sector where the collective agreement is concluded). These provisions do not pose additional dilemmas since they have *erga omnes* effect, as they apply to all workers and employers regardless of their membership in a trade union or employers' association.

#### 4.2.2 Personal scope of application of the Special Collective Agreements

The Labour Relations Act (LRA) stipulates the personal scope of application of the Special Collective Agreements, i.e. collective agreements concluded on a branch level, i.e. on a department level, in accordance with the National classification of activities. Referring to its application by employers, the LRA prescribes that the *collective agreement on a branch level, i.e. department level, in accordance with the National classification of activities is directly applied and is mandatory for employers members of the employers' association signatory of the collective agreement or which have additionally joined in the association.*<sup>29</sup> It follows that employers who are not members of an employers' association signatory to the Special Collective Agreement shall not be obliged to apply this collective agreement for their workers. This category of employers shall only fall within the scope of the General Collective Agreement for the private sector in the field of economy, and the Individual Collective Agreement on a company level (if there is any). In any case, in accordance with the current regulations, they must not be compelled to

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25 LRA, Article 204, paragraph 1.

26 LRA, Article 205, paragraph 1.

27 LRA, Article 204, paragraph 2.

28 LRA, Article 205, paragraph 2.

29 LRA, Article 205, paragraph 3.



apply the Special Collective Agreement on their workers and, as a result, to be obliged to pay membership fee for using the collective agreement. However, in practice, hypothetically speaking, there could be a dilemma about the personal scope of the Special Collective Agreement in case when the employer is neither a member, nor has additionally acceded to the Employers' association signatory of the collective agreement; however, at the same time, there is a trade union organization in this employer affiliated to a trade union on a higher level - signatory to the Special Collective Agreement. In such circumstances, the employer (*ipso iure*) would not be obliged with the Special Collective Agreement; however, the trade union established on a company level, i.e. its members (*ipso iure*) should be covered with the concluded collective agreement. The Labour Relations Act (*de lege lata*) does not offer resolution of this dilemma and leaves out a "legal gap" for its interpretation. In such circumstances, the dilemma about the personal scope of application of the Special Collective Agreements (*de lege ferenda*) could be resolved with addendums in the labour legislation and introduction of the institute "extension of the scope of application of a collective agreement". By introducing this institute, Special Collective Agreements could be "extended" to all employers in a certain branch, i.e. department, in accordance with the National classification of activities, even covering employers where there are no trade union organizations.

In the comparative labour law, there are many different national labour-related legal systems which regulate the institute "extension of the scope of application of collective agreements". The common denominator among all of these is the fact that in order to extend the scope of application of the collective agreement, the line minister competent for issues in the field of labour (i.e. public authority) shall adopt a Decision thereon.<sup>30</sup> Usually, the decision is being adopted if there is a general, i.e. public interest for extension of the scope of the collective agreement, upon request of one or both contractual parties-signatories to the collective agreement. In theory, these collective agreements are called "*imposed collective agreements*", since their effect and application arises from a decision by an authorized representative of the executive authority, and they are not reflection of the will of the representatives of workers and employers covered by the collective agreement.<sup>31</sup> On the other hand (implicitly referring to its application by workers), the Labour Relations Act prescribes that the collective agreement *shall be binding for all parties that concluded it and for all parties that at the time of concluding the collective agreement had been or additionally became members*

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30 See: Ravnič.A, *Osnove Radnog Prava*– domačeg, usporednog i međunarodnog, Pravni fakultet u Zagrebu, 2004, p.506.

31 See: Buklijaš.B, *Kolektivno Radno Pravo*– Drugo izmijenjeno i dopunjeno izdanje, Pravni fakultet Sveučilišta u Splitu, 2012, p. 112.

*of associations that concluded the collective agreement.*<sup>32</sup> Furthermore, the Act prescribes that *the collective agreement shall also be binding for all persons that joined it and for all persons that additionally became members of the associations which joined the collective agreement.*<sup>33</sup>

The analysis of the provisions regulating the personal scope of application of the Special Collective Agreements leads us to several preliminary conclusions on their application. Thus, these collective agreements apply to *all persons concluding it* (i.e. parties signatories of special collective agreements), *all natural persons who at the time of conclusion of the agreement were or successively became members of associations which had concluded the relevant collective agreement* (i.e. workers who at the time of conclusion of the collective agreement had been members of the trade union signatory of the collective agreement or lateron became members thereof). Further on, the Special Collective Agreement obliges *all persons who have acceded to the collective agreement and all natural persons who additionally became members of the associations that acceded to the collective agreement* (i.e. individual non-unionized workers who lateron joined the concluded collective agreement, as well as workers who lateron became members of another trade union which joined the concluded collective agreement). Taking into consideration this interpretation of the personal scope of the Special Collective Agreements, in practice, we have the following dilemmas: does a Special Collective Agreement (branch, i.e. department level collective agreement) cover workers who are neither members of the union which concluded the collective agreement, nor have additionally become members thereof, nor they have personally acceded the collective agreement, or became members of trade unions which acceded to the concluded collective agreement; furthermore, does the labour legislation regulate the manner and conditions for individual accession to the collective agreement by non-unionized workers? The Macedonian labour-related legal system does not provide for a legal background for these questions. Yet, in practice, this legal gap is resolved "for the benefit" of non-unionized workers, recognizing their right not to be members of a trade union but, at the same time, to be able to enjoy the benefits arising from the concluded (special) collective agreement. This situation is the result of the implicit application of the constitutional and legal provisions which prohibit discrimination on any basis, including being or not being a member of a trade union. Therefore, in the practical application of Special Collective Agreements, the prevailing opinion is that employers must not differentiate between "workers-members" and "workers non-members" of the trade union signatory of the collective agreement in the process of exercising the rights guaranteed by and arising from the collective

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32 LRA, Article 208, paragraph 1.

33 LRA, Article 208, paragraph 2.

agreement, especially regarding some essential labour related rights (e.g., the amount of the salary, annual leave, etc.). Yet, neither the labour legislation nor practice offer adequate response about the manner (formal procedure) and/or conditions (material requests) to realize the legal and actual accession to the concluded collective agreement by workers who are not members of the trade union signatory of the collective agreement.

#### *4.2.3 Personal scope of application of Individual Collective Agreements*

The third type of collective agreements regulated with the Macedonian labour legislation is the so-called Individual Collective Agreement, i.e. collective agreements concluded on a company level. Taking into consideration the hierarchy of the collective agreements and the general standard of “favouring” of workers (*in favorem laboratoris*) which is also regulated by the Labour Relations Act<sup>34</sup>, in reality, the greatest scope of rights (benefits) for the workers arise at the lowest level of collective bargaining, i.e. collective agreements at a company level (where they are concluded). This situation in itself reflects the need to determine the persons covered by the concluded Individual Collective Agreements. According to the Macedonian labour legislation, *the Individual Collective Agreement shall also be binding/valid for the employees in the company who are not members of a trade union or of the trade union-signatory of the collective agreement.*<sup>35</sup> By this provision, the Act clearly and undoubtedly stipulates that Individual Collective Agreements shall be applicable to all employees (*erga omnes*), regardless whether workers with a relevant employer are or are not members of a trade union or are members of another trade union non-signatory of the concluded collective agreement.

In the comparative labour legislation, resolving the dilemma related to the personal scope of application of Individual Collective Agreements also depends on resolving a previous issue, which is “*the admissibility of concluding more than one collective agreement at the same level, i.e. area of application*”. If the labour legislation allows for concluding more than one collective agreement at the same level (e.g., two or more collective agreements at a company level) whose parties in addition to the employer shall be two or more different trade unions, than it could be assumed that its objective is the extension of the personal scope of application of the collective agreements to as large a group of workers as possible in the field where such collective agreements are concluded. In cases when one collective agreement is admitted, labour legislations of different countries

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34 See: LRA, Article 12 (Limiting the autonomy of the contracting parties).

35 LRA, Article 208, paragraph 3.

prescribe special conditions for extension of the concluded collective agreement to cover all employees in the company.<sup>36</sup>

In the Macedonian labour-related legal system, the conclusion of the collective agreement is consequently related to the fulfilment of the condition for representativeness of the social partners. In this context, the Labour Relations Act stipulates that *the collective agreement is concluded between the employer or the representative employers' association and the representative trade union.*<sup>37</sup> *The Act regulates in detail the conditions for obtaining representativeness of the trade unions (on the territory of the Republic of Macedonia<sup>38</sup>, at the level of public<sup>39</sup>, i.e. private sector, in the field of economy<sup>40</sup>, at a branch/department level, in accordance with the National classification of activities<sup>41</sup>, and at a company level<sup>42</sup>) and employers (for the territory of the Republic of Macedonia<sup>43</sup>, at the level of private sector in the field of economy<sup>44</sup>, and at a branch/department level<sup>45</sup>); however, the "percentage threshold" as a condition for attaining the status of representativeness of the trade unions at a company level is identical as the one prescribed for trade unions at a branch/department level and both public and private sectors. In this direction, a representative trade union at company level shall be a trade union with at least 20% of the number of employees with the employer, who pay membership fee.*<sup>46</sup> While attainment of representativeness of trade unions at a branch/department level and public and private sector is conditioned by filing an application for determining representativeness to the Commission for establishing representativeness, and obtaining decision on representativeness issued by the Minister competent for labour related issues, the attainment of

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36 For example, in the Swedish labour legislation, the collective agreement may be extended to all workers in a company if it covers more than 1/2 of the workers who are members of trade unions; there is an identical provision in the Egyptian labor code (art.91). According to the Japanese labor legislation, if the concluded collective agreement covers 3/4 of the total number of workers in the company, then it is automatically extended to the rest of the workers, at least for the part covering the working conditions. See: Ravnič.A, *Osnove Radnog Prava – domačeg, usporednog i međunarodnog*, Pravni fakultet u Zagrebu, 2004, pp.506-507.

37 LRA, Article 210, paragraph 1.

38 See: LRA, Article 212, paragraph 1.

39 See: LRA, Article 212, paragraph 2.

40 See: LRA, Article 212, paragraph 3.

41 See: LRA, Article 212, paragraph 4.

42 See: LRA, Article 212, paragraph 5.

43 See: LRA, Article 213, paragraph 1.

44 See: LRA, Article 213, paragraph 2.

45 See: LRA, Article 213, paragraph 3.

46 See: LRA, Article 212, paragraph 5.

representativeness of trade unions at a company level is realized with the employer. Hence, hypothetically, in one employer, there may be five trade unions which shall acquire status of representative unions at a company level.

In such circumstances, the following question arises: *will all representative trade unions at a company level be able to participate in individual and independent collective bargaining with the employer for the purpose of conclusion of individual and own collective agreements, or, there can be only one Individual Collective Agreement at a company level, regardless of the fact whether there are more representative trade unions?* Macedonian labour legislation does not contain a legal provision on the possible number of collective agreements concluded for the private, i.e. public sector, branch/department level and company level. Yet, if we interpret the legal regime regulating the right to associate, organize and collective bargaining of workers and employers, we can conclude that the Macedonian labour related legal system is founded on the rule “*one level of collective bargaining - one collective agreement*”. This means that, as with the other levels, only one collective agreement may be concluded at a company level. However, we should take in consideration the legal provisions regulating “possible situations” when on the relevant level of collective bargaining “*there is no representative trade union*” or “*there are several representative trade unions*”. If at a certain point, on the level of collective bargaining there is no trade union which fulfils the representativeness criteria, then, the Act authorizes the “*majority trade union*”, i.e. the union with greatest number of members at the relevant level of collective bargaining, to participate in the collective bargaining and conclude collective agreement. In this context, the Labour Relations Act stipulates that *when a request for establishment of the representativeness is submitted and the conditions for representativeness referred to in the law are not fulfilled with regard to the percentage of members until fulfilling the conditions for the percentage of members and determination of the representativeness, a collective agreement shall be concluded by the employer or employers’ association and the trade union with the most members, based on the list submitted with the request for determination of representativeness.*<sup>47</sup> *In such circumstances, the collective agreement shall be concluded following the receipt of notification from the Ministry of Labour and Social Policy to the trade union, i.e. employers which submit a request for determination of representativeness, i.e. employers which have most members.*<sup>48</sup> On the other hand, the Labour Relations Act (LRA) stipulates a different mechanism for attaining eligibility to participate in the collective bargaining and conclusion of a collective agreement in case when none of the trade unions individually fulfil the legal conditions to attain

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47 See: LRA, Article 210, paragraph 2.

48 See: LRA, Article 210, paragraph 3.

representativeness. In this case, the LRA stipulates the concept of "*agreement for affiliation for the purpose of concluding a collective agreement*".<sup>49</sup>

Both previous cases reflect the legislator's approach to resolving the questions related to the collective bargaining in conditions when there is no representative trade union at the level where the collective agreement is being concluded. Nevertheless, a parallel provision providing for the possibility of a so-called "majority trade union", which may conclude collective agreement in case when the conditions of representativeness are fulfilled and a provision referring to concluding an agreement on affiliation between two or more trade unions in order to fulfil the threshold for representativeness, may lead to a probable conflict situation between legal provisions and problems in their practical application. More concretely, there is the question *what would happen in case when there are several trade unions at the level of collective bargaining, whereas none of them is representative, would the provision of "recognition" of the so called "majority trade union" be applied, to be the representative party to conclude the collective agreement, or would the provision for "agreement on affiliation" be applied for the non-representative trade unions for the purpose of "joint" fulfilment of the legal threshold for representativeness and "joint" participation in the collective bargaining?*

Through interpretation of the above mentioned provisions, we come to the conclusion that the first provision would be used only if (at the level where collective bargaining is to take place) there is no other trade union except the "majority trade union", which intends to be recognized as a representative union, or in case when even with affiliation among trade unions at the collective bargaining level the conditions for attaining representativeness are not met. In our opinion, in all other cases, advantage should be given to the second provision (i.e. the provision on "agreement on affiliation" for association) because it adequately represents the "trade union pluralism". We point out that according to the Labour Relations Act, the provisions which enable collective bargaining in case where there is no representative trade union (i.e. the provision for providing the legitimacy of the so called "majority trade union" and the provision for "agreement on affiliation") apply only to trade unions at a higher level, and cover General and Special collective agreements. *Per analogiam*, these provisions do not apply to trade unions at a company level and do not cover Individual Collective Agreements. In addition to the analysis of the possible situation where on the level of collective bargaining "there is no representative trade union", we refer to the possible situation where there are "several representative trade unions" at the relevant level of collective bargaining. In this case, we may pose the following question: *Which of the several representative trade unions shall be*

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49 See: LRA, Article 214.

*competent to participate in the collective bargaining and conclude the collective agreement?* The Labour Relations Act gives the answer to this question, by providing for the establishment of a “negotiations board”. In this context, the LRA prescribes that *if several representative trade unions and/or employers’ associations participate in concluding the collective agreement for the territory of the Republic of Macedonia and/or branch level, according to the National Classification of activities, a negotiation board shall be established, the members of which shall be determined by the representative trade unions and/or representative employers’ associations.*<sup>50</sup> This provision explicitly applies to collective bargaining on the level of the territory of the country (i.e. public and private sector) branch or department level, covering only general and special collective agreements. The Act does not provide for forming a “negotiations board” if there are several representative trade unions at a company level.

The preliminary conclusion from this debate is related to the personal scope of Individual Collective Agreements. Under the veil of its “direct and mandatory (*erga omnes*) application”, the legislator has “closed” any dilemma related to the coverage of employees who are not members of the trade union signatory of the collective agreement, or who are members of another trade union. The Individual Collective Agreement shall be applied to all workers with the respective employer, including those who are not members of the trade union or the trade union signatory of the collective agreement. It seems that with this approach of the legislator, any type of clause on payment of a fee for accession to an Individual Collective Agreement, i.e. using the benefits thereof, is made impossible.

## **5. General conclusions**

The normative and institutional framework of social dialogue in the Republic of Macedonia is regulated with the labour legislation, primarily by the Labour Relations Act (LRA) of the Republic of Macedonia. A bipartite social dialogue is regulated in Chapter XIX of the LRA, under the title “Collective agreements”, while a tripartite social dialogue is regulated in Chapter XXI of the Act, under the title “Economic and social council”.

The establishment of a Fund for promotion of the social dialogue in the Republic of Macedonia, which would be funded by employers and employees not at all members of employers’ associations or trade unions, or employers and workers not members of employers’ associations, i.e. trade unions signatories of the collective agreement which benefit from the advantages arising from the concluded collective agreement, is an issue closely related to the labour-related legal institute “union security clause”, i.e. “clause on mandatory payment of a

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<sup>50</sup> LRA, Article 221.

fee for using the benefits of the concluded collective agreement by workers not members of a trade union or the trade union signatory of the collective agreement". Hence, the matter regarding the establishment of the Fund for promotion of the social dialogue in the Republic of Macedonia is referred to as a secondary issue compared to the matter of admissibility of the so-called "fee for using the benefits of a concluded collective agreement" within the Macedonian labour-related legal system.

The analysis provides the following summary conclusions:

- 1.** Union security clauses have the purpose to strengthen trade unions, improve the position of trade unions as regards employers, and have the objective to increase the rights and advantages of workers in the process of collective bargaining. However, union security clauses are often in conflict with the individual workers' right to choose whether they want to associate in a trade union; as such, they are either treated as prohibited or are not at all regulated in the national labour related legal systems.
- 2.** Clauses on mandatory payment of a fee for using the benefits of the concluded collective agreement by workers who are not members of a trade union or not members of the trade union signatory of the collective agreement (agency shop clauses) are less disputable as compared to the clauses on mandatory membership in a trade union (closed shop clauses). The justification for this conclusion comes from the claim that it is more acceptable to "oblige" non-unionized workers to participate in the costs for collective bargaining because they use the benefits of the concluded collective agreement, instead of "obliging" workers to be or successively become members of the trade union signatory of the collective agreement.
- 3.** In this context, union security clauses in general, and agency shop clauses in particular, are predominantly subject to regulation of the labour legislations belonging to the Anglo-American legal systems, and in certain countries of Central and South America, Africa, and Asia.
- 4.** The International Labour Organization (ILO) has not provided a Convention or Recommendation which regulates the matter of the "union security clauses", including "clauses on mandatory fees for using the benefits of a collective agreement". The analysis of the fundamental ILO Conventions regulating the freedom of association and the right to organize and collective bargaining (the Convention of the freedom of association and protection of the right to organize No. 87, and the Convention on the right to organize and collective bargaining No. 98) yields the conclusion that the ILO has a neutral position regarding the admissibility of the clauses on union security (including clauses on mandatory fees for using the



benefits of a collective agreement), and that it leaves this issue to be regulated by the national labour related legal systems of the ILO member countries.

5. Taking into consideration the legal regime of regulation of the freedom of (trade union) association in the Macedonian labour-related legal system, i.e. the relevant provisions in the Constitution of the Republic of Macedonia and the Labour Relations Act, we can conclude that the “clauses on mandatory trade union membership” (closed shop clauses) are prohibited. The Constitution of RM and the Labour Relations Act level the “positive” and the “negative” aspect of the freedom of association (i.e. the right to membership in a trade union and/or employers’ association); thus, workers and/or employers must not be compelled to establish or join a trade union, i.e. employers’ association.

6. The Labour Relations Act clearly states the matter on the personal scope of application of the General and Individual Collective Agreements. General Collective Agreements are directly and mandatorily applied to all workers and employers depending on the sector (public or private) where such agreements are concluded. Individual Collective Agreements shall also be binding for the employees who are not members of a trade union or of the trade union-signatory of the collective agreement. General and Individual Collective Agreements, by force of law, apply “*erga omnes*” to all workers, regardless of their membership in a trade union and regardless of whether they have acceded to the concluded collective agreements. Special Collective Agreements apply to a “certain” and “defined” scope of persons covered by their provisions (i.e. their effect is “*inter partes*”). Thus, the legal space for introducing a contribution (membership, i.e. solidarity fee) for using collective agreement can apply only to the Special Collective Agreements, given that only Special Collective Agreements may apply to a limited scope of persons, “leaving out” individual workers who did not accede to the concluded collective agreement “outside” the scope of its application. However, the Labour Relations Act provides for a “legal gap” as regards accession to the Special Collective Agreement for two categories of persons: workers who are not members of a trade union within the branch or the department where the Special Collective Agreement has been concluded, and workers who are members of another trade union not signatory of the Special Collective Agreement. This means that the Macedonian labour legislation does not regulate at all the “manner” and the “conditions” for accessing the Special Collective Agreement.

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## **КЛАУЗУЛЕ СИНДИКАЛНЕ СИГУРНОСТИ НАСПРАМ СЛОБОДЕ СИНДИКАЛНОГ УДРУЖИВАЊА**

### **Резиме**

У раду се анализира слобода синдикалног удруживања и органи-зовања у светлу клаузула синдикалне сигурности, са посебним освртом на њихову прихватљивост у македонском систему радног права и ниво усклађености или неусклађености са македонским прописима о раду.

Аутор разматра клаузуле синдикалне сигурности у контексту иницијативе за успостављање Фонда за промоцију социјалног дијалога у Републици Македонији, који би требало да обезбеди могућност „обаве-зивања“ радника који нису чланови синдиката да плате накнаду агенцији како би се могли подвести под нормативни садржај закључених колектив-них уговора. У том контексту, рад ће указати на могућа решења проблема који се тичу тумачења слободе удруживања радника као и примењивост колективних уговора.

Аутор даје анализу „клаузула синдикалне сигурности“ из перспек-тиве упоредног радног права и компаративне судске праксе појединих земаља у којима су такве клаузуле предвиђене законом, као и земаља у којима су забрањене.

**Кључне речи:** колективни уговори, клаузуле синдикалне сигурности, синдикат, заступништво, слобода синдикалног удруживања.



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## **TELECOMMUTING: CONTEMPORARY CHALLENGES IN EU SOCIAL POLICY IN THE CONTEXT OF GLOBALISATION**

**Abstract:** *Under the impact of globalization processes, extensive social changes have been introduced in the past few decades which have reshaped the world of employment in many ways. Above all, development of information technologies and their wider application at workplace has enabled decentralization of workplaces, which is embodied in the concept of telecommuting. Telecommuting jobs are performed on the basis of a flexible part-time employment contract, and they essentially imply performing work activities at any appropriate place located outside the employer's premises, by using information technologies (specific for certain workplace). As such, telecommuting is an atypical form of employment and an exception to the employment contract rule where the employer is explicitly required to stipulate the place where the employee will perform his/her job-related activities. This kind of organization and/or work generates multiple benefits. The European Framework Agreement on Telework, therefore, determines a wider legal framework for concluding employment telecommuting contracts and, at the same time, encourages individuals to conclude such employment contracts without fear for their security. Not only are telecommuting employees guaranteed all the employment contract rights comparable to the right of employees working on the employer's premises but they are also entitled to certain rights reflecting the specificity of their position.*

**Keywords:** *globalization, flexibility, information technologies, telecommuting.*

## 1. Introduction

In the past decades, globalization has become the focus of scientific, professional and broad public interest.<sup>1</sup> Passionate globalists and their fierce opponents no longer challenge the globalization process but discuss how to join and adapt to this process, how to avoid its unfavorable effects and achieve higher employment rates, better living standard, and economic and social cohesion. In the endeavors to find the adequate answer to this question, they disregard the term of "globalization" itself (Kumar, 2003: 87). It is an indisputable fact, however, that globalization is a complex process, characterized by intensive connectivity and interdependence of states, internationalization of business operations, development of trade at the world level based on the policy of removing any obstacles, the increasing share of transnational companies in the world production and commerce, international migration primarily stemming from existential reasons, distribution of information technologies, growth of capital stock, etc. (Milošević, 2005:145). It is also evident that globalization has been shaping the world of employment in several different ways. Above all, it has imposed the need for faster, more efficient, quality adaptability to changes in business by establishing a more flexible regime of employment relations. To this extent, flexible forms of employment have arisen, among which telework has a special position.

The appearance of such a form of work, facilitated by the development of information technologies and their greater application at the workplace, has essentially changed the way of organizing and/or performing job-related activities. The flexibility of telework implies the decentralization of the workplace and work on a regular basis at any appropriate place, away from the employer's premises, by using information technologies (Slijepčević, 2015: 47); as such, it may be multifunctional and quite useful for solving numerous social problems.<sup>2</sup> For this

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1 Globalization is a phenomenon recognizable in different areas such as law, sociology, economics, culturology, etc. The economic aspect of globalization focuses on the hegemony of the free market, the principle of liberalism and minimum participation of the state in regulation of economic relationships, under the pretext that non-regulated market is the best way to reach economic growth which will be of advantage to everyone in the long run (Drašković, 2007: 258).

2 Telework can contribute to solving numerous problems, particularly the problem of unemployment, by expanding opportunities for employing people who have or might have difficulty finding jobs, such as people with disabilities or people who need to stay at home to look after their family members. Through telework, employers may modernize the organization of work, intensify productivity, become more competitive, reduce pressure of rationalization and make significant savings (reducing costs of work space and transport for the employees), whereas the employees may reconcile work and family life more easily, by organizing their working time in the way most suitable for them (Nilsen, 2002:29).

reason, in the past years, there has been a constant trend in terms of signing telework agreements in EU member states.<sup>3</sup>

However, the fact is that these and other countries can make the most out of the information society, if they base this broader application of telework on achieving the necessary balance between flexibility and safety, improving working conditions and creating greater opportunities for employment (Framework Agreement on Telework, Art.1 (4)).

## **2. *Acquis communautaire* standards on telework**

*Acquis communautaire* standards on telework are primarily contained in the European Framework Agreement on Telework (2002).<sup>4</sup> The European Council initiated the making of this Agreement, inviting European social partners to negotiate agreements in the context of European employment strategy, with the aim to modernize the organization of work (and regulate flexible working arrangements), make business undertakings more competitive and productive, and establish balance between flexibility and security (Framework Agreement on Telework, Art.1 (1)). The European Commission had a major role in the process of making this Agreement. In an effort to modernize and improve employment arrangements, the Commission invited European social partners to embark on negotiating telework agreements, and thus contribute to the development of a competitive and knowledge-based society, characterized by economic growth and development, better working conditions and increased social cohesion (Framework Agreement on Telework, Art.1(2)).<sup>5</sup>

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<sup>3</sup> According to a survey conducted in 27 EU member states, about 5% of employees were involved in telework in 2000, which was by 2% less than in 2005. The highest telework rate was recorded in the Czech Republic, Denmark, the Benelux Union (Belgium, Holland and Luxembourg), and Scandinavian countries. In most cases, telework was carried out by highly skilled employees, in the areas of financial intermediation, real estate and education. There were more male than female employees, since telework was prevalent in sectors dominated by men (European Foundation for the Improvement of Living and Working Conditions, 2010).

<sup>4</sup> The *Acquis Communautaire* standards on telework are also contained in the provisions of EU treaties regulating social policy issues (so-called "social Europe") as well as in some directives, which do not explicitly deal with telework but which may contribute to protection of teleworkers since their provisions can apply to this particular category of employees. The examples are Directive 93/104/EEC concerning the organization of working time, Directive 97/81/EC on part-time work, etc. (Bilić, 2011:636).

<sup>5</sup> The European Framework Agreement on Telework established a normative framework for the type of employment which had already been in use over a long period of time and was, as such, organized in EU member states. In Germany, for example, telework had existed for seven years before signing of this Agreement (European Foundation for the Improvement of Living and Working Conditions, 2010).

The European Framework Agreement on Telework establishes a general framework of telework (Framework Agreement on Telework, Art.1(5)), acceptable to both employees and the employers, and applicable in EU member states as well as in the countries of the European economic zone (Framework Agreement on Telework, Art.1(2)). The specificities at the national level, therefore, impose the need to implement this agreement in accordance with national practices and employment procedures (Framework Agreement on Telework, Art.1(5)); if necessary, European social partners, as well as social partners at the national level, are entitled to adapt and/or supplement the provisions of this agreement in a way which addresses their specific needs (Framework Agreement on Telework, Art.1(7)). However, the implementation of this agreement may not result in reducing the general level of protection, guaranteed to teleworkers at the national level, or impose unnecessary burdens to small and medium-size enterprises (Framework Agreement on Telework, Art.1(6)). At the same time, the Framework Agreement on Telework is the first European agreement which has not been incorporated in a directive or which is to be implemented through a directive; it is an autonomous instrument and, as such, it may be accordingly applied at the appropriate national level.<sup>6</sup> Hence, social partners have to undertake adequate measures until the end of July 2005, and submit a report on the taken measures to an *ad hoc* body operating within the framework of the committee for social dialogue. On the basis of this report, the *ad hoc* group will prepare a joint report on the taken implementation actions four years after the signing of this agreement (Framework Agreement on Telework, Art. 12).

### 3. Definition and scope

Employment relationship, where the employee performs work on a regular basis at the employer's premises, is considered as a basic form of employment, founded on the assumption that work performed within employment relationship is characterized by "the unity of time, space and action", and, accordingly, as regular performance of work at the premises of the employer (Mousseron, 2007: 1110). The employment relationship in such modality is "opposed" to the employment relationship where work is carried out away from the employer's

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6 The Framework Agreement on telework can be implemented through: a) national legislation, which implies transposing the EU soft law into the national hard law, as well as the uniform implementation of the fundamental principles set forth in this Agreement; b) through collective agreements, as the most common instrument for the implementation of this Agreement, which implies adapting the provided standards to the distinctive features and procedures specific to particular sector and/or company; and c) through non-binding guidelines, codes of practice and recommendations, which contribute to the implementation of this Agreement by ensuring the collection of data on telework in light of the national regulations. (Bilić, 2011: 637).



premises, within which telework is “the form of organizing and/or performing work, by using information technologies, in the context of an employment contract/relationship, where work which could be performed at the employer’s premises is carried out away from these premises on a regular basis” (Framework Agreement on Telework, Art. 2(1)). Such form of organizing and/or performing work is an efficient answer to challenges of the information society, and in that context, an exception to the standard form of organizing and/or performing work. Concurrently, due to the features that distinguish telework from the typical (standard) form of organizing and/or performing work, it is considered atypical form of organizing and/or performing work. (Bilić, 2009:922).

Telework is a form of organizing and/or performing work in the context of an employment relationship, although the autonomy of teleworkers poses a question whether they could be qualified as self-employed persons. This approach reflects the belief that this category of employees depends on the employer’s authority, among other things, because they perform work in the name of and for the employer, strictly observing his guidelines and directives; they do not take the risks of doing business, and the work they perform is subject to the employer’s monitoring; therefore, the autonomy they exert does not exceed “the permitted” level of independence and does not prevent the employer from managing the results of their work (Ray, Royot, 2002/2003: 118).

Telework is a specific form of organizing and/or performing work, which essentially means doing work on a regular basis<sup>7</sup> at any appropriate place, away from the employer’s premises<sup>8</sup>, by using information technologies.<sup>9</sup> Such work, hence, results in achieving greater autonomy for the employees with regard to organizing work; in compliance with national legislation, collective agreements

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7 Telework on a regular basis means permanent and continuous performing of work away from the employer’s premises. However, such character of telework does not exclude the possibility of part-time work at the employer’s premises. Hence, in order to make a distinction between telework and a standard form of organizing and/or performing work, it would be useful to determine the number of minimum working hours below which specific form of organizing and/or performing work is not to be considered telework (Kovačević, 2009: 94).

8 Telework may be done at home, in call centres or other premises that do not belong to the employer. The premises where telework is performed have to meet specified requirements and, if work is performed in the employee’s home, care must be taken about housing conditions (Mousseron, 2007: 1110).

9 Various information technologies can be used in telework, although the most frequent equipment implies the use of a computer, and the Internet with wi-fi connection. For this reason, and given the constant and rapid development of these technologies, European social partners came up with the definition of telework, which is broad enough to encompass the whole spectrum of different forms of work, characterized by use of current but also future equipment in the field of information technologies (Kovačević, 2009: 91).

and company regulations, teleworkers manage the organization of their working time (Framework Agreement on Telework, Art.9(1)). Thus, teleworkers can organize their working time in the way they find appropriate, and determine working hours in any given period of time during performing work.<sup>10</sup> Another effect of telework lies in the specificity of the employer's monitoring of the employees, excluding the possibility of exercising traditional control mechanisms over their work; the monitoring authority of the employer focuses on work results and not on the method of performing work (Supiot, 2000:134) whereas a direct, more or less strict control of the employees' performance has been replaced by the virtual one, such as tracking of the time spent at the computer online or connected to the employer's server, even though it can also be based on the obligation of the teleworkers to keep evidence on work and forwarded it to the employer in electronic format, by fax or in some other way (Bochurberg, Cornuau, 2001: 134). Qualifying telework as a specific form of organizing and/or performing work also entails other consequences. Thus, the employer is obliged to provide the teleworkers with relevant written information on collective agreements and description of the work to be performed, but also to inform them of their immediate superiors and/or other persons to whom they can address questions, the methods of making the work results available, as well as the department of the company which the teleworker is attached to (Framework Agreement on Telework, Art.2(2)). The employer is responsible for organizing the training of teleworkers for this kind of work (Framework Agreement on Telework, Art.10(2)) in order to improve the knowledge and skills necessary for computer work, use of the Internet and other communication technologies, writing work reports, etc. At the same time, subject to mutual agreement, the employer is obliged to provide, install and maintain the equipment necessary for regular telework<sup>11</sup>, as well as to provide technical support

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10 A specific solution is found in France, where the national inter-sectoral agreement on telework determines the framework for regulated hours of work and the obligation of the employer to determine the time, subject to agreement with the teleworker, when it would be possible to contact each other (Kovačević, 2009: 100).

11 As a rule, the employer is responsible for providing, installing and maintaining of the equipment necessary for telework (separate telephone line, computer and modem, etc.); the employer is also responsible for its damage or loss, in compliance with national legislation and collective agreements (Framework Agreement on Telework, Art.7(2)). Besides, the employer is obliged to inform the teleworker about any restrictions in the use of IT equipment or tools, such as the Internet, and possible sanctions in case of non-compliance (Framework Agreement on Telework, Art.5(4)). Likewise, the teleworker is to look after the equipment properly and use it in a legal way. For example, it cannot be used for the purpose of collecting and distributing illegal material via the Internet (Framework Agreement on Telework, Art.7(6)).

to the teleworker<sup>12</sup>. The employer compensates for the costs directly caused by performing telework<sup>13</sup>, and ensures the protection of data used and processed by the teleworker for professional purposes<sup>14</sup>, etc.

Concurrent with advances in the field of information technologies, telework implies different forms of organizing and/or performing work, ranging from telework done at home or in call centres to jobs requiring constant motion or travel (“nomadic” form of telework) (Martino, Wirth, 1999: 530). Thus, owing to its complexity, telework cannot be simplified as work at home<sup>15</sup> even though it is based (just like work at home) on performing work on a regular basis away from the employer’s premises, and causes problems in applying imperative norms on limited working time, holidays, night and overtime work, and occupational health and safety (Kovačević, 2009: 97).

Telework can be included in the authentic description of activities which are to be performed by the employee or be implemented later, by changing the agreed form of organizing or performing work<sup>16</sup>, as determined by individual or collective agreement. In any case, however, telework is voluntary both for

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12 Technical support is the support to the teleworker given by the support operator, via the Internet, safety station (closed firewalls), program solution Remote Detoskop (etc.), by observing the work station and work with computer, if needed.

13 If the teleworkers use their own equipment, they are entitled to compensation of costs for its use (Framework Agreement on Telework, Art.7(3)), in the amount agreed with regard to the type and character of the equipment, intensity of usage and lifetime, amortization rate and other factors influencing the value of equipment use. The employee is also entitled to compensation of other costs caused by performing telework, such as electricity and water bills, the costs of heating or rubbish removal, and costs caused by communicating with the employer and other employees, for example, costs of using the Internet (Framework Agreement on Telework, Art.7(3)).

14 The employer is to take appropriate measures to ensure the protection of data used and processed by the teleworker for professional purposes, notably with regard to software protection. The employer has to inform the teleworker of all relevant legislation and company rules concerning data protection, and the obligation of the teleworker to act in compliance with such legislation and rules (Framework Agreement on Telework, Art.5(1,2)).

15 The first studies on telework defined this form of work as work at home (Shamir, Salomon, 1985: 455).

16 A standard form of organizing and/or performing work could be changed by establishing the obligation of the employer to inform the employees about possibilities for telework, in due time and in an appropriate manner. A specific example is found in Ireland, where development strategy for telework falls under authority of non-governmental organizations and other bodies, such as the National Council for Telework, e-Work Action Forum, Eircomand Enterprise Ireland (Parliamentary Institute Research Center, Parliament of Montenegro, 2016).

the employee<sup>17</sup> and the employer concerned. If the employer makes an offer of telework, the employee may accept or refuse his offer. The employee's refusal of telework agreement is not, as such, a justifiable reason for terminating the employment relationship on the part of the employer, since the employer's offer concerns the changes of the agreed form of organizing and/or performing work, and not the agreed working conditions (or conclusion of the annex labour contract).<sup>18</sup> Likewise, should the employee express the wish to opt for telework, the employer may accept or refuse this request.<sup>19</sup> It is the obligation of the employer, however, to consider that offer as *bona fide*, and inform the employee about it (in writing). If the employee opts for telework, his legal status remains unchanged, given that the passage to telework as such only modifies the way of organizing and/or performing work. The change of the agreed form of organizing and/or performing work, as determined by collective or individual agreement, could also imply returning to work at the employer's premises<sup>20</sup> (Framework Agreement on Telework, Art. 3).

#### 4. The legal status of teleworkers

The legal status of teleworkers is the central issue in the confronted demands for flexibility and security. In order to reconcile these seemingly opposite requirements is a challenge for the *Acquis Communautaire*, which has to address

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17 The voluntary character of telework is reflected in freedom of work and the right to work, concurrently enabling the workers to reach a higher level of individual freedom of choice within the time spent at work.

18 There is a specific Italian example, where general collective agreement states that, if the worker refuses to opt for telework, the employer has the right to terminate his employment relationship, when telework is the only measure for (new) employment in case of laid off workers in the process of business reorganization (ETUC, UNICE/UEAPME, CEEP, 2006.)

19 However, the labour legislation of Portugal states that the employer is obliged to enable telework to the worker who is a victim of domestic violence, after meeting specific requirements, and to the worker whose child is younger than three years of age, on condition that telework is compatible with the activity of the working parent, whereas the employer can provide the equipment necessary for telework (Parliamentary Institute Research Centre, Parliament of Montenegro, 2016).

20 To this effect, the Greek national collective agreement from 2006 determines a period of adjustment to telework in duration of three months; within this period, each of the parties may terminate telework relationship, having informed the other party fifteen days prior to termination. If telework is terminated, the worker has the right to return to his former place of work. In some cases, however, it is not possible to reverse the telework agreement. The employer can reject the request of the teleworker to opt for a standard workplace due to financial, organizational or other justified reasons, such as higher costs or difficulties in providing work space (Parliamentary Institute Research Centre, Parliament of Montenegro, 2016).

the issue in an adequate way, by promoting the concept of flexicurity,<sup>21</sup> with the aim to create competitive, knowledge-based society, characterized by economic growth and development, better working conditions and greater social cohesion (Bilić, 2009:922).

The legal status of teleworkers is essentially protected through a non-discrimination clause, which reads as follows:” regarding employment conditions, teleworkers are entitled to equal rights as comparable workers at the employer’s premises” (Framework Agreement on Telework, Art. 4).<sup>22</sup> This clause, drafted in the manner of a great humanist idea that all human beings are equal in their dignity and rights, reflects the attitude that teleworkers cannot be treated less favourably than the comparable workers in standard workplaces<sup>23</sup> only because they work away from the company’s premises. Teleworkers are entitled to limited working hours, protection from overtime and night work,<sup>24</sup> and they have equivalent access to training and career development opportunities as comparable workers at the employer’s premises, and they are subject to the same appraisal policies (Framework Agreement on Telework, Art. 10(1)). Teleworkers also have the same rights to participate in and stand for elections to bodies representing workers, and the number of teleworkers is included in calculations

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21 The concept of “flexicurity” is a new integrated approach to European social model, approved by the European Commission, given the more pronounced liberal labour markets in Europe and the need “to move from the principle of stable employment towards creating workplaces so as to assist the workers in maximizing their job opportunities on the labour market, and ensuring that the employer face the challenges of global competitiveness and the need for change” (Bilić, 2009:922)

22 The Framework Agreement on Telework does not define the term “employment conditions”, nor does it give examples of sectors or rights concerning employment relationship. This is considered to be a more favourable solution for teleworkers since it allows for extensive interpretation of the term “employment conditions” (Parliamentary Institute Research Centre, Parliament of Montenegro, 2016).

23 Comparable workers at the employer’s premises are the workers who perform the same or similar work at the employer’s premises. Introducing the standard of “comparable workers at the employer’s premises” is part of employment conditions, differing from one employer to the other, but also from profession to profession, depending on the kind of work which is the basis of employment relationship.

24 This is confirmed by *acquis communautaire* standards, demanding that workload and performance standards of all workers be equivalent (Framework Agreement on Telework, Art.9(2)). Another solution would be incompatible with the right of teleworkers to limited working time and protection from overtime and night work, given that they would be forced to work without rest, overtime and at night, in order to achieve performance standards equivalent to those of comparable workers at standard workplaces. Thus, it would be useful to establish the same terms for all workers so that teleworkers could be entitled to holiday, daily and weekly rest periods of the same duration as comparable workers with the standard workplace (Kovačević, 2009:100).

for determining thresholds for establishing bodies for workers' representation, in accordance with European and national legislation (Framework Agreement on Telework, Art.11). Furthermore, this allows for a different approach to these two categories of workers, if these appropriate distinctions in performing work are caused by work experience, skills and/or working conditions. Therefore, the teleworker's pay can be higher or lower than the pay of the comparable worker at the employer's premises, if his years of service are longer or shorter than the years of service of the comparable worker at a standard workplace.

The legal status of teleworkers is more than delicate, as confirmed by problems these workers have in some areas of employment relations. The problems they face are essentially different and specific in relation to problems of the workers in standard workplaces since labour law, traditionally drafted in line with the model of employment where the employee works at the employer's premises, does not take into account specificities of telework. Therefore, with the aim of making provisions for effective exercise of every employee's right to fair working conditions, some labour provisions (most importantly, the ones dealing with the organization of work and working time<sup>25</sup>, privacy rights and monitoring

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25 The autonomy of teleworkers in relation to organization of their working time, and in correlation with the lack of direct (physical) monitoring of their work by the employer, is closely related to difficulties consistent with applying imperative norms about limited working time, overtime and night work, particularly given the common practice of these workers to work longer than full-time, in the period from 10 pm until 6am of the following day. Therefore, it would be useful to establish the working time schedule and the obligation of the employer to determine the time when to contact each other, subject to mutual agreement with the teleworker. If this schedule is not determined, the teleworker should be denied access to the employer's central computer during holidays and after daily working hours. If the employee is not connected with the employer's central computer, the employer shall provide for relevant implementation of the norms on limited working time, night work and overtime in some other way (e.g. via telephone checks or software control of time and duration of computer use, only after prior notification of the employee) (Martino, 2001: 170).

authority of the employer<sup>26</sup>, occupational health and safety<sup>27</sup>) need to be adapted to peculiarities of telework. Simultaneously, appropriate measures need to be taken in order to prevent isolation of teleworkers<sup>28</sup> and ensure participation of their representatives in protection of their rights<sup>29</sup>.

26 The privacy of the teleworker is an important issue. Their privacy is exposed, not only due to intensive interdependence between professional and private life at the specific workplace but also due to modern technological monitoring of their work (via the GPS, for example). Therefore, in order to protect the right to privacy, the employer's monitoring must be proportionate to the objective and introduced in accordance with Directive 90/270/EC on the minimum safety and health requirements for work with visual display units (Framework Agreement on Telework, Art. 6(2)). The employer's monitoring authorities are limited by the obligation of loyalty to the worker as well as the obligation to respect the worker's rights and freedom, but also by preventing monitoring in secret, which implies the obligation that teleworkers (and worker representatives) must be notified prior to implementing monitoring measures (transparency rule). Protection of privacy is particularly delicate if the teleworker works at home, since this working place ensures protection, guaranteed by the inviolability of the home. Therefore, the employer, as well as labour inspectorate and worker representatives, can access the worker's home only if the worker has been previously notified about inspection and consents to it (Framework Agreement on Telework, Art.8(3)). The control of the workplace, accordingly, is to be done at the time when the worker is available to the employer, except in special cases, for instance, in case of danger of software damage (Kovačević, 2009:102).

27 Teleworkers are exposed to safety and health risks, due to common practice to work overtime or at night, but also due to usage of electronic and visual display equipment. Therefore, in order to ensure the workers' complete physical, psychical and social welfare, the equipment for telework must satisfy the requirements of occupational health and safety regulations (ETUC, UNICE/UEAPME, CEEP, 2006). The employer needs to take appropriate measures as required by Directive 90/270/EC on the minimum safety and health requirements for work with display screen equipment, and relevant daughter directives, national legislation and collective agreements; employer needs to inform the teleworker about the company's policy on occupational health and safety regulations, particularly requirements concerning the use of display screen equipment, and his obligation to apply those policies and procedures; employer is responsible for preliminary control and periodic inspection of the telework place, respecting the teleworker's right to privacy (Framework Agreement on Telework, Art.8(3)); he also has to provide training for the teleworkers regarding the use of IT equipment (Framework Agreement on Telework, Art. 10(2)), and to make periodic risk assessment at the specific telework place. It is also necessary to prohibit telework agreements for performing work dangerous or harmful for the health of teleworkers or other persons (Parliamentary Institute Research Centre, Parliament of Montenegro, 2016).

28 Teleworkers are often isolated because they are dislocated from the employer's premises and, thus, separated from their colleagues. To prevent teleworkers from being isolated, the employer has to take certain measures. Among other things, the employer is obliged to give teleworkers the opportunity to meet with their colleagues on a regular basis and provide access to company meetings (Framework Agreement on Telework, Art. 9(3)).

29 Hence, the employer has the obligation to inform and consult worker representatives on introducing telework in accordance with European and national legislation, collective

## 5. Conclusion

Telework is a specific form of organizing and/or performing work, conditioned by the need to accept the realities of economic knowledge, information society and global competitiveness in the best manner possible. Telework can be used to modernize organization of work, enhance competitiveness and productivity, and help reconcile work and social life, etc. However, it can be expected that the standard form of organizing and/or performing work will be prevalent as type of labour performance for a long time, given the fact that both the employers and the workers are not willing to accept this novelty, due to mistrust and fear of the unknown. On the other hand, organization of telework poses a challenge for the *acquiscommunaire*, regarding the autonomous position of teleworkers, lack of direct (physical) monitoring of their work, as well as risks undermining their dignity and welfare.

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**РАД НА ДАЉИНУ - САВРЕМЕНИ ИЗАЗОВИ У ДОМЕНУ  
СОЦИЈАЛНЕ ПОЛИТИКЕ ЕУ У УСЛОВИМА ГЛОБЛАИЗАЦИЈЕ**

**Резиме**

*Последњих деценија, под инфлуенцијом процеса глобализације, догодиле су се опсежне друштвене промене, које су изазвале преобликовање света рада на више начина. Између осталог, развој информационих технологија и њихова све већа примена на радном месту, омогућила је децентрализацију радних места, оличену у раду на даљину. Такав рад обавља се у форми радног односа, а суштински је одређен редовним обављањем послова на било ком одговарајућем месту које се налази изван просторија послодавца, уз употребу информационих технологија (специфичностима места рада), те представља изузетак од правила о заснивању радног односа у оквиру којег радник редовно ради у просторијама послодавца и атипични облик запослења. Посредством таквог начина организације и/или извршавања рада могу се остварити вишеструке користи. Оквирни споразум о раду на даљину, отуда, утврђује шири правни оквир за закључивање уговора о раду на даљину, а појединце охрабрује да, без страха за своју сигурност, закључују ову врсту уговора о раду - радницима који раде на даљину јамчи сва права из радног односа као и радницима који раде у просторијама послодавца, али и нека посебна права која респектују специфичност њиховог положаја.*

**Кључне речи:** *глобализација, флексибилност, информационе технологије, рад на даљину.*

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## **THE LEGAL REGIME OF MULTIMEDIA WORKS**

**Abstract:** *The article considers the issues of the legal regime of multimedia works in the Republic of Belarus and the Russian Federation. The author notes that the absence of definition of the legal regime of multimedia works in the Belorussian law leads to insecurity of authors' rights. Taken together, these circumstances lead to the destabilization of turnover rights on the multimedia works. This paper is a comparative analysis of theoretical and practical peculiarities of the institute of multimedia works. In the article, we point to the timeliness in the scientific development of this topic in legal science, and analyze the current legislation in the sphere of multimedia products. In order to determine the legal regime governing multimedia works, it is necessary to investigate the legal nature of multimedia works. To this end, the author suggests using the so-called "real definition" that reveals the essential features of this complex nature of multimedia works.*

**Keywords:** *multimedia works, multimedia products, copyright, digital form, complex object.*

### **1. Introduction**

Multimedia works are one of the modern technological forms in the information society, which have generated a completely new level of information processing and interactive human-computer communication. Nowadays, there is an increasing prevalence of multimedia works. The term "multimedia objects" often refers to a variety of intellectual activity results, created with the help of computer technology, or converted into an electronic form. Such an understanding can be explained by the fact that there is no complete list of objects in the doctrine that can be described as multimedia works.

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Pursuant to Paragraph 14 of the Recommendations on harmonization of state legislation of the EurAsEC member states in the field of copyright and related rights, approved by the Resolution of the Interparliamentary Assembly of the Eurasian Economic Community on May 16, 2012 No. 14-16: “The Establishment of a special legal regulation in the legislation of the Russian Federation in relation to the so-called “complex objects” has resulted in significant differences between the national legislation of the Russian Federation and the statutory regulations of other member states of the EurAsEC in respect of audiovisual works and a number of other intellectual property objects (theater performances, multimedia products). It seems necessary to ensure a consensual transition to a uniform decision on matters concerning the ownership of rights to such objects in all member states of the EurAsEC, which may be achieved either by making the agreed changes in national legislative acts, or by the refusal of the Russian Federation to introduce a special legal regulation in relation to “complex objects”<sup>1</sup>.

Within the EurAsEC framework, the matter of harmonizing the legislation in the sphere of “complex objects” was not resolved at the legislative level. At present, the Treaty on the Eurasian Economic Union contains no reference to multimedia works; however, Paragraph 2 of Annex No. 26 to the Treaty on the Eurasian Economic Union contains an open list of intellectual property objects which extends the application of provisions on security and rights protection to intellectual property objects and multimedia works.

The legal regime of multimedia works is not defined by the Belarusian legislator. In the Civil Code of the Republic of Belarus, in the Act “On Copyright and Related Rights” of the Republic of Belarus dated 17 May 2011<sup>2</sup>, and in other normative legal acts, there is no mention of multimedia work as an object of copyright. However, as rightly stated by Kondakova, multimedia works, which combine the results of different types of art converted into a digital format by means of computer programs, may be singled out into a separate category protected by copyright (Кондакова, 2007: 132). In this respect, it seems necessary to con-

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1 О Рекомендациях по гармонизации законодательства государств – членов ЕврАзЭС в области авторского права и смежных прав (на основе сравнительно-правового анализа национальных законодательств): Постановление Межпарламентской Ассамблеи Евразийского экономического сообщества от 16 мая 2012 г. №14-16 Эталон 6.6 – Беларусь [Электронный ресурс]. / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017 (Paragraph 14 of Recommendations on harmonization of state legislation of the EurAsEC member states in the field of copyright and related rights).

2 Об авторском праве и смежных правах: Закон Республики Беларусь от 17 мая 2011г. №262-3 // Эталон 6.6 – Беларусь [Электронный ресурс]. / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017 (Act “On Copyright and Related Rights” of the Republic of Belarus dated 17 May 2011)

sider the possibility of harmonizing the legislation of the Russian Federation and the Republic of Belarus within the framework of the Eurasian Economic Union.

## **2. The concept and essential features of a multimedia work**

The matters of the legal regime of multimedia works were considered by I. Stamatudi (Stamatudi, 2001), F. Godra (Годра, 2001), E. S. Grin, (Гринь, 2013), G. Moskalevich (Москалевич, 2013), V. V. Lebed (Лебедь, 2014), and E.N. Kalugina (Калугина, 2013).

The complex objects of intellectual property rights were analyzed by such scholars as: S.A. Sudarikov (Судариков, 2007), V.A. Dozortsev (Дозорцев, 2003), I.A. Bliznets and K.V. Leontiev (Близнец, Леонтьев, 2014), and O.A. Ruzakova (Рузакова, 2004).

Before going into a more detailed consideration of these issues, it is necessary to examine the concept and the essential features of a multimedia work. Due to the novelty of the phenomenon under investigation, the concept and the legal nature of a multimedia work are under discussion in the doctrine.

E.S. Kotenko defines the concept of multimedia products as “the object of copyright expressed in an electronic (digital) form which includes several protected intellectual activity results” (Котенко, 2012: 9). P.V. Babarykin notes in his study that, being a complex object, a multimedia work may contain a variety of results of intellectual activity and means of individualization in machine-readable (digital) form (Бабарыкин, 2010: 84). G.N. Moskalevich defines a multimedia work as “a set of audio and video components with the support of software” (Москалевич, 2013: 19). O.V. Shlykova defines multimedia products as the documents that carry information of different types and involve the use of special technical devices for their creation and reproduction (Шлыкова, 2004: 138).

The multimedia product is a computerized combination of digital objects, which are text or graphics, as well as a serial data stream (audio and video recording), which the user can interact with to varying degrees in many ways (Aplin, 2005: 15).

A brief overview of terminological definitions of the category “multimedia product” clearly leads us to the conclusion that, due to the complexity of the “multimedia” term at the disposal of modern jurisprudence, there is no uniform and clear idea of the nature of the phenomenon under investigation. In addition, the doctrine contains the terms “multimedia product” and “multimedia work” in relation to the same copyright objects. For clarity, let us turn to the normative legal sources and world experience.

In the Russian Federation, the legislator mentions the category of "multimedia product" in Article 1240 of the Civil Code, but there is no positive regulation on the relations concerning the creation of this object.<sup>3</sup>

The category "multimedia product" is contained in Directive 2001/29/EC "On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society".<sup>4</sup>

The Glossary of model legislation for the Commonwealth of Independent States in the field of intellectual property, approved by the Resolution No. 37/17 of the Interparliamentary Assembly of States - members of the Commonwealth of Independent States on 17 May 2012, has a fixed definition of "multimedia as a combination of different visual media and information delivery technologies in a single work"<sup>5</sup>.

In accordance with Article 2 of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, a piece of work is protected as a piece of copyright work.<sup>6</sup>

Article 991 (item 1) of the Civil Code of the Republic of Belarus also points out that copyright applies to works of science, literature and art, existing in a physical form.<sup>7</sup>

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3 Гражданский кодекс Российской Федерации: Закон РФ от 18 декабря 2006 года N 230-ФЗ: в ред. Постановления Конституционного Суда РФ от 13.12.2016 N 28-П [Электронный ресурс]. // Консультант Плюс: Версия Проф. Технология 3000 [Электронный ресурс] / ООО «ЮрСпектр». – М., 2017 (Article 1240 of the Civil Code of the Russian Federation).

4 О гармонизации некоторых аспектов авторского права и смежных прав в информационном обществе: Директива Европейского Парламента и Совета Европейского Союза 2001/29/ЕС от 22 мая 2001 г. [Электронный ресурс]. // Консультант Плюс: Версия Проф. Технология 3000 [Электронный ресурс] / ООО «ЮрСпектр». – М., 2017 (Directive 2001/29/EC "On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society)

5 О глоссарии модельного законодательства для государств - участников Содружества Независимых Государств в области интеллектуальной собственности: Постановление Межпарламентской Ассамблеи государств - участников Содружества Независимых Государств от 17 мая 2012 г. №37-17 Эталон 6.6 – Беларусь [Электронный ресурс]. / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017. (The Glossary of model legislation for the Commonwealth of Independent States in the field of intellectual property)

6 Бернская конвенция по охране литературных и художественных произведений: Конвенция от 9 сентября 1886 г.: Эталон 6.6 – Беларусь [Электронный ресурс]. / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017. (Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886)

7 Гражданский кодекс Республики Беларусь: Закон Респ. Беларусь, 7 декабря 1998 г. № 218-З: в ред. Закона Республики Беларусь от 31 декабря 2014 г. № 226-З// Эталон

Based on the above, when describing the phenomenon under analysis, it appears to be well-grounded to use the category of “multimedia work”. P.V. Babarykin also points to the appropriateness of using the term “multimedia work”, indicating that in legal terminology the category “product” is generally used to refer to things and the term “multimedia work” is likely to mean some result of intellectual activity, regardless of its material medium (Babarykin, 2010:83).

The judicial practice of the Russian Federation considers a multimedia work as a computer program<sup>8</sup> or database<sup>9</sup>.

According to the Copyright Act of the United States 1976, a multimedia product refers to audiovisual works.<sup>10</sup>

In the French doctrine, a multimedia work is characterized as the object of “a special kind” that may be compared with an audio-visual work and differs from it in its interactivity (Калугина, 2013: 20).

The analysis of the doctrine and regulations demonstrates the lack of sufficient clarity and uniformity of terminology, which causes both theoretical and practical difficulties and actualizes the problem of separating the essential legally significant features of the phenomenon under investigation that may allow for defining the content and scope of the term “multimedia work”.

In this context, there is the key concept of “work” which refers to a multimedia work, as well as to other objects of copyright. This concept allows drawing the line between objects of copyright and other objects of intellectual activity, as well as between multimedia works and objects outside the scope of copyright. Despite the active use of the term “work” in the national legislative acts, they do not disclose its content. The category “work” is absent in the international unified agreements in the field of copyright.

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6.5 – Беларусь [Электронный ресурс]/Нац. центр правовой информ. Респ. Беларусь, Минск, 2017.(Article 991, item 1, of the Belorussian Civil Code).

8 Постановление Девятого арбитражного апелляционного суда от 17.09.2015 №09АП-33364/2015 по делу №А40-53098/14 // Консультант Плюс: Версия Проф. Технология 3000 [Электронный ресурс] / ООО «ЮрСпектр». – М., 2017 (Resolution of the Ninth Arbitration Appeal Court of 09.09.2015 No. 09AP-33364/2015 in case No. A40-53098 / 14)

9 Постановление Девятого арбитражного апелляционного суда от 29.07.2015 № 09 АП -25762/2015 по делу №А40-2686/12// Консультант Плюс: Версия Проф. Технология 3000 [Электронный ресурс]/ООО «ЮрСпектр». – М., 2017 (Resolution of the Ninth Arbitration Appeal Court of 29.07.2015 No. 09 AP -25762/2015 in case No. A40-2686 / 12).

10 Copyright Law of the United States of 19 October 1976 г. [Electronic resource]. -- 2010. – Mode of access: <https://www.copyright.gov>;Date of access: 12.01.2017

This gap is filled in the legal doctrine. The features and content of the category "work" are disclosed in detail in the works of V.J. Ionas (Ионас, 1963), M.A. Gordon (Гордон, 1955), V.I. Serebrovsky (Серебровский, 1956) and others.

The definition proposed by V.I. Serebrovsky is the most widespread in the doctrine: "A work is a set of ideas, thoughts, images being a result of the author's creative activity and expressed in a specific form that allows reproduction and is accessible to human perception". (Серебровский, 1956: 32)

The Civil Code of the Republic of Belarus emphasizes that copyright extends to works of science, literature and art that are the result of creative activity, regardless of the purpose and value of the work, as well as the way of its expression.<sup>11</sup> At present, in order to be provided protection under the copyright rules, a work must be the result of a creative activity and have an objective form of existence.

The category "creative activity" has not been clearly defined in the copyright legislation of the Republic of Belarus. In Article 1 (para.1, item 1.12) of the Culture Act of the Republic of Belarus, the creative activity is defined as a kind of cultural activity that includes artistic creativity and other intellectual activity that ends in the creation of a new independent result of an intellectual activity that did not exist before in a branch of science.<sup>12</sup>

The doctrine offers its own interpretations of the category "creativity". So, according to E.P. Gavrilov, creativity is the activity of the human brain, which is capable of creating only ideal images, but not the objects of the material world (Гаврилов, 2005: 44). V.J. Ionas notes that "it is the mental activity (mental, spiritual, intellectual), which is usually considered to be creative, resulting in a creatively independent work of science, literature or art" (Ионас, 1972:9).

The wording of the object of copyright gives the reason to say that it is not the creative activity that is under the legal protection but rather the result of such activity, whereby the work is a form of expression of such activity/

The importance of the criterion of creativity is confirmed by judicial practice. Thus, under the agreement concluded between LLC Video studio Mozga.ru (the plaintiff) and LLC Trade House SPARTAK (the respondent), the plaintiff undertook to perform the reconstruction of the computer game "Gamer": to create

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11 Гражданский кодекс Республики Беларусь: Закон Респ. Беларусь, 7 декабря 1998 г. № 218-З: в ред. Закона Республики Беларусь от 31 декабря 2014 г. № 226-3// Эталон 6.5 – Беларусь [Электронный ресурс] / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017 (The Civil Code of the Republic of Belarus).

12 Кодекс Рэспублікі Беларусь аб культуры: Кодекс Республікі Беларусь от 20 июля 2016 года // Эталон 6.5 – Беларусь [Электронный ресурс] / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017 (Article 1 (par. 1, item 1.12) Culture Act of the Republic of Belarus).



computer graphics in the form of an image of a moving object (bullets), smoke from the barrel during a shot and other graphic images. The court of the first instance, and subsequently the Court of Appeal, found that not every object of computer graphics can be recognized as an object of copyright, but only the object which possesses, from a legal standpoint, features inherent in the author's work, including creative character, originality and uniqueness. Computer graphics in the form of a moving object (bullet) and other graphic images do not meet the above characteristics of the copyright object. For the above mentioned reasons, the court rejected the plaintiff's claims for recovery of compensation for the illegal use of the object of copyright<sup>13</sup>.

The second criterion for the protection of a work is its expression in an objective form. In Article 992 paragraph 2 of the Civil Code of the Republic of Belarus<sup>14</sup>, there is an indication that copyright extends to both published and unreleased works existing in any objective form. In accordance with this article, the list of forms is open, which means the possibility of adding a work in other forms.

Multimedia works are created by using special computer programs. Their reproduction and perception is possible through the use of special technical devices: a computer, a mobile phone, a play-station. The digital form involves not only the possibility to watch or listen but also the user's impact on the product and proactive participation in the development of the plot. Thus, an object may be recognized as a multimedia work if it is expressed in a digital form.

With regard to the objective form of expression of a multimedia work, there is no unified approach in the doctrine. P.V. Babarykin points to the existence of a multimedia work in a machine-readable (digital) form (Бабарыкин, 2010: 84). S.V. Novackiy describes the form of a multimedia work as electronic (Новацкий, 2014: 10). E.S. Kotenko notes that the electronic form can be called a digital form (Гринь, 2013: 25). According to S.A. Sudarikov, the important feature of a multimedia work is its existence in a digital form (Судариков, 2014: 188). A similar position is taken by O.V. Kondakova (Кондакова, 2007: 132), O.V. Lutkova, L.V. Terentyeva, and B.A. Shahnazarov (Луткова, Тереньтьева, Шахназаров, 2017: 171).

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13 Постановление Девятого арбитражного апелляционного суда № 09АП-31934/2011-ГК по делу № А40-73889/11-118-571 от 27 декабря 2011 г. [Электронный ресурс]. // Консультант Плюс: Версия Проф. Технология 3000 [Электронный ресурс] / ООО «ЮрСпектр». – М., 2017 (Resolution of the Ninth Arbitration Appeal Court No. 09AP-31934/2011-GK in case No. A40-73889 / 11-118-571 of December 27, 2011

14 Гражданский кодекс Республики Беларусь: Закон Респ. Беларусь, 7 декабря 1998 г. № 218-З; в ред. Закона Республики Беларусь от 31 декабря 2014 г. № 226-З// Эталон 6.5 – Беларусь [Электронный ресурс] / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2017.(Civil Code of the Republic of Belarus)

Based on the foregoing, it can be concluded that a multimedia work meets the criteria of an object of copyright; therefore, it is a work protected on an equal basis with other results of intellectual activity. For a coherent vision of the nature of a multimedia work, it seems necessary to identify its qualifying elements.

According to S.A. Sudarikov, the important feature of a multimedia work is its existence in the digital environment and digital form (Судариков, 2014: 188). V.V. Lebed emphasizes that the classification of an object as a piece of multimedia work requires all of the following characteristics: the presence of several diverse creative results in the structure, including a computer program; interactivity; and virtual reality (Лебедь, 2014: 76). V.P. Beliaev singles out the following identifying characteristics of a multimedia work: the provision of information through the combination of a plurality of environments perceived by a human; the presence of several story lines in the product content; artistic design of interface and navigation tools. (Беляев, 2013: 28)

Summarizing the features of multimedia works proposed by the doctrine, the following can be considered to be the main qualifying elements of a multimedia work: the presence of several heterogeneous protected results of intellectual activity in the structure, which are the independent objects of copyright; the availability of an electronic format (digital format); functioning in the process of interaction with the user (interactivity); the imitation of objective reality or display of the fictional world created by the author with the help of computer technology (virtuality); and the presence of the computer program in the structure.

Let us consider if there is any evidence of virtuality elements in a multimedia work. Like many actively studied phenomena, the category "virtual" is viewed from the standpoint of different disciplines and has many perspectives accordingly: *virtual* [lat. *virtualis*] – possible; one that can or should manifest itself under certain conditions" (Комарова, 1988: 106); *virtual* – apparent, illusory; *virtuality* – "conscious artificial reproduction of illusions of really existing objects" (Гигина, 2007: 52). T.E. Schechter characterizes the virtual space as "a kind of network structure, each cell of which is open to multiple changes" (Шехтер, 2000: 58). The author notes that within the cells there are mechanisms for transforming the objective features of artistic compositions; due to multiple combinations of fractals, an illusory reality, resembling a labyrinth structure, is created. Within the framework of virtual reality, there is the formation process of the existence regularities of many specific virtual worlds (Шехтер, 2000: 58). E.F. Gongalo emphasizes that the virtual reality is treated as complex technical systems from the point of view of computer program developers, i.e. these systems refer to a physical or technical reality, and the phenomenon can be considered to be vir-

tual as long as it contrasts with the real (Гонгалo, 2010: 198). Virtual reality is a product of processing the information by a computer that creates the effect of presence and the ability to manage a new reality created by modeling with the help of modern computer equipment (Ильин, 2004: 96).

On these grounds, it is possible to single out the main concepts that characterize virtuality: simulation; interaction; artificiality; immersiveness; the effect of presence; complete physical immersion; network communication (Гонгалo, 2010: 197). Thus, virtuality can be characterized as a feature of the intellectual activity result, manifested in the creation of an objective reality imitation or display of the world invented by the author with the help of computer technology.

Therefore, virtual reality, perceived as the imitation of physical laws and their visual demonstration, is the heart of any multimedia work.

The definition of interactivity as a feature of a multimedia work is ambiguous in modern science. Its interpretation varies depending on the challenge confronting a researcher. Thus, disclosing the content of this phenomenon in relation to the needs of modern culture, E.S. Chichkanov draws the line between interactivity with respect to installations (interaction of a work of art with a recipient through physical contact with parts of the installation) and interactive multimedia applications (direct participation of the recipient in the functioning of the program both at the level of physical interaction with interaction tools and in the information exchange with a computer program for the modification and individualization of content) (Чичканов, 2009: 310). In his study, I.G. Eliner considers interactivity to be the "quintessence of a multimedia work" (Елинер, 2013: 20).

Interactivity is a set of events that determine the interaction of the viewer-actor with the virtual reality system. The event returned by the system changes the further spatial-temporal construction of the work, depending on the incoming event determined by the actions of the viewer-actor (Чичканов, 2009: 312).

Therefore, interactivity is the feature of a multimedia work, illustrating its functioning in the process of interaction with the user through a computer program. The user must take an active part in the interaction with the multimedia work.

The next feature of a multimedia work is the presence of several heterogeneous creative results in the structure, including a computer program. A multimedia work usually contains such objects of intellectual rights as computer programs, literary components, images, music, a website as a composite work and other components (Калугина, 2013: 20).

External perception of a multimedia piece of work is similar to an audiovisual piece of work. However, the interactivity of the multimedia work, which requires

the user involvement in the control of a piece of work, does not refer to the audiovisual piece of work, which is characterized by a fixed sequence of changing images and audio sequence, presented in a certain unity.

It is impossible to identify the legal regime of a multimedia piece of work with a computer program, since a multimedia piece of work is a complex result of creative activity, which consists of two parts: a computer program and other objects. The computer program itself is not a complex object. Besides, if we consider the author of a computer program to be the sole author of a multimedia piece of work, we ignore the rights of the people involved in the creation of this work: script writers, artists, composers, designers and others.

In contrast to a database, which is a composite product and involves the acknowledgement of copyright only for the performed selection or arrangement of materials, in the process of creation of a multimedia piece of work, a whole new product is born as a result of combining of different forms of art, which is not a just a combination of its individual components but a single piece of work.

### **3. The legal nature of a multimedia work**

Nowadays, multimedia works become more and more successful being the results of commercial activity. Their commercial use takes place not only within the country but also at the international level. However, the legislation of the Republic of Belarus lacks special rules regulating the legal regime of multimedia works, and there is no specification in respect of those subjects who can act as authors of a multimedia work.

A multimedia work is a single complex work being the result of the creative activity of an authoring team. As V.A. Dozortsev noted, one cannot traditionally define the circle of authors of such objects, as long as there is a large number of authors carrying out heterogeneous activities, who are involved in the creation of complex works (Дозорцев, 2005:146).

Among the persons who participate in creating a multimedia work, I. Stamatoudi singles out the following: the authors of those intellectual activity results that make up the content of the work (various artistic components, computer programs, music, etc.); employers, publishers, producers, editors, developers, owners of the rights to various objects (Stamatoudi, 2001: 33).

S. Novatsky proposes to consider the following as authors of the work: chief designer, chief programmer, script writer, and composer (Новацкий, 2017: 40).

The legislation of the Republic of Belarus lacks special rules related to the copyright of a multimedia work. There are no separate instructions on the legal status

of persons who take part in the creation of a multimedia work. In the context of the disjointed doctrinal positions regarding the legal regime of the multimedia work and the lack of a clear legal regulation at the legislative level, it seems necessary to consider the process of creating a multimedia work using the example of a computer game to determine the circle of authors of the work under study.

The development of a computer game is a unique creative activity, during which a large number of elements are combined into a final game product. The game development process usually includes the following stages: preparation, production, testing, release and distribution of the finished product. However, these stages may vary depending on the preferences of the developers and the features of the project.

At the preparatory stage, the game conception, storyline, character design, the game prototype, the plan for creating the game are being developed and agreed upon. At this stage, the concept and game-play of the game are documented in a design document, which is usually developed by the game designer.

At the production stage of the computer game, the bulk of the work is done: the artists draw the graphic components of the game; the sound engineers develop realistic sound design; the level designers produce the levels of the game, the writers and script writers create the dialogues of the characters; musical works are used to create the sound accompaniment of a computer game; composers are involved into the work on the project in order to make such pieces of music.

An important function in the creation of games is performed by programmers who develop software for the game and also combine the work of all the authors involved in the process of creating a computer game into a single project. The project may involve several programmers who specialize in one key area, for example: graphics, sound or artificial intelligence. For instance, graphics programmers create software that manages the storage and display of graphics and animation; artificial intelligence programmers create sets of rules that determine the behavior of enemies or characters in different game situations; programmers of tools create software for artists, designers and sound designers (Крукс, 2005: 22). The producer performs a coordinating function at all stages of the computer game creation.

As soon as the work on the game is completed, the testing phase begins. Software errors of the game are revealed by beta testers. The next stage is public testing. At this stage, the computer game is tested by professional and ordinary users. After a public test, programmers conduct system testing, due to which all system errors are corrected. At the end of this stage, the computer game is considered complete and can be submitted for production and distribution (Новацкий, 2017: 73).

Following the analysis of the computer game creation process, we can conclude that the key role in such a process is performed by a scriptwriter, a programmer, an artist and a composer. The result of the creative activity of these individuals is a computer game. Those participants who perform technical functions that do not have signs of creative activity cannot be recognized as authors of a multimedia work.

By analogy with the computer game, E.S. Kotenko proposes to recognize the same circle of persons as authors of other varieties of multimedia work (Гринь, 2013: 73). This position seems reasonable, since a computer game is one of the types of a multimedia work.

#### **4. Conclusion**

Despite the fact that multimedia works are used almost all over the world, we may conclude that their legal nature remains a matter of debate.

For qualification of an object as a multimedia work, there should be the combination of the following features: the presence in its structure of multiple heterogeneous protected results of intellectual activity that are independent objects of copyright; an electronic (digital) form; functioning during the interaction with a user (interactivity); the imitation of an objective reality or display of a fictional world created by the author through computer technologies (virtual reality); and the presence of a computer program in the structure.

To ensure the effective legal protection of multimedia works, it seems logical and reasonable to fix the category "multimedia work" at the legislative level by providing the legal protection to the mentioned works as to a single complex object.

The protection of multimedia works is necessary and possible by means of successive amendments and additions to the existing normative legal acts. The possibility of such a solution is proved by the practice of changing the national legal systems of the states, the search for adequate solutions by judicial practice and actions to improve the protection of copyright at the international level. In particular, it appears necessary:

1. to supplement Paragraph 2 of Annex No.26 to the Treaty on the Eurasian Economic Union by means of including "multimedia works" into the list of objects stated in the norm.
2. to supplement Paragraph 4 of Annex No.26 to the Treaty on the Eurasian Economic Union with Part 5 having the following content: "Multimedia works (computer games, electronic libraries, web-pages etc.) are protected as a single complex object".

3. to supplement Paragraph 1 of Article 993 of the Civil Code of the Republic of Belarus with Subparagraph 102 on “Multimedia works”.

4. to supplement Article 5 of the Act “On Copyright and Related Rights” of the Republic of Belarus dated 17 May 2011 with Subparagraph 12 on “Multimedia works”.

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### **ПРАВНИ РЕЖИМ МУЛТИМЕДИЈАЛНИХ РАДОВА**

*Чланак разматра питања правног режима мултимедијалних радова у Републици Белорусији и Руској Федерацији. Аутор указује да одсуство дефиниције правног режима мултимедијалних радова у белоруском законодавству проузрокује несигурност у области ауторских права. Такве околности доводе до дестабилизације права на промет мултимедијалних радова. Овај чланак представља компаративну анализу специфичности мултимедијалних радова у теорији и пракси. У чланку се указује на значајне моменте у научном развоју ове теме у правној науци. Аутор такође даје анализу важећег законодавства у области мултимедијалних производа. Како би се утврдио правни режим који се односи на мултимедијалне радове, неопходно је испитати правну природу тих радова. Ради утврђивања најадекватнијег правног режима, аутор предлаже употребу тзв. „праве дефиниције“ која открива основне карактеристике предмета истраживања.*

**Кључне речи:** *мултимедијални радови, мултимедијални производи, ауторско право, дигитална форма, комплексни производи.*



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## **THE PARTICIPATING ROLE OF MUNICIPALITIES IN WATER SUPPLY AND SEWERAGE SYSTEMS IN BULGARIA**

**Abstract:** *According to the Bulgarian legislation, the water supply and sewerage systems are managed by the Minister of Regional Development and Public Works, water supply and sewerage system Associations, and the city councils. According to decision on the municipality authorities, municipality acts as a member of the Association or as an independent authority. The presentation will describe the characteristics of the two possible forms by which the municipality manages water supply and sewerage systems.*

**Keywords:** *water supply and sewerage systems, municipalities, Bulgaria.*

### **1. Introduction**

In Bulgaria, the reform in the water supply and sewerage system sector has been underway for more than 15 years. The aim is to find the most expedient decision for the customers to receive better quality in the water services which will respond to the citizen's needs. In 2009, the Waters Act (hereinafter: WA) was amended and supplemented by a new Chapter 11 A, dealing with "Management, Planning and Construction of water supply and sewerage systems. Provision of water and water supply services. Unique information systems on water supply and sewerage services. Registration of water supply and sewerage associations and utilities".<sup>1</sup>

For the needs of managing, planning and construction of water-supply and sewerage systems, Bulgarian national territory is divided into different territorial units. designated as geographically defined areas (Article 198a of the Waters

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1 The Waters Act (hereinafter: WA), originally promulgated in 1999 (State Gazette RB, No. 67/27.07.1999) and subsequently amended and supplemented by Chapter 11 A (Articles 198a -198v WA, New, State Gazette RB, No. 47/2009, effective since 24.09.2009).

Act). In the legislation, there is no definition of these distinctive territorial units. In the context of functional and territorial characteristics, a territorial unit may be designated as a territory-defined unit in which there is a unified and synchronized planning and managing of the water-supply and sewerage systems and services managed by one executive body.

At the national level, the management of the water-supply and sewerage systems is vested in the Minister of Regional Development and Public Works, who is authorized to coordinate the managements of the water-supply and sewerage systems at national level (Article 198b, para.1 WA), in compliance with the national legislation and the national water strategies. The Minister of Regional Development and Public Works cannot directly intervene in the work and the powers of the regional authorities, which are defined as authorities with personal powers in the water-supply and sewerage services.

The management of the water-supply and sewerage systems in these territorial units may be vested in two different regional authorities, depending on whether the water-supply and sewerage system is owned by a single municipality or by multiple municipalities within the boundaries of these territorial units and the State (Article 198b, par.2 and par. 3 WA). When the water-supply and sewerage system is owned by a single municipality, the competent authority is the City Council (Article 198b, para.3 WA). When the water-supply and sewerage system is owned by more than one municipality and the State, the competent regional authority is the designated water-supply and sewerage system Association (Article 198b, para.2 WA).

The powers of the Association and City Council in managing the water-supply and sewerage system in these territorial units are identical. The differences in their powers only stem from the way the two authorities are constituted as regional authorities. In order to define the participation of municipalities in the management of the water-supply and sewerage sector, we shall explore the nature of the two regional authorities and their role in managing the water policy in the particular territorial units unit.

## 2. Association of water-supply and sewerage system as the authority for managing the water and sewerage system

The Association of water-supply and sewerage system is a collegial authority that manages the water-supply and sewerage systems in case these systems are owned by the State and multiple municipalities, or more than one municipality. The Association is a legal entity that is established on the basis of an explicit provision in the Waters Act<sup>2</sup>. It cannot be a trade company, and it cannot make or distribute profits (Article 198c, par. 2 WA).

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<sup>2</sup> According to the Article 198c ( para. 1) of the Waters Act, the Association of water-supply and sewerage system is a legal entity which has its registered office and address at the

The water-supply and sewerage system Association is a collegial body, which consists of the representative of the State and the representatives of each municipality that is included in the territorial unit. The administrative personality of the Association is defined on the basis of the legal powers vested in the Association under the Waters Act. Among these powers are the powers to: designate or select the water-supply and sewerage operator (utility); take acts for signing contracts entrusting the activities for providing and maintaining the water-supply and sewerage services to specific operators; develop and endorse the regional plan for water-supply and sewerage systems; develop and endorse the general/master plan for agglomerations with more than 10,000 inhabitants; develop and enforce long-term and short-term investment programs, etc. (Article 198c(4) 1-4 WA). As it can be seen from the description, those powers they are connected with administrative powers of the state authorities.

As a public authority, the Association has all legal characteristics of an authority that has administrative functions. This administrative authority acts on behalf of the state. It is powered to issue administrative acts, whose execution is guaranteed by the force of the state<sup>3</sup>.

In all cases, the representative of the State in the Association of water-supply and sewerage system is the Regional Governor. The territorially competent governor is the governor of the administrative region in which the territorial unit is located, or the region in which the larger part of the geographically defined area is located in case the area concerned belongs to multiple administrative regions (Article 198f (1-2) WA)

The representative of the municipality in the Association is the city major. When the major cannot participate, the City Council chooses another representative (Article 198f (3) WA). In that case, the City Council chooses a representative under Article 21, para. 2, point 23 of the Local Self-government and Local Administration Act, and Article 198e, para. 3 of the Waters Act, which constitutes the legal ground for taking decisions of different matters.

There are cases where some City councils take decisions on other legal bases, which is contrary to the law, These are cases where the decision of the City council for empowering the major to represent the municipality in front of the Association is taken on the base of Article 21, para. 1, point 15 of the Local Self-local Government and Local Administration Act. This provision authorizes the City council to take decision on the participation of the municipality in

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regional administration unit in the relevant district.

3 On characteristics of the state authority, see: Dimitrov, D. Administrative Law, Sofia, Ciela, 2006, p.102

the associations of local authorities and in legal non-profit organizations<sup>4</sup>. The Association of water-supply and sewerage system is not an association of local authorities because the state also takes part in its activities, nor is it a legal non-profit organization. It is a state authority with special powers.

The powers of the Association can be exercised only in the general meeting of the Association, which is convened by the chairman of the Association. When the State and more than one municipality participate in the particular water-supply and sewerage Association, the State is entitled to 35 % of the votes while the municipalities distribute among themselves the remaining 65 % of the votes in proportion to the number of inhabitants. The decisions of the general meeting of the Association are taken by a two-third majority of representatives, except for the decision on changing the borders of these territorial units which shall be adopted unanimously. In case where only the State and a single municipality participate in the Association, decisions have to be unanimous (Article 198c (6-10) WA).

The municipalities exercise their powers in the Association of water-supply and sewerage system through their representatives. When the common policy for the specific territorial unit is adopted, the influence of the municipality depends of the number of municipalities participating in the Association and their inhabitants.

The legislative solution of Parliament is not appropriate. To comply with the principle of local self-government, it is necessary to take into account the the quality of the water services that are provided to the citizens of each municipality. The problems in maintaining the water-supply and sewerage systems, their modernization, managing the water resources and the quality of water supply are different in each municipality. This is primarily due to different geographical characteristics, different management methods until the moment of establishing the Association, as well as the the state of the water and sanitation infrastructure. For these reason, when taking a decision, it is necessary to take into consideration the needs of each municipality, especially when the decision directly affects the municipality territory.

The percent of the State influence in the decision-making processes has to be reduced. The strong state impact conflicts with the principle of local self-government that defines the right and the possibility of citizens to resolve all issues of local importance<sup>5</sup>. As the larger part of the property of the water and sewerage

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4 Decision N 1/21.02.2016 of City Council of Plovdiv Municipality; Decision N 287/22.02.2017 of City Council of Belogradchik Municipality; Decision 1307/24.09.2015 of City Council of Svishtov Municipality.

5 Article 17 of the Local Self-government and Local Administration Act.



systems is public municipal property, a bigger influence in taking decisions has to be given to the local authorities<sup>6</sup>.

The general meeting of the water-supply and sewerage Association has the following powers: to designate the water supply and sewerage operator; to take decisions for signing contracts on behalf of and for the account of the owner of the system with the operator for the provision of water supply and sewerage services and the maintenance of the system; to elaborate and adopt a regional plan for water supply and sewerage systems; to elaborate and adopt a general plan for agglomerations with more than 10,000 inhabitants; to elaborate and adopt long-term and short-term investment programs as part of the general plan; to coordinate the business plan with the operator; to distribute between the owners the funds which are gathered by the concession payment; to take decisions on changing the borders of these territorial units; to take decisions on the cessation of the geographically defined area; to elaborate and adopt the annual budget, and to report on the annual activities of the association (Article 198c (4) 1-10 WA).

All these powers are common powers for managing water supply and sewerage systems. They are connected with strategic planning, management and maintaining the water supply and sewerage systems, defining the working operator, contracting the conditions pertaining to the activities of the water supply and sewerage operator in compliance with the prescribed legal provisions, and forming the price of the water supply and sewerage services.

The most interesting among the powers of the Associations is the power to take decisions on changing the boundaries of these territorial units. When there is a change of borders of the territorial unit, in case when land is accessed, there is need for two administrative acts which have to be issued by two different authorities.

The borders of the specific territorial unit may be changed when a decides to accede to the territorial unit which is managed by the Association of water supply and sewerage system, or when the municipality decides to withdraw from the territorial unit managed by the Association. In all cases, the procedure starts with the administrative act issued by the City councils.

The administrative act has to include two operative parts. In the first operative part, on the basis of Article 198a (para. 5) of the Waters Act, the City councils

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6 Under the 2003 amendments of the Waters Act, the ownership of property which was included in the commercial companies (water-supply and sewerage operators with state or municipality participation) was supposed to be separated between the State and the Municipalities by protocols. The protocols prove the property ownership of the State and Municipalities.

has to agree on the accession of the municipality territory to a specific territorial unit, which is managed by the Association of water supply and sewerage system. The second operative part of the decision has to include an injunction on the cessation of the old independent territorial unit when the accession procedure ends. The second part of the administrative act is expressed in conditional terms because the Association has to give consent on the termination of the accession.

The decision of the City council is an administrative act which concerns the rights and interests of the municipality and its citizens. The statement of the city council is made on behalf of the state authority. The powers come from the Waters Act because the municipal authority chooses which territorial unit to adjoin.

In the Bulgarian judicial practice, there are conflicting opinions on this matter. Part of the Bulgarian case specifies that those decisions are not administrative acts which can be appealed under the Administrative Procedure Code because those decisions are not individual or general administrative acts within the meaning of Article 21 and Article 65 of the Administrative Procedure Code<sup>7</sup>. Part of the case law defies that those decisions on accession to another territorial unit have an operative character, and they do not create independent rights and obligations. For this reason, the act cannot be independently appealed to the administrative court.

As previously stated, those decisions have the characteristics of administrative acts and, as administrative acts, they can be returned for further consideration or they can be appealed to the administrative court by the major of the municipality or by the regional governor according to Article 45 of the Local Self-government and Local Administration Act.

In my opinion, those acts are general administrative acts. They have the elements of administrative acts. A general administrative act is an act of the administration. It is regulated by the administrative law and has public law consequences. It is a final act that affects and threatens the rights and obligations of /unspecified circle of people and entities, and it is used for a concrete case (Petrov, 2017: 113).

The second elements in the complex factual grounds for changing the territory managed by the Association of water supply and sewerage system is the final decision by which the Association gives consent for changing the borders of the territorial unit and the accession of the municipality territory.

In cases where the territory of the Association is changed because a municipality wants to separate its territory, there is no need for a decision of the Association because the municipality has the right to take independent decision on how its

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<sup>7</sup> Court Order N 130/22.12.2016 on administrative case 195/2016 from the Administrative Court - Gabrovo.

territory will be managed: independently or together with other subjects in the Association. Thus, the change of the boundaries of the territorial unit will be finished when the decision of the municipality is sent to the Association. If the association takes subsequent decision on separating the territory of one municipality, that decision shall not have constitutive effects but constative ones.

In connection with the above conclusion, the text of Article 198c, para 4, point 7 WA shall be amended and supplemented; the legislator shall specify that the Association takes decision on changing the boundaries of the territorial unit when another territory is accessed.

The Association decisions related to the management of the water and sewerage systems are administrative acts. As such, they have to be in written form. Because the decisions are taken during a general meeting, the written form is a protocol which contains decision of the authority and relevant statements, the legal ground, the reasons and all other elements that are prescribed in Article 59 of the Administrative Procedure Code<sup>8</sup>.

In the Waters Act, there is no explicit text that defines the process of appeal against the acts of the Association. That does not mean that those acts cannot be appealed. By the power of the general clause,<sup>9</sup> the decisions of the Association can be appealed to the administrative courts within a period of 14 days from the date of receiving the notice that the act has been issued. The persons who may file an appeal against this act are people who fall under the impact of obligations created thereof and whose rights, interest, freedoms are directly affected. Filing an appeal against these acts with the administrative courts is the only way to assure the principle of legality. That principle is envisaged in Article 4 of the Administrative Procedure Code, which obliges the authorities to exercise their powers within the legal framework (Slavova, Petrov, 2014: 30).

When the decision directly affects the right and the interests of a municipality, and the municipality has participated in the general meeting and in forming the decision of the collegial body, the municipality will not have legal interest to file an appeal against the act. Thus, there is a need to introduce a new legal provision into the Waters Act, which should envisage the right of a municipality (as the owner of the water supply and and sewerage system) affected by the decisions of the general meeting to file an appeal against this administrative act within a period of 14 days since the date of the general meeting. In cases where the municipality has not participated in the general meeting, the time limit should start running from the day of receiving the notice that the act has been issued.

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8 Administrative Procedure Code, State Gazette RB, no. 30/11.04.2007 and subsequent amendments.

9 Article 120 of the Constitution of the Republic of Bulgaria

### 3. The city council as authority for managing the water and sewerage system

As already noted, when the water supply and sewerage system within the boundaries of a territorial unit is owned by a single municipality, the water supply and sewerage system is managed by the City council.

The City council is a local self-government authority<sup>10</sup> which defines local policies. The main powers of the city councils are defined in the Local Self-government and Local Administration Act. The provisions in Article 198d of the Waters Act define additional powers of the City councils when the territorial unit covers a single municipality.

Within the meaning of Articles 198c and 198d of the Waters Act, some powers of the Association and the City councils are identical, particularly in terms of managing the water-supply and sewage systems.

The powers of the City councils are connected with defining the water and sewerage operator, taking decisions on signing contracts with the operator for providing the water supply and sewerage services and maintaining the system, elaborating and adopting a regional plan for water supply and sewerage systems, elaborating and adopting the general plan for agglomerations with more than 10,000 inhabitants, elaborating and adopting long-term and short-term investment programs as part of the general plan, coordinating the business plan with the operator, distributing among the owners the funds which are gathered by the concession payment, taking decisions on changing the boundaries of the territorial unit, etc.

When the City councils exercise these powers, they have to abide by the rules of the Local Self-government and Local Administration Act about the decision making procedure of the city councils. Those rules are valid for all meetings of the city councils. The proposal for such a decision has to be included in the agenda of the council meetings, after being discussed by the standing committee.

The City council is also a collegial body. The difference between the City council and the Association is that the City council is an authority with common competency. The city council can take decisions on the basis of Article 198d of the Waters Act during its general meetings or during a special meeting called upon specially for taking those decisions. The decisions of the City councils which are issued on the basis of Article 198d of the Waters Act are administrative acts. They can be appealed before the administrative court within a period of 14 days of receiving the notice thereof. Concurrently, they are subject to control under Article 45 of the Local Self-government and Local Administration Act, which envisages the powers of the major and the governor to return the administrative

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<sup>10</sup> Article 138 of the Constitution of the Republic of Bulgaria

act for new consideration<sup>11</sup> or to submit an appeal against these administrative acts to the administrative court.

Although the acts of the City councils and the acts of the Association for water supply and sewerage system are issued upon identical powers, there are different rules for exercising control over those acts. For this reason, the legislator has to define common proceedings for exercising control over the two authorities when exercising their powers under the Waters Act. In that sense, it is necessary to reduce the control of the governor (envisaged in Article 45 para. 4 of the Local Self-government and Local Administration Act) because it challenges the independence of the local authorities.

#### **4. Conclusion**

The Bulgarian legislator accepted an approach according to which the management, planning and construction of the water supply and sewerage systems is accomplished by dividing the national territory into different territorial units. In case the owner of the water supply and sewerage system is a single municipality, or more municipalities and the State, the competent authority is the City council or the Association of water supply and sewerage system (respectively).

The legislation sets no limits of the number of territorial units. The accession or exclusion of the territory can be accomplished only by the will of the municipal authorities on the base of a valid administrative act.

During the last two years, the municipalities were forced by the central executive authority to join the Associations of the water supply and sewerage systems because only an Association could be a beneficiary of the European funds for reconstruction of the water supply and sewerage systems. Such enforcement has no legal ground, although it is synchronized with the obligations of Bulgaria upon the ratified European Charter on Local Self-government<sup>12</sup>.

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11 According to art. 45 of the Local Self-government and Local Administration Act, the major and the governor have the possibility to return the administrative act for new consideration or to appeal to the administrative court.

12 Ratified by the Act adopted at the 37th National Assembly of the Republic of Bulgaria, on 17.03.1995, State Gazette, no. 28 / 28.03.1995.

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**УЛОГА ОПШТИНА У РЕГУЛИСАЊУ ВОДОВОДНО-КАНАЛИЗАЦИОНИХ СИСТЕМА У БУГАРСКОЈ**

***Резиме***

*Према бугарском законодавству, водоводно-канализационим системима управља Министар регионалног развоја и јавних радова, Удружења за водоснабдевање и канализацију, и градска већа. Према одлуци о овлашћењима општинских власти, општина делује као члан Удружења или као независан орган. У овом раду се приказују карактеристике два могућа модела које општина може користити у процесу управљања системима водоснабдевања и канализације.*

***Кључне речи:*** општина, водоводно-канализациони системи, Бугарска.





## **ENGLISH FOR LEGAL PURPOSES: THE ROLE OF LEGAL ENGLISH IN LEGAL EDUCATION IN THE GLOBALIZED WORLD**

**Abstract:** *In light of the global trends in language education, the article explores the current status of ELP/LE instruction in tertiary education in Serbia, the Balkan region and worldwide, and discusses the relevance of ESP (in general) and ELP/LE (in particular) in the contemporary legal education. The first part of the paper provides a historical overview of the development of ESP and ELP/LE at the international and national level, and an outline of different kinds of ELP/LE courses available worldwide. In the second part, the author presents and discusses the findings of a comparative survey on the status of ELP/LE courses at law schools in Serbia, the Balkan region and some European countries. Drawing on the solutions observed in comparative practice, the author identifies issues that call for further consideration and suggests possible action that may improve the ELP/LE status in Serbian law schools. Referring to the concepts of the 21st century skills and global competences, the author highlights the important role of interdisciplinary ESP/LE instruction in legal education, argues for more latitude for ESP/ELP in law school curricula and establishing national ESP standards in tertiary education, and urges for a more vigorous support of all stakeholders, whose joint action may contribute to providing relevant ELP/LE instruction for real-world purposes, foster the development of the 21<sup>st</sup> century skills and global legal skills, and promote life-long learning as the highest educational value.*

**Key words:** *ESP-law, ELP/LE, legal education, global legal skills, 21<sup>st</sup> century skills, Serbia.*

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## 1. Introduction

English language is indisputably well-established as a *global language* and a *lingua franca* of the contemporary world. It is used on a daily basis by billions of people worldwide, including both native speakers (as a *mother tongue*) and non-native speakers (either as a *second language* [ESL] or as a *foreign language* [EFL]). Among other factors, this “three-pronged development” (Crystal, 2003: 6) has considerably contributed to its universal use. *Historical Linguistics* recognizes several concepts reflecting not only its predominant status among world languages but also its flexibility and ability to change and evolve in keeping with global trends. Thus, the concept of **Global English** reflects its prevalence as “a global *lingua franca*” in the contemporary world (Crystal, 2003: x). The concept of **Global/World Englishes** acknowledges different varieties of standard English developed across the world due to its universal acceptance as a *common language* of communication (Crystal, 2003: xiii) in various socio-linguistic, cultural, economic and political contexts. The concept of **New Englishes** embodies the socio-cultural circumstances governing constant language change and evolving status (Crystal, 2003: xii) in the context of the requisite 21<sup>st</sup> century skills.

**English Language Teaching (ELT)** is a prominent area of *Applied Linguistics*, an interdisciplinary branch of linguistics dealing with language use in different social contexts and application of linguistic theories and methods in resolving language-related issues. It experienced dynamic development in the 20<sup>th</sup> century, particularly after World War II. The expansion of **General English (GE)** courses may be attributed to a range of socio-political, economic and cultural factors, arising from the predominant impact of English-speaking countries (primarily the UK and the US). Due to global socio-political events, economic and scientific-technological developments in the 1960s and the rapid growth of the European Community from the 1980s onward, English surfaced as a common language of international communication among global participants in business, law, politics, international relations, science, engineering, etc. Given their distinctive professional communication needs, it was essential to provide “specialized English language courses” catering for learners in discipline-specific areas whose *real-life* needs exceeded the communicative competences taught in GE courses. It was the cornerstone for the emergence of **English for Specific Purposes (ESP)** and its many specializations for a wide range of academic (EAP), professional (EOP) and vocational (EVP) purposes. On the global scale, this trend was reflected in the concept of **Languages for Specific Purposes (LSP)**: English, French, German, Russian, Spanish, etc. In the past five decades, **ESP** has become the most prominent, dynamic and constantly evolving ELT area. Since the turn

of the 21<sup>st</sup> century, advances in digital technologies have contributed to further proliferation of **ESP** varieties reflected in efforts to “chart” new ESP territories<sup>2</sup>.

**English for Legal Purposes (ELP)**, generally known as **Legal English (LE)** or **English for Law**, is one of the many ESP areas which has been in huge demand in the past decades, particularly due to the globalization of business, commerce, politics, international relations, IT sector, etc. **ELP/LE** deals with English for specific academic, professional and vocational *legal* purposes. It caters for the specific needs of legal and other professionals from all law-related sciences who are expected to competently and efficiently communicate in English in their discourse communities and/or in different socio-cultural contexts.

In this context, this paper explores *the current trends in ELP/LE instruction in tertiary education in Serbia, the wider Balkan region and worldwide*, and discusses the relevance of **LSP/ESP** (in general) and **ELP/LE** (in particular) in the contemporary legal education. In the first part of the paper, the author provides a brief *historical overview of the development of ESP and ELP/Legal English* at the international and national level, as well as an outline of *different kinds of ELP/LE courses* in the contemporary world, including both formal/institutional and informal/non-formal instruction at different levels. The second part of the paper presents and discusses the findings of *a comparative survey* on the status of ELP/LE courses in legal education in Serbia, the Balkan region and some European countries; thereupon, the author identifies some problems in ESP/ELP instruction and indicates possible solutions that may contribute to improving the current ELP/LE status in Serbian law schools. In the third part, in light of the concept of *global education/learning* and the projected *21<sup>st</sup> century skills*, the author highlights the important role of *interdisciplinary ESP/LE instruction* in contemporary legal education and urges for a more vigorous support of all stakeholders in tertiary education which may contribute to ensuring more systematic ELP/LE instruction, foster the development of the requisite *global competence and life skills*, and promote *life-long learning* as the highest educational value.

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2 New ESP areas include: IT industry, aviation, military, law enforcement, architecture and civil engineering, logistics, tourism and hospitality, metallurgy, mining, agriculture, forestry, nursing, dentistry, physiotherapy, sports, environment, etc. See: Express Publishing ELT Catalogue 2016-2017: ESP Career Paths, 2016; <https://www.expresspublishing.co.uk/rs/esp>; (1.9. 2017)

## 2. The historical development of ESP and ELP/LE worldwide and in Serbia

### 2.1. The development of ESP

**English for Specific Purposes (ESP)** is a generic term for an array of discipline-specific areas of English language instruction which have flourished since the late 1960s, as a result of advances in science, technology, commerce and international relations. As the power of English-speaking countries grew worldwide, English was increasingly recognized as a new *lingua franca* of international communication in law and legislation, politics, business, trade, economics, industry, medicine, technology, communications, media, scientific research and publications, etc. This trend called for providing relevant instruction that would cater for the diverse but highly specific needs of the goal-oriented participants in global communications.

**ESP** is a *multi-disciplinary* approach to language learning which entails discipline or subject-specific "learning-centered" instruction tailored "to meet the needs of particular learners" for their current/prospective academic, professional and vocational purposes (Hutchinson & Waters, 1987:19-21). Relying on the insights from many scientific disciplines (applied linguistics, psychology, pedagogy, sociology, anthropology, cognitive science and discipline-related sciences), ESP aims to provide **a sound balance** of interrelated General English (**GE**), English for Academic Purposes (**EAP**) and discipline/subject-specific **ESP** contents and communicative competences, as well as a sound discipline-specific methodology reflecting the *real-world* communications in a target community (Dudley-Evans & St-John, 1998: 4-5). Given that learners' needs in one ESP area may differ from the learners' needs in another ESP area, ESP instruction focuses on discipline/subject-specific lexical corpus and register analysis, syntax and stylistics, discourse and genre analysis, pragmatics, target learner needs analysis, requisite communicative competencies, and relevant learner/learning-centered pedagogy (Hutchinson & Waters, 1987: 9-14).

**ESP** is classified into three huge branches: *a) English for Academic Purposes (EAP)*, which includes (pre-study, in-study or post study) courses for current/prospective academic study purposes in the country or abroad; *b) English for Occupational Purposes (EOP)*, which implies (pre-service, in-service or post-service) courses for professional purposes; and *c) English for Vocational Purposes (EVP)*, which implies (pre-experience or in-service) instruction for trades, occupations and vocations. Each of these branches comprises a set of sub-categories reflecting *general or subject-specific contents* and different *study purposes*.

**EAP** is subdivided into *English for General Academic Purposes (EGAP)* and *English for Specific Academic Purposes (ESAP)*. Based on the classification by *content*

(discipline-specific matter), ESAP includes: English for Science and Technology (EST); English for Business and Economics (EBE), English for Medical Purposes (EMP); English for Social Sciences (ESS); English for Educational Purposes (EEP) (Hutchinson & Waters, 1987:17); English for Legal Purposes (**ELP**); English for Management, Finance and Economics (EMFE), etc. (Dudley-Evans & St-John, 1998: 6).

**EOP** is subdivided into General EOP and Specific EOP, the latter of which implies a further distinction between *English for Professional Purposes* (EPP) and *English for Vocational Purposes* (EVP) (Dudley-Evans & St-John, 1998: 6-7). Yet, given that ESP keeps spreading into new areas, many author note that these classifications “fail to capture the fluid nature of various types of ESP teaching” (Dudley-Evans & St-John, 1998: 8), different “hybrid permutations of EAP and EOP, combining elements of both” (Belcher, 2009: 2), such as *English for Academic Legal Purposes* (EALP) for law students whose needs exceed the immediate academic setting and refer to prospective professional communities (Belcher, 2009: 14). Moreover, as a result of globalization and contemporary migration trends, the ESP world is further enlarged by *English for Socio-cultural Purposes* (ESCP), catering for the needs of global participants (migrants, immigrants, indigenous community members, etc.) who do not fall into either EAP or EOP (Belcher, 2009: 16). This diversity proves that ESP is a dynamic area which keeps changing, evolving, adapting to new circumstances and reinventing itself in response to the specific needs of contemporary 21<sup>st</sup> century learners.

## 2.2. The development of Legal English

Whereas the genesis of the first legal systems, sources of law and legal language on the global scale may be traced back to the ancient civilizations of China, Mesopotamia, India, Egypt, Greece, and Rome, the development of **Legal English** has its origins in the early British history and multiple linguistic influences of different settlers, raiders, invaders and conquerors (Tiersma, 2010: 2). It includes the Celtic tribes (400 BC), the Romans (55 BC to 5<sup>th</sup> century AD) and Christian missionaries (c. 600 AD) who reintroduced Latin, the Anglo-Saxons’ customary law tradition (embodied in the popular assembly trials called “*moots*”) (Tiersma, 2010:12-13), the Danes and Scandinavian Vikings, and particularly the Normans (1066) whose invasion instituted French as the official language in courts for nearly 300 years. Notably, after the Norman Conquest, three languages were use in the British Isles: *English* was the language spoken by commoners and used in lower court trials; *French* was the language of learning, nobility and royal courts’ proceedings; and *Latin* was the official language of legal writing, court records and statutes (Tiersma, 2010:14-15). English language was brought

back to courts in 1362, the first statutes in English were printed in English in 1476, but many French and Latin words still remained part of the legal English corpus until the 18<sup>th</sup> century. The English common law system, based on the Anglo-Saxon legal tradition, judge-made law, adversarial court proceedings, the principle of equity and the doctrine of binding precedent started developing in the 16<sup>th</sup> and 17<sup>th</sup> century, and Latin and French were finally abandoned in legal proceedings in 1731 (Tiersma, 2010:16).

In the 18 and 19<sup>th</sup> century, due to the colonial power of the British Empire, the English common law tradition was exported into the United States and the Commonwealth countries (Canada, Australia, Ireland, India, South Africa, Malaysia, etc.), where the development of specific legal systems (e.g. Anglo-American, Anglo-Indian, Canadian, etc.) was governed by ample political, economic and socio-cultural factors. Today, many of these countries (Ireland, Scotland, Quebec, Louisiana, the South African Republic, etc.) have *mixed-law* systems comprising elements of both civil/continental and common law tradition (Mattila, 2006: 240). Given these historical influences, interferences and terminological borrowings, "legal languages were often *a linguistic mix*" (Mattila, 2006: 260). Thus, while going global, Legal English kept developing local varieties with their idiosyncratic features, which often imply distinctive meanings of legal terms, concepts and institutes within a specific legal culture.

In the 20<sup>th</sup> and 21<sup>st</sup> century, due to the internationalization and globalization processes where law was no longer confined to local contexts, English has become the *lingua franca* of the contemporary world and a dominant language in international relations, trade, business, politics, IT sector, etc. As law pervades every aspect of life, **English for Legal Purposes (ELP)**, generally known as **Legal English (LE)** or **English for Law**, has necessarily become one of the ESP areas in high demand. It has triggered a rapid development of diverse forms of ELP/LE instruction for academic, professional and vocational *legal* purposes, depending on the specific needs of legal and other professionals who are expected to competently communicate in their discourse communities and/or in different socio-cultural contexts.

### 2.3. The Development of ELT/ESP/ELP in Serbia

Historically speaking, the institutional study of foreign languages (FLs) in Serbia started with the establishment of first public schools: the first three-year High School (*Fachhochschule*) in Belgrade (1808-1813 and 1830-1833), the *Lyceum* in Kragujevac (1838-1841) and its transfer to Belgrade in 1841, and the University of Belgrade in 1905 (Avramović, 2006:12-13). In line with the political and socio-cultural influences of the time, the records of *the Law Faculty in Belgrade*

report on the study of several FLs: German (1808-1813; 1830-1833), French (1840-1853), French and German (1856-1863), Latin and French (1873-1897); yet, there is no information on the periods 1905-1914 and 1919-1941 (Jončić, 2006: 21-27). The gap may be filled with data provided by the Faculty of Philology in Belgrade, which organized first English language courses in the periods 1907-1914 and 1926-1941.<sup>3</sup> Notably, the Berlitz Center was opened in Belgrade in 1914, initially providing private language courses in German, French and English; in 1930s, the first specialized (ESP) courses were offered for bank administrative staff and merchant assistants.<sup>4</sup> The *oldest private school* of foreign languages was organized at Kolarac Peoples' University in Belgrade in 1933, initially offering courses in English and later in other languages.<sup>5</sup> In *public schools*, English was first introduced as an elective course in some secondary schools in 1930s; after World War II, it was a compulsory subject in some primary and secondary schools.<sup>6</sup> In tertiary education, the Belgrade Law Faculty records show a fragmentary picture of foreign language instruction in the period from 1945 onwards: a) *German* 1949-1975 and 1995-2006; b) *English*: 1949-1985, 1990-1993, 1994-2003 and 2003-2006; c) *Russian*: 1994-1999; and d) *French* 1995-2006.<sup>7</sup> Other available sources report that **LSPs** (*Languages for Specific Purposes*) were officially introduced in secondary and tertiary education in the early 1980s (under the 1983/1984 University Curriculum and 1984 Secondary School Curriculum of the SFRY).<sup>8</sup> The first **ELP** textbooks show that ELP has been taught in the former SFRY countries since the 1980s.<sup>9</sup> They offer insight into the course contents and methodology.

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3 See: Faculty of Philology Belgrade, [http://www.fil.bg.ac.rs/lang/sr/katedre/anglistika/istorijat/\(1.10.2017\)](http://www.fil.bg.ac.rs/lang/sr/katedre/anglistika/istorijat/(1.10.2017)).

4 See: Berlitz tradicija i istorija; <https://www.berlitz.co.rs/berlitz-tradicija-istorija/> (accessed 1.Oct.2017).

5 See: Foundation of Ilija Kolarac: Open/Peoples' University), <http://www.kolarac.rs/> (accessed 15.10.2017).

6 See: Faculty of Philology, Belgrade: [http://www.fil.bg.ac.rs/lang/sr/katedre/anglistika/istorijat/\(1.10.2017\)](http://www.fil.bg.ac.rs/lang/sr/katedre/anglistika/istorijat/(1.10.2017)).

7 See: Monograph: *The 165<sup>th</sup> Anniversary of the Law Faculty in Belgrade 1841-2006*, Pravni fakultet, Univerzitet u Beogradu, 2006, (str.74-79;191-193); statistical data compiled by Milka Stjepanovic.

8 Zbornik radova (1990): Collected papers: 1<sup>st</sup> Conference "Living Languages": Language learning/teaching-communicative approach and teacher education, 1989), Filozofski fakultet, Univerzitet Novi Sad, 1990:172, 182.

9 See: Vićan D., Pavić Z., Smerdel B. (1984), *Engleski za pravnike*, Pravni Fakultet u Zagrebu; Arandelović, D. (1995). *Engleski za Pravnike*, Pravni fakultet u Nišu, SIIC, Niš, 1995; Mešić J. (1997). *Engleski jezik (Izbor tekstova)*, Pravni fakultet u Beogradu, Dosije, Beograd.

*The Faculty of Law in Novi Sad* was the second law school in Serbia, established in 1955. Unfortunately, the available sources contain no records on FL/LSP courses.<sup>10</sup>

*The Faculty of Law in Niš* was the third law school in Serbia, established in 1960, originally as the Faculty of Law and Economics. Historical records shows that FL courses were initially optional (1964/65); FL courses in English, French, Russian and German were first introduced in 1967/68, but only in the Economics Department (2h/w, 60h/year in II, III and IV year) (LF Niš Monograph, 1970: 10, 15-16). After Law Faculty in Nish had been established as an independent institution in 1973/74, the 1978 LF Curriculum contains no data about FL courses but the 1986 LF Niš Monograph (1986: 40, 43) shows that Latin was taught from 1963 to 1984. FLs were first introduced in III and IV year of law study in 1987, under the LF Niš Curriculum 1987-1990,<sup>11</sup> but there are no data on the number of semesters, hours per week, and course contents. The LF Niš Monograph (2010: 12-15) shows that FLs had the same status in the 1990-1994 LF Curriculum and the 1995-2003 LF Curriculum, but without specifics. Another LF Niš Monograph (1995: 29) shows that the 1995 LF Curriculum comprised 30 subjects and a *foreign language*: English, French, German or Russian. The first ELP textbook published in 1995<sup>12</sup> bears witness that ELP instruction was well-established at that time. When I started teaching in 2002, ELP/LE instruction was organized in the III and IV year (2h/w in 4 semesters, 60h/year; 120h total). Under the 2003/2004 LF Curriculum,<sup>13</sup> FL courses were not officially included in the tables due to the fact that they were given an odd status of "obligatory competences"; namely, students were "*obliged* to pass the exam in a foreign language for lawyers, and the basic computer skills" but they were not to be graded and the descriptive mark (*pass/fail*) was not calculated in the GPA. Thus, the *four-semester* LSP courses were not only awkwardly degraded and equaled with a *two-week* computer course but also arbitrarily "deprived" of the status of an academic subject. LSP teachers were still required to submit the syllabi (LF Curriculum, 2004:145-151) and courses were held pursuant to the 1995-2003 LF Curriculum (2h/w in 4 semesters), the only difference being that students received a descriptive mark instead of regular grades. The 2008 LF Curriculum

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10 See: Law Faculty, University of Novi Sad), <http://english.pf.uns.ac.rs/faculty/history>; (accessed 1. Oct. 2017)

11 The 1987-1990 Curriculum of the LF Niš, ed. D. Paravina, Pravni fakultet, Univerzitet u Nišu, 1989

12 See: Arandjelović, Dušica (1995). Engleski za Pravnike, Pravni fakultet u Nišu, SIIC, Uni.Nis, 1995 (88str).

13 Article 2 LF Curriculum 2004, Pravni fakultet, Univerzitet u Nišu (pp. 14; E, F, G, R syllabi pp.145-151)



(the first accredited Bologna curriculum) brought new challenges as the former *four-semester* ELP/LE course was “squeezed” into two semesters in IV year: an *obligatory* ELP (3h/w; 3 ECTS) in 7<sup>th</sup> semester, and an *elective* LE course (3+1 h/w; 5 ECTS) in 8<sup>th</sup> semester (LF Monograph, 2010: 35). Finally, under the 2013/14 Curriculum<sup>14</sup>, there is **one compulsory LSP course** (3h/w,45h/sem, in I year/2. sem), where students opt for *one* LSP: English, French, German or Russian, and **two elective Legal English courses** (3+1h/w, 60h/sem each), in III year/6.sem and IV year/8.sem (LF Monograph, 2015: 29, 32-35), where students opt for LE from among 17-21 law courses rather than another FL.<sup>15</sup>

*The Faculty of Law in Kragujevac* was established in 1976 but the institution website contains no historical data when ELP/LE courses were first introduced.<sup>16</sup> *Law Faculty in Kosovska Mirovica* and *Law Department in Novi Pazar* provide no data on this either. The *first private law schools in Serbia* were established after the year 2000. The scope of ELP/LE instruction in all these institutions will be presented later on in this paper.

### 3. Contemporary developments in ELP/LE instruction worldwide

#### 3.1. The role of law-and-language instruction in legal education

Many legal scholars and linguists have explored correlations between law and language and underscored the role of ELP/LE in legal education. Discussing the discursive, pragmatic and stylistic features of legal language, Mellinkoff (1963: vi) noted that “*the law is a profession of words*”, which are law professionals’ essential “tools of trade”. *Legal language* is “the language of statutes, public documents, courts, processes, teaching, textbooks, notices, recording, meetings” (Mellinkoff, 1963: 5), which touch upon every aspect of human life.

The development of ELP/LE engendered a new branch of Applied Linguistics. Initially named as *the language of the law* (Melinkoff, 1963) and *legal language* (Tiersma (1999), **Legal Linguistics** is an *interdisciplinary* area of Applied Linguistics which examines “the development, characteristics and usage of legal language” (Mattila, 2006: 11), the correlations between *law and language*, “the linguistic aspects of law” and the use of “language in law” (Galdia, 2009: 27,64). It includes many sub-disciplines focusing on different aspects of *law and lan-*

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14 The 55<sup>th</sup> Anniversary of the LF Niš, eds. I. Pejić, N. Stojanović, Pravni fakultet, Univerzitet u Nišu, 2015

15 The course descriptions and syllabi are accessible at the Law Faculty Nis website: [www.prafak.ni.ac.rs](http://www.prafak.ni.ac.rs)

16 Pravni fakultet, Univerzitet u Kragujevcu; <http://www.jura.kg.ac.rs/index.php/sr/osnovne-studije.htm>;

*guage* (legal pragmatics, syntax, semantics, stylistics, discourse/genre analysis, lexicology, legal jargon, rhetoric, translation, forensic linguistics, etc.), which are correlated with other scientific disciplines (history, anthropology, sociology, pedagogy, etc.). Mattila (2006: 3-4) specifies that *legal language* it is “a functional variant of natural language”, often designated as “a technical language (*“technolect”*)”, whose properties vary according to the branch of law” and across different legal traditions; it is used by members of “a specialist profession” (legal scholars, legislators, administrators, judiciary, lawyers, notaries, etc.). In terms of globalization, Mattila underscores that Legal Linguistics faces new challenges: to untangle the intricate “web” of legal information, to compare distinctive concepts and institutions, and to avoid misunderstandings in communication and mistakes in various *real-life* legal contexts (Mattila, 2006: 265-266).

In the context of globalized, internationalized and multicultural world, Goddard (2009) discusses the role of *legal education*, which is perceived as “an interdisciplinary exercise” aimed at preparing practitioners to competently use legal knowledge and skills in cross-cultural legal contexts; thus, contemporary law professionals “need three kinds of knowledge: **expert, legal, and linguistic**” (Goddard, 2009: 2-3). In terms of ELP/LE instruction for *real-world* academic/professional purposes, it implies an **interdisciplinary** approach to **legal knowledge, integrated linguistic skills, language-related professional competences**, as well as **learner/learning-centered pedagogy and discipline-specific methodology**. Each course has to be tailored to address the distinctive needs of particular learners and provide *challenging learning opportunities for meaningful interactions* reflecting the *real-world* discourse community contexts. Given the elaborate contents, one of the greatest challenges of ELP/LE instruction is to ensure a **fair balance** of *content knowledge, professional skills and communicative competences*<sup>17</sup>, aimed at *developing transferable life skills* and fostering *learner autonomy* as a cornerstone for *life-long learning* (Ignjatović, 2017:576, 586).

### 3.2. Types of law-and-language courses worldwide

On the global scale, in light of distinctive legal systems and legal culture, learners’ specific needs and requisite competencies in different socio-cultural contexts, there are varied forms of *law-and-language instruction*. Generally speaking, they may be classified into two broad categories: a) *law-and-language courses for na-*

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17 As noted by Hymes (1971), the concept of *communicative competence* includes: a) **linguistic competence**: mastery of language codes and conventions; b) **social-linguistic competence** and cultural awareness of the appropriate language use; c) **discourse competence**: discourse community conventions and practices reflecting language use among its members; and d) **strategic competence**: relevant strategies for promoting effective communication in different social contexts (Friedenberg, *et al.*, 2003: viii).

tive (L1) speakers, and b) *law-and-language courses for non-native (L2) speakers*, including both ESL and EFL learners. Each of these categories includes various types of courses.

In English-speaking countries (UK, US, Canada, Australia), there are *law-and-language courses for native (L1) speakers* who need legal content knowledge and terminology to prepare for law study or career: a) undergraduate pre-law programs preparing students for law school admission exams (LSAT, LNAT, LAT);<sup>18</sup> b) 1-year law foundation programs (including 1-term Academic Study Skills and 3-term law foundation courses); c) intensive summer (2-4 week) law foundation courses (including legal research, academic writing, case analysis, critical thinking, legal reasoning skills)<sup>19</sup>; d) professional development courses for practicing lawyers (legal practice, bar training, qualification exam) in different areas of law (constitutional, criminal, civil, tort, business law; human rights, economics, arbitration, etc).<sup>20</sup>

In terms of ELP/LE instruction for *non-native (L2) speakers*, there is a wide variety of ELP, LE and law foundation courses offered worldwide: a) pre-LLM preparatory courses provided by law schools in English-speaking countries for international graduates pursuing their LLM degree in the UK, US, Canada, Australia;<sup>21</sup> b) introductory LE and law courses for LLB or LLM students interested in the common law system and legal culture (often including legal/professional skills);<sup>22</sup> c) full-time LLB or LLM programs in English, or specific GE/EAP/LE courses required within LLB or LLM study programs<sup>23</sup>; d) LE and

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18 LSAT (Law School Admission Test in the US and Canada), LNAT (Law National Admission Test in the UK) and LAT (Law Admission Test in Australia) exams focus on: Reading Comprehension, Argument Structure, Analytical/Logical/Critical Reasoning, and Academic Writing. See: <https://www.lsat-center.com/prep-guide/>; <https://www.manhattanprep.com/lsat/>; <http://www.londonlawtutor.com/LNAT.html> (accessed 30.11.2017).

19 See, for example: [www.oxford-royale.co.uk/course/law-school-preparation](http://www.oxford-royale.co.uk/course/law-school-preparation); accessed 30.11.2017; <https://www.kingseducation.com/university-pathways/undergraduate-uk/our-courses/law-foundation.html>

20 See, for example: <http://www.londonlawtutor.com/lawcourses.html> (LPC, BPTC, QTLS, Other Courses)

21 See, for example: Columbia Uni: <http://ce.columbia.edu/American-Language-Program/English-Professional-Purposes-Law>; Boston Uni: <http://www.bu.edu/celop/academics/programs/legal-english/>; accessed 30.11.2017

22 See, for example: *Trier Uni. Law Faculty*, Germany (2017/18): <https://www.uni-trier.de/index.php?id=61380> (International Legal Study Program); *Sapienza University of Rome, Law Faculty*, Italy (2017/18): <http://corsidilaurea.uniroma1.it/it/corso/2017/giurisprudenza/insegnamenti>; accessed 30.11.2017.

23 See: *Katmandu Law School*, Nepal (2017/18): <http://www.ksl.edu.np/programs/ba-llb>; *Hong Kong City Uni.* (LLB 2017/18): <http://www6.cityu.edu.hk/slwl/lib/doc/LLB/>

law courses for international legal scholars and practitioners in various legal areas (contracts, human rights, international law, etc.);<sup>24</sup> e) LE courses preparing learners for certified international exams (TOLES, ILEC) and career in international contexts<sup>25</sup>; f) introductory ELP and subject-specific LE courses (often including EAP in legal contexts) provided over a number of semesters in different formats at law schools and law-related institutions worldwide;<sup>26</sup> g) one-semester LE courses provided within EU exchange programs (e.g. ERASMUS);<sup>27</sup> and h) discipline-specific law and legal terminology courses in English (on EU, International, comparative law, etc.).<sup>28</sup> In addition to traditional on-site courses, many institutions have modernized the learning process by providing varied forms of distance learning (DL): Blended Learning, Flipped Learning, Mobile Learning, Online Learning, etc.

Considering the multi-disciplinary nature of ESP instruction and ample application in different areas of human life, the overview of ELP/LE courses should also include a brief reference to some forms of *non-formal and informal ELP/LE instruction* worldwide. The high demand for ELP/LE courses has been reflected in the increasing number of fee-based Legal English, ILEC and TOLES certification courses, offered by private FL schools and institutions worldwide.<sup>29</sup> Reflecting the internationalization of legal matters, these LE courses focus on subject-specific language used in international law contexts (company, business, trade, contracts, intellectual property, competition law, etc.), which are perceived as highly relevant areas for developing linguistic and academic/professional competences of both prospective and practicing professionals. Some institutions also

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LLB\_2017\_and\_thereafter.pdf; Johannesburg Uni, South Africa (2017): <https://www.uj.ac.za/faculties/law/Documents/FACULTY%20REGULATIONS%202017.pdf>

24 See: [http://fulbright-france.org/sites/default/files/summerlaw\\_2017\\_0.pdf](http://fulbright-france.org/sites/default/files/summerlaw_2017_0.pdf); accessed 30.11.2017; Edinburgh Uni: <http://www.ed.ac.uk/english-language-teaching/global-partners-and-professionals/specific-purposes/law/english-legal-studies>;

25 See: <http://www.toleslegal.com/>; <http://www.cambridge.org/us/cambridgeenglish/catalog/business-professional-and-vocational/international-legal-english-2nd-edition>; <https://www.translegal.com/academy>

26 See: *Helsinki Uni. Law Faculty*, Finland (2017/18): <http://www.helsinki.fi/kksc/english/index.html>;

27 See: Stockholm Uni LF (2016/17): <http://www.jurinst.su.se/english/education/courses-and-programmes/law-programme/exchange-programmes/exchange-programme-courses-2016-2017>;

28 See, for example: *Law Faculty Vienna Uni*: [https://ufind.univie.ac.at/de/vvz\\_sub.html?path=182781](https://ufind.univie.ac.at/de/vvz_sub.html?path=182781) ;

29 See, for example: Pyramid Group: ESP program: <http://thepyramidgroup.biz/esp-programme/>; TransLegal : <https://www.translegal.com/>; TOLES: <http://www.toleslegal.com/>; ILEC was discontinued in January 2017.

provide fee-based ESP/LE teacher training courses *online*<sup>30</sup>. In addition, many renowned universities offer *open access* Massive Open Online Courses on MOOC learning platforms (e.g. Coursera, edX, Canvas, FutureLearn, etc.), which provide free or fee-based (certification) distance learning courses on law-related issues via Digital Learning Environments (DLE) or Learning Management Systems (LMS), such as: Moodle, Blackboard, etc. Additional support has been provided through different global or regional ESP projects focusing on law-and-language instruction,<sup>31</sup> where legal practitioners take *discipline-specific professional courses*.<sup>32</sup> Moreover, there is a number of international ESP associations (ESP Asia, South America, IATEFL ESP SIG) and EULETA<sup>33</sup> which organize scientific conferences and workshops for ESP/LE scholars and practitioners. Notably, based on the scientific research and developments in *Legal Linguistics*, a significant number of publishing houses have responded to the lack of material by publishing books which provide significant support for ELP/LE instruction worldwide.<sup>34</sup>

These examples show that the importance of law-and-language learning has been widely recognized by many institutions operating in both public and private sector.

#### **4. Survey of the current status of ELP/LE at Law Schools in Serbia and abroad**

The diverse forms of law-and-language instruction in the contemporary world take us to the next issue: the current status of ELP/LE courses in Serbia and abroad. For comparison sake, this paper presents the research results on ELP/

30 See, for example: <http://thepyramidgroup.biz/teacher-training/> (accessed 30.11.2017).

31 E.g.: US RELO *Law and Language Institute* (2004); *E-Teacher: ESP Best Practices Training Course* (2013);

32 E.g: *Training for Legal Practitioners: Linguistic Skills and Translation in EU Competition law*, LF Rijeka, <http://www.pravri.uniri.hr/hr/znanost/znanstvenoiustrazivacki-projekti/85-hr/znanost/projekti/1350-legal-practitioners.html>; European University Institute: *ENTrANCE for Judges* (2011), <http://ec.europa.eu/competition/court/training.html>; *English for Judges*, Podgorica (2013), <http://en.sudovi.me/cenp/news/legal-practitioners-learn-legal-english-70>; *Legal Translation for Lawyers*, LF Osijek (2012/13), <http://www.pravos.unios.hr/katedra-stranij-jezika/pravnici-lingvisti-cjelozivotno-obrazovanje>; EU Mobility/Exchange programs, ect.

33 The European Legal English Teachers' Associations (since 2006); <https://euleta36.wildapricot.org/About-Us>

34 See, for example: A. Riley (1991) *English for Law*, Macmillan Publishers Ltd, UK; F. Russell, Ch. Locke, (1992) *English Law and Language*, Prentice Hall Int., UK; D. Lee, Ch Hall, M Hurley (1999) *American Legal English*, University of Michigan Press; A. Krois-Linder & Translegal (2006) *International Legal English*, CUP; A. Frost (2009) *English for Legal Professionals*, OUP; A.Trebits, M.Fischer (2010) *EU English*, Klett, etc.

LE courses available at law schools in Serbia, the wider Balkan region and Europe, which may indicate current trends in ELP/LE instruction. The presented data were collected from institution websites and documents available online (institution curricula, syllabi, course outlines, etc), which necessarily implies that the data are incomprehensive. Yet, given that ELP literature contains very few (if any) comparative surveys on this matter, the data may yield interesting results and serve as basis for conclusions and discussion on the observed trends in ELP/LE instruction.<sup>35</sup>

On the basis of prior experience, the starting hypothesis in this survey was that LSP/ESP (ELP/LE) instruction in Serbia and the wider region is largely disregarded and marginalized in legal education and often subject to arbitrary decisions of the institution decision making bodies. Second, it is not given sufficient latitude within law school curricula to ensure students' ongoing and systematic exposure to complex interdisciplinary ELP/LE contents which may enable them to attain the requisite level of competences envisaged in the common European and international standards and develop the essential *21<sup>st</sup> century skills*. Third, given the lack of national policy and educational standards on LSP/ESP instruction in tertiary education, there is a variety of approaches to ESP contents and methodology in specific educational contexts, which inevitably yields different learning objectives, outcomes and competencies. Such a status gives rise to ample issues concerning not only the immediate ESP instruction but also the role of ELP/LE in legal education, the lack of common ESP standards (benchmarks) for tertiary education, the attitudes of different stakeholders involved in this process, the lack of adequate facilities and resources at the institutional level, etc. In spite of the best efforts of committed ESP practitioners and learners, we seem to be lagging behind in many respects. If nothing else, this comparative survey may contribute to raising awareness about the current state of affairs and need for joint action of all stakeholders.

#### ***4.1. Survey of the current status of ELP/LE courses at Law Schools in Serbia***

**Table 1** (*in the Appendix*)<sup>36</sup> shows the scope of **ESP (ELP/LE/BE) instruction at Law Schools and law-related institutions in Serbia** (2017). The table provides an overview of available LSPs (English, French, German and Russian) in undergraduate and graduate academic study curricula per institution, the distribution of ESP courses per semester, the number of hours/week, the total number

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35 The data were collected online in August-October 2017. The institution websites are listed *in the Appendix*.

36 **Tables 1, 2 and 3** and sources of presented information are provided in the **Appendix**.

of hours, the assigned ECTS credits,<sup>37</sup> the output proficiency level on the CEFR scale<sup>38</sup> and literature (where available) as evidence of content.

The survey has shown that LSPs are generally taught as a *compulsory* subject in lower years of undergraduate study, when students opt for a foreign language (E, F, G or R). As for ESP (including EAP, ELP, LE and BE), most *state law schools* and law-related institutions in the observed sample provide a *single* introductory ELP course (**3-5 h/w** per semester); the attained output Intermediate (**B1+**) proficiency level is certainly insufficient in terms of European ESP standards. Very few institutions offer a broader range of GE/EAP courses (F/Political Science), content-specific ESP courses (F/Security), or LE courses (LF Nis) over 2-4 semesters, amounting to a total of **4-8 h** of ESP instruction (except for FPS which has a total of 16h of systematic exposure to GE/EAP over 8 semesters). Although the provided courses have a different status (e.g. four *compulsory* EAP/ESP courses at the FPS, and two *elective* LE course at the LF Nis), the additional exposure to EAP/ESP contents contributes to attaining a higher intermediate/advanced (**B2-C1**) proficiency level. However, at the LF in Nis, the two *elective* LE courses (in 6<sup>th</sup> and 8<sup>th</sup> sem.) are selected by a relatively small number of students given that students opt for only one elective course (in III year) or two elective courses (in IV year) from the list of 17-21 law courses. In terms of literature, the survey shows that law schools use local ELP/LE textbooks or selected texts from available published sources; yet, many institutions provide only general course outlines (without detailed syllabi), which makes it difficult to evaluate the course contents properly. LF Novi Sad offers no ELP/LE courses. Moreover, no EAP/LE courses are offered at the LLM level. Notably, no institution provides for taking GE/EAP exams (FC, CAE CPE, IELTS, TOEFL) or discipline-specific exams (BEC, BULATS, TOEIC, TOLES, ILEC), and obtaining internationally recognized certificates.<sup>39</sup> All courses are taught by ESP practitioners.

37 ECTS - *European Credit Transfer and Accumulation System*, introduced by the Bologna Declaration (1999) for the purposes of providing the same standards, promoting mobility and equal-opportunity access to quality higher education. See: [http://www.magna-charta.org/resources/files/BOLOGNA\\_DECLARATION.pdf](http://www.magna-charta.org/resources/files/BOLOGNA_DECLARATION.pdf) (p.3-4);

38 CEFR- *Common European Framework of Reference* for foreign languages provides educational standards (learning objectives and benchmark descriptors) of FL proficiency at 6 level: A1 (Beginner), A2 (Elementary), B1 (Lower-Intermediate), B1+ (Intermediate), B2 (Upper-Intermediate), C1 (Advanced) and C2 (Proficiency). See: <https://www.coe.int/en/web/common-european-framework-reference-languages>; (accessed 20.10.2017)

39 GE/EAP Exams: First Certificate (B2); Cambridge Advanced (C1); Cambridge Proficiency (C2); IELTS and TOEFL tests for academic study or professional purposes (B2-C2); Discipline-specific tests: BEC-Business English (B1-C1); BULATS-Business Lg. Testing (A1-C2); TOEIC-English for International Communication (B1-C1), TOLES-Test of Legal English Skills(A2/B2/C2), ILEC-International Legal English (B2/C2). For more, see: <https://www.examenenglish.com/examscomparison.php> (accessed 20.10.2017)

The situation is considerably better in *private law schools*, which frequently provide a combination of (lower-level) GE courses and (higher-level) ESP courses, including ELP, LE and BE (**8-12h/w**) at **B1+/B2** level. Compulsory courses are distributed across 3-4 semesters (one in each year of study), providing for more consistent and systematic exposure to ESP/ELP/LE contents. Within the graduate (LLM) programs, LE/BE courses (4h/w in 9.sem) are provided only by two of the observed institutions (FLBS NS and FELPS NS). Although the course syllabi are usually inaccessible or placed on the institutional LMS (e.g. *Moodle*), the available information on literature shows the use of subject-specific ILEC materials (e.g. FELPS NS) and an opportunity to prepare for the internationally recognized TOLES exam<sup>40</sup>. Notably, BE/LE courses at LF Union University are taught by a law professor, which reflects the focus on the law and LE professional skills, and high proficiency level requirements.

On the whole, considering the modest scope of ELP/LE instruction (reflected in the small number of hours and the trend of allocating ESP/ELP courses into a *single* semester), there is a notable trend of marginalization of ESP at law schools in Serbia; it may also be substantiated by a tendency to further reduce the number of compulsory hours of instruction within each new accreditation cycle, whenever it is deemed necessary for the purposes of law subjects (as formerly illustrated on example of the LF Niš, where the compulsory 4-semester pre-Bologna course has been reduced to one-semester compulsory course). As there is no opportunity for on-going, systematic and comprehensive exposure to ELP/LE contents, the output CEFR levels for compulsory courses are considerably low (ranging from B1 to B1+ at best). In this respect, private law schools have proven to be much more sensitive to students' needs, in terms of providing more latitude for diverse *compulsory* GE/EAP/ESP courses over a number of semesters, as well as envisaging both remedial GE/EAP and discipline-specific ELP/BE/LE courses. As course syllabi are largely unavailable online, it is essential to ensure that all institutions make their program contents transparently available online. Above all, given the diversity of instruction hours, educational contexts, contents and methodologies, there is a need for instituting a national standard or common framework for ESP (ELP/LE) instruction in tertiary education, which would attempt to provide benchmark descriptors (similar to those on the CEFR scale) as a point of reference for ESP instruction, setting common objectives/outcomes and assessment. Such standards would ensure a more consistent approach to universally recognized requisite competences.

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40 See: TOLES exam: <http://www.fepps.edu.rs/o-fakultetu/toles> (accessed 20.10.2017.)



#### **4.2. Survey of the status of ELP/LE courses at Law Schools in the Balkan region**

Historically speaking, it may be interesting to briefly compare the situation in Serbia with information on ELP/LE courses at other law schools in the former SFRY counties. For example, in Croatia, *LF Zagreb* introduced foreign languages in early 1980s and ELP/LE has been taught from the outset and the textbook *English for Lawyers* (1984)<sup>41</sup> is probably the first ELP/LE textbooks in the region; the Foreign Languages Department was established in 1997. At *LF Osijek*, English and German were introduced in 1976/77 in I and II year; the first *elective ELP courses* were provided in 2001/2002 in III and IV year, and *elective LE courses* were offered in 2003/2004 in III and IV year. In 2005/06, ELP/LE was taught as a *compulsory course* in 4 semesters (I and II year) and an *elective course* in V year (9. and 10. semester of integrated law studies). At *LF Maribor*, Slovenia, English and German were first introduced in 1991/1992. At *LF Sarajevo*, B&H, English and German were first introduced in 1992/1993; at *LF Mostar*, English has been taught since 1993. At *LF Podgorica*, Montenegro, FLs were introduced in 1972/73 and LE course was introduced in 1992/1993.<sup>42</sup>

**Table 2** (*in the Appendix*) provides an overview of the available **ESP/ELP/LE courses at public law schools in the Balkan region (2017)**, including the former SFRY countries and several other countries. The survey illustrates the distribution of ELP/LE courses per semester in undergraduate and graduate academic law study curricula per institution, the number of hours/week, the assigned ECTS credits, the total number of instruction hours, the output CEFR proficiency level and literature (if available) as evidence of course contents.

The table shows that LSPs are taught as a *compulsory* subject in undergraduate programs, where students opt for one foreign language (mainly E, G and F). *In Croatia*, the ELP/LE courses are distributed **in 4 semesters (2-4 h/w per semester, 6-16h total)**, ranging from B1-B2+ CEFR level. The *compulsory* ELP classes are followed by *subject-specific* LE classes, which inevitably yield a high output proficiency levels (**B2/C1**). Moreover, *LF Zagreb* and *LF Osijek* provide *elective* LE courses at the LLM level (**2h/w, 9.sem**) focusing on EU legal terminology. All Croatian law schools use local ELP/LE textbooks and selected legal texts, and the syllabi are fully available online. The important position of LSPs in legal education is reinforced by the legal translation courses and life-long learning programs

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41 See: Vićan D., Pavić Z., Smerdel B. (1984), *Engleski za pravnike*, Pravni Fakultet u Zagrebu

42 The statistical data were obtained through Library communication upon request submitted by the Library Manager of the LF Nis, and provided by courtesy of librarians working at the respective institutions. [Data received 4-11 Oct.2017 from Vesna Stojanović, Library Manager at the Law Faculty Nis.]

for lawyers and graduates (LF Osijek).<sup>43</sup> In *Slovenia*, LF Ljubljana and LF Maribor offer a single LE course (each) in undergraduate studies, but the courses start at a higher CEFR level (**B2/C1** and **B1+/B2**, respectively). Notably, LF Ljubljana course is taught by a law professor and literature includes high-profile legal texts, focusing on LE academic/professional competences and legal linguistics needed for LLM program.<sup>44</sup> The good practice of having **2-4 compulsory ELP/LE courses across 3-4 semesters** is also present in LF Mostar (B&H), LF East Sarajevo (RS) and LF Podgorica (Montenegro); the lastest includes a number of (lower level) GE courses which results in a lower output proficiency level (B1+). LF Banajluka (RS) and LF Skopje (Macedonia) provide a *single* ELP course (at B1/B1+ level). Syllabi are unavailable online, which makes it difficult to access course contents.

A glance at the ESP curricula in other countries in the region shows that *compulsory* ELP/LE courses in Romania are distributed across 4-5 semesters (2-3h/w, **8-12 h** total); in higher years, students are provided 3-4 *optional* courses in **all LSPs**. At LF Sofia (Bulgaria), law students have two LE courses (4h/w each, at **B2** level), but international relations students are offered an extensive range of course (**4h/w in 8 successive** semesters, **32h** total), which clearly reflects the heightened awareness about the relevance of LE in international matters. LF Tirana (Albania) offers a modest range of 2 semesters (2+3h/w each); by contrast, LF Ankara (Turkey) provides a combination of four GE and two ELP courses (2h/w per semester), ranging from A1 to B1 level. The provided range of compulsory courses is highly commendable but a small number of hours/week at lower levels (A1-B1) certainly does not provide relevant linguistic, academic and LE professional competences needed for real-world purposes. On the other hand, given a slightly higher number of hours/week (**3-4 h/w**) across **3-4 semesters**, B1/B1+ level students may be taken to a **B2/C2** level, which is illustrated by the examples of Croatian, Bulgarian and Romanian law schools. In the context of Serbia's EU integration process, this option may be worth considering both within the forthcoming accreditation cycles and within the national policy on ESP instruction.

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43 The FL Department has organized ELP courses for practitioners since 2009, and Life-long Learning Programs in Legal Translation since 2012. See: *Pravni fakultet, Sveučilište Osijek* (LF Osijek, Croatia)

44 *Pravna fakulteta, Univerza Ljubljana, Slovenija* (LF Ljubljana, Slovenia, 2017): <http://www.pf.uni-lj.si/media/ucni.nacrt.tuja.pravna.terminologija.-.anglescina.b1.2017.pdf> (accessed 1.10.2017)

### **4.3. Survey of current status of ELP/LE courses at Law Schools in Europe**

Given the diversity of available programs at law schools across Europe (which have varied organizational structures: integrated 5-year studies leading to LLM degrees, 4+1 and 3+2 study programs), it is rather difficult to provide a comprehensive survey of ELP/LE instruction in Europe. **Table 3** (in the Appendix) provides a small sample of randomly selected **ELP/LE courses at Law Schools in Europe**, where *credit-bearing* ELP/LE courses are explicitly provided (as *compulsory* or *elective* subjects) in the law school curricula. The table shows the assigned number of hours/week and credits across the given number of semesters, the output CEFR level, course contents and literature (where available). The collected data results illustrate the variety of available EAP/BE/ELP/LE courses, their current status at the observed institutions and comparatively different sociolinguistic circumstances.

*In Europe*, language skills are recognized as *essential 21<sup>st</sup> century skills* and core competences required by employees for prospective academic/professional careers. The European multilingualism policy is reflected in providing bilingual or trilingual educational programs (e.g. in the Benelux and Scandinavian countries). The country-specific educational circumstances (the national policy and FL standards, requisite CEFR certification of GE competencies, institutional admission requirements on FLs at B2 level, etc.) illustrate a pragmatic approach to ESP instruction. Many countries offer student-tailored programs, where students opt for preferred *compulsory* and *elective* courses in both law and language. Thus, EAP/ESP courses are not strictly allocated to a specific semester but can be *taken throughout the LLB/LLM study program*, depending on the attained proficiency level (e.g. LF Helsinki, LF Vienna). Educational systems ensure extensive exposure to languages and taking relevant CEFR exams at different points of education. As communicative competence at **B2-C1** level is almost implied, law schools offer **high-profile specialized LE courses** at both undergraduate/LLB and graduate/LLM study programs (e.g. LF Trier, LF Paris).

Another distinctive feature of European higher education is that most universities have *Foreign Language Centers* (e.g. Helsinki, Vienna), which provide a variety of courses (A1-C1 on the CEFR scale) in both European and non-European languages for schools within the university structure. These institution-related or fee-based *credit-bearing* FL courses are officially recognized within a study program and awarded a number of credits: 3 ECTS (2h/w) to 5 ECTS (4h/w). In terms of English language instruction, there is a wide range of course on offer: a) **GE courses**: FC, CAE, CPE, IELTS, TOEFL; b) **EAP courses**: Academic Research, Academic Writing, Life skills (e.g. LF Helsinki, Stockholm); c) **BE courses**: BEC, BULATS, TOEIC (e.g. LF Helsinki, Prague); d) **LE courses**: TOLES, ILEC (e.g. LF

Trier, Prague, Vienna); and e) **specialist LE courses** for law students and legal practitioners (e.g. EU legal terminology, Anglo-American legal writing, contract drafting, professional skills: presentations, conference presentations, oral arguments, critical thinking, negotiations, etc.) (LF Helsinki, Stockholm, Trier, Groningen, FLPS Budapest). Moreover, some law schools offer **specialized law courses in English** (at LLB/LLM level) in subject-specific areas: Anglo-American Law, EU Law, English Law, International law, American Business Law, Contracts and Torts, Intellectual Property, etc. (e.g. LF Vienna, Trier, Brussels, Rome). Consequently, many of the provided LE and law-related courses require higher levels of linguistic competencies (**B2+ to C1/C2**), which are also essential when applying for LS **Moot Court** teams (e.g. for Jessup International Moot Court competition) (e.g. LF Vienna). In addition, many law schools providing **full-time LLB and LLM study programs in English** (LF Helsinki, Groningen; Vilnius, Vienna) have bilingual/dual LLB programs in English and German/French/Italian law (LF Helsinki, Groningen, Brussels) or joint/dual LLM programs: 1 year in the country and 1 year at a partner-institution abroad (LF Paris, Rome); some law schools participate in ERASMUS programs (LF Coimbra, FLPS Budapest), where a number of subject-specific law courses are taught in English for international exchange students. In that case, students are obliged to provide proof or official certification of the attained language proficiency level (B2-C1 on the CEFR scale) in FC, CAE, CPE, IELTS, TOEFL. LF *Lomonosov* in Moscow provides a range of four FL courses (**6h/w** per semester each, **24h** total) but, unfortunately, the specifics on the course contents are unavailable.

On the whole, it may be concluded that the current situation in ESP instruction in European countries is quite different from and almost incomparable to the situation in Serbia and most observed institutions in the Balkan region. *In Europe*, students are encouraged to take full responsibility for their education and tailor their education by opting for a range of law-and-language courses in line with their pursuits. Some institutions have a specific number of credits (e.g. 15 ECTS), which students are obliged to acquire as part of the corpus of language competences envisaged in the law program (e.g. Helsinki, Stockholm, Brussels, Vienna). Moreover, given the national and international standards for foreign languages, many LE courses are provided at considerably high proficiency level (**B2-C1**), focusing primarily on the development of requisite LE academic and professional competences, cultural awareness of the common law systems, law-specific skills through specialized courses, and the *21<sup>st</sup> century life skills* for professional purposes (e.g. LF Helsinki, Trier, Prague, Budapest).

*In Serbia* and some Balkan countries, ELP/LE courses are largely fixed in specific semesters and allocated a relatively small number of instruction hours over one or two semesters (at best), which necessarily implies a more modest scope

of instruction and a much lower output proficiency level (generally **B1/B1+** to B2 at the most). In such circumstances, the instruction is remedial rather than developmental, focusing on a mixture of GE/EAP and ELP contents, which makes the teaching/learning context additionally demanding on both students and ESP practitioners. A few examples of private law schools in Serbia (LF Union, LS FBSL, LD FELPS) may be commended for providing more latitude for GE/ELP/LE courses in the curricula, thus acknowledging the importance of LSP/ESP and ELP/LE in legal education. Yet, there are more than a few valuable lessons to be learnt from good practices of a number of institutions in the European countries: Croatia (LF Osijek, Zagreb, Split, Rijeka), Bulgaria (LF Sofia), Romania (LF Bucharest, Timisoara), Lithuania (LF Vilnius), Germany (LF Trier), Czech Republic (LF Prague), Hungary (FLPS Budapest), etc., which have fully recognized the relevance of providing ELP/LE courses not only at a higher proficiency level but also the need to focus on academic and professional law-and-language (*real-life*) skills.

## 5. Considerations for ELP/LE instruction in Serbia

Many scholars underline that the globalized world imposes new educational demands and calls for redefining the concept of education. The new framework for the **21<sup>st</sup> Century Learning** is embodied in the concept of the essential **21<sup>st</sup> century skills** (P21, 2016)<sup>45</sup>, which includes three interrelated areas: **1) sustained life-long learning**: creativity, critical thinking, cooperation and collaboration; **2) technology skills**: information, media, ICT literacy and ethical behaviour; and **3) life and career skills**: flexibility, adaptability, responsibility, productivity, accountability, initiative and self-direction. Within this framework, an individual is perceived as a responsible, well-learned, self-directed, value-driven, productive, socially-responsible and culturally-sensitized **citizen of the world**. In addition, European scholars adopted the Maastricht Declaration on *Global Education* (2002)<sup>46</sup>, which envisaged the EU policy, strategy and perspectives for developing the concept of *global learning*; it includes: education for human rights, eradication of poverty, sustainable development, peace and conflict prevention, interculturality, and citizenship (O’Laughlin & Wegimont, 2003: 13). In the contemporary world, the new “**global competences**” entail

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45 For more, see: P21 (2016). *Framework for 21st Century Learning*, Partnership for 21<sup>st</sup> Century Learning; [http://www.p21.org/storage/documents/docs/P21\\_framework\\_0816.pdf](http://www.p21.org/storage/documents/docs/P21_framework_0816.pdf) (retrieved 18.07.2017)

46 See: O’Laughlin E. & Wegimont L. (2003) Executive Summary (pp.9-14); In: CoE *Global Education in Europe to 2015: Strategy, Policies and Perspectives*, North-South Centre of the Council of Europe, Lisbon, Portugal, 2003; <http://library.deeep.org/record/1368/files/DEEEP-REPORT-2015-040.pdf> (accessed 1.12.2017).

cross-cultural communication, acknowledging different perspectives, developing interdisciplinary knowledge and skills necessary to understand global events and address global issues (Boix-Mansilla, Jackson, 2013: 2). In terms of legal education, the concept of "**global legal skills**" includes a wide range of communication, socio-linguistic, professional and strategic competencies, such as: effective communication techniques, public speaking, legal research, academic writing, problem-solving, legal reasoning, legal ethics and professionalism, awareness of cultural diversity cultural issues, competent use of professional Legal English, leadership and management, networking, cooperation and collaboration, cross-cultural mediation/negotiation, use of digital technologies in legal contexts, etc (GLS, 2017).<sup>47</sup> These skills should be addressed in legal education and ELP/LE instruction alike.

All things considered, the presented research results and subsequent analysis allow for certain conclusions and considerations for further development of ELP/LE in Serbia.

*First*, considering the global trends, widespread and ever-growing use of ELP/LE all aspect of contemporary life, there seems to be no dispute about the the **relevance of law-and-language instruction in legal education**. Many legal scholars and linguists underscore the important role of ELP/LE in the development of highly relevant **global legal skills**, which entail not only *content knowledge* and *profession-related competences* but also diverse *linguistic, socio-cultural communication* and *academic/professional life skills* needed in the specific real-world discourse community and/or the international arena. Given the *interdisciplinary nature of ELP/LE instruction*, the provided examples show that European law schools have recognized the importance of providing an extensive range of both *compulsory* and *elective* law-and-language course (GE/EAP/ESP, ELP/LE and law-foundation courses in English), thus offering multiple learning opportunities aimed at developing competent legal professionals who need to use these skills in their prospective careers. In Serbia, in spite of declarative statements, the actual relevance of LPS/ESP and ELP/LE for real-life purposes does not seem to be fully acknowledged for a number of reasons: the traditional approach to legal education and supremacy of law-related subjects in law school curricula; discretionary authority of institutions and *ad hoc* decisions on the scope of LSP/ELP instruction; the lack of national LSP/ESP standards and slow-paced recognition of international standards; a diversity to institutional approaches

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<sup>47</sup> The *Global Legal Skills Conference* has been organized annually since 2005 by John Mitchell Law School, Northwestern University Law School, Chicago, Illinois, USA; it is aimed at sharing the best practices in international legal skills education. See: GLS Conference Program 2017, held 15-17 March 2017, at the Facultad Libre de Derecho de Monterrey, Mexico; <http://glsc.jmls.edu/2017/speakers/> (accessed 1.12.2017).

frequently resulting in incompatibility of envisaged course syllabi; declarative statements unsupported by relevant consideration of observed drawbacks and taking joint action to institute change; inadequate support to modernizing the traditional (face-to-face) instruction by providing for more contemporary forms of instruction (e.g. Blended or Online Learning), etc. Therefore, in light of the best practices in European countries and worldwide, it may be necessary to reexamine the role of ELP/LE in legal education and take joint action to make it comply with the established international trends.

*Second*, considering **the status of ELP/LE instruction** in Serbia and the Balkan region, the findings show that ELP/LE is *largely marginalized in legal education* and that it is not given sufficient latitude in law school curricula to ensure students' ongoing and systematic exposure to complex interdisciplinary ELP/LE contents. As a result of inadequate national LSP/ESP standards, ELP/LE courses are provided at different proficiency levels (ranging from A2 to B1+), featuring different contents and methodological approaches. In addition to diverse curricular solutions and mutual incompatibility of envisaged syllabi across different laws schools, there is a tendency to reduce the scope of LSP/ESP courses within each subsequent accreditation cycle. Institutional decisions on this issue are not based on assessment of global trends or survey of students and employers' actual needs; they are largely driven ample factors pertaining to the distribution of law courses within the curriculum and available teaching staff. Thus, LSP/ESP instruction is sporadic (provided in one or two semesters at best, with a relatively small number of class hours/week) and remedial rather than developmental. Such modest scope of courses does not contribute to raising awareness about the real relevance of ELP/LE in legal education, nor does it provide sufficient space for systematic exposure to complex interdisciplinary ELP/LE contents and acquisition of competences envisaged in the common European and international standards, the projected 21<sup>st</sup> century skills, and the essential *global legal skills*. The pragmatic approach to LSP/ESP and ELP/LE instruction in Europe shows that there are ample ways of organizing and providing *relevant, meaningful* and *practical* ELP/LE instruction, which would not only satisfy the bare minimum of general educational requirements but also contribute to developing highly competent professionals who are well-equipped with expert knowledge, communication competences and professional skills. The practice of European institutions which provide a more extensive range of both *compulsory* and *elective* LE courses has shown significant results in terms of attaining a higher B2-C1+ level of communicative competences required for functional performance in the real-world discourse community contexts. Therefore, instead of formally satisfying the basis needs, ELP/LE instruction should be a **functional and applicative** part of legal education, aimed at promoting

a *holistic (learner/learning-centered)* approach to complex discipline-specific contents, linguistic and professional competences, which can only be achieved by providing a more extensive range of **3-4 compulsory EAP/ELP/LE courses** and additional **elective LE courses** distributed across 4-6 semesters (in all years of law study).

*Third*, given the lack of **national policy and educational standards** on LSP/ESP instruction in tertiary education, there is a variety of approaches to ESP/ELP contents and methodology in specific educational contexts, which inevitably yields different learning objectives, outcomes and competencies. In Serbia, the CEFR framework has been made part of the national policy standards for GE instruction in primary and secondary education, but there are no uniform standards for LSP/ESP instruction in tertiary education. Thus, ESP practitioners resort to devising their own course requirement, goals/objectives and assessment criteria by relying on the GE framework. Despite some attempt to assess the state of affairs and draw some conclusions on the issue (REFLESS, 2013: 1-15)<sup>48</sup>, the national policy in seems to be deficient as there are no referential descriptors for LSP/ESP course requirements, setting learning goals/objectives and outcomes, assessment criteria, requisite output competences and proficiency levels. The lack of common ESP/LE standards raises ample issues concerning not only the immediate ELP/LE instruction but also the role of ELP/LE in legal education, the attitudes of different stakeholders<sup>49</sup>, the lack of adequate facilities and resources at the institutional level, tendency to marginalize and further reduce the scope of ESP/ELP/LE instruction, etc. In the past years, given the proliferation of ESP areas, some attempts have been made to provide a global referential framework for ESP, based on and aligned with the CEFR scale. The **Global Scale of English** (2016)<sup>50</sup> aims to provide a global framework of reference for adult learner instruction for academic and professional purposes. Although it is still under development, this new scale may ensure the same standards for subject-specific ESP areas, which would preclude any arbitrary approaches to complex interdisciplinary ESP instruction. These global standards would contribute to

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48 The situation in teaching LSPs at the non-philological Faculties in Serbia was examined within the TEMPUS Project: Reforming Foreign Language Studies in Serbia (REFLESS) 2010-2014. For more, see: [http://projects.tempus.ac.rs/en/project/785;20\\_03\\_2014\\_REFLESS\\_jezik\\_struke.pdf](http://projects.tempus.ac.rs/en/project/785;20_03_2014_REFLESS_jezik_struke.pdf) (accessed 101.12.2017)

49 In ESP, the term *stakeholders* refers to all participants in education who are directly/indirectly involved in, connected with, interested in or benefit from such instruction, such as: students, teachers, institutions, sponsors, potential employers, national authorities, professional association, etc.

50 See: Global Scale of English: Learning Objectives for Professional English, Pearson Education Ltd., 2016; [https://www.english.com/gse/learning\\_objectives](https://www.english.com/gse/learning_objectives); <https://www.english.com/blog/gse-learning-objectives-professional-english>



developing relevant universally recognized competences and, eventually, raise awareness of all stakeholders in the educational process about the relevance of ELP/LE instruction in legal education. In spite of the best efforts of committed ESP practitioners to catch up with the international standards, we seem to be lagging behind in many respects. Thus, instead of placing all the burden on the immediate participants (ESP practitioners and learners), the other stakeholders should take their part of responsibility by providing relevant conditions for quality instruction and further development of ESP for discipline-specific purposes.

*Fourth*, in light of the globally projected *essential 21<sup>st</sup> century skills* and widely recognized *global legal skills*, it is also essential to foster both formal and non-formal modes of ESP/ELP/LE instruction, as well as to promote more intensive learner participation in extracurricular and community-based activities, exchange programs, international projects and moot competition. Such an approach will open new horizons and prove the relevance of ELP/LE for both academic and prospective professional purposes. To that effect, there is a need for a much more vigorous support and joint action of all stakeholders in tertiary education, which shall fully endorse the concept of *life-long learning* as the highest value.

*Fifth*, with reference to the observed good practice in some European countries and the growing need for post-study discipline-specific ELP/LE courses for practicing legal professionals (lawyers, judges, prosecutors, notaries, administrative stuff, etc), Law Faculties in Serbia and/or relevant Foreign Language Centers and English Language Departments at Serbian universities should consider offering discipline-specific ESP courses to institutions seeking this form of professional development. As such ESP courses are not offered within the educational system, unless funded by international organizations, it may be a course of action worth pursuing in terms of providing *life-long learning* opportunities.

Last but not least, given that that ESP practitioners are the ones carrying the burden of designing and providing quality ESP/ELP courses in tertiary education, it may be important to underscore the need for more substantial ESP/ELP teacher training courses. Teaching Legal English is considered to be one of the most challenging and demanding ESP areas for ESP practitioners, who need to understand not only the legal terminology, procedures, culture, genres, speaking and writing conventions but also legal thinking, reasoning, distinctive viewpoints of different legal professionals. It also implies discipline-specific methodology, which is not part of general ELT Methodology training provided by English Language Departments at Faculties of Philology in Serbia. Most ELP/LE practitioners resort to extensive research, reading, consulting law subject teachers (etc.), but the best insights are provided by law-and-language experts, who may help ELP/LE practitioners understand the underpinnings of differ-

ent aspects of legal language. Thus, in order to advance the quality of ESP instruction in Serbia there is a need to provide discipline-specific ESP courses in undergraduate and graduate programs, as well as post-study teacher training opportunities, which would empower ESP professional to design and provide quality ESP instruction. Above all, there is a need for regional and international ELP/LE programs which will provide relevant support to practitioners in teaching the complex law-and-language matter.

## 6. Conclusion

On the whole, considering the status of English the *lingua franca* in the contemporary world, the global trends in ELP/LE instruction worldwide clearly demonstrate that **Legal English** has an important role in legal education and development of competent legal professionals. In Serbia, although ELP/LE instruction has been provided since the late 1980s, this segment of legal education has been disregarded or marginalized for a long time, for various socio-economic, institutional and educational policy reasons. In spite of the best efforts of committed ELP/LE practitioners to change the general perception and traditional mindset, the actual need for and practical applications of quality ELP/LE instruction have become apparent to law students, legal scholars and practitioners only in the past five to ten years. This article aims to show that there is still a lot of room for improvement. In order to promote the status and advance the quality of ELP/LE instruction in Serbian law schools, all stakeholders in tertiary education should take joint action to modernize the ELP/LE instruction in line with the changing needs of the new generations of learners and new circumstances on the global market. With reference to the *21<sup>st</sup> century skills* and requisite *global legal skills*, the author underscores the need to envisage common national standards for ESP/ELP instruction in tertiary education aligned with international standards, to provide a more extensive range of compulsory and elective courses in law school curricula which would ensure more systematic and ongoing exposure to complex interdisciplinary EAP/ELP/LE contents, and to foster different types of formal and informal education which would promote the concepts of *life-long learning* as the highest educational value.

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## **ЕНГЛЕСКИ ЈЕЗИК ПРАВНЕ СТРУКЕ: ПРАВНИ ЕНГЛЕСКИ ЈЕЗИК У ГЛОБАЛИЗОВАНОМ СВЕТУ**

### **Резиме**

У светлу глобалних трендова у језичком образовању, у раду се разматра улога енглеског језика струке (ESP) уопште и енглеског језика правне струке (ELP/LE) у правном образовању, и сагледава тренути статус наставе правног енглеског језика (ELP/LE) на правним факултетима у Србији, балканском региону, Европи и широм света. Први део рада даје историјски приказ развоја енглеског језика струке (ESP) и енглеског језика правне струке (ELP/LE) на међународном и националном нивоу, као и концизан преглед различитих врста и облика формалне и неформалне наставе широм света. У другом делу аутор представља резултате истраживања о статусу наставе енглеског језика правне струке (ELP-LE) на правним факултетима у Србији, региону Балкана и неким европским земљама. Компаративна анализа указује на значајне контекстуалне разлике у приступима наставној материји, статусу предмета у оквиру правничког образовања и схватању важности развијања адекватних комуникативних, језичких и професионалних компетенција неопходних у образовању правника. У Србији се овај сегмент савременог правничког образовања често занемарује или маргинализује из различитих разлога, па је припрема правника за адекватно функционисање у ситуацијама где су ове компетенције неопходне за професионалну комуникацију често базична и неадекватна. Истичући важну улогу интердисциплинарне наставе енглеског језика правне струке у образовању правника, аутор предлаже решења која би могла допринети побољшању статуса и квалитета наставе енглеског језика струке на високошколским установама у Србији и ширем региону. Аутор скреће пажњу на значајну улогу свих актера у том процесу (наставника, студената, институција, будућих послодаваца, надлежних установа, професионалних асоцијација, итд.), као и потребу да се установе јединствени национални стандарди за наставу страних језика струке (LSP/ESP) у високошколском образовању којима би се уредили критеријуми у погледу наставних садржаја, излазних компетенција и нивоа знања. На институционалном нивоу, најпре би требало обезбедити повећани обим наставе страних језика правне струке (LSP/ELP) кроз обавезне и изборне курсеве, који би покривали већи број семестара, чиме би се обезбедио простор за

континуирано и систематично развијање релевантних језичких/академских/ професионалних компетенција. У контексту развоја неходних компетенција и вештина за 21. век (21st century skills) и опште прихваћених глобалних правничких вештина (global legal skills), неходно је модернизовати наставу на правним факултетима кроз већу употребу савремених технологија и подстицати различите облике формалног и неформалног образовања, који би допринели развијању свести о функционално-апликативној улози правног енглеског језика у професионалном животу модерних правника и промовисали концепт доживотног учења (life-long learning) као вредносног модела за даљи развој на личном и професионалном плану.

**Кључне речи:** енглески језик струке (ESP), енглески језик правне струке (ELP), правни енглески (LE), високошколско образовање, глобалне правничке компетенције, доживотно учење, Србија.



**APPENDIX: ELP/LE courses at Law Schools in Serbia, the Balkan region and Europe**

**Table 1. ESP Courses: ELP/LE instruction at Law Schools and law-related higher education institutions in Serbia (2017)**

Law School	Curriculum	ESP area	I year		II year		III year		IV year		V year LLM		TOTAL	CEFR	Literature
or law-related higher edu. inst.	Year +LSP	**CE, BE, ELP, LE	1. sem	2. sem	3. sem	4. sem	5. sem	6. sem	7. sem	8. sem	9. sem	10. sem	h/week acc. to course content	acc. to course content	acc. to available info: course outline/syllabus
Law Faculty Belgrade	2011-2014 E, G, F, R	ELP/LE				2+2 6 ECTS							Co 4	B1+	Just English I, Meris, 2012
LF Novi Sad	-												0		
Law Faculty Nis	2013/14 E, G, F, R	ELP/LE		Co 3+0 7 ECTS				E 3+1 6 ECTS		E 3+1 6 ECTS			Co 3 E 8	B1+ B2+C1	LE Files 1(2016) G.I., LE Files 2 (2011) G. G.
LF Kragujevac	2015 E, G, R	**** Law Security	Co 2+2 (6) Co 2+2 (5)										Co 4	B1+	Selected texts (mixed courses)
LF Kosovska Mitrovica	2016 E			C 3+1 6 ECTS									C 4	B1+	Selected texts unavailable
LF Novi Pazar	2016/17 E			C 3+2 7 ECTS									C 5	B1	Headway Pre-Int, 2005 Selected texts (KPA)
Faculty of Political Sciences Belgrade	2015/16 E, G, F	Politicalology Social policy	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 0+2 2 ECTS	Co 8	B-C1	GE/EP: Pearson, Speak out (Int-Adv), Selected texts
Interac. Politics/EU integr.			Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 0+2	Co 16		
Fac. of Security Studies, Bgd	2017/18 E	GE/ESP Sec/Criminal	C 2+1	C 2+1 6 ECTS	C 2+1	C 2+1 6 ECTS							GE 6 ESP 6	A1-A2 A2-B1+	Reader & Grammar, Selected texts (KPA),
P) Law Faculty, Union Uni, Bgd	2014 E, G, It	BE/LE	Co 2+0 3 ECTS		Co 2+0 3 ECTS		6 ECTS Co 2+0		6 ECT Co 2+0				BE 4 LE 4		unavailable (ought by law prog.)
P) Faculty of Business Studies and Law, N. Bgd	2016/17 E, Elect F.R.	GE/ESP/BE	C 1+4 6 ECTS	Elective F.R 1+4 (6 ECTS)	C 1+4 6 ECTS	Elective F.R 1+4 (6)	C 1+4 6 ECTS	Elective F.R 1+4 (6)	C 1+4 6 ECTS				GE 10 BE 10	B1-	unavailable
P) Law Faculty, Business-Judicial Academy, NS	2014/15 E, G, R	GE/BE	GE Co 2+3 8 ECTS				BE Co 2+3 8 ECTS						GE 5 BE 5	B1 B1+	Headway, OUP (B1) English 365 for Work
P) Law Dept, Fac of European Legal & Political Studies Educon Uni, NS	2017/18 E, G	ELP/LE a) Beginners b) Advanced	2 5 ECTS	2 5 ECTS	2 5 ECTS	2 5 ECTS	2 5 ECTS	2 5 ECTS	2 5 ECTS		4		ELP 8 LE 8 LE +4	B1-B2 B1+B2+	Intro to ILEC, 2008 ILEC-Translegal, 2011 TOLES exam center
P) Fac of Legal & Business Studies "L. Vukobratović", NS	2015 E, F	BE Law Security St.	2+2	2+2	2+2							4	BE 12+4	A2-B1+	unavailable

Note:  
 \* LSP: Languages for Specific Purposes (English, French, German, Russian, Italian) – students opt for one of the available foreign languages  
 \*\* ELP: English for Legal Purposes (introductory course in the language of law); LE: Legal English (subject-specific areas of law); GE - General English; BE - Business English;  
 \*\*\* C/Co/E; C - Compulsory course; Co - Compulsory course but students opt for one of the available LSPs; E - Elective course  
 h/week number of class/contact hours per week (a class/contact hour is 45 minutes (for example: 2h/w x 15 weeks per semester = total of 30 hours per semester);  
 ECTS European Credit Transfer System (ECTS) - the number of credits students obtain upon course completion  
 LF modules/trands: General module (Gen), Security module (Sec), Politicalology, International Politics, EU integrations, etc.  
 \*\*\*\* CEFR standard: the Common European Framework of Reference (CEFR) for foreign languages, demonstrating the language proficiency level upon course completion  
 A1 Beginner, A2 Elementary, B1 - Lower Intermediate, B1+ Upper-Intermediate, B2 Upper-Intermediate, C1 Advanced, C2 Proficiency

Source: Table 1 is based on available documents and information collected from the institution websites in Sept/Oct. 2017 (Gordana Ignjatovic; Nis, 1<sup>st</sup> October 2017)

Source: Institution websites and available documents (listed in the References)

**Table 2** *ELP/LE courses at Law Schools in the Balkan region*

Table 2. ESP Courses: ELP/LE instruction at Law Schools in the Balkan region (2017)															
Law School	Curriculum	ESP area	I year		II year		III year		IV year		V year/ Master	TOTAL	CEFR	Literature	
or law-related Higher Edu. Inst.	Year + LSP	** CE, BE, ELP, LE	1. sem	2. sem	3. sem	4. sem	5. sem	6. sem	7. sem	8. sem	9. sem	10. se	h/week	ECT to content	ECT to available info
LF Zagreb, Croatia	2015/16 E, G	ELP LE	2 2 ECTS	2 2 ECTS	2 2 ECTS	2 2 ECTS					Elective 2 4 ECTS	Co 8 E 2	B1-B2 B2-C1	English for Lawyers; Vican, Paris, Smedal	
LF Osijek	2017/18 E, G	ELP LE	2+2 3 ECTS	2+2 3 ECTS	2+2 3 ECTS	2+2 3 ECTS					Elective 2 (E) 6 ECTS	Co 16 E 2	B1-B2 B2/C1	Eng for Lawyers; Vic EU leg. terminology	
LF Split	2015/16 E, F, G	ELP/LE Administration	2+0 2 ECTS	2+0 2 ECTS	2+0 2 ECTS	2+0 2 ECTS						Co 8	a) A1-B1 b) B1-B2	Selected texts; Eng for Lawyers; Vican	
		Integrated studies				2+1 4 ECTS	2+1 4 ECTS					Co 6	B1/B2	Selected texts; Eng Law & Lg. Russell; Locke	
LF Rijeka	2016/17 E, G	ELP LE	2+0 4 ECTS	2+0 4 ECTS	LE 1+0 4 ECTS	1+0 4 ECTS						Co 6	B1/B2	Unavailable Module E-Learning	
LF Ljubljana, Slovenia	2016/17 E, G	LE (taught by law prof)						2+2 4 ECTS			EU Master in Eng	Co 4	B2+C1	EL Terminology, 2015, H. Cobly; Selected L&E Legal Linguistics texts Brown, High, Mattie	
	E, G, F, It.	+ Elective taken (alternatively) in 4, 6 or 8 sem			2+2 (4)			2+2 (4)		2+2 (4)		E 4			
LF Maribor	2016/17 E, G	ELP			2+2 3 ECTS							Co 4	B1/B2	LE Terminology, 2014; J. Hojnik; ILEC, 2008	
LF Banjaluka, Rep. Srpska	2013 E, R	ELP/LE		4+2 6 ECTS								C 6	B1+	Selected text: Brown, V. Evans; ILEC	
LF Iotocno Sarajevo, RS	2012/13 E	ELP	3+1 4 ECTS	3+1 3 ECTS								C 8	B1+	Prof/English in Use & Selected texts	
LF Mostar, B&H	2015/16 E, G	ELP/LE			2 2 ECTS	2 2 ECTS	2 2 ECTS	2 2 ECTS				Co 8	B1+	English for Lawyers (Zagreb, 2005)	
	2016/17	Integrated			4/3 acts	2/3 acts						Co 6	B1+		
LF Podgorica, Uni. Montenegro	2015/16 EF UGD 2017 E	GE/ELP Integrated	2+2 4 ECTS	2+2 4 ECTS	2+2 4 ECTS							Co 12	A1-B2	unavailable	
	2016/17 E, F	ELP/LE				ELP 2+1 6 ECTS	LE 1+0 2 ECTS					Co 4	B1+	Selected texts & TOLES (F.H. sample)	
LF Skopje, Macedonia	2017	ELP Law Politics		3,5 6 ECTS							3/3 ECTS	Co 3,5 Co 3	B1+	Legal English, M. Lazarovska, 2008	
LF Sofija, Bulgaria	2013/14 E	LE Law					4 3 ECTS	4 3 ECTS				C 8	B2	unavailable	
	2014/15	I Foreign lg II Foreign lg	4+0 4 ECTS	4+0 4 ECTS	4+0 4 ECTS	4+0 4 ECTS	4+0 4 ECTS	4+0 4 ECTS	4+0 4 ECTS	4+0 4 ECTS	- optional Russian in 3, 4, 5, 6, 7, 8 sem	C 32		unavailable	
LF Bucharest, Romania	2014/15 E, F, G, It.	ELP LE	2 2 ECTS	2 2 ECTS	2 2 ECTS	2 2 ECTS	Optional E, F, G, I in 3, 6, 7, 8 sem	2 2/2 acts	2 2/2 acts	2 2/2 acts		Co 8 Op 8t		unavailable	
	2016-2020 E, F, G, It.	LE	1+2 2 ECTS	1+2 2 ECTS	2 2 ECTS	2 2 ECTS	2 2 ECTS	- Optional E, F, G, It. in 1, 2, 3, 4 sem (2h each, 1 ECTS)				Co 12 Op 8		unavailable	
LF Tirana, Albania	2015/16	FL	3 4 acts	2 4 acts								C 5		unavailable	
LF Ankara, Turkey	2014/15	GE/ELP	2	2	2	2	ELP 2	ELP 2				8 + 4	A1-B1 +	a) unavailable b) Course summaries	

Source: Table 2 is based on available documents and information collected from the institution websites in Sept/Oct. 2017 (Gordana Imitovic; Nis, 1<sup>st</sup> October 2017)

Source: Institution websites and available documents (listed in the References)

**Table 3 ESP: ELP/LE courses at Law Schools in Europe**

Table 3. ELP/LE courses at Law Schools in Europe (2017)																		
Country	Law School	Curriculum		ESP area	I year		II year		III year		IV year		V year/Master	TOTAL	CEFR	Literature		
		Stud. program	Year		1.sem	2.sem	3.sem	4.sem	5.sem	6.sem	7.sem	8.sem					9.sem	10.se
Finland	Helsinki University, Law Faculty	Law LLB-required	2017/18	EAP ESP	Required: Academic & Professional Communication in English 1 & 2 (4cr)								LLB bilingual LLM (Internat. Business Law)	R 4	B2	Languages center		
					Opr: Business English (2cr)				Remedial English grammar (2 cr) B1								0	14
		Required lg. courses: 15 ects				Presentation skills (2cr)		Reading, Writing, Speaking (4cr) A2-B1		Oral fluency (2cr) B2-C1		R 4	C1	unavailable				
Sweden	Stockholm Uni., LF	Law (3+2)	2017/20	LE/EAP intensive	Content: LE Terminology, Writing, Oral Arguments, Negotiations, Case study, interpreting legal texts				10+2 h/w		3 LLMs in Eng				12	C1	B Garner on lg. & writing	
					Required: Academic Writing 1+2 (4 ects)				Opr: English for Prof. Purposes in Law (5 cr)		Legal Translation and Oral Argument (3cr)		Advanced Academic & Professional English (18 cr)					Conference presentations 1+2 (3 cr each)
Lithuania	Vilnius Univ., LF	Law & Customs & Management & State Border	2016/17	ELP/LE LSP	Elective 130h/6 cr		LSP (Lith)		6 LLMs in English				9	B2	Course outlines LE contents			
					BE (6cr) 62h/s 3 ects		Ac. Writing 3 ects		50h/6 cr									
Germany	Trier Uni., Law Faculty	Law (in Germ)	2017/18	LE	2 (5 ects)		2 (5 ects)		2 (5 ects)		+ FFA courses (2 cr. each) Anglo-Am. Law, UK Legal System/Terminology; US Legal System/Moot Court; Contract Law, Intellectual Property, UK Company Law		6	B1+C1	ILEC,			
					International Legal Studies		Int. LS: FFA		Specialist FFA courses		4 ects					4 ects		4 ects
Czech Rep.	Charles Uni. Prague, LF	Law	2017/18	LE	ILEC 4 ects	2h 4 ects	ILEC 4 ects	2h 4 ects	BE 1+2 for lawyers r	LE 1+2 for Commerce	Presentation skills 1+2 for lawyers		18	B1+B2	ILEC, LE textbooks			
Holland	Groningen Uni., LF	LLB Intern. & European Law	2017/18	EAP/ELP LE/Writ	5 ects	5 ects	+ all law courses taught in English				8 LLMs in Eng.		6	C1-C2	EAP, ILEC Legal Writing			
Belgium	Saint-Louis University, Brussels, LF	LLB French French/English French/Dutch	2017/18	GE ELP	60h/s		7 ects		75h 6 ects		+ Law course in English (4 ects)		8	B1/C1	B2	unavailable		
					E, F, D				+ Optional: EU Studies (10 ects)									
France	Paris Uni 2, Pantheon-Assas, Law Faculty	Law (Licence en droit)	2017/18	LE	US Gov. & Judiciary	UK Gov. & Judiciary	US Constitutional law	UK Constitutional law	US Crim. & Civil Proc.	UK Crim. & Civil Proc.	2h/w, 3 ects each	Joint/dual LLMs in UK, US, Spain, Italy		12	B2-C1	Course outlines: Taught by law professors		
Portugal	Coimbra Uni., Law Faculty	Law	2017/18	LE	6 ects	6 ects										8	B1	Syllabus:
Austria	Vienna Uni. Law Faculty	LLB/Diploma 8 sem (2+3+2)	2017/18	LE (law+ESP lectur)	2h/w 3 ects	2h/w 3 ects	+ Elective: Anglo-Am. LE 1-3 (2h/w, 3 ects each)				+ Special elective law subjects (2h/w, 3 ects each)		LLM Internation. Legal Studies		4		ILEC 1 & 2, Moodle	
Italy	Sapienza Uni. Rome, Law Faculty	Law & Public Admin.	2017/18	Law LSP	GSp: 4h 6 ects		E/F 4 h/w 6 ECTS		+ Law courses in English: EU Law and Economics, Comparative and European Law				Dual/joint LLMs with inst. abroad		4		unavailable	
					Admin.		GSp: 2h 3 ects		E/F 2 h/w 3 ECTS									2
Hungary	Ramusovics Peter Catholic Uni., Budapest	Faculty of Law & Political Sciences	2017/18	Law & Admin.	ILEC1 2h/w each	ILEC2	LE writing	LE Contract drafting	Negotiations for lawyers	Intern. Communication	Business Comm.	LE EU lg.	+ provided in ERASMUS programs		16	B1-B2	Course outlines: PROFEX exams	
Russia	Lomonosov Moscow State Univ., LF	Law Faculty	2017/18	Law	6 h/w	6 h/w	6 h/w	6 h/w								24		unavailable

Source: Table 3 is based on available documents and information collected from the institution websites in Oct/Nov. 2017 (Gordana Ignjatovic; Nij, 10 November 2017)

Source: Institution websites and available documents (listed in the References)

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# **Criminal Law Session**

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## **NEW ALTERNATIVE CRIMINAL SANCTIONS: DEFINITION AND MAIN CHARACTERISTICS**

**Abstract:** *The recent amendments to the Criminal Code of the Republic of Serbia have introduced some new penalties in the system of criminal sanctions in the Republic of Serbia. The Criminal Code provides three new alternative criminal sanctions: community service, confiscation/withdrawal of the driver's license, and house arrest. According to their characteristics and function in the system, the new alternative criminal sanctions are a reaction to the frequent application of (short-term) prison sentences for perpetrators of less serious criminal offences who demonstrate milder forms of criminal behavior, and a response to the observed "crisis" pertaining to imprisonment sentence. In addition to the new alternative criminal sanctions, criminal legislation contains a number of new institutes which may substitute a prison sentence; in a wider context, they may be viewed as an alternative to imprisonment.*

*The paper focuses on determining the definitions of these new alternative criminal sanctions and discussing the distinction between these alternative sanctions and the term "(new) alternatives to imprisonment", given the fact that they are often used as synonyms in criminal law literature. Also, the paper contains the definitions of alternatives to imprisonment presented in the most important international sources in this area. Since new alternatives are structurally different measures within the same discourse, the paper points to the basic common characteristics of new alternative criminal sanctions.*

**Keywords:** *new alternative criminal sanctions, alternatives to imprisonment.*

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## 1. Introductory considerations

The contemporary social reaction to different forms of criminal behavior is characterized by the simultaneous development of two completely contradictory concepts: the extension of the limits of criminal law repression with the intensification of penalties for existing incriminations, and the development of more humane and less punitive sanctions and measures aimed at the perpetrators of milder forms of crime. Such a conflict of concepts in modern comparative law, the relationship between „criminal law expansionism“ (Stojanović, 2010: 34) and an alternative approach to punishing offenders of mild crime is symbolically referred to in the literature as the phenomenon of “bifurcation strategy or double-track strategy” (Soković, 2011: 217).

As a consequence of the domination of criminal justice expansionism and the retributive concept of punishment, the number of prisoners approached the “epidemic” proportions, which caused “chronic” overpopulation and overload of a large number of penitentiary systems in the world, but it also demonstrated the inefficiency of the entire criminal justice system and contributed to the spreading of “moral panic” (Young, 2009: 5). The crisis of imprisonment (Mrvić-Petrović, 2007: 7), the inability of the convicted persons to exercise their rights, the inadequate implementation of treatment programs, prisonism, deprivation and other negative consequences of imprisonment, costs of maintaining criminal justice, including the system of execution of criminal sanctions which is an enormous burden for every state (Bishop, Schneider, 2001: 180), the inadequate post-penal assistance and acceptance, as well as the lack of readiness of the state, society and local community to accept and provide post-penal opportunities without the stigmatizing effects for persons after serving a sentence, have confirmed the need for a different, alternative response towards the perpetrators of minor offenses, especially having in mind that in the total number of committed crimes the most serious crimes make a percentage on the global level which is not considered terrifying, but quite the opposite (Felson, 2011: 15-21).

In the 1970s, within the “new” restorative discourse, new alternative criminal sanctions were introduced and applied in the countries of the Anglo-Saxon legal tradition. They soon became an acceptable social response to milder forms of crime in the countries of European-continental legal tradition as well. Of course, their introduction into criminal legislation is not aimed at the complete replacement of imprisonment; on the contrary, they are only alternatives to short-term prison sentences (McNeill, 2013: 176).<sup>1</sup> As stated in the literature, “criminal law

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1 McNeill states that „perhaps one of the reasons for the failure to displace or marginalize the prison in the popular, penal-political or in the penological imagination, rests in the historical origins of community sanctions in many jurisdictions, particularly where they emerged not as punishments but rather as measures imposed (primarily in Anglophone countries) instead

should have two clearly differentiated approaches in the fight against crime: the energetic suppression of the most serious forms of crime with the full use of punishment and traditional criminal law (with respect for all the principles of the rule of law) on the one hand, and in terms of less serious (and in some cases medium) forms of crime, the introduction of such criminal law that would heavily rely on alternative criminal sanctions and alternative forms of criminal proceedings and which, in some sense, may be seen as quasi-criminal law (Stojanović, 2009: 3).

However, in addition to prescribing and applying new alternative criminal sanctions within the restorative approach, there are new institutes, measures, instruments and procedures that emerged in the contemporary criminal legislation, which are ultimately aimed at avoiding (altering) short-term imprisonment sentences. Bearing in mind that these measures and procedures, in the broadest sense, can be considered as alternatives to prison sentences and that the terms *alternative criminal sanctions* and *alternatives to prison sentences* are often used as synonyms in criminal law literature, this paper aims to examine the notion of (new) alternative criminal sanction, distinguish this concept from the concept of (new) alternatives to imprisonment, and present the common characteristics of new alternative criminal sanctions.

We are of the opinion that the definition of the previous terms is important for understanding the alternative approach and alternative punishment of the perpetrators of minor offenses, especially taking into consideration that the criminal legislation of the Republic of Serbia contains a number of alternative sanctions: 1) “traditional” alternative criminal sanctions (suspended sentence and admonition; 2) new alternative criminal sanctions (community service, the penalty of confiscation of a driver’s license, and the house arrest as a potential modality of the execution of a sentence of imprisonment up to one year); and 3) new institutes, new alternatives to prison sentences, in the broadest sense of the concept (including the principle of opportunity of the prosecution, new legal grounds for exemption from punishment: remorse and compensation of damage, and settlement between the perpetrator and the victim).

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of punishment or (primarily in countries with Roman law traditions) as a form of suspended punishment. This peculiar non-status as a mode of punishment may have suited liberal and progressive reformers who were so often trying to divert first-time and/or minor offenders from the demoralizing dangers of imprisonment and into nascent forms of social welfare services (for the Scottish example, see McNeill 2005). However, its legacy in the context of late-modern penal populism and of contemporary public sensibilities has been a legitimation crisis for sanctions cast around remedial, rehabilitative and re-integrative intentions that are seen, rightly or wrongly, as being principally concerned with the interests and needs of ‘offenders’. (McNeill, 2013: 176).

## **2. The concepts of *new alternative criminal sanctions and alternatives to imprisonment***

In criminal law literature, there is no single and universally accepted definition of an alternative to imprisonment or new alternative criminal sanctions; nor does it exist in as such in international documents relating to the promotion of an alternative approach to punishment and implementation of alternatives to imprisonment. The basic problem in determining the definition of alternatives to imprisonment is the fact that the traditional and new criminal sanctions that are pronounced by the court for the purpose of substituting the sentence of imprisonment are often considered to be equivalent with the measures and procedures that are used, in a wider context, to avoid imposing the sentence of imprisonment. It is necessary to note that, in the legislative and scientific system, the notion "criminal sanctions" is broader than the term "punishment"; but, bearing in mind that the term "alternatives to imprisonment" is accepted and used in literature as a generic term for alternative criminal sanctions and other measures which can be alternate for the imposition of a prison sentence, in this paper we use the term "alternatives to imprisonment" as a wider term than the term "alternative criminal sanctions". Therefore, the term *alternatives to imprisonment* includes the (traditional and new) alternative criminal sanctions as well as a whole range of measures, procedures or methods that alter the imposition or execution of a prison sentence,<sup>2</sup> but also other measures that can be applied during the execution of imprisonment.

In the broadest sense, alternatives to imprisonment can be defined as a generic term that includes various criminal sanctions which differ in concept, form and content, as well as measures and procedures whose common feature is the alternation of prison sentences. The term (traditional and new) *alternative criminal sanctions* is narrower in scope than the concept of alternatives to imprisonment, and it pertains only to criminal sanctions prescribed by the law, which are imposed by the court on the perpetrators of the criminal offenses in order to avoid imposing the sentence of imprisonment. Depending on the criminal law system, they may include sentences or other criminal measures, but their formal position in the system is not essential to the fact that they are alternative criminal sanctions.

Norman Bishop, one of the most important European authors in this field, states that the term *alternatives to imprisonment* covers a wide range of different measures. This author states that "in the literature – and especially in United Nations

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<sup>2</sup> Škulić rightly emphasizes that such measures have an effect close to the effects of some criminal sanctions, which neither formally nor substantially constitute criminal sanctions (Škulić, 2009: 39).



documents – the term is used to refer to (a) pre-trial measures the object of which is to avoid bringing the offender to trial, (b) particular sanctions or measures of a non-custodial character imposed by the courts and (c) certain steps during the enforcement of a prison sentence which are intended to alleviate the negative effects of imprisonment“ (Bishop, 1988: 42). The author points out that only the second type - the sanctions and measures imposed by the court - are the real alternatives to imprisonment. When it comes to measures aimed at preventing the perpetrator from being tried, he believes that these are measures of diversification of the procedure which, as a rule, are prescribed by the prosecutor. Bearing in mind their content and the fact that they are applied to minor offenses (for which the court would probably not impose a prison sentence), they do not constitute alternatives to prison sentence but “*alternatives to accusation*”. He also states that it is imprecise to call the third type of measures (which are aimed at mitigating the regime during the execution of the prison sentence) alternatives to prison sentence because they represent alternatives to the way of executing the prison sentence, i.e. “*alternative to institutionalization*” (Bishop, 1988: 43-44).

The conceptual delineation between *alternatives to imprisonment* (in a wider sense) and *alternative criminal sanctions* (traditional and new) presented in this paper is based on the classification of alternatives to imprisonment proposed by Bishop. Bishop considers that true alternatives to imprisonment are only those sanctions and measures which are imposed by the court in the criminal proceedings, which implies (traditional and new) alternative criminal sanctions that are used by the courts to avoid imposing a prison sentence (alternative to imprisonment - in a narrower sense).

The perceptions presented in the literature, related to determining the notion of alternatives to imprisonment, can be divided into those that define alternatives to prison sentences (in the broad sense) or as those defining alternative criminal sanctions only ( in the narrow sense). Mrvić-Petrović points to both views; thus, in the narrow sense, “alternatives to prison or alternative sanctions can be defined as new criminal sanctions, deprived of penal property, which can replace a short-term imprisonment”; in the broader sense, “alternative sanctions should mean some new measures that can be applied to perpetrators and the ways in which they can be treated that are more favorable to them, and different in relation to the traditionally developed criminal penalties applied in criminal proceedings” (Mrvić-Petrović, 2010: 15; Mrvić-Petrović, Đorđević, 1998: 96-97).<sup>3</sup>

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3 The author further points out that in this way the problem of conceptual determination is not solved, it is only created, because the concept of alternative criminal sanctions can be understood in different ways depending on whether it is linked to the system of criminal sanctions or to a function which, using the measures of alternative criminal justice in the judicial system (Mrvić-Petrović, 2010: 15).

Referring to the wider conception presented by Mrvić-Petrović and Djordjević, Konstantinović-Vilić and Kostić point out that alternative punishment includes various procedures and measures aimed at avoiding the instigation of criminal procedure and/or punishment for committed misdemeanor and minor offenses; alternatively, for the purpose of successful re-socialization of the convicted person, the sentence of imprisonment may be substituted by specific obligations, inclusion in socio-pedagogical treatment and out-patients' health care program, or partial imprisonment (Konstantinović-Vilić, Kostić, 2011: 247).

Soković points out that "in the broadest sense, the term alternative criminal sanctions and measures implies anything that aberrates from the traditional imprisonment regime, irrespective of whether it implies the pre-trial measures aimed at preventing the offender's appearance in court or special measures of non-custodial character imposed by the court, or the measures taken during the execution of imprisonment aimed at removing the negative consequences of prison isolation" (Soković, Simonović, 2012: 380). Šeparović states that alternative measures, sanctions or penalties are all those measures that are being used in order to avoid sending the delinquent to prison (Šeparović, 2003: 158). Lažetić-Bužarovska specifies that alternatives to prison sentences are penalties, measures and regimes of their execution which provide for a full or partial avoidance of imprisonment or reduction of prison time, whereby the convicted offender is subjected to treatment and supervision of professional or authorized people within the community, concurrently taking into account the position of the victim (Lazetić-Bužarovska, 2013: 47). Ignjatović suggests that the use of the term "alternative" should refer only to those measures that eliminate the possibility of imprisonment in the penitentiary institution, and he defines them as "measures that remove the possibility of imposing a prison sentence to the offender in order to avoid its negative effects, provided that the court assesses that such a measure corresponds to the nature and severity of the crime, the personality of the perpetrator and the degree of danger exercised by committing a crime. By the nature of the matter, these measures alter short-term imprisonment" (Ignjatović, 2016: 195). Škulić emphasizes that, whenever something is alternative, it logically implies the existence of a certain rule in relation to which there are certain exceptions, and he states that, in order for a certain criminal sanction to be considered an alternative sanction, there must be a primary criminal sanction, which also implies the possibility of replacing this primary criminal sanction, under certain conditions, by another criminal sanction of alternative character (Škulić, 2009: 42).

Finally, starting from the general notion of criminal sanctions (Stojanović, 2010: 245), alternative criminal sanctions can be defined as measures prescribed by the law which may be imposed on criminal offenders (on the basis of court

decision and after conducting criminal proceedings crimes) for the purpose of preventing crime; they aim to avoid imposition and execution of imprisonment, i.e. to serve as alternative to imprisonment. Accordingly, we may define alternatives to imprisonment as a term which, in addition to alternative criminal sanctions, includes other measures, procedures and methods applied before or during criminal proceedings with the aim to avoid the possibility of imposing a prison sentence, as well as the measures and procedures that can be applied after imposing imprisonment for the purpose of enabling non-custodial execution of the imposed sentence.

### **3. Terminological inconsistency in science and international documents concerning the use of the term *alternatives to imprisonment***

As previously noted, in theory, the terms *alternatives to imprisonment* and (traditional and new) *alternative criminal sanctions* are used as synonyms. In order to explain alternative approach to the perpetrators of minor offenses and the application of alternatives to imprisonment, some other terms are used in domestic legal literature, such as: alternatives, alternative sanctions, alternative measures, alternative criminal sanctions and measures, community sanctions and measures, non-custodial sanction and measures, non-institutional measures, intermediate sanctions, medium-gravity sanctions, quasi-penal measures, and others. This terminological inconsistency, or the use of these terms as synonyms, is the consequence of using different terms for alternatives to imprisonment in the basic international documents in this field, and the result of translation of terms in foreign literature, primarily from English, given that most alternatives to imprisonment originate from the states of Anglo-Saxon legal traditions. Thus, the use of these terms as synonyms is, in a way, a result of different circumstances.

We will try to present terms used in the most important international documents to explain how the concept of alternative sanctions has spread on the global and regional level, which has led to terminological inconsistency in using the term alternative to imprisonment.

Namely, this term was created with the first reflections on changing the sentence of imprisonment with some other criminal sanction. An alternative for the prison sentence was needed almost from the moment of introducing imprisonment into the register of criminal sanctions.<sup>4</sup> In all international documents in this area, states were invited to introduce various alternatives to prison sentence

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<sup>4</sup> In that sense, Foucault emphasized that "reforming the prison sentence is almost as old as the prison itself, as if it were part of its program" (Fuko, M. 1997: 226).

into their legislation and to try to reduce imprisonment, particularly short-term imprisonment.

The generally accepted term “*alternatives to imprisonment*” related to the prescription and application of criminal sanctions that could be pronounced instead of punishment of imprisonment. This term was used at the United Nations Congresses on Crime Prevention and the Treatment of Offenders<sup>5</sup> until the adoption of the UN Standard Minimal Rules for Non-custodial Measures (the Tokyo Rules) in 1990.<sup>6</sup> In the Tokyo Rules, the term *non-custodial measures* is used instead of the term alternatives to imprisonment. The Tokyo Rules do not include the definition of non-custodial measures, but they list various types of criminal sanctions and measures, which are proposed to be introduced into the national criminal legislation and which can be applied at the trial stage, at the stage of pronouncing the judgment and at the phase after imposing a prison sentence. Considering that these rules had to provide not only for criminal sanctions but also for some other measures, the authors of the Tokyo Rules decided to adapt the name to manner of their (non-custodial) execution. Thus, the term *alternatives to imprisonment* was replaced with the term *non-custodial measures*.

A similar change occurred in the Council of Europe documents. In the Recommendation on the European Rules on Community Sanctions and Measures of 1992,<sup>7</sup> the term *community sanctions and measures* was used for alternatives to imprisonment. As with the Tokyo Rules, the method of their execution determined their name, except that the title of European Rules contains the term “sanctions”. Under the European Rules, the term *community sanctions and measures* refers to “sanctions and measures which maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction, as well as ways of enforcing a sentence of imprisonment outside a prison establishment. (Although monetary sanctions do not fall under this definition, any

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5 See, inter alia: Resolution 8. Alternatives to Imprisonment, Sixth United Nations Congress on the Prevention on Crime and the Treatment of Offenders, 1980; Resolution 16. Reduction of the Prison Population, Alternatives to Imprisonment and Social Integration of Offenders, Seventh United Nations Congress on the Prevention on Crime and the Treatment of Offenders, 1985.

6 Standard UN Minimal Rules for Non-custodial Measures – Tokyo Rules, General Assembly Resolution 45/110.

7 Recommendation No. R(92)16 of the Committee of Ministers to Member States on the European rules on community sanctions and measures (Adopted by the Committee of Ministers on 19 October 1992 at 482<sup>nd</sup> meeting of the Ministers Deputies).

supervisory or controlling activity undertaken to secure their implementation falls within the scope of the rules).” In the Council of Europe Probation Rules,<sup>8</sup> the term *community sanctions and measures* is also used instead of alternatives to imprisonment. Under these Rules, the term means “sanctions and measures which maintain offenders in the community and involve some restrictions on their liberty through the imposition of conditions and/or obligations. The term designates any sanction imposed by a judicial or administrative authority, and any measure taken before or instead of a decision on a sanction, as well as ways of enforcing a sentence of imprisonment outside a prison establishment”. The term *community sanctions and measures* is defined in the same way in the new European Rules on Community Sanctions and Measures.<sup>9</sup>

These terminological changes in the most important international documents have led to using numerous terms in criminal law literature, primarily in English, either concurrently or as synonyms, which denote all alternative criminal sanctions, measures or methods.<sup>10</sup> Consequently, various terms are used in the domestic literature, as already specified.

Terminological inconsistency is still present in our criminal justice system. Namely, the Act on Enforcement of Non-Custodial Sanctions and Measures (2014),<sup>11</sup> as a specific legislative act regulating the procedure for the enforcement of alternative criminal sanctions and measures (ny means of which this area is separated from the act regulating the execution of other criminal sanctions) uses the term *non-custodial sanctions and measures* for alternatives to imprisonment (in a wider sense); concurrently, it envisages the establishment of the Probation Office as the authority responsible for the implementation of these sanctions and measures, which operates within the Department for the Treatment and Alternative Sanctions, as the organizational unit within the Directorate for the Execution of Criminal Sanctions, at the Ministry of Justice of the Republic of Serbia. Therefore, the terminological imprecision is clearly reflected in the fact

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8 Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules (Adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers’ Deputies).

9 Recommendation CM/Rec(2017)3 on the European Rules on Community Sanctions and Measures (Adopted by the Committee of Ministers on 22 March 2017 at the 1282nd meeting of the Ministers’ Deputies).

10 Community sanctions and measures, community corrections, community penalties, non-custodial measures, non-custodial alternatives, non-custodial penalties, intermediate punishments, intermediate sanctions, offender supervision, supervision in the community, community supervision.

11 “Službeni glasnik Republike Srbije” no. 55/2014.

that the execution of non-custodial sanctions and measures is carried out by the authority competent for the execution of alternative sanctions.

#### **4. Specific characteristics of new alternative criminal sanctions**

As we pointed out in the previous section, new alternative criminal sanctions are measures of different content and concept, within the same discourse, whose common feature is to alter the imposition and execution of short-term imprisonment sentences. However, by analyzing various new alternative criminal sanctions envisaged in the Serbian and comparative criminal legislation, we have established other common and distinctive characteristics of these sanctions. We will try to present them in several segments: consequential prescription and utilitarianism in occurrence and application, competitiveness in relation to short-term imprisonment, consentuality in the imposition or execution, special preventive character, and a "new" semantic potential.

##### ***4.1. Consequential prescription and utilitarianism in occurrence and application***

The ineffectiveness of the imprisonment sentence and the usefulness of new alternative criminal sanctions, as a response to the "crisis of imprisonment", is the basis of their occurrence and development. This means that the common characteristics of new alternative criminal sanctions are the consequential prescription and the utilitarianism in their creation and application. Without disputing the necessity and usefulness of other penalties and criminal sanctions as measures of criminal-political activities aimed at preventing criminality, we point out that the usage of new alternative criminal sanctions is viewed in a different context.

Namely, they appeared and developed in response to the "crisis of imprisonment" and as a consequence of the dominant position of only one punishment – the imprisonment sentence. Thus, the emergence and development of prison sentences was also the answer for the crisis of the concept of punishment based on the application of death penalty and severe corporal punishments. However, instead of addressing the issue by finding a new dominant punishment, the creation and implementation of new alternative criminal sanctions is an attempt to build up a whole system of potentially purposeful alternatives to imprisonment. There is another dimension in the utilitarianism of their prescription and application. Namely, unlike the earlier conceptions on the usefulness of penalties that only contribute to the state or society, new alternative criminal sanctions represent a method of treatment whose application is potentially beneficial not only to the victim of a criminal offense and the criminal offender (in terms of rehabilitation

and re-socialization) but also to their families, the social environment and the local community (micro-social environment), and ultimately to the society as a whole and the state.

#### ***4.2. Competitiveness in relation to short-term imprisonment***

New alternative criminal sanctions are prescribed in such a way that they represent a potential substitute for short-term imprisonment, thereby establishing a specific competitive relationship between them. Namely, the potential imposition of the new alternative criminal sanctions usually depends on the maximum imprisonment prescribed for specific criminal offence or by determining penalty of imprisonment. The “common” way of prescribing new alternative criminal sanctions, both in our and in comparative law, confirms their alternative status in the system of criminal sanctions, but at the same time determines a specific, subsidiary character. Competition, as a common feature of all new alternative criminal sanctions, is manifested in each particular case where the court decides whether to impose a short-term imprisonment or considers it justified and purposeful to apply a new alternative criminal sanction.

#### ***4.3. Consent to imposition or execution of new alternative criminal sanctions***

A special feature of the new alternative criminal sanctions is the fact that the consent of the perpetrator is necessary for their imposition or execution, either explicit or tacit (in certain cases). In certain criminal sanctions (e.g. compensation of damage), the prerequisite for imposing the sanction can be the prior consent of the victim of the crime. In comparative criminal law, there are cases where an alternative sanction may be imposed upon obtaining the consent of the family members of the convicted person or members of the family household (e.g. when applying electronic surveillance). The consent for imposing certain new alternative criminal sanctions must be explicit and communicated during the criminal proceedings (e.g. in case of community service, the electronic monitoring, compensation) while in other cases it may be tacit (e.g. in case of house arrest).

The notion of consent to the new alternative criminal sanctions is a complete novelty in criminal law, and it is incompatible with the traditional understanding of the application of penalties and punishment. The basic question that arises is whether the criminal sanction which the perpetrator agrees with constitutes a punishment, or whether it thereby loses its distinctive punitive identity. Is sentencing and imposing the punishment incompatible with consent and adherence to the imposed punishment? Was the history of punishment rightly based

on an ambivalent relation towards the attitude of the convicted offender about the imposed sentence and the manner of its execution, where punishment was considered as a form of retribution for the committed crime ("an eye for an eye"), or is it necessary to review such a position today? Above all, when imposed a new alternative criminal sanction, does the perpetrator agree with the criminal sanction itself or with certain content that makes its execution possible?

Different questions lead to a simple answer. The offender's consent to being awarded a new alternative criminal sanction is only part of a different (alternative) approach to the perpetrators of minor offenses. Depending on the criminal sanction, the offender may be required to give a prior consent to being imposed a criminal sanction, which is inconsistent with the traditional understanding of punishment and punishing; consent may also be required for a specific content of the criminal sanction, which in practice constitutes a precondition for its successful execution.

#### ***4.4. Special-prevention character***

The special-prevention character is another common feature of new alternative criminal sanctions. Namely, as repeatedly pointed out, the main goal of these criminal sanctions is the alteration of short-term imprisonment and facilitating the social reintegration of the perpetrators of minor offenses. In this context, most new alternative criminal sanctions have pronounced special-preventive character, which is confirmed by the goals of their prescription, the content and the manner of their execution. The general preventative effects of their application are minimal, unless they are perceived for a certain category of potential perpetrators as part of a new concept of punishment and a new symbolic "punitivism".

#### ***4.5. A "new" semantic potential of the new alternative criminal sanctions***

Finally, we point to another common feature of these alternative criminal sanctions - their "new" semantic potential. What does it mean? Namely, the imposition of a punishment or any other criminal sanction necessarily implies a particular message which is communicated to the perpetrator of the committed crime. Therefore, by prescribing, sentencing, imposing and executing a particular punishment or other criminal sanction, the society and the state send a particular message to the perpetrator of the crime and other possible offenders.

Regardless of the proclaimed objectives of re-socialization, rehabilitation and reintegration, the traditional message of retributive criminal justice systems conveyed to the perpetrator of the crime (by imposing strict prison sentences



for most crimes and especially considering the manner of their execution) does not constitute encouraging content about a “normal” life after the sentence has been served. In the contemporary society, the harmful effects of stigmatization of a convicted person, after serving the sentence and being released, virtually prevent the person’s inclusion into social life and organization of everyday life without being denied various opportunities or being deprived of some basic human and civil rights, all of which are the result of the previous punishment and time spent in prison.

However, the message that is communicated to a perpetrator by imposing and applying new alternative criminal sanctions has a different content. The new approach to “punishment” embodies different semantics. An alternative approach to the perpetrators of minor crimes which has been developing within the framework of the restorative justice discourse attempts to communicate the message that classical punishment and penal symbolism are unnecessary or ineffective in relation to most perpetrators of minor offenses. The alternative approach gives the perpetrator an opportunity to show remorse and apologize to the victim or the victim’s family, to compensate the victim (in pecuniary or symbolic manner) or otherwise eliminate the harmful consequences of the crime and, ultimately, to reintegrate into the society which accepts the offender without stigmatization and other restrictions, and enables the offender’s inclusion into the community. Acceptance of the perpetrators, recognition of the victim’s rights and the continuation of “normal” life in the local community are the basic messages of this approach.

However, without the intention to idealize the baseline of the new semantics of alternative criminal sanctions, we must point out that “alternative forms of punishment” include some sanctions and measures that entail control and supervision of the perpetrators, which are aimed at incapacitating the perpetrators to harm the society by committing criminal acts. Therefore, new alternative criminal sanctions and measures involving control and supervision change and complement the basic meaning of the message. Although the opportunity to amend the consequences of the crime and reintegration of the perpetrator into the community remains the basic message, it is upgraded through the content of control and supervision; thus, it also communicates what type of behavior is expected from the perpetrator or will be “created” by the system. In a latent way, this points to the (un)willingness of the society to fully accept the perpetrators. It should be noted that the measures of control and supervision, although significantly less punitive than the retributive punishment by deprivation of liberty in the penitentiary institution, pose a new danger of violation of personal freedom and basic human rights, primarily due to the attempts to “create” the expected behavior of supervised persons. Notwithstanding the expressed

fear that may be present in the pessimistic projections in the future, we must conclude that the semantics of this approach in today's context brings about a significantly different and more effective quality and potential in terms of the perpetrators of minor offenses, as compared to the messages communicated by the retributive punishment.

## 5. Concluding Remarks

The amended criminal legislation of the Republic of Serbia envisages new alternative criminal sanctions and new institutes which are aimed at avoiding the imposition and execution of prison sentences (primarily short-term imprisonment). Bearing in mind that the terms *alternatives to imprisonment* and *alternative criminal sanctions* are often used as synonyms both in criminal law literature and in the most important international documents in the field of promotion and application of alternatives to imprisonment (alternative criminal sanctions and other measures, methods and procedures), we have tried to point out the difference between these two concepts and define each of them separately. In this paper, we have shown how the term *alternatives to imprisonment* is defined in our literature and international sources. In the domestic literature, the concept of alternatives to imprisonment is defined as follows: in the broadest sense, which includes (traditional and new) alternative criminal sanctions as well as other measures, methods and procedures for avoiding the imposition or execution of imprisonment; and in a narrow sense, which is reduced to the concept of (traditional and new) alternative criminal sanctions. In the international documents until the beginning of the 1990s, the term *alternatives to imprisonment* was used uniformly (for alternative criminal sanctions); after that period, the term was replaced by *non-custodial measures* (Tokyo Rules) and *community sanctions and measures* (Council of Europe Recommendations) because the term entails not only criminal sanctions but also other measures, methods and procedures that can be used to replace short-term imprisonment.

Starting from the view that the new alternative criminal sanctions represent conceptually and normatively different measures within the same restorative discourse, we wanted to point out in this work that these criminal sanctions have a number of common characteristics: avoidance and alternation of the sentence of imprisonment, consequential prescription and utilitarianism in occurrence and application, competitiveness in relation to short-term imprisonment sentences, consent to the imposition or execution of new alternative criminal sanctions, the special-prevention character, and the "new" semantic potential of the new alternative criminal sanctions.

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## **НОВЕ АЛТЕРНАТИВНЕ КРИВИЧНЕ САНКЦИЈЕ – ПОЈАМ И ОСНОВНЕ КАРАКТЕРИСТИКЕ**

### **Резиме**

Систем кривичних санкција у Републици Србије је након нове-лирања кривичног законодавства проширен новим казнама. Кривични законик предвиђа три нове алтернативне кривичне санкције: рад у јавном интересу, одузимање возачке дозволе, и кућни затвор. Према карактеристикама и функцији у систему нове алтернативне кривичне санкције представљају реакцију на учесталу примену казне затвора према учиниоцима блажих форми криминалног понашања и одговор на „кризу“ казне лишења слободе. Поред нових алтернативних кривичних санкција, кривично законодавство садржи и низ нових института чијом се применом може алтернирати изрицање казне затвора и које се, у ширем контексту, могу посматрати као алтернативне казни затвора.

Рад смо посветили одређивању појма нове алтернативне кривичне санкције и дистинкцији овог у односу на појам (нових) алтернатива казни затвора, имајући у виду да се, често, у литератури користе као синоними. Такође, представљамо појам „алтернатива казни затвора“ који садрже најзначајнији међународни извори у овој области. Како садржински представљају различите мере у оквиру истог дискурса, у раду укажујемо на основне заједничке карактеристике нових алтернативних кривичних санкција.

**Кључне речи:** нове алтернативне кривичне санкције, алтернативе казни затвора.



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## **CRIMINAL LEGISLATION AND THE GLOBALIZATION PROCESS**

**Abstract:** *The globalization process, which pervades all aspects of life, affects the legislation as a social and legal phenomenon. Criminal legislation, which is directly and undoubtedly linked to the very essence of life, becomes either the stepping stone of development or the stumbling block of the globalization process. Until recently, the undisputed sphere of criminal law has been regarded as an area strictly regulated by national legislation. Yet, in the past decades, it has been significantly affected by the globalisation process, in which the necessity of cooperation among nations primarily affects human rights. Thus, the exclusion of human rights protection from the exclusive jurisdiction of the states emerges as a cornerstone of international human rights standards, all of which has inevitably affected the field of criminal law. The rule of law per se will be tested through criminal legislation, in general, and particularly through the process of globalization as a dominant feature of our time. The wide-ranging issues that have to be addressed by the general theory of law will include ontological questions, explicit definitions on the notion of globalization and legislation, as well as a number of axiological issues. Those axiological issues, which will arise from the possible relationship between globalization and criminal legislation, shall determine the path of the rule of law, which may not be guaranteed and efficiently protected without criminal legislation.*

**Keywords:** *globalization, criminal legislation, human rights, international criminal law.*

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## 1. Introduction

Criminal legislation, which is directly and undoubtedly related to the very essence of life, has become either the probe stone of development or the stumbling block of the globalization process, especially nowadays when there are reservations about the absolute trust towards the legislative body, raised by the question who controls those who are above everyone else (Zsifkovits, 1996:82). Yet, it is possible, especially at the international level which has become the prelude to the globalization, to take into consideration the "good" people and add the power of the sword to their strength (Radbruch, 1980: 215).

One issue may be raised here: what happens when one loses trust in the legislature? This is caused by shifting the focus from the general interest of all to the particular interests of individuals who make up the legislative body, which especially causes confusion and doubt when related to the globalization process which has entered legislation in general and criminal legislation in particular. Such conduct of the legislative body leads to enacting laws aimed against the general good which, according to St. Thomas Aquinas, should be of the utmost importance of every law. Thus, if these issues are to be shifted from the national to the international level and considered as integral part of the process of globalization, the growing insecurity and fear give rise to the question how to preserve any democratic tendencies in the society.

As a matter of fact, the past years were all but Kant's dream of eternal peace. They clearly demonstrated the power of the legislator, i.e. of the majority constituting the legislative bodies, which made almost everything legally possible. Thereby, we moved away from Montesquieu's conception of freedom (liberty) as embodied in man's security (Heller, 2011:9).

## 2. Globalization and unreliability of legislation

Human conduct is always questioned in terms of responsibility for the undertaken actions but here we focus on the responsibility (accountability) for the activity of the legislative body. The problem is further complicated given the fact that enacting legislation involves the responsibility of "many hands", which is a common problem of the democratic process where it may be quite difficult to establish who is "to blame" or who is "guilty" (as the concept pertinent to criminal law). As related to the globalization process which points to something universal, the efforts of those in pursuit of "the responsible person" subside in the diffuse space offered by globalization.

Thus, especially in the domain of the criminal law, there is an increasingly prominent problem concerning the relationship between the legislation and the



value of freedom which has moved into the realm of uncertainty, despite the efforts to frame the specific legal value known as legal certainty. For, although it is stated that a man is free and subordinate to the laws rather than to other men, there is still a lingering problem that a man is subordinate to the laws enacted by other men and enforced for the sake of ruling. This is an indirect but rather certain way leading to dictatorship, perhaps even better than it was in the past. Due to this “degeneration” of the legislative body, there is distrust towards laws enacted at the national and international level, and resistance towards what may be designated as globalization at the legislative level.

Until recently, criminal law has indisputably been regarded as an area strictly regulated by national law but, in the past few decades, it has been significantly affected by the globalization process, in which the inevitable cooperation between nations primarily affects the domain of human rights. In that context, as a notable counterweight to globalization as a phenomenon that constitutes a negation of man as an individual, we may call attention to the standpoint that man is not such a tiny element of society and the state to become almost invisible to them (Radbruch, 1980: 216). The negation of man can occur if he is “disregarded” during the legislative proceedings at the global level. This becomes increasingly interesting if an individual is regarded as “the basic entity”, necessarily accompanied by the statement that “communities are larger versions of ... individuals” (Finnis, 2011: 327). The problem actually begins with the concept of “individual sovereignty” and how to harmonize it with the power of the national and the “global” legislator, given the fact that societies are understood “primarily as a collection of sovereign individuals” (Finnis, 2011: 328). In particular, the issue of values underlying the individual-legislator-globalization relations is additionally influenced by the belief that, instead of the term “sovereignty”, it is more appropriate to use the term “the one who has power over himself or power over his actions” (Finnis, 2011: 328-329) The question is whether the one who has power over himself can in any possible way be subordinate to another at any possible level? This question will never get the answer that will be satisfactory for both theory and practice, the ideal and the reality. The only possible answer to this ontological concern might be a more secure position of man in criminal proceedings, where he will be provided better protection.

Despite the efforts to protect man, it has not happened at the global level and the long-awaited peace has not yet come. And if happened by means of war, it would mean that all the enemies were destroyed; yet, it is still disputable who the enemies are and who has the right to label somebody an enemy. If global peace is to come to us in this way, it first implies that all the enemies have to be defeated, but, who are the enemies? No legislator can answer this question.

For this reason, in the globalization process, observed through the prism of legislation (especially criminal legislation), there is a need for more adequate assessment of the social reality which is to be legally standardized and, thus, made more *justiciable*. This is justified by the fact that the act of "misleading" a nation may be initiated by means of legal rules (Zsifkovits, 1996: 77).

The rule of law, as the counterweight to the acts of deception and leading people astray, will be tested through the criminal legislation in general, and especially through the globalization process as a dominant characteristic of our time, for it seems that the governing powers will be built in a way that is quite different from the usual democratic processes, which implies a top-down rather than a bottom-up approach (Heller, 2011: 29). Such course in the development of governing powers is a purely ontological-axiological issue of globalization, which is directly related to the omnipotence of the legislature as compared to the power of citizens at the national level. When raised to the global level, it implies the existence of self-procreating power. It will determine the trajectory of the rule of law in the time of globalization, when the supranational criminal legislation will become either the stepping stone or a stumbling block of the globalization process.

If it turns out that the supranational legislation develops alongside with the development of globalization, it will serve as proof that there are nations which exist only in law (Schmitt, 2003: 7). This could be accepted as a value-based step forward only if we accepted a number of wrong premises: that laws are perfect and that globalization is impartial and unbiased. So far, there is no agreement on this issue.

Every legal rule has imperative character, which means that it is a kind of restraint imposed on people (Schmitt, 2003: 12-13). At the same time, it implies that the product of global legislation is a restraint affecting many nations in different ways.

In effect, this is the source of fear that globalization, expressed in the field of legislative activity (particularly in criminal law) and given its inherent nature, might turn into the monopoly of the supranational state. As power tends to corrupt and absolute power corrupts absolutely, this may as well happen to global governing powers (Zsifkovits, 1996: 34). Should this come true, the legislative body would not only be left without its function but also without its dignity (Zsifkovits, 1996: 48). This is particularly true in cases where citizens, after receiving "election goodies", express their distrust towards the enacted laws". Thus, the opponent of globalization will consider that globalization (as expressed in the legislative field) is a kind of global legal insanity of the super-power (Kantorowicz, 2006: 15). Such legislation is believed to deprive every

nation of its own spirit. Therefore, it can be assumed that the rights of people would be guaranteed in the global legislation only when they are really secured (Feuerbach, 2008: 11) and safeguarded in all substantive and procedural aspects, particularly in the field of criminal law.

The importance of the role of criminal legislation in the process of globalization is highlighted in the statement that a legislator is the utmost authority with the supreme will, whose order expressed in the form of legal regulation has a binding power. However, although it comes as a surprise to both the legislators at the national level and the international level, legal notions that are found in law are devised by legal scholars rather than the chosen representative in the legislative body (Feuerbach, 2008: 27). Thereby, the following issues are raised: who is the teacher of the legislator at the national level and at the global world level in the process of globalization, and who sets the rules of behavior and action and guidelines for providing special criminal-law protection (Feuerbach, 2008: 40)?

Thus, in the process of globalization, it is possible to entrust the legislative power to some authority, but only provided that he delivers what he says, and if he submits himself to the rule of law (Radbruch, 2007: 23). This is more than the "shallow noise of diplomacy" and the faint sound of resolution and concession. The danger lies in the fact that globalization is founded on the presumptions which is unable to justify, as it cannot constitutionally constrain the legislative power. In the process of globalization at the level of legislation, it is extremely dangerous when legitimacy is drawn from legality (Hebermas, Ratzinger, 2006: 19). It is interesting that the process of globalization is underway in the circumstances of broken social relations, which makes it all absurd. Therefore, it is necessary to accept the idea of joint control over power (Hebermas, Ratzinger, 2006: 33) in the legislative bodies throughout the world.

Is it viable to consider the issue of the legislation (including criminal legislation) in such a way that the legal system is completed exactly in the process of globalization? Starting from the process of development of the pure idea of law, it may be said that the development of the legal and social community as a whole stems from the importance of law as imperative legal act (Radbruch, 1980: 248). If this is not possible, is it possible to establish Kant's union of nations, as a form of loose association and a surrogate for the unattainable global community expressed in a single legislative body. Only time will tell if such a union of people may be attained under the rules of a single social order, which concurrently does not embody the ultimate power.

Thus, the dream of the union governed by fair and just laws may resemble the dream of the natural law which "claims to be a right that is discernible by human reason and is universally acknowledged..." (Strauss, 1992: 9). Surely, the

likelihood of such legislative harmony is questioned but it may be achieved if we accept the idea that "laws are just to the extent that they are conducive to the common good" (Strauss, 1992: 102). The law which contributes to common good is the precondition for the "global" and just legislator, for "many today think that the fundamental problem of ethical and political theory is to escape egoism – to show how and in what sense one can be required, in reason, to give weight to others' interests against one's own, and to recognize at least some moral duties to other people" (Finnis, 2004: 111). Everything else is abuse of power, which is certainly nothing new or unusual for states. Hence, the relation between law and the legislator, both at the national and at the global level, must be set forth as follows: law must be perceived on its own merits rather than as a product of the legislator or the result of the legislative process which had brought about the law; on the contrary, the legislator and the legislative process must be considered only on the merits of the specific subject matter embodied in the law (Strauss, 1992: 122-123). This is the only way to bridge the gap between the individual and the legislator, and only when "harmony among human beings" is achieved inside "*societas*" (Finnis, 2004: 111).

This is indispensable because the "global" legislator has to rely on the common good which "includes the all-round virtue of every member of the state" (Finnis, 2004: 235). Given that the issue of the "global" legislator is both a legal and a political issue, the issue of the common good may be approached considering "the common good which is political" and, draw the following conclusion on the relation towards the "global" legislator: "it is a good of using government and law to assist individuals and families do well what they should be doing" (Finnis, 2004: 238). This is to be expected, for the real union is the union for and not the union against, and the globalization is the process of creating one huge union (Ratzinger, 2008: 72). It is thus possible to attain new understanding of reality and the processes within it, one of which is globalization as well as the formation of the "global" legislature.

By examining the position, the role, assignments and valuative meaning of the "global" legislator, we actually address the issue of how to move forward (Ratzinger, 2010: 33). Why is the valuative element of the "global" legislator introduced here? The "global" legislator has the role to preserve and protect the fundamental values. Although it is clear that nobody will dispute the value of human dignity, at least formally and legally speaking, the fear of race theories of crime is still present (Ratzinger, 2010: 33-36). Thus, the "global" legislator can mitigate the "painful" experience of separation and provide for establishing the union of all people (Ratzinger, 2008: 7).

### 3. Two faces of globalization

It cannot be denied that globalization is one of the most significant phenomena of our time but it is evident that we are dealing with a complex and multidimensional phenomenon which includes various courses, tensions, and conflicts. The fast formation of the *world as a whole*, determined by the global economic integration and technological innovations, has produced powerful political and cultural implications. This fact has to be taken into account, given that globalization is indispensable part of the intricate wide-ranging factors which are reflected in issues related to the course of development of criminal law and creation of decision-making procedures. Since a thorough analysis of the whole spectrum of factors goes beyond the boundaries of this paper, the survey has to be simplified. Hence, we will focus on the insights which will facilitate drawing conclusions (Davidov, 2016: 14-43). For the time being, it should be noted that current tendencies do not support the idea of the *forthcoming cosmopolitanism*, the concept which is to bring about the new international institutional order that will abolish violence and accomplish the eternal peace.

It is apparent that globalization is veiled by the aura of necessity. Even those who are disgruntled by globalization withdraw when faced with the sheer force of declared inevitability of globalization. The concepts of space and time have changed due to technological innovations and economic internationalism, and the world has been turned into the huge market. A few decades ago, Lasch complained that the mobility of the capital and the global market had weakened the local and regional loyalty. In his opinion, new elites are far more cosmopolitan, or at least far more mobile and restless as compared to the predecessors. Lasch's shrewd insights contain the essential spirit of contemporary times: "Ambitious people understand that a migratory way of life is the price of getting ahead. They pay the price willingly since they associate the notion of home with the intrusive relatives and neighbors, dull gossip and narrow-minded conventions. New elites have stood against the "middle-class America", which is - as they believe: the world technologically backward, politically reactionary, repressive in its sexual morality, of poor taste and manners, self-satisfied and self-important, dull and sloppy. Those who are eager to be part of the new cerebral aristocracy are accustomed to gathering on the rivieras; turning their back on the homeland, they cultivate ties with international market through fast-moving money, glamour, fashion and popular culture. It is questionable whether they consider themselves to be Americans at all. On the other hand, "multiculturalism" suits them to perfection, with its nice image of global bazaar, where it is possible to try out exotic cuisine, exotic clothing, exotic music, exotic tribal customs, without redundant questions or any sense of responsibility. New elites are at home only in transit, on their way to a high-level conference, or grand opening of a new agency, an

international film festival or undiscovered resort. At its core, their view of the world is the one of a tourist - without any prospects to encourage a passionate devotion to democracy" (Lasch, 1996: 13). To make the story complete, it should be noted that "in the short 20<sup>th</sup> century" this kind of America became the largest industrial economy and the basic propulsive force of mass production and mass culture that overwhelmed and conquered the world. With global supremacy, the presumptuous illusion about *Pax Americana* has come into existence. As we will see later on, the influences of the Empire have not always been beneficial as has been preached by the evangelists of the imperialism.

There is a small number of issues in today's globalised world that caused such an intellectual turmoil as pluralism and their incarnations, such as multiculturalism, cultural diversity and cultural pluralism. At first, the contemporary pluralism was articulated through the concept of *cultural diversity*, that is to say *cultural pluralism*, which implies not only the fact that other cultures are different but also that they have their own values. The logical reaction to the potential dispute between different cultural concepts with equal rights of valuation is mutual tolerance. However, the curtains of tolerance of "cultural pluralism" hide the dizzy concept of *relativity*: as there are no neutral standards for valuating culture, they all deserve equal respect. Following the same pattern, far more devastating relativism has come into fashion: epistemological and moral. It has come into existence as an unavoidable result of the emancipation from religion, i.e. as an inevitable outcome of understanding that moral systems are merely social constructions. Another important factor closely associated with globalization is the neoliberal political-economic doctrine: the free market has turned into a myth of our times. Such intellectual climate undoubtedly suggests that even judicial proceedings could not avoid being affected by the turmoil of neo-liberalism. The third important factor is belief in the social construction of reality, which has been turned into the central dogma of post/modern thought due to the victories in "the wars over culture and science".

On the scale of constructionist axioms, the first one is the unreliability of knowledge. This theory releases us from the task of confirming which tradition, system of values, religion, political ideology or ethical principles represent the ultimate and the transcendental Truth or Good. Each culture has its own standards of what is right; thus, what a man for the Western World holds "true" sticking to secularism might not be "true" to an Islamic terrorist. We should not disregard the system theories: the moment when the social system reaches high complexity and variability, legitimacy of political power can no longer surrender to morality (representing itself as something natural) and it should rather be achieved in the political system. Modern society consists of relatively independent systems (economy, science, law, etc.) which are subject to their own functional specific

normativity. In this kind of environment, there is no space for normativity which is functionally non-specific (moral).

In legal theory, the consideration of the aforementioned factors has generated the thesis according to which problems of modern criminal procedure cannot be resolved in a satisfactory way without abandoning the standardized codes of expression of criminal procedural science: the terms *legal acculturation*, *revaluing of values* and *simulation* are an indispensable part of every serious dispute on that subject (*amplius*: Đurđić, Davidov, 2016:70). In line with the thesis, the process of dismantling the old and developing a new order of procedural values is only the reflection of wider social movements and ideas coming from other social sciences or, in other words, the development of a new map of procedural values is the direct consequence of the entire “moral situation” of the western culture nowadays (Davidov, 2017: 7).

The most conspicuous consequence of revaluing values is the negation of the classical conception, under which judicial procedure implies the search for truth; the change is justified by the fact that this standard is unsustainable in the conditions of overwhelming complexity of society. Modern societies find it unattainable to reach such high standards that imply that decisions obtain legitimacy through righteousness (truthfulness, virtue) of its contents. The departure from the principle of legal certainty is described in literature as follows: “Way back in time, criminal procedures on both fronts of the western legal circle were looked upon as instruments for attaining the right result. The point that I see as highly significant for the development of modern criminal procedure is the blazing triumph of citizens who consider that the integrity of fair proceedings over is a presumption for reaching the right results on the merits. I don’t know which event is more important for (re)shaping the criminal procedure than the turning point in understanding the concept of legitimacy of decisions. It is the basic change happening at the first and most important level, whose proper understanding is most closely connected to the need to correctly understand and assess outer manifestations” (Baudrillard, 2007: 211-221). What is the alternative then? In the given environment, where the issue of truth can no longer be raised considering that nothing is either wrong or right (true), it is clear that the alternative is simulation. Baudrillard says that simulation is “mutual neutralization of true and wrong” (Baudrillard, 2007: 217). Therefore, the function of proceedings is to serve the stability of the political system by simulating the search for truth. The post-modern proceeding is an illusion created to deceive the public, whereby the public has not agreed to it (Davidov, 2017: 11). Its main function is to resolve the dispute, specify and minimize dissatisfaction, and absorb protest. As far as mixed criminal procedure is concerned, its reshaping revolves around two disputes: the conflict which includes the process of transposing standards and

legal acculturation, which generally implies the penetration of Anglo-American procedure solutions into the European-continental legal space.

Thus, it can be noticed that certainty is thrown onto the deadly cliff of doubt and the despair of skepticism has brought us to indecisiveness and restraint as a natural state of affairs. As far as procedural law is concerned, it implies the following: owing to the inability to ensure certainty, court proceeding is limited to attaining an equal treatment to both parties and establishing a balance of procedural prospects for success. In other words, since the truth may remain elusive, court procedure should at best secure the unbiased adjudication. In relation to that, impartiality is a presumption for the correct outcome, while material justice is reduced to procedural fairness. As for the influence of neo-liberal market concept, the situation is as follows: if we assume that criminal procedure is irretrievably corrupted by the aggressive market ideas, it becomes clear why the creators of the tools for resolving disputes are satisfied with attaining formal equality for both parties, and why the procedural parties are perceived in abstract terms. Namely, a party is treated as any other subject on the free market, where the law of competition rules, where the rules are equal for everyone, regardless of the differences coming from the personal circumstances.

The bitter fruits of globalization are easy to recognize even in criminal law. Today's scene, decorated with harsh cruelty of American imperial power, has yielded a new type of terrorism, which spread like a virus across the planet. Resembling the waves of the sea, one form of terrorism gives way to another. The wave carrying us now has nothing in common with Walzer's understanding of terrorism, as there is no protected group and everyone can get killed (Davidov, 2016: 534). Baudrillard believes that he has found the reasons for global terrorism and informs us (in terms of 11<sup>th</sup> September) that "*they* did it, but *we* wanted it", explaining that everybody must dream of destroying any power that has attained such degree of hegemony: "allergy to any definitive order, to any definitive power is, fortunately, universal, and the twin towers of the World Trade Center perfectly embodied this definitive order" (Baudrillard, 2007: 212). He proposes that it is not the clash between civilizations nor religions, but a conflict that overcomes Islam and America, while the basic antagonism between these elements is only the symptom of the triumphant "mondialisation" which is fighting against itself. In this conflict, he can see the fourth and the only true world war, for what is at stakes is the "mondialisation" itself. That war does not give peace to any world order, or to any hegemony, and if Islam dominated the world, terrorism would rise up against Islam. The globe itself is resistant to mondialisation (Baudrillard, 2007: 214). In that context, we may conclude as follows: "When global power monopolizes the situation to this extent, when there is such a formidable condensation of all functions in the technocratic



machinery, and when no alternative form of thinking is allowed, what other way exists but a terroristic situational transfer? It was the system itself which created the objective conditions for this brutal retaliation. By seizing all the cards for itself, it forced the Other to change the rules. The new rules are cruel as what is at stake is also cruel" (Baudrillard, 2007: 213). Thus, we could say that the power of criminal law has weakened since what is customary has lost its power and no longer offers the firm frame to social activity.

#### 4. Conclusion

The relations between the phenomenon of globalization and the development of criminal legislation are wrapped in multiple veils of darkness. Nowadays, it is not possible to give a simple and correct answer to the question how the process of globalization would affect the development of criminal law. The main reason is the fact that globalization is tightly connected to dizzying technological improvement, which moves us to the field of experimental natural sciences, whose outreach may only be assumed.

The formation of world as a whole has stirred the utopian spirits that have recognized an opportunity for the triumph of the *cosmopolitan concept* in the rise of globalization and the weakening of the state-nation. There is no doubt that utopian visions, understood as belief that future could fundamentally exceed the present (Jacoby, 2002: 11), are indispensable and useful. However, stating that the NATO intervention in Kosovo was an attempt to shift the international law towards the cosmopolitan law and to move up the laws to the level of world civil society (see Douzinas, 2009: 208), Habermas pointed to the danger that such visions might turn into boasting nonsense. In short, reality has swept away the chimeras of the political philosophy of cosmopolitanism with an iron broom. "New elites" have different a plan, which seems to be based on denying the traditional values.

On the other hand, we can hear today without surprise or shock that criminal law does not live up to the expectations of the contemporary society. Before we acknowledge this statement, we should first look into the possibility that there may be too many demands imposed on criminal law. The obvious problems are not a reason enough to agree with the thesis that the law cannot manage the whirl of social modernization because of its own dilemmas. The pattern according to which law has to constantly increase its own complexity, in order to be able to function in the social conditions which are becoming too complex, is more applicable to new fields emerging with scientific and technological development than to criminal law which still protects the *essential social similarities* that do not change, or are not easily changeable (Davidov, 2016: 534). The power

of criminal law has weakened with the decline of customs, which was caused by the decline of values and morality. One way or the other, the disintegration of traditional social patterns has set free various disintegrating powers, which criminal law seems to be unable to absorb.

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## **КРИВИЧНО ЗАКОНОДАВСТВО И ПРОЦЕС ГЛОБАЛИЗАЦИЈЕ**

### **Резиме**

Процес глобализације, као појава која захвата све аспекте живота, „уплео“ је у себе и законодавство као друштвено-правни феномен. Кривично законодавство које је директно и недвојбено везано за саму суштину живота, постаје пробни камен напретка или спотицања процеса глобализације. Основно полазиште аутора је да и доскора неприкосновена сфера кривичног права као националног права, последњих деценија бива погођена процесом глобализације, у коме неминовност сарадње држава најпре захвата домен људских права. Тако се изузимање заштите људских права из искључиве надлежности држава јавља као извориште међуна-родних стандарда о људским правима, не обилазећи ни кривичноправну област. Сама владавина права биће тестирана кроз кривично законо-давство уопште, а посебно кроз доминантну одлику нашег времена, у односу на процес глобализације. Питања ће ићи од оних која су онто-лошке природе, преко детерминисања појма глобализације и појма законодавста које даје општа теорија права, па до аксиолошких. Та аксиолошка питања која ће произићи из могућег односа глобализације и кривичног законодавства одредиће путању владавине права, која без кривичног законодавства нема осигурану ефикасну заштиту.

**Кључне речи:** глобализација, кривично законодавство, људска права, међународно кривично право.

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## **PROTECTION OF PERSONS WITH DISABILITIES AGAINST DISCRIMINATION IN CRIMINAL LAW**

**Abstract:** *People with disabilities are subject to discrimination in almost all spheres of social life, which considerably jeopardizes the exercise of their human rights and freedoms. Discrimination in education, employment and public transport are just some forms of discrimination that people with disabilities encounter on a daily basis. Creating an effective legal system for combating discrimination against people with disabilities is of great importance for the process of Serbia's accession to the European Union. Legal protection of persons with disabilities against discrimination may also be achieved by enacting relevant legislation in the field of criminal law. In that context, the paper analyzes the relevant provisions of the Criminal Code of the Republic of Serbia. By providing an analysis of the mechanisms of criminal protection of persons with disabilities in Serbia and a comparative analysis of criminal legislation of former Yugoslav countries, the paper aims to indicate the possible direction of reforming the Serbian criminal law provisions on specific criminal offenses related to the violation of human rights of people with disabilities. In particular, the author underscores the need to explicitly envisage disability as a specific discrimination ground, as it was done in the Constitution of the Republic of Serbia. From the aspect of criminal law, such a provision would create an adequate regulatory framework for effective legal protection of persons with disabilities against all forms of discrimination. It would further contribute to exercising the principle of legal certainty but, above all, it would increase trust of people with disabilities in the Serbian legal system, reinstate their confidence and ultimately empower them to seek adequate legal protection in all discrimination cases.*

**Keywords:** *discrimination, people with disabilities, criminal law.*

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## 1. Introduction

In recent years, discrimination has been the subject matter of many debates and academic articles. Yet, given the fact that discrimination encompasses an array of various topics (Petrušić, Ilić, Reljanović, et al, 2012:28), it raises the question what discrimination actually is. Many of the behaviors we face in everyday life can be discriminatory. Whenever we are impeded or denied access to public facilities or sports grounds, or when we are subjected to some "special" conditions for employment as compared to other candidates, due to some personal characteristic (age, disability, national, ethnic or religious affiliation), we are actually exposed to different forms of discrimination. In simplest terms, discrimination implies an unequal treatment of a person or a group based on some of their personal characteristics, which results in inequality of opportunities to exercise the rights guaranteed by the constitution and legislation. It implies unequal treatment, exclusion, or bringing into subordinate position of individuals or groups of people who are in the same, similar or comparable situation (Commissioner for the Protection of Equality, 2016).<sup>1</sup> The Serbian Act on the Prohibition of Discrimination (hereinafter: the Anti-discrimination Act)<sup>2</sup> defines the concept of discrimination as "any unwarranted discrimination or unequal treatment or omission (exclusion, limitation or preferential treatment) in relation to persons or groups as well as to members of their families or close relatives, be it overt or covert, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics" (Article 2 Anti-discrimination Act).

The data on the prevalent forms of discrimination against persons with disabilities in Serbia can be indirectly derived from the Annual reports of the Commissioner for the Protection of Equality. In 2016, a total of 82 complaints were filed for disability-related discrimination, which makes 12.9% of the total number of complaints lodged, and the same number of complaints was submitted on the grounds of gender discrimination. Thus, disability-based discrimination and gender-based discrimination were the most frequently recorded discrimination grounds in the total number of complaints lodged in 2016. The percentage

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1 *Poverenik za zaštitu ravnopravnosti* (2016), *Šta je diskriminacija?* (The Commissioner for the Protection of Equality, What is discrimination?), Retrieved 29 August 2017 from <http://ravnopravnost.gov.rs/diskriminacija/sta-je-diskriminacija/>

2 Zakon o zabrani diskriminacije (Anti-Discrimination Act), „Službeni glasnik Republike Srbije“, br.22/2009).

of complaints submitted on disability-based discrimination was roughly the same as in previous years. In 2015, a total of 11.3% (73) complaints were filed on this basis; in 2014, a total of 10.1% of complaints were filed on this basis. In the past years, disability-based discrimination has always been among the first four discrimination grounds in the total number of complaints lodged in the specific year (Annual Report of the Commissioner for the Protection of Equality for 2016, 2017: 101).

According to available literature, discrimination against persons with disabilities is most prominent in the field of education, labor and employment, provision of health services and transportation, but it also exists in other areas of social life (Tanjević, Mirić, 2013:134-135).

Legal protection of persons with disabilities against discrimination may also be achieved by relevant legislation in the field of criminal law. In that context, the paper discusses the relevant provisions of the Criminal Code of the Republic of Serbia, by analyzing the mechanisms of criminal law protection of persons with disabilities in Serbia and providing a comparative analysis of criminal legislation of former Yugoslav countries. The paper ultimately aims to indicate the possible direction of reforming the Serbian criminal law provisions on specific criminal offenses related to the violation of human rights of people with disabilities. In particular, the author underscores the need to explicitly envisage disability as a specific discrimination ground, as it was done in the Constitution of the Republic of Serbia. From the aspect of criminal law, such a provision would create an adequate regulatory framework for effective legal protection of persons with disabilities against all forms of discrimination. It would further contribute to exercising the principle of legal certainty but, above all, it would increase trust of people with disabilities in the Serbian legal system, reinstate their confidence and ultimately empower them to seek adequate legal protection in all discrimination cases.

## **2. Criminal law protection of persons with disabilities in the countries of the former SFRY**

The legal protection of persons with disabilities against discrimination is (*inter alia*) guaranteed in the norms of criminal legislation. In Serbia, the basic source of criminal law is the Criminal Code of the Republic of Serbia.<sup>3</sup> Regarding the criminal protection of persons with disabilities, it should be noted that this protection is incomplete and fragmentary.

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<sup>3</sup> Krivični zakonik Republike Srbije (Criminal Code of Republic of Serbia), *Službeni glasnik Republike Srbije* br.85/2005...94/2016).

First of all, we may refer to the criminal offense of *violation of equality* under Article 128 of the Serbian Criminal Code (hereinafter referred to as: CC), which is punishable by a term of imprisonment not exceeding three years. However, the qualified form of this criminal offense exists if it is committed by an official in discharge of duty, who may be subjected to a more severe punishment of imprisonment ranging from three months to five years. The perpetrator of this criminal offense may be any person who is authorized to decide on the exercise of another's rights and interests (Jovašević, 2006: 480).

It is interesting that the legislator envisaged another discrimination-related criminal offence (Mirić, 2015:118), a criminal act of *racial and other forms of discrimination* envisaged in Article 387 CC. The basic form of this criminal offense is committed by anyone who "on grounds of race, color, religion, nationality, ethnic origin or some other personal characteristics violates the fundamental human rights and freedoms guaranteed by the universally accepted rules of international law and international treaties ratified by Serbia", and it is punishable by a term of imprisonment ranging from six months to five years (Art. 387 par. 1 CC). The same sentence will be imposed on persons who persecute organizations or individuals for their efforts to promote equality of people (Art. 387 par. 2 CC). Further on, the Code stipulates that "whoever propagates ideas of superiority of one race over another or propagates racial intolerance or instigates racial discrimination, shall be punished by imprisonment of three months to three years" (Art. 387 par. 3 CC). The same sentence will be imposed on any person who "disseminates/propagates or otherwise makes publicly available texts, images or any other representation of ideas or theories that advocate or incite hatred, discrimination or violence against any person or group of persons based on race, skin color, religious affiliation, nationality, ethnicity origin or some other personal characteristic" (Art. 387 par. 4 CC), as well as on any person who "publicly threatens to commit a criminal offense punishable by imprisonment of more than four years against a person or group of persons, based on their race, skin color, religion, nationality, ethnic origin or some other personal characteristic" (Art. 387 par. 5 CC).

It can be noticed that disability is not envisaged as a basis for discrimination, which is contrary to the provisions of the Constitution of the Republic of Serbia.<sup>4</sup> Yet, the provision in Article 54a CC stipulates special circumstances for sentencing offenders for the commission of hate crime; thus, if a criminal offense is committed from hatred for reasons of race or religion, national or ethnic affiliation, gender, sexual orientation or gender identity of another, the court shall consider such circumstance as an aggravating circumstance, unless it is prescribed as

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<sup>4</sup> Ustav Republike Srbije (Constitution of Republic of Serbia), *Službeni glasnik Republike Srbije*, br. 98/2006).



a distinctive feature of the criminal offence. Namely, although the legislator did not envisage disability as the basis for the commission of hate crimes, this provision provides additional criminal protection to a broad circle of persons, which is certainly very useful in terms of legal certainty.

The criminal legislations of the former SFRY counties contain slightly different legal solutions. We may first refer to the provisions of the Croatian criminal legislation. The Criminal Code of the Republic of Croatia (hereinafter: CC RC) prescribes the criminal offense of *violation of equality* (Article 125 CC RC), which stipulates that any person who “on the basis of differences in race, ethnicity, color, sex, language, religion, political or other opinion, national or social origin, property, birth, education, social status, marital or family status, age, health status, disability, genetic heritage, gender identity, expression, sexual orientation or other characteristics, denies or conditions the right to acquire goods or receive services, the right to perform activities, the right to employment and promotion, or who, on the basis of such a difference or affiliation, grants other privileges or benefits, shall be punished by imprisonment for a term not exceeding three years” (Article 125 CC RC).<sup>5</sup>

From the aspect of the protection of persons with disabilities, of particular importance is the provision on the criminal offense of public incitement to violence and hatred, envisaged in Article 325 of the Croatian Criminal Code. This provision envisages that any person who “through the press, radio, television, computer system or network, publicly or otherwise, encourages or makes available to the public leaflets, images or other material that call for violence or hatred directed against a group of people or group members, due to their racial, religious, ethnic or ethnic origin, origin, skin color, gender, sexual orientation, gender identity, disability or any other characteristics, shall be punished by imprisonment for a term not exceeding three years” (Art 325 CC RC). Moreover, in case of criminal offenses involving elements of violence which are committed against persons with disabilities, criminal prosecution is undertaken *ex officio*.<sup>6</sup>

A similar solution exists in the Criminal Code of Montenegro (hereinafter: CC MNE). Namely, Article 443 CCMNE stipulates that “whoever spreads ideas about the superiority of one race over another or propagates hatred or intolerance based on race, sex, sexual orientation, gender identity or other personal property or incitement to racial or other discrimination, shall be punished by imprison-

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5 Kazneni zakonik Republike Hrvatske (Criminal Code of Republic of Croatia), *Narodne novine*, br.125/11, 144/12.

6 See Art.138. and Art. 139. Criminal Code of Republic of Croatia.

ment from three months to three years".<sup>7</sup> From the aspect of protecting people with disabilities, this solution can be assessed as positive.

The Penal Code of the Republic of Slovenia does not stipulate disability as a special legal ground in the criminal offense of violation of equality (*kršitev enakopravnosti*).<sup>8</sup>

The Criminal Code of the Republic of Macedonia (CC RM) does not stipulate disability as the basis of discrimination in the criminal offense of violation of equality envisaged in Article 137 of the CC RM, nor in case of the criminal offense of racial or other discrimination envisaged in Article 417 CC RM.<sup>9</sup> Such legal solutions in the criminal laws of Macedonia and Serbia certainly do not contribute to the protection of persons with disabilities against discrimination as a socially dangerous behavior.

Regarding the criminal legislation of Bosnia and Herzegovina, it should be noted that each entity has a special criminal code: the Criminal Code of Republika Srpska, the Criminal Code of the Federation of Bosnia and Herzegovina, the Criminal Code of the Brčko District, and the Criminal Code of Bosnia and Herzegovina.

Article 145 of the Criminal Code of Bosnia and Herzegovina contains the criminal offense of violation of equality of man and citizen.<sup>10</sup> In this incrimination, disability is not explicitly stipulated as a separate basis for the violation of equality although the general wording "other personal characteristics" may provide persons with disabilities at least indirect criminal law protection against discrimination.

Article 162 of the Criminal Code of Republika Srpska does not envisage disability as a separate discrimination ground in the criminal offense of violation of equality of citizens.<sup>11</sup>

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7 Krivični zakonik Crne Gore (Criminal Code of Republic of Montenegro), *Službeni list RCG*, 70/2003...56/2013).

8 Kazenski zakonik Republike Slovenije (Criminal Code of Republic of Slovenia), *Uradni list Slovenije*, 55/2008).

9 Krivičen zakonik na Republika Makedonija (Criminal Code of Republic of Macedonia), *Služben vesnik na RM*, 37/96.

10 Krivični zakon Bosne i Hercegovine (Criminal Act of Bosnia and Herzegovina), *Službeni glasnik Bosne i Hercegovine*, 3/2003).

11 Krivični zakon Republike Srpske (Criminal Act of Republika Srpska), *Službeni glasnik Republike Srpske*, 49/2003.

Similarly, Article 174 of the Criminal Code of the Brčko District does not envisage disability as a basis for discrimination or violation of equality of citizens.<sup>12</sup>

Finally, Article 177 of the Criminal Code of the Federation of Bosnia and Herzegovina does not envisage disability as a particular basis of discrimination,<sup>13</sup> and thus does not provide persons with disabilities with appropriate criminal law protection.

This brief review of the criminal legislations of the former SFRY countries shows that the significance of ensuring criminal law protection of persons with disabilities has not been properly recognized. Although some of these countries have special legislative acts on the prohibition of discrimination against persons with disabilities, which include penal provisions, we consider that legal protection within the framework of misdemeanor law is insufficient to sanction all those unlawful acts that put persons with disabilities into a substantially unequal position vis-à-vis other citizens.<sup>14</sup>

In order to create a more effective normative framework for the criminal-law protection of persons with disabilities against discrimination, Article 128 of the Criminal Code of the Republic of Serbia should be amended by explicitly introducing disability into the scope of legal grounds for discrimination. This would raise the legal protection against discrimination of persons with disabilities to a much higher level.

Disability may certainly be subsumed under the generic term “other personal characteristics,” but such a solution creates further problems in judicial practice, particularly in the process of proving these “other personal characteristics” in criminal proceedings. For this reason, amending the existing legal provisions and introducing disability as a separate legal ground for discrimination would be a much better solution, which would significantly improve the criminal justice protection of persons with disabilities and prevent their discrimination (Mirić, 2015:120).

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12 Krivični zakon Brčko Distrikta Bosne i Hercegovine (Criminal Act of Brčko District of Bosnia and Herzegovina), *Slubeni glasnik BD BiH*, 33/2013.

13 Krivični zakon Federacije Bosne i Hercegovine (Criminal Act of the Federation of Bosnia and Herzegovina), *Službene novine FBiH*, 36/2003...76/2014.

14 See: Zakon o sprečavanju diskriminacije osoba sa invaliditetom (Act on the Prevention of Discrimination of People with Disabilities), *Službeni glasnik RS*, 33/2006). This Act is a *lex specialis* in relation to the aforementioned Anti-Discrimination Act, which was adopted later; it is a kind of curiosity in the anti-discrimination legislation of the Republic of Serbia.

### 3. Conclusion

People with disabilities face many forms of discrimination. Discrimination in the field of labor and employment, education and healthcare are just some of the most visible forms. Every civilized society has the obligation to provide equal conditions for life and work to all its members. This is sometimes a very difficult task, but its fulfillment is the basic precondition for the advancement of a nation in all aspects of social life.

For the past ten years, Serbia has done a lot on the normative agenda in the fight against discrimination against persons with disabilities. By adopting the Act on Prevention of Discrimination against Persons with Disabilities and the Act on the Prohibition of Discrimination, Serbia has been created an efficient normative framework for the effective fight against discrimination.<sup>15</sup> Moreover, after establishing the Commissioner for the Protection of Equality in 2009, as an independent and autonomous state authority for the prevention of all forms of discrimination, persons with disabilities have been given the opportunity to submit their complaints to the Commissioner for Equality whenever they feel they are exposed to discrimination. This is certainly a positive step towards ensuring full equality among citizens.

As a rule, anti-discrimination laws contain penal provisions of misdemeanor character, but legal protection provided within the scope of misdemeanor law is certainly insufficient, incomplete and often ineffective.

The provided brief overview of criminal codes of the former SFRY countries demonstrates that disability is not recognized as a separate discrimination ground in the current legislations of most of these states, nor as an element of the criminal offense of violation of equality. This state of affairs creates a legal gap, which is currently filled by subsuming disability under the generic term "other personal characteristics", which creates a series of problems in the course of proving these "other personal characteristics" in criminal proceedings. For these reasons, it would be useful to introduce disability as a discrimination ground in the legal provision on the violation of equality and other relevant criminal offenses envisaged in the current legislation, which would in many ways facilitate the criminal protection of persons with disabilities against discrimination. Such provisions would certainly be in line with international documents in the field of protection against discrimination, as well as in line with the relevant constitutional provisions on the prohibition of discrimination.

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<sup>15</sup> Zakon o potvrđivanju Konvencije o pravima osoba sa invaliditetom (Act on the Ratification of the UN Convention on the Rights of People with Disabilities), *Službeni glasnik RS*-Međunarodni ugovori, br. 42/2009.

The most important international document on this matter is the UN Convention on the Rights of Persons with Disabilities, which was ratified by the Republic of Serbia in 2009. This Convention is the first binding legal act that explicitly prohibits discrimination against persons with disabilities. The basic objectives of the Convention are: to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all persons with disabilities and to promote respect for their innate dignity. The application of the principles and provisions of the Convention will encourage States Parties to the Convention to actively work on removing both architectural and social barriers that prevent persons with disabilities from becoming active factors in the society in which they live and work (Tatić, 2006:10).

Another notable problem in terms of ensuring protection against discrimination of persons with disabilities is a small number of criminal proceedings initiated on the grounds of the criminal offence of violation of equality, as well as a small number of legally terminated cases where people with disabilities appear as injured parties. Bearing in mind the overall social status of people with disabilities in Serbia today, the basis assumption seems to be that the “dark figure” of crime related to unreported discrimination of persons with disabilities is extremely high. In order to empirically substantiate and verify this statement, further research is needed on the appropriate sample of respondents, hopefully in the near future.

The quality of life of persons with disabilities depends on the success of activities aimed at preventing their discrimination, creating an accessible environment, providing relevant conditions for their education and employment, and ensuring their social inclusion in general. The struggle to improve the quality of life of persons with disabilities certainly implies a joint action of many state authorities but, above all, it entails the highly developed awareness of the people with disabilities about their values and potentials that can contribute to the progress of the community they live in. It is an ongoing and never-ending struggle for every single individual and society as a whole, for the general well-being and protection of universal human rights (Mirić, 2014:55).

Owing to the significant efforts exerted by the legislator, numerous organizations and associations of persons with disabilities, the legal position of persons with disabilities in Serbia has been significantly improved as compared to the previous period. It seems that now people with disabilities have become “more visible” and that many state institutions approach and deal with the issue of disability in a more comprehensive way. However, in order to adequately protect the rights of persons with disabilities, it is necessary to keep amending relevant legal solutions and to insist on their consistent application. In this process, the

reform of criminal legislation is of paramount importance. After all, it should not be forgotten that the legal system is basically a sum of regulations, and that legal provisions should not be viewed in isolation from each other.

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## **КРИВИЧНОПРАВНА ЗАШТИТА ОСОБА СА ИНВАЛИДИТЕТОМ ОД ДИСКРИМИНАЦИЈЕ**

### **Резиме**

Особе са инвалидитетом су изложене дискриминацији готово у свим сферама друштвеног живота, што у многоме угрожава остваривање људских права особа са инвалидитетом. Дискриминација у образовању, запошљавању, превозу само су неки од облика дискриминације са којима се особе са инвалидитетом свакодневно сусрећу. Стварање ефикасног правног система за сузбијање дискриминације особа са инвалидитетом је од изузетног значаја за процес приступања Републике Србије ЕУ. Заштита особа са инвалидитетом од дискриминације се постиже и нормама кривичног права. У том смислу, у раду ће бити анализирани релевантни одредбе Кривичног законика Републике Србије. Циљ рада је да се, кроз анализу механизма кривичноправне заштите особа са инвалидитетом и упоредноправним приказом релевантних законских решења законодав-става држава бивше СФРЈ, укаже на могуће правце реформе инкрими-нација појединих кривичних дела у кривичном законодавству Републике Србије, у смислу прописивања инвалидитета као посебног основа дискриминације, као што је то учињено и у Уставу Републике Србије. На тај начин би се, са кривичноправног становишта, створио адекватан нормативни оквир за ефикасну кривичноправну заштиту особа са инвалидитетом од свих облика дискриминације. То би свакако допринело остварењу принципа правне сигурности, а код самих особа са инвалидитетом повећало поверење у правни систем Србије и оснажило их да у свим случајевима дискриминације затраже адекватну правну заштиту.

**Кључне речи:** дискриминација, особе са инвалидитетом, кривично право.



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## **CONVICT CRIMINOLOGY**

**Abstract:** *Criminology provides profuse and broad knowledge about phenomenological and etiological characteristics of crime. Its achievements in the field of crime prevention are immeasurable. Citizens must be constantly reminded of the basic scientific postulates and achievements in the field of criminalization and decriminalization of certain behaviours. On the one hand, it is important to raise citizens' awareness about crime as a human act which is impossible to completely eradicate; on the other hand, it must be a priority of every state to identify crime and exert efforts to prevent it. Hence, there shall be no scientific dilemma among criminologists about recognizing a new area of criminology, which would be explicitly designated as convict criminology. In this paper, we discuss the concept, content, characteristics and scope of this dynamic area of criminology.*

*Namely, convict criminology was created in United States in the late 1990s by a group of former ex-convict academics, dissatisfied with the theoretical approach to criminal justice research which did not include the prisoners' perspective. It was the first time that a criminological conception developed from an ex-convicts' movement, involving academic staff/lecturers who studied criminology not only from the theoretical aspect but also had a first-hand "insider" experience of residing in penitentiary and correctional institutions. Although the actual scope, outreach and success of convict criminology may not be fully measurable by statistics or the costs of crime prevention in a country, it is definitely a valuable experience which may contribute to casting more light on the ex-convicts' personality profiles and their unique experiences of repentance, rehabilitation and resocialization.*

**Keywords:** *criminal phenomenology, criminal etiology, convict criminology, crime prevention.*

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## 1. Introduction

*Prima facie*, the starting points of criminological literature are standard topics and numerous issues pertaining to the basic postulates of criminology as an autonomous science, such as: the subject matter, methods, criminologists' ideological starting points in interpreting the empirical research results or their theoretical speculations on the matter under observation. From the very outset of scientific considerations about criminality and the criminal offender, there was a certain heterogeneity and ambiguity in the scholars' conceptions on the notion of crime and criminality in general, which were observed from different perspectives. Thus, criminological issues were first explored by experts from various other sciences: psychologists, biologists, doctors, anthropologists, sociologists; they used the knowledge from their sciences and scientific disciplines as a source for interpreting various factors observed in the criminal phenomenon or the criminal offender.

Dealing with criminology, as well as any other social science or scientific discipline, implies a clear, precise definition of the subject matter and objective of theoretical and empirical research, as well as the application of adequate methodological procedures to examine the subject matter under consideration. The leading ideas of the intellectual tradition in the west are embodied in various questions posed and answered in the field of sociology, criminology, penology and victimology, which primarily concern the nature and methods of attaining scientific knowledge. In other words, there is a constant need in science to provide a clear picture of the history of the development of human thought and the related continuous "proliferation" of human research, which makes it extremely difficult for one's knowledge to be indisputably designated as the first or principal step in intellectual history (Oldroyd, 1986: 1).<sup>1</sup>

Generally speaking, the notion of a science can only be determined by the precise definition of its subject matter and research methods. Criminology has been recognized as an independent, theoretical, empirical, social and interdisciplinary science (Gidens, 2005: 656)<sup>2</sup> due to the specific subject matter and research methods. However, considering the multifaceted nature of scientific research where related scientific disciplines deal with the same subject matter or real world phenomenon, a number of disciplines may be using the same methods in exploring the specific phenomenon. In science, it raises the question of making

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1 See: Oldroyd, D (1986). *The Arch of Knowledge*, <https://books.google.rs/books?isbn=0416013414> (17.10.2011).

2 Science implies the use of systematic methods of empirical research, data analysis, theoretical thinking and logical evaluation of arguments, to develop a knowledge corpus on a particular problem. According to this definition, E. Gidens points out that sociology and criminology are separate/ independent sciences (Gidens, 2005: 656).

a clear distinction between two separate/independent sciences which have the same subject matter and research method. Formally speaking, Horvatić (1981: 22) considers that “the specific subject and research methods are the only requirements for establishing an independent special scientific discipline”.

Social sciences, such as sociology and criminology, deal with correlated, mutually conditioned and frequently “intertwined” phenomena. Notwithstanding the similar subject matter and application of identical research methods, there are other criteria “justifying the establishment of separate and independent scientific disciplines” (Horvatić, 1981: 22). Justification for establishing an autonomous scientific discipline certainly rests on making a clear distinction between the epistemological and the methodological point of view pertaining to a specific science. The epistemological point of view implies establishing the constitutive principles of scientific activity, the purpose and goals that the science aims to achieve, whereas the methodological point of view relates to the methods and techniques the scientist applies “to actually adjust his behavior to the ideal requirements of the activity in which he participates” (Đurić, 1962: 32).

The recognition of the concept concerning the influence of social circumstances as primary criminological factors has significantly contributed to extending the criminological study from the offender’s personality onto the criminal activity; thus, the focal point of observation has been shifted from anthropological conceptions to sociological and psychosocial explanations. Criminology as a science should contribute to a comprehensive study of crime, constantly re-examining the existing concepts, developing new directions, advancing the existing knowledge and verifying already implemented solutions.

Today, the subject matter of criminological studies are issues related to crime, delinquency and deviation. In the narrow sense, criminality includes all crimes committed at a specific place and within a specific timeframe under observation. The broader concept of a criminal phenomenon implies all punishable acts committed at a specific place and within a specific timeframe (such as: criminal offences, misdemeanors, economic offenses, disciplinary infractions of work obligation, domestic violence, and other forms of conduct which are sanctioned by the positive legislation), as well as different forms of deviant behavior which entail departure from the generally accepted cultural standard in a specific space and within a specific timeframe; crime is the most serious form of personal deviation (Milutinović, 1989: 34).

The segment which is hardly visible in the presented explanation on the subject matter of criminology pertains to the possible continuation and consequences of such deviant behavior, irrespective of the mechanisms of formal social control and the ultimate outcome of such behavior (unless it falls into the category of

the "dark figure" of crime). Thus, following the contemporary trends, especially those pertaining to the marginalization of specific groups of people (such as current or former convicts), criminologists seem to ignore the link between criminology and penology, which is a natural and logically expected continuation of the activities of state authorities in the fight against crime.

This opinion corresponds to the explanation given by Pinatel in 1960. In the context of American criminology, Pinatel pointed to the assimilation of criminology and penology in the United States, stemming from the reception of the 19<sup>th</sup> century French school of thought. Hence, criminology includes two major areas: criminal etiology and penology. Each crime prevention program implies understanding the type, form, and conditions of the specific crime; in order to determine the methods of treating the offenders, it is essential to understand the dominant features of the offender's personality, its structure and development (Pinatel, 1964: 16).

In addition, in criminology, there is no straightforward sum of quantitative statistics; instead, statistical data are observed within the framework of a certain methodological system and subjected to scientific analysis, which implies the application of analytical and synthetic methods, inductive and deductive methods, as well as materialistic and historical-dialectical methods. This kind of study, at the level of the specific nature and occurrence of phenomena, constitutes the essence of scientific knowledge. However, empirical monitoring and recording of observed phenomena is not an end in itself. The procedure does not end at the level of describing the established facts; on the basis of the previously constructed theoretical concept, these facts are the starting point for the interpretation and verification of theoretical postulates, with the aim of discovering the laws governing the investigated phenomenon (Aranudovski, 2007: 104-105).

## **2. Convict criminology: a new concept or a formerly invisible paradigm**

In criminology, there should not be a scientific dilemma among criminologists about acknowledging or making move visible the area of criminology which is explicitly designated as *convict criminology*. Yet, it remains to determine its counterpart within the classification of criminological science. Considering the conventional mindset and established academic mode of thinking, the introduction of the concept of convict criminology into domestic criminological discourse would almost be regarded as heresy.

The concept of *convict criminology* was devised in the United States in the late 1990s by a group of former convicts, including academic staff/lecturers who were dissatisfied with the theoretical approach to criminal justice research which did not include the prisoners' perspective. It was the first time that a

criminological conception developed from an ex-convicts' movement, involving academic staff/lecturers of criminal law who not only studied criminology from the theoretical aspect but also had a first-hand "insider" experience of residing in penitentiary and correctional institutions. Although the actual scope, outreach and success of convict criminology in crime prevention may not be fully measurable by statistics or costs of crime prevention in a country, this valuable experience may contribute to casting more light on the ex-convicts' personality profiles and their unique experiences of repentance, rehabilitation and resocialization.

Since 1997, ex-convicts in the United States (who got educated while serving their sentences and eventually became academics and professor of criminal law) have organized annual meetings at the American Association of Criminology, the Academy of Criminal Justice Sciences and the American Association of Penitentiary and Correctional Facilities. These conferences were aimed at establishing the principles of a new scientific school of *convict criminology*. The primary architects of this project were former convicts, educated men and women who had been imprisoned for a number of years, who criticized the deteriorating conditions in American penal institutions and correctional practices.<sup>3</sup>

Convict criminology applies various scientific methods in the process of discovering the causes and circumstances of committed crime, which is quite logical considering that personal experience is often associated with creating new approaches to the study of convicted offenders. The process of obtaining understanding is important both for criminology as an independent science and for criminal jurisprudence. The value, suitability and necessity of using qualitative methods are subject to discussion but there are considerable benefits from applying these methods (particularly, the in-depth understanding of the phenomenon as the primary goal). Thus, criminologists discuss how often these methods can be used and how they can contribute to developing criminological theory and criminal jurisprudence. On the other hand, these findings may be directly applied in the process of re-socialization and social reintegration of new convicts.

Due to the diverse methods of obtaining, collecting and analyzing data, and how data analyses contribute to clarifying the subject matter of research, the findings obtained through qualitative research are "much more informative and abundant, and provide better understanding as compared to those achieved by quantitative research" (Tewksbury, 2009: 38).

In criminological literature, it is emphasized that qualitative research is aimed at the quintessence of a criminological phenomenon, its distinctive features,

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<sup>3</sup> See: Convict Criminology (website): <https://marisluste.files.wordpress.com/2010/11/convict-criminology.pdf> Accessed 23.7.2017.

determining characteristics of people, events, interactions, cultural settings and experiences. Berg (2001), as one of the leading proponents of qualitative research in criminology, explains: "Quality refers to the essence and specific environment of a phenomenon, where, when and how it occurred. Therefore, qualitative research points to the meaning, concepts, definitions, characteristics, metaphors, symbols and descriptions of things" (Tewksbury, 2009: 39). Qualitative research contributes to true understanding of the social aspect of how the crime occurs and how the state structure and related procedures react to a committed crime in a culturally based context.

In the explanation of qualitative research, a clear statement is often neglected: the data need not be expressed numerically at all. The frequency of occurrence or distribution of a certain phenomenon, or predictions, need not be displayed. The data can take the form of words, images, impressions, gestures or tone of voice, which actually represent actual events or reality, as it is perceived symbolically or in a sociological sense. Qualitative research uses "unstructured" logic in order to come to "the actual reality": the quality, meaning, context, or image of reality in which people actually operate, instead of merely saying that they act in a certain way. The notion of unstructured logic is that there are no "step-by-step" rules; the researcher does not have to abide by the already *fabricated* methods or established rules, terms and procedures, which will make their research "clear and connected", as it appears when published in journals.<sup>4</sup>

Therefore, there is a difficulty in defining qualitative research because it does not include the same terminology as the usual scientific one. The simplest definition is that qualitative research includes methods of data collection and non-quantitative analysis (as noted by Lofland, Lofland, 1984). Qualitative research may also imply the focus on the "quality", which refers to the essence or ambience of something (as noted by Berg, 1989). Then, qualitative research includes the researcher's subjective methodology, i.e. the researcher as an instrument for research (as noted by Adler, Adler, 1987) (Tewksbury, 2009: 38).

In fact, everyone has one's own favorite definition. Researchers who apply a historical-comparative method believe that qualitative research always involves a historical context and sometimes a critical attitude towards the emphasis on examining past experiences aimed at studying the "deeper structure" of social relations (rather than current issues). However, qualitative research most frequently rests on the basic theoretical stance accepted by the researchers as the starting point of research.

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4 See: O'Connor, Tom (blog): *Qualitative Social Science Research Methodologies*, accessed 25.10.2011. <http://www.drtoconnor.com/3760/3760lect06.htm>

*Participatory observation* is a process in which a researcher is involved in studying people by taking active part in the events, whereby he/she cannot be “stand out from the crowd”. This usually implies covert observation or undercover activity, where the researcher’s true identity is hidden under a different name, whereby he does not reveal the actual purpose of his/her stay in the specific environment. This process may involve: full participation (the researcher participates in deviant or illegal activities in an attempt to directly influence the group); participant as an observer (the researcher participates in deviant or illegal activities but does not have direct impact on the group); observer as a participant (the researcher takes part in a single/specific deviant or illegal activity and then does not participate in any other criminal activity); full observation (as a member of a criminal group, the researcher observes but does not participate in any deviant or criminal activity). What is crucial for all these procedures is that the researcher must act at two different levels: to become an “insider” and, at the same time, to remain an “outsider”; he/she must also avoid being too close to the group members or becoming a “natural part”, which would make him stop researching and become group member for life. In criminological-empirical sense, it would mean that a researcher becomes and begins to glorify criminals. This research method has been used in studying gangs, groups that commit hate crimes, prostitutes and drug dealers (Veljković, Đurić, 2003: 68).

One of the basic methods used by the proponents of convict criminology is the ethnographic method. *Ethnography* is the process of describing the culture or lifestyle of a nation. The point is that each person is a reflection of their culture and that all gestures, symbols, songs, and personal statements of a member of this culture have an implicit meaning for all other people who belong to this specific culture or people. The ethnographic approach entails observation and note-taking. In doing so, the researcher should follow some guidelines: everything is recorded immediately, without any discussion before note-taking; the rules and sequences of the events should be carefully observed, and notes should be taken on the duration of the sequence; the observation notes shall be objective and unaffected by the researcher’s feelings and/or thoughts. Photographing or recording a movie is an ethnographic process conducted by using cameras. For example, an ethnographic film can be recorded about homeless people. This technique is often called *speech history* (Veljković and Đurić, 2003: 68).

*Ethnomethodology* is the study of ordinary knowledge. It is an ethnographic technique, founded by the sociologist Harold Garfinkel in the late 1960s. It implies an active role of the researcher, who takes some activity that interferes with the standard routine of groups in a nation, with the aim of determining the strength and the ways in which the members of the group mobilize to re-establish the action of the cultural norm. The idea of this procedure is not to

violate the law or norms of social organization; the researcher performs some small and slightly ridiculous activities that breach the customary group rules, for which reason he/she is considered as "a weirdo". In such a case, the researcher may better understand the fragile and fluid processes of social control, as well as the rules that people use in order to keep restrictions in their culture. Despite its huge theoretical potentials, this method is not often used. Since 1989, it has been designated as *sociolinguistics* and used by researchers in different contexts.

Another technique which may be applied for conducting research in penitentiary institutions is an *interview through role-play*. The drama technique (dramaturgy) implies playing a role or acting out one's preferences in a symbolic interaction or a form of social performance. The drama technique or *socio-drama* was propagated by Erving Goffman in the early 1960s.<sup>5</sup> The participants are: the entire group, part of the group, or an individual representing the group. Socio-drama does not deal with the inner world of an individual and his/her interpersonal relationships but with inter-group relations and relations within groups, relation between authority in society, working organization, the examination of social layers and relations between them (Veljković and Đurić, 2003: 68).

*Sociometry* is the technique for measuring social distance between group members. It involves evaluating the degree of attraction and rejection among individuals in a group, as well as assessing the group structure, which is defined by feelings. The method was first established by a social psychologist J. L. Moreno (1934), and it implies a graphical description of the structure of group relations, which is called a *sociogram*.<sup>6</sup> The method basically involves the use of paper and pens, whereby each person in the group is requested to write down his/her his own choice of group members, as partners in different activities; it is a relatively simple technique for determining who is "the group star" and who is "an outcast" (Veljković and Đurić, 2003: 68).

*Natural experiment* is an observation technique used in case of a conflict, clash or partition between members of the group, when the researcher is given the opportunity to study the process of differentiation of the social structure. Natural experiment is often used in political science for monitoring the change of regulations on collecting taxes from citizens or in cases where the federal state forces member states to change their social policies, employment, education or transport policies. In historical-comparative research, natural experiment occurs when a nation turns from communism to capitalism, in which case

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5 See: O'Connor, T.: *Qualitative Social Science Research Methodologies*, accessed 25.10.2011. <http://www.drtoconnor.com/3760/3760lect06.htm>

6 See: O'Connor, T.: *Qualitative Social Science Research Methodologies*, accessed 25.10.2011. <http://www.drtoconnor.com/3760/3760lect06.htm>



economists analyze the growth of private businesses or recession, as forms of a natural experiment.

*Case study*, the method of studying an individual case, or a *historical method* (as a methodological procedure frequently described in the domestic criminological literature, as well as in neighboring countries) is an analytical-inductive method which provides scientific knowledge by examining individual cases of criminal behavior and delinquency (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2009: 74).

Another data collection method includes *unobtrusive* measurements (sometimes called *non-responsive* measurements), where subjects are not aware that they are the subject of study. They usually entail covert and atypical ways of collecting data or discovery that fall into one of the two categories: “piling” or “flushing”. *Piling* is a reflection of collecting everything that other people leave behind (e.g. garbage). *Flushing* is a reflection of emotional states where something related to the immediate human environment or people in general is either discarded as worn out (e.g. an old suit) or destroyed by human activity (e.g. graffiti). In criminal law, the unobtrusive measurements are for example applied in the study of graffiti art and vandalism.<sup>7</sup>

*Content analysis* is a technique for collecting data and analyzing the content of a text. The content is determined according to words, phrases, statements, paragraphs, images, symbols and style used in the text. This is often used in the work of intelligence or police services, in case of monitoring diplomatic mail, tapping telephones, reading the content of e-mails on the Internet (e.g. for counteracting terrorism).

*Historiography* is a method of using historical research for the purpose of collecting and analyzing historical data. There are four types of historical records: primary sources, secondary sources, reports and re-collection of available data for new methodological processing.

*Secondary analysis* is a re-examination of data originally collected by another researcher for other purposes and repeated analysis based on the current researcher’s needs and objectives. For example, the Uniform Crime Report may be analyzed in many ways, and researchers often introduce additional variables to the existing system of collected data. As this technique is mostly quantitative, the qualitative parts are used as a valuable check on quantitative indicators.<sup>8</sup>

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7 See: O’Connor, T.: *Qualitative Social Science Research Methodologies*, accessed 25.10.2011. <http://www.drtoconnor.com/3760/3760lect06.htm>

8 See: O’Connor, T.: *Qualitative Social Science Research Methodologies*, accessed 25.10.2011. <http://www.drtoconnor.com/3760/3760lect06.htm>

Finally, regardless of the particular subject matter and the applied criminological research method (including a clearly and precisely applied scientific sequence of research activities), the researcher always has a clear goal: to uncover this segment of social life in a new way rather than provide a superficial understanding of the criminal phenomenon at issue. In any subsequent research on the same or similar topic, all the acquired knowledge about the phenomenological and etiological indicators of the investigated criminological phenomenon will only have the character of hypotheses, which should be verified. Given that theoretical starting points are verified only through empirical research, this is the only possible way to institute better and more effective methods of crime prevention policy.

### 3. Concluding remarks

The title of this paper, the structure and concluding remarks clearly indicate the author's intention that this article should be an introduction to further discussion of the essential issues of criminology and related disciplines (penology and victimology), which should be aimed at revisiting and re-interpreting the existing corpus of criminological knowledge. In the completely changed contemporary social and economic circumstances, there is a need to exert efforts to cast more light on phenomenological and etiological characteristics of crime which are important in the context of crime prevention.

In the first half of 2016, a discussion was initiated in Serbia on the topic of the current position of social sciences and the importance of studying socio-humanistic disciplines at domestic universities. The discussion was triggered by rather prosaic (financial) reasons for cutting down the funding of scientific research in the field of social studies and humanities in Serbia. In that context, there is a dilemma how to make the topic of *convict criminology* more appealing to the general/professional audiences, particularly considering that it falls into the category of "non-legal" sciences. As such, in the current socio-economic circumstances, it would linger on the margins of social and humanistic sciences.

Where does the inspiration for this work come from? Criminology contains an abundant corpus of knowledge on the phenomenological and etiological characteristics of crime. Its achievements in the area of crime prevention are immeasurable. Yet, the basic scientific postulates and achievements in the field of applied methodology should be put into good use. On the one hand, it is important to raise citizens' awareness about crime as a human act which is impossible to completely eradicate. On the other hand, crime detection and crime prevention must be the ultimate priority of every state.

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## **ОСУЂЕНИЧКА КРИМИНОЛОГИЈА**

### **Резиме**

Криминологија обилује бројним сазнањима о феноменолошким и етиолошким својствима криминалитета. Њена достигнућа у области превенирања злочина немерљива су. Подсећања на њене основне научне постулате, као и достигнућа у области криминализације и декриминализације појединих понашања, морају бити коришћена на начин који ће грађанима предочити сазнања о злочину као људском чину, кога је немогуће потпуно искоренити, с једне стране, а чије препознавање и улагање државних и појединачних напора у његову превенцију, с друге стране, мора бити приоритет сваке државе. Отуда не треба да постоји научна дилему у области криминологије о томе да ли је могуће учинити видљивим још неку поделу криминологије, као што би то била она с јасном назнаком да је осуђеничка криминологија, с тим што једино преостаје одређење њеног пандана. Наиме, осуђеничку криминологију су на тлу САД осмислили бивши осуђеници, школовани током боравка у пенитенцијарним установама, па по први пут постоји покрет наставника/предавача криминологије, који се њоме не баве само као наученом, већ доживљеном дисциплином. Колики је њен стварни домет, успех у превенирању злочина, можда није мерљиво статистикама или ценом коштања криминаитета у једној земљи. Али, свакако представља драгоцену искуство, као и начин упознавања са излеченим делинквентима, и њихов искуствени доживљај покајања због непоштовања закона.

**Кључне речи:** криминална феноменологија, криминална етиологија, осуђеничка криминологија, превенција криминалитета.

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## **JUDGE IN CHARGE OF THE EXECUTION OF CRIMINAL SANCTIONS IN CRIMINAL LEGISLATURE OF THE REPUBLIC OF SERBIA: DE LEGE LATA AND DE LEGE FERENDA**

**Abstract:** *The institute of a judge in charge of the execution of criminal sanctions was introduced into Serbian law by the adoption of the Criminal Procedure Code (CPC) in 2011, which has been in force since 1st October 2013. According to the CPC, the judge for the execution of criminal sanctions is in charge of supervising people in detention (Art. 222 CPC) and he may act in the second-instance proceeding concerning legal rehabilitation (Art. 571 CPC). The 2014 Act on the Execution of Criminal Sanctions (ECS Act) determines the jurisdiction of this judicial authority in detail (Articles 33-42). Basically, according to the ECS Act, the primary task of the judge in charge of the execution of criminal sanctions is to provide judicial protection for a person who is subjected to the execution of a criminal sanction. The 2014 Act on the Execution of Non-custodial Sanctions and Measures envisages the same authorities of the judge for executing criminal sanctions. Although the introduction of this institute into Serbian law can be deemed a good solution, we think that the particular provision is not satisfactory. Therefore, in this paper, the author will present the institute of a judge for executing criminal sanctions de lege lata and give certain proposals de lege ferenda.*

**Keywords:** *Criminal Procedure Code, Act on the Execution of Criminal Sanctions, judge for the execution of criminal sanctions, jurisdiction.*

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## 1. Introduction

Courts as autonomous and independent state authorities have the right and duty in the criminal law matter to discuss and solve the *causa criminalis* (and possibly the so-called secondary criminal proceedings issues). If they find that the accusation of an authorized prosecutor is substantiated, they will deliver the decision that imposes a criminal sanction on the defendant (which may be omitted in case of exemption from punishment, for example). In this way, courts contribute to the maintenance of peace among people (*opus iustitiae pax*) and establish a state legal order (Grubač, 2004: 77).

After a judicial decision delivered by the court becomes effective, as a rule, the next step is its execution. It is usually pointed out that the execution of court decisions takes place in another procedure, "which by its legal nature implies not a judicial but an administrative procedure... and the court, as a rule, has no functions there" (Brkić, 2013: 272). Nevertheless, the exemptions from the rules are listed, such are the cases of the educational measures imposed on the minor (Đurđić, 2006: 240; Knežević, 205-251) with release on parole (Brkić, 2013: 273), although the participation of the court at the execution stage is not disputable in case of certain security measures. When it comes to educational measures (Đurđić, 2006: 240) and safety measures of a medical character (Radulović, 2009: 619), the commonly cited reason for the participation of courts in the process of execution is the manner of regulating the duration of these measures, which implies the systems of indefinite (absolute or relative) duration.

These are not the only cases involving participation of the courts at the stage of execution of criminal sanctions, which will be discussed later on in this paper. Generally, the role of the court in the enforcement of criminal sanctions can be threefold: 1) *technical* role (e.g. when sending the convicted person to serve the sentence of imprisonment); 2) *control or supervision* (e.g. when executing educational measures); and 3) "*constitutive*" (e.g. release on parole), which creates an appropriate legal situation for the convicted and significantly affects his/her position.

This paper, however, is concerned with a new institute in Serbian criminal legislation, which is, as suggested in its title, envisaged for the phase of execution of criminal sanctions. It is the institute of a *judge in charge of the execution of criminal sanctions* (abbreviated: *the judge for execution*), introduced by the Criminal Procedure Code (CPC) of 2011, whose jurisdiction and manner of work is regulated by the Act on the Execution of Criminal Sanctions (ECS Act) of 2014. Yet, the judge for execution has certain competencies in accordance with the Act on the Execution of Non-Custodial Sanctions and Measures (Probation Act).

Before elaborating on this institute and the role of the court in the procedure for the execution of criminal sanctions, we should consider the concept of *the execution of criminal sanctions*, which seems to be straightforward and unambiguous at first sight. Namely, the *execution* can only encompass the act of execution of a specific criminal sanction (for example, in case of imprisonment, from sending a convicted person to the detention center until the dismissal). However, it can also have a *wider meaning* and include appropriate legal relationships that arise afterwards (for example, in deciding on rehabilitation, the legal consequences of conviction, and the like). We are obliged to indicate this because, under Art. 571 of the CPC, the jurisdiction of a judge for execution extends to the procedure of legal rehabilitation, which falls within the concept of execution in the broader sense.

In order to adequately view the legal regulations pertaining to the judge for execution, we should also point out to other cases where the court participates in the procedure of enforcement of criminal sanctions.

## **2. A general overview of the possible role of the court in the enforcement of criminal sanctions in the Serbian legislation**

In Serbian law, the courts of different subject matter and functional jurisdiction participate in the enforcement of the imposed criminal sanctions. *We are obliged to point out these possibilities because in the comparative law (as well as at the time when the present ECS Act was at the proposal stage) some of these competencies were assigned to the judge for execution.* A general overview of the court's role and position at the execution stage will be presented through particular sanctions, guided by the system set forth in the Criminal Code (CC).

**a) Imprisonment.** The jurisdiction of courts at the execution stage entails:

- *Sending the prisoners to serving the sentence of imprisonment*, as decided by the President of the Basic Court according to the place of residence of the convicted person (Art. 54 ECS Act).

- *Postponing the execution of imprisonment.* This decision is also in the jurisdiction of the Court President who issued the order for execution of the sentence of imprisonment (Art. 63 ECS Act); an appeal against this decision may be submitted to the President of the competent Higher Court.

- *Decision on parole* (Art. 46 CC; Art. 47 ECS Act).<sup>1</sup> The first instance court that decided on parole has subject matter jurisdiction, and the functional competence is entrusted to the non-judiciary council referred to in Art. 21 par. 4 of the CPC (Art. 565 CPC).

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<sup>1</sup> Earlier it was decided by a special commission formed by the Ministry of Justice (Jovašević, Kostić, 2012: 323).

- *Notification on the release of a prisoner from serving a sentence of imprisonment* (Art. 186 ECS Act)/ *Notification on the execution of "house arrest"* (Art. 31 Probation Act). Yet, it is not clear which judicial authority is being notified. Considering that it is not explicitly stated that the judge for execution is notified and that the execution of criminal sanctions falls within the scope of court administration affairs, it should be taken that the notification is delivered to the President of the Court.

- *Decision to serve the rest of the sentence of "house arrest" at the detention center facility office* (Art. 45 CC). This decision is issued in the form of a court order by an individual judge of the court which delivered the first instance judgment (Art. 29 Probation Act).

**b) Fine.** The enforcement is vested in the court that brought the first instance judgment (Art. 187 ECS Act), which may *replace the unpaid fine with imprisonment or community service/work the public interest* (Art. 51 CC, Art. 189-191 ECS Act). Our laws do not indicate which court body is competent to issue a court order on replacing the fine; according to the position of the judicial practice,<sup>2</sup> the non-judiciary council of the first instance court has jurisdiction to decide on this matter.

**c) Work in the public interest.** The court decides on: *substituting the work in public interest with the prison sentence*, if the convicted person does not perform all or part of the hours of this sentence (Art. 52 CC; Art. 43 ECS Act); *reducing the work in public interest*, if the convicted person fulfills all the obligations related to the imposed punishment of community service (Art. 52 CC; Art. 43 Probation Act); in both cases, it should be deemed that the non-judiciary council of the first instance court has jurisdiction to decide on this matter.

**d) Seizure of the driving licence.** In the enforcement of this punishment, the court may *substitute this penalty with the sentence of imprisonment* if the convicted person drives a motor vehicle during the period for which the licence is suspended (Art. 53 CC). In the absence of the explicit legal stipulation, it should be deemed that the non-judiciary council of the first instance court has jurisdiction to decide on this matter.

**e) Conditional sentence.** In the process of execution, the court is competent to decide on *conditional sentence when the perpetrator is imposed appropriate obligation in terms of Art. 65 par. 2 CC and in case of conditional sentence with protective supervision*. The offender's failure to fulfill the obligations from Article 65 par. 2 of the CC, or the obligation of protective supervision from Article 73 of the CC, may lead to: *admonition, substitution of one obligation with another; extension of*

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2 Decision of the Appellate Court in Kragujevac, Kž. 2-276/10, dated 15<sup>th</sup> April 2010.



*the deadline for fulfillment or duration of protective supervision, revocation of the conditional sentence* (Art. 69 and 76 CC; Art. 37 Probation Act). The individual judge of the first instance court has jurisdiction to decide on the revocation of the conditional sentence (Art. 545-546 CPC).

**f) Security measures.** When the *medical measures* are concerned (mandatory psychiatric treatment and custody in health institution, mandatory psychiatric treatment at liberty, mandatory treatment of drug addicts and mandatory treatment of alcoholics), the court may: *refer the person to a relevant institution for the execution of the imposed medical measures*, whereby the first instance court has the subject matter jurisdiction to issue this measure (Art. 195, 202 and 205 of ECS Act) but it does not have functional jurisdiction; (yet, as it involves the affairs of the judicial administration, it would be right to deem that this decision is brought by the president of the court); *bring decision on abatement of these security measures*, considering that they are of indefinite duration.

The court which pronounced the security measure of compulsory psychiatric treatment and custody in a health institution for a mentally incompetent perpetrator may *terminate* this measure under the circumstances provided by the law, or *replace* it by compulsory psychiatric treatment at liberty (Art. 82 CC; Art. 531 and 532 of the CPC; Art. 199 ECS Act). Functional jurisdiction belongs to the non-judiciary council referred to in Art. 21 par. 4 of the CPC, as stated in the decision of the former Supreme Court of Serbia, Kž 2 no. 697/01 of 27 June 2001. (Ilić, *et al.*, 2013: 1095). The court has jurisdiction to *refer* the perpetrator who has been awarded compulsory psychiatric treatment at liberty to mandatory psychiatric treatment and custody in a health institution if the perpetrator fails to be subjected to treatment or arbitrarily abandons such treatment or if, in spite of the treatment, there is a risk of re-offending or committing an unlawful act provided for in the law as a criminal offense (Art. 82 CC).

The CC envisages that compulsory psychiatric treatment at liberty may be occasionally conducted in a health institution (Art. 82, para. 4), but the provision does not stipulate who makes the decision. Bearing in mind that the healthcare institution has only the duty to notify the court about the execution of the measure (Art. 203 and 204 of the ECS Act), it should be deemed that only the first instance court can make a decision on occasional treatment in hospital. As in previous cases, it should be deemed that council referred to in Art. 21 para. 4 CPC has jurisdiction to decide on this issue.

If mandatory psychiatric treatment and custody in a health institution is pronounced to a person with diminished mental incapacity in addition to a prison sentence, then the court (non-judiciary council) is entitled to impose this safety measure within the decision on parole (Art. 81 CC; Art. 531 CPC).

In case of compulsory treatment of drug addicts or alcoholics which is executed at liberty, the court decides that this measure shall be enforced in a medical or other specialized institution if the offender voluntarily does not undergo treatment or arbitrarily abandons it (Art. 83 and 84 of the CC). In addition, in that situation, the CPC allows the suspended sentence to be withdrawn (Art. 534 CPC). Although the positive legislation contains no provisions on jurisdiction, it should be deemed that this measure was issued by a non-judiciary council of the court which imposed the measure, in accordance with the interpretation present in other medical measures.

In case of non-medical security measures, the court has jurisdiction to decide on: *the cessation of certain security measures before the expiry of their term* (Art. 90 CC), which refers to measures of prohibiting the performance of professional or vocational activities and duties, and the prohibition of driving a motor vehicle; *revocation of suspended sentence for violation of a ban imposed by security measures*, which refers to the said security measures, as well as the measure of banning the presence at certain sport events. In these cases, the competent authority is the non-judiciary council (Art. 578 CPC).

**g) Educational measures and juvenile imprisonment.** Having in mind the nature and the manner of regulating the duration of educational measures, according to the Act on Juvenile Offenders and Criminal-law Protection of Minors, the court (juvenile judge or juvenile council) is competent to: *decide to discontinue the execution or replace the imposed educational measures with another educational measure* (Art. 24); *consider the need for the execution of the imposed educational measure* (Art. 25); *decide on parole release* in case of institutional educational measures (Art. 22); *supervise and control the execution of educational measures* (Art. 99); *decide on parole release* in case of juvenile imprisonment (Art. 32), etc.

**h) Other cases.** The non-judiciary council is competent to decide on: *legal rehabilitation* if the competent authority has not issued a decision (Art. 572 CPC); *judicial rehabilitation* (Art. 573 CPC); *the termination of the legal consequences of the conviction* (Art. 578 CPC), etc.

### **3. Judge for the Execution of Criminal Sanctions in the Serbian Criminal Legislation:**

#### **Status *de lege lata* and critical review of the legislation**

Article 22 par. 4 CPC stipulates that the judge for the execution of criminal sanctions has the authority to decide in the proceedings for the execution of criminal sanctions and in other cases provided by the law. However, under the CPC, the judge is entrusted with very modest competences: *to exercise supervision*

over detained persons (Art. 222 CPC) and to *act in the second instance procedure related to legal rehabilitation* (Art. 571 CPC). Only three years after establishing this institute, the rules on the judge's competence and authorizations have been elaborated in more detail, which was done by the adoption of the 2014ECS Act, while certain competencies are also provided in the Probation Act, which was also adopted in 2014. Otherwise, this institute is recognized in the legislations of Italy<sup>3</sup> (Tommasetti, 2002: 209), Croatia<sup>4</sup> and France<sup>5</sup> (Babić, Josipović, Tomašević, 2006: 715-716).

Before embarking on a more detailed analysis of the existing provisions on the judge for the execution of criminal sanctions, we will briefly revisit the provisions of the previous 2005ECS Act, which for the first time introduced the judicial protection of the rights of persons serving the prison sentence, which could be exercised in administrative dispute proceedings (Jovašević, Stevanović, 2008: 152). Prior to this, our legislation explicitly excluded the possibility of initiating an administrative dispute on this matter (Jovašević, 1997: 23). The introduction of court protection is considered to be a solution in accordance with modern penological standards because it "improves the system of protection of the rights of convicted persons and introduces court control of the execution of imprisonment, which also implicitly integrates the field of execution of the prison sentence into the legal system" (Soković, 2008: 75).

The 2014 ECS Act retains judicial protection but it is not linked solely to the offenders sentenced to imprisonment but to all those who are subject to the execution of criminal sanctions. Namely, in its basic provisions, Article 8 para. 3 of the ECS Act envisages that a judge for the execution of criminal sanctions shall (in compliance with this Act) ensure the judicial protection against individual acts involving decisions on the rights and obligations of the convicted person. However, both under the 2014 ECS Act and under the CPC, the judge for the execution of criminal sanctions is obliged to protect the rights of detainees; thus, in comparison with the former legal solution, the circle of persons enjoying judicial protection has been expanded (Veković, 2015: 62).

### ***3.1. Notion of a judge for the execution of criminal sanctions***

The judge for the execution of criminal sanctions is a *judicial authority which, in the sense of the said provision of the CPC, decides in the procedure for the*

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3 See art. 665 - 676 of the Criminal Procedure Code of Italy.

4 See art. 41-47 The Act on the Execution of the Imprisonment of Croatia, Official Gazette no. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 190/03, 76/07, 27/08, 83/09, 18/11, 48/11, 125/11, 56/13, 150/13.

5 See art. 712 - 1 of the Criminal Procedure Code of France (English version).

*enforcement of criminal sanctions and in other cases provided for by law.* This judicial authority is envisaged for each Higher Court. The judge for the execution of criminal sanctions is appointed by the president of the court from among the judges of that court. The judge may act solely in cases under his jurisdiction, with the assistance of a special expert service from the ranks of the court employees. In accordance with the court's rules of procedure, special records have to be kept on the cases where the judge for the execution of criminal sanctions acts in that capacity (Art. 33 ECS Act).

The ECS Act does not prescribe any special qualifications for judges in charge of the execution of criminal sanctions. The Draft ECS Act of 2012 envisaged that the judge for the execution of criminal sanctions should be appointed "from the ranks of judges who have acquired special knowledge in the field of execution of criminal sanctions, verified by an institution designated by the Minister of Justice" (according to: Ignjatovic, 2013: 81). However, the 2013 Draft ECS Act did not include such a provision, which was eventually accepted in the adopted ECS Act. The removal of this provision was criticized by certain theoreticians, according to whom the adopted legal solution is only formally in accordance with the contemporary criminal enforcement law solutions, but that nothing has really changed in this area (Ignjatović, 2014: 54). A provision on specific qualifications to be met by the judges for the execution of criminal sanctions would undoubtedly be a very useful solution. Upon examining the comparative law solutions on this matter (Croatia, Italy, France), we have not found that special qualifications are required in these legal systems for the same authority. But, this is certainly not the reason why our legislator should not prescribe it, particularly given the fact that possession of special knowledge in the field of penitentiary law and penology will contribute to the quality of the work of judges for the execution of criminal sanctions. In this regard, we point out that Croatian law has an interesting solution because it provides the possibility of establishing centers for the execution of imprisonment, consisting of two or more judges for the execution of criminal sanctions as well as the necessary professional and supporting staff. The Croatian Act on the Execution of the Prison Sentence establishes the duty of the Supreme Court of Croatia to convene a meeting of judge for the execution of criminal sanctions at least once a year for the purpose of ensuring the uniform implementation of this Act.

### ***3.2. Jurisdiction of a judge for the execution of criminal sanctions***

The subject matter jurisdiction of the judge for the execution of criminal sanctions is determined in Article 34 ECS Act. According to paragraph 1 of this Article, the judge for the execution of criminal sanctions is obliged to: 1) protect the rights of detainees, convicts, persons who have been imposed a security

measure of compulsory psychiatric treatment and custody in a health institution, obligatory treatment of drug addicts or obligatory treatment of alcoholics when conducted at the institution; 2) monitor the legality in the procedure for the enforcement of criminal sanctions and ensure the equality and equal treatment of these persons before the law. Regarding the latter, Art. 42 of the ECS Act stipulates that the judge for the execution of criminal sanctions has to visit the institutions in the territory of his/her district authority, at least once every four months during the year, talk to the convicts and inform them about the means of exercising their rights. According to Art. 222 of the CPC, the judge for the execution of criminal sanctions, *or another judge authorized by the president of the court*, supervises detainees.<sup>6</sup> In this case, it can be clearly concluded that there is no exclusive jurisdiction of the judge for the execution of criminal sanctions.

In accordance with the typology of the role of the court in the enforcement procedure, which has been presented in the introduction to this paper, it can be concluded that the powers of the judge for execution are constitutive in the former case and supervisory in the latter case.

In addition, Article 34 para. 2 of the ECS Act stipulates that the judge for the execution of criminal sanctions also decides on: 1) the protection of the detainees' right to *complain and the request for judicial protection* of the convicted persons, the person who are imposed the compulsory psychiatric treatment and custody in the health institution, treatment of drug addicts or compulsory treatment of alcoholics which is conducted at the institution; 2) the protection of the rights of the convicted persons, by deciding on an *appeal* against the decision of the manager of the institution or director of the Directorate for the Execution of Criminal Sanctions (Director of the Directorate), in cases provided by the ECS Act; and 3) *in other cases provided for by law*.

The decisions taken by the judge for the execution of criminal sanctions in cases under 1) and 2) will be discussed later on in the paper. Here, we will just explain the other cases in which the decision is made by a judge for execution. These cases are envisaged in the ECS Act, but also by other laws. Thus, for example, the ECS Act stipulates that a judge for execution may decide about monitoring

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<sup>6</sup> A judge who supervises detainees is obliged to visit detainees at least once in every 15 days and, if necessary, even without the presence of employees in the institution, inform about the quality of the prisoners diet, how they are supplied with other needs and how they are treated. The judge is obliged to inform the Ministry of Justice, as well as the Ombudsman, about the irregularities observed during the tour of the institution, and to do so without delay. Within 15 days from the date of receipt of the notification of irregularities, the Ministry is obliged to inform the judge of the measures taken for their removal. The supervising judge can at all times visit all the detainees, talk to them and receive complaints from them (Art. 222, para. 2 and 3 of the CPC).

the letters of convicted person, that is, he may prohibit correspondence (Article 87 ECS Act). These decisions shall be made on the proposal of the manager of the institution or director of the Management Board. From his/her powers provided in other laws, we will mention the already mentioned jurisdiction to act in the second instance procedure of legal rehabilitation (Article 571 of the CPC). In that case, the authority competent to keep criminal records acts in the first instance (Article 569 CPC); in our law, it is the police (more: Čorović, 2016: 196-197). Therefore, in that case, the judge for the execution of criminal sanctions is a second instance body in relation to the police (acting within the authority of the Ministry of Internal Affairs), and not in relation to the manager of the institution or director of the Directorate (acting within the authority of the Ministry of Justice). The ECS Act envisages the jurisdiction of the judge for execution only in respect of the detained persons and persons over whom the prison sentence is enforced. However, Art. 7 of the Probation Act stipulates that a judge for the enforcement of criminal sanctions shall (in compliance with that Act) provide judicial protection against the individual acts of the Director of the Management Board, dealing with the rights and obligations of the person who are subject to execution of non-custodial sanctions and measures.

It follows from the above that the jurisdiction of the judge for the execution of criminal sanctions in our law is rather modest. According to the Draft ECS Acts of 2012 and 2013, it also included: deciding on the revocation of suspended sentence and parole in cases of facultative recall; referring convicted offenders to penal institutions; referring the convicted persons to the execution of security measures; postponement of the execution of imprisonment; revocation and suspension of postponement of imprisonment (Ignjatović, 2013: 82). In Croatian law, those powers are entrusted to the judge for the execution of criminal sanctions, but when it comes to parole, he/she convenes and presides over the Council for the parole release.<sup>7</sup> According to the Italian CPC, the judge for the execution of criminal sanctions has the authority: to decide if the decision is controversial or the executive title is invalid; to decide in cases of concurrence of crimes and continuing crime; to decide on the possibility of revoking a conviction, a penalty order and an continuing crime;<sup>8</sup> to decide that there is no legal ground for proceedings, to rule on the statute of limitations, as well as in case

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<sup>7</sup> See Art. 42 The Act on the Execution of Imprisonment of Croatia.

<sup>8</sup> It is about the procedure for pronouncing a single sentence when the provisions on concurrence of crimes and continuing crime have not been applied. In Italy, the criminal law of the continuing crime applies different rules than in our law. It is a penal provision similar to the one intended for the concurrence. In Serbian law, this situation (except for continuing crime) is decided by non-judicial council.

of *abolitio criminis*, if the criminal provision was declared unconstitutional;<sup>9</sup> to decide on recall of suspended sentence, etc. (Tommasetti, 2002: 209). In French law, the judge for the execution of criminal sanctions has the right, for example, to authorize the execution of prison sentences in the so-called semi-slip mode; the judge is the chairman of the commission for the classification of prisoners; he/she decides on the transition to the next phase of a progressive enforcement system, as well as on the recall of parole release; he/she can decide on some disciplinary punishments and reduction of some mild imprisonment sentences (Babić et al., 2006: 716).

The territorial jurisdiction of the judge for the execution of criminal sanctions is defined in Art. 35 ECS Act. The protection of the rights of the convicted persons in the course of serving the sentence of imprisonment or detainees during the period of detention is entrusted to the competent Higher Court in the territory where the institution for the execution of criminal sanctions is located. In case a convicted offender or a detainee is transferred to another penal institution or detention center located in another jurisdiction, where the prison sentence or detention measure is to be executed, any further treatment of the convicted or detained person is entrusted to the competent Higher Court in the place of residence of the penal institution or detention center where the convict or detainee has been transferred. In that case, the judge from the territory where the first penal institution or detention center is located is obliged to promptly deliver the convict's or the detainee's case files to the competent judge in the place of residence of the second institution, where the convicted or detained person has been transferred for the execution of the imposed criminal sanction or detention measure.

### ***3.3. Procedure before the judge for the execution of criminal sanctions***

When deciding on the protection of the convict/detainee's rights, the judge for the execution of criminal sanctions acts upon two initial acts: a *complaint* submitted by a detainee, and a *request for judicial protection* submitted by a convicted offender or a person who is subject to the execution of safety measures of compulsory psychiatric treatment and custody in a health institution, or compulsory treatment of drug addicts or compulsory treatment of alcoholics when they are conducted at the institution. The second instance procedure before the the judge for the execution of criminal sanctions is initiated by filing an *appeal* (Art. 35 par. 1 ECS Act).

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<sup>9</sup> In our country, this is the reason for submitting a request for the protection of legality, pursuant to Art. 485 CPC.

This procedure is *contradictory* according to the law which stipulates that "during the procedure, the judge for the execution of criminal sanctions enables the convicted/detained person or the institution, to give a writing statement about the facts indicated in the request or complaint" (Art. 35 par.2 ECS Act). The cited formulation is not well-defined, because, under the principle of *audiatur et altera pars*, only the "respondent" side (which is the institution) can come clean on the complaints from the initial act. It was probably meant to be said that the convicted/detained persons can give their statements in writing about the allegations put forward by the institution during the proceedings. The ECS Act also provides for the possibility of *having a hearing* before the judge for the execution of criminal sanctions. The CPC provisions shall accordingly apply to the proceedings before the judge for the execution of criminal sanctions, unless otherwise provided by the ECS Act or other law (Art. 35 par. 3 ECS Act).

According to Article 37 para.1 of the ECS Act, a detainee who believes that his right was violated during the execution of the detention measure at the institution has the right to file a *complaint* on the record verbally or in writing to the judge for the execution of criminal sanctions. According to Article 37 para.2 of the ECS Act, the convicted person has the right to file a request for judicial protection against the decision of the Director of the Directorate (the manager is not mentioned!!!), within three days from the date of delivery of the decision, if he considers that some of the rights envisaged in the ECS Act have been unlawfully limited or violated, which are normatively regulated in Articles 76 to 125 of that Act. However, Article 37 para. 5 of the ECS Act stipulates that "the convicted person or the detainee has the right to file a complaint to the judge for the execution of criminal sanctions within three months from the date of the violation of the right, and exceptionally within six months if there has been an objective impediment". The cited provision is not quite clear. Namely, it refers to filing of a *complaint* by the *convicted* person, whereas this initial act is related only to the detainee; moreover, Article 35 par. 2 of the Act stipulates a period of three days whereas Article 35 par.7 provides for a significantly longer period. Yet, the provision in paragraph 7 may be combined with other provisions relating to the proceedings before the judge for the execution of criminal sanctions.

Namely, the right of a convicted person to request judicial protection (which is not granted to a detainee) is *conditioned* by the duty of the convicted person to refer to the penitentiary bodies in the procedure that is regulated by provisions in Articles 126 and 127 of the ECS Act.<sup>10</sup> However, the ECS Act only exceptionally

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<sup>10</sup> Art. 126 of the ECS Act refers to the pleading that a convicted person may send to the chief of staff or another authorized person of the appropriate service in the penal institution, the complaint that may be submitted to the manager of the institution and the appeal that may be filed with to the director of the Administration on the decision upon complaint or



allows that the convicted person can submit a request for judicial protection directly to the judge for the execution of criminal sanctions in case his/her right to life or physical integrity is seriously endangered (Art. 37 par. 3 and 4 of the ECS Act). Considering that in this exceptional case the convict's right is not conditioned by the procedure and decisions of the penitentiary bodies, it could be interpreted that the convicted person has the right to file a request (not a complaint) for judicial protection within the said three-month (or six-month) deadline.

Notably, the ECS Act states that the complaint of a detainee can be submitted in writing or given orally for the record, which is not envisaged in terms of the convict's request. According to Article 89 of the ECS Act, the institution is obliged to provide legal assistance to the convicted person, whereas the applicable CPC (Art. 229) prescribes that initial acts shall be submitted in writing or given orally for the record. Taking these provisions into account, it can be concluded that the convicted person has the right to submit the request in writing or orally for the record.

It has been noted that a hearing can be scheduled before the judge for the execution of criminal sanctions. In principle, the hearing is not obligatory but only an option. If the hearing is scheduled, the participants in the proceedings will orally declare the facts and evidence important for making a court decision. Nevertheless, the judge for the execution of criminal sanctions is obliged to hold a hearing if he/she assesses (from the statements in the complaint or in the request for judicial protection and other evidence) that the right to life, physical integrity or health of the detained or convicted person is endangered. Therefore, in the latter case, the hearing is mandatory (Veković, 2015: 64). The ECS Act explicitly determines the place of the hearing, which can be held in the court or on the premises of the respective institution.

If a detained or convicted person has an attorney, the attorney is invited to attend the hearing; in case the attorney fails to appear, despite being duly summoned and delivered the court notice, the hearing being held in spite of his default. During the proceedings, the judge for the execution of criminal sanctions may hear other convicted persons and the institution employees as witnesses, obtain or inspect the documentation of the institution and other state bodies, visit the premises of the institution and determine facts in some other way.

The judge for the execution of criminal sanctions makes a decision in the form of a court order. According to Article 39 of the ECS Act, the judge may issue a

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for failure to act upon the complaint. Art. 127 of the ECT Act refers to the complaint of the convict that may be submitted to the Director of the Administration for the actions of the institution managers.

number of court orders: 1) the court order on the rejection of the detainee's complaints, or the convicted person's request for judicial protection, which is issued if the initial acts are untimely, incomplete or unlawful; 2) the court order on the refusal of the detainee's complaint or the convicted person's request for judicial protection of convicts, which is issued if they are found to be unsubstantiated; 3) the court order obliging the institution to remove the established flaws within a specified period and to inform the judge on the measures taken to eliminate such flaws or, if the flaws cannot be eliminated, the court will find the specific activity unlawful and prohibit its further repetition.

An appeal is permitted against the decision of the judge for the execution of criminal sanctions made upon the detainee's complaint or the convicted person's request for judicial protection. The non-judiciary council of the same court decides on the appeal, which is submitted through the judge for the execution of criminal sanctions who rendered the first instance decision, within three days from the date of receipt of the first instance decision. The non-judiciary council is obliged to decide on the appeal within eight days from the date of its receipt.

In addition to this "first instance" jurisdiction of the judge for the execution of criminal sanctions, this judicial authority is also competent to act as a second instance authority, i.e. to rule on appeals against the decisions of the Director of the Directorate or the Manager of the institution. The ECS Act must explicitly prescribe the cases when the second instance proceedings may be initiated. Thus, for example, a convicted person has the right to appeal to the judge for the execution of criminal sanctions as follows: against the decision of the Director of the Directorate determining the change of the place of execution of the sentence (Art. 49 ECS Act); against the decision of the Director of the Directorate determining the subsequent deployment (Art. 52 ECS Act); against the decision of the manager of the institution determining the accommodation under increased supervision or isolation (Art. 51 and 52 ECS Act); against the decision on disciplinary penalty of the convicted person (Art. 174 ECS Act), etc.

A convict may file an appeal to the judge for the execution of criminal sanctions against the decision of the manager of the institution or director of the Directorate within three days from the date of delivery of the decision. The ECS Act prescribes the minimal content of the appeal. It must contain: 1) information on the decision against which it is filed, 2) the reason for the appeal being declared, and 3) the signature of the person who makes the appeal. The timely filed appeal does not delay the execution of the decision, i.e. it has no suspensive effect. The convicted person submits the appeal through the institution to the first instance body, which is obliged to promptly deliver the appeal with the case files to the judge for the execution of criminal sanctions. In this proceeding, the *beneficium*

*novorum* rule is valid because in the appeal the applicant may propose establishing new facts and obtaining new evidence, if they were not known at the time of taking the contested decision.

In the proceedings upon the convicted person's appeal, the judge for the execution of criminal sanctions may rule as follows: 1) dismiss the appeal as untimely, incomplete or unlawful; 2) reject the appeal as unsubstantiated and confirm the decision of the first instance body; 3) approve the appeal, abolish the contested decision and refer the case to the first instance body for a new decision, or adopt the appeal and amend the first instance decision.

#### **4. Conclusion**

Although the CPC prescribes that the judge for the execution of criminal sanctions decides in the procedure for the enforcement of criminal sanctions, the provisions of the ECS Act have given really insignificant responsibilities to this judicial authority. The institution of the judge for the execution of criminal sanctions is justifiable only if it is given the right place in the legal system. Unfortunately, by analyzing our positive law regulations we have seen that it does not have such a place. Therefore, further work must be undertaken on expanding its competences. Otherwise, the purpose of this institution remains questionable.

In the light of the above, we believe that the following legislative steps must be taken for the purpose of prescribing the following competences of the judge for the execution of criminal sanctions: 1) to refer convicted offenders to the execution of criminal sanctions; 2) to decide on the postponement of the execution of the prison sentence; 3) to substitute all milder penalties with stricter ones in the case of non-enforcement (e.g., to replace a fine with an imprisonment sentence, etc.); 4) to decide on the execution of "house arrest" in institutional conditions in case of convicts' violation of the imposed obligations; 5) to participate in the work of the council that decides on parole, or at least he/she should be the rapporteur of this council; 6) to decide on the revocation of a suspended sentence due to a failure to fulfill obligations or protective supervision measures; 7) to decide to dismiss or replace the imposed security measures of indefinite duration, or decide on other consequences related to certain security measures (or on their termination).

Moreover, it would be beneficial to envisage the competences related to legal rehabilitation in cases where the competent body does not make a decision, as well as the competences related to judicial rehabilitation, termination of the legal consequences of conviction, and the right to decide on the statute of limitations in the execution of criminal sanctions. Some of these duties could be regulated as the exclusive authority of the judge (e.g. suspension of execution due to obso-

lescence) and others may be performed by the judge as member of the judicial council (e.g. judicial rehabilitation). Moreover, by analogy with Italian law, it would be justified that the judge for the execution of criminal sanctions decide on imposing a single sentence when the provisions on the concurrence have not been applied, given that it implies judgments that are valid and enforceable. We dare say that the judge for the execution of criminal sanctions shall be not only a *central* but also a *general judicial authority* at the stage of execution. Therefore, the cases where another judicial authority has jurisdiction to act in execution proceedings shall be explicitly prescribed by the law, which means that another judicial authority shall have jurisdiction to act only in exceptional cases.

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**СУДИЈА ЗА ИЗВРШЕЊЕ КРИВИЧНИХ САНКЦИЈА У КРИВИЧНОМ  
ЗАКОНОДАВСТВУ РЕПУБЛИКЕ СРБИЈЕ: DE LEGE LATA И DE LEGE FERENDA**

**Резиме**

Институт судије за извршење кривичних санкција уведен је у право Републике Србије доношењем Законика о кривичном поступку (ЗКП) из 2011. године, који је у општој примени од 01.10.2013. године. Према ЗКП-у судија за извршење кривичних санкција је надлежан да врши надзор над притвореним лицима (чл. 222), као и да поступа у другом степену у поступку законске рехабилитације (чл. 571). Законом о извршењу кривичних санкција из 2014. године (ЗИКС) детаљније је одређена надлежност овог судског органа (чл. 33-42). У основи, може се рећи да је према ЗИКС-у примарни задатак судије за извршење кривичних санкција да обезбеди судску заштиту лицима према којима се кривична санкција извршава. Исти задатак судија за извршење кривичних санкција има и према Закону о извршењу ванзаводских санкција и мера из 2014. године (чл. 7). Иако се увођење овог института у наше право може сматрати добрим решењем, сматрамо да конкретна регулатива није задовољавајућа. У том смислу у раду ће се представити институт судије за извршење кривичних санкција *de lege lata* и даће се извесни предлози *de lege ferenda*.

**Кључне речи:** Законик о кривичном поступку, Закон о извршењу кривичних санкција, судија за извршење кривичних санкција, надлежност.





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## **NORMATIVE OBSTACLES TO THE IMPLEMENTATION OF THE ACT ON PREVENTION OF DOMESTIC VIOLENCE**

**Abstract:** *One of the consequences of globalization in the contemporary criminal law is the increasing protection of the family and its members. Some countries have amended their criminal legislation by envisaging the criminal acts of domestic violence as well as specific safety measures aimed at preventing such conduct and removing the “bully” from the family environment. Accordingly, the Republic of Serbia gradually introduced relevant legislation by prescribing the criminal act of domestic violence and instituting certain mechanisms that prevent communication and encounters between the victim and the perpetrator. The “end result” of this intervention was the adoption of the new Act on the Prevention of Domestic Violence in November 2016. Although the adoption of this legislative act has been keenly awaited in terms of providing for more coordinated state response to domestic violence, its implementation will be considerably frustrated by the fact that during its adoption the legislator has failed to take into account all normative requirements which are relevant for its application.*

**Keywords:** *domestic violence, prevention, Act on Prevention of Domestic Violence.*

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## 1. Introduction

Domestic violence as a form of crime of violence, leads to violations of fundamental human rights and freedoms of family members. Until the late 1960s, domestic violence was considered to be a private matter of family members, which prevented the reaction of the state. The activism of the women's movement and the movement for the rights of victims of domestic violence contributed to the criminalization of domestic violence in the Republic of Serbia in 2002 with the adoption of the Act on Amendments to the Criminal Code.<sup>1</sup> After the criminalization of domestic violence as a criminal offense, the number of offenses from Chapter XIX, designated as "Offenses against marriage and family", increase three times in the coming years. In 2004, there were 1,009 adults registered for committing the crime of domestic violence, while in 2015 the number of reported adults grew to 5,040.<sup>2</sup> At the same time, the increase in the number of committed crimes of domestic violence was accompanied by numerous cases involving death of a spouse after years of mistreatment, which attracted great attention of mass media and the public.

Exposure of family members, especially women as persons sustaining the greatest risk of victimization, is substantial, regardless of the fact that countries around the world have developed an appropriate legislative framework to combat this type of crime of violence by envisaging clear penal policy of the retributive process. However, as the criminal policy for combating domestic violence has not yielded adequate results, it is necessary to start building a different model of social reaction to this type of crime of violence, which would be clearly aimed at avoiding the commission of the same offense in the future (Dimovski, 2015: 424). The role of the state in the prevention of domestic violence is crucial. Therefore, the Republic of Serbia is obliged to act preventively on this form of violence through various policies and social protection program, and to provide financial, advisory and other assistance to victims of violence. The preventive role of the state in counteracting violence among family members is embodied in the adoption of the Act on Prevention of Domestic Violence (hereinafter: the DV Prevention Act).<sup>3</sup> Given the fact that this area has already been regulated in the existing legislation, the authors do not intend to discuss whether this act was necessary and how long it took to enact it; nor do we raise an issue of the harmful impact of this act on family relations and to what extent it will contribute

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1 Act on Amendments to the Criminal Code, Official Gazette of RS, no. 10/2002

2 Statistical Office of the Republic of Serbia, Retrieved 12 December 2016 from: <http://www.stat.gov.rs/WebSite/Public/ReportResultView.aspx?rptKey=indId%3d140202IND01%2635%3d6%2657%3d0%2c01%2c02%2c03%2c04%2c2%262%3d%23all%23%266%3d1%2c2%26sAreaId%3d140202%26dType%3dName%26lType%3dSerbianCyrillic>,

3 Act on Prevention of Domestic Violence, Official Gazette of RS, no. 94/2016

to “breaking up” the family units. Namely, whenever the police, the prosecution or the court get involved in solving family relations, the family differences can hardly be reconciled. It may also be assumed that the crime rate related to these offences will increase from the date this Act enters into force, which would ultimately lead to an increase in the number of divorces and broken families. In this paper, the authors will analyze the provisions of the Domestic Violence Prevention Act and propose some solutions aimed at improving the legal text and providing for a better protection of family members from the commission of these criminal offences.

## **2. Analysis of the Domestic Violence Prevention Act**

In December 2016, the National Assembly of the Republic of Serbia adopted the Act on Prevention of Domestic Violence (hereinafter: the Domestic Violence Prevention Act)<sup>4</sup> after a series of murders of women committed by their partners, where there was a lot of pressure of the general public for state reaction aimed at preventing and ultimately reducing the number of criminal offenses committed between family members. The adoption of a special law that would regulate the prevention of domestic violence requires an analysis of the legal provisions in order to eliminate discrepancies and possible legal contradictions in the legal text, and to provide better legal protection for victims of this type of crime of violence.

From the title of this act, we can conclude that it refers to the prevention of crimes of domestic violence under Article 194 of the Criminal Code of the Republic of Serbia (hereinafter: CC).<sup>5</sup> In addition to the title, the scope of the legal text is substantiated in Article 1 of the DV Prevention Act, which stipulates that this legislative act regulates the prevention of domestic violence and the actions of state authorities and institutions in preventing domestic violence and providing protection and support to victims of domestic violence. In other words, the Act refers only to the prevention of domestic violence.

Starting from this hypothesis, the analysis of the legal provisions yields a different conclusion. The first fact which disproves the initial hypothesis refers to Article 1 of the DV Prevention Act, which brings us to the conclusion that the Act

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4 Prior to the enactment of this Act, there was a Draft Act on Protection against Domestic Violence, which differed not only in title but also in the subject matter from the current Act, given that it regulated the subject matter in a different way. See: Draft Act on Protection against Domestic Violence. Retrieved 20, December 2016, from: <http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php>

5 Criminal Code, Official Gazette of RS, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014

does not apply only to prevention of the commission of certain crimes but also to providing assistance and support to victims of domestic violence. Another fact that refutes the initial hypothesis is related to Article 4 of this Act, which states that the provisions of this Act also apply to cooperation in preventing domestic violence in criminal proceedings for offenses such as stalking, rape, sexual intercourse with a incapacitated person, sexual intercourse with a child, sexual intercourse by abuse of official position, illicit sexual acts, sexual harassment, soliciting and facilitating sexual intercourse, mediation in prostitution, displaying, obtaining and possessing pornographic material and exploitation of minors for pornography, inducing a child to witness sexual intercourse, neglect and abuse of a minor, domestic violence, withholding maintenance, violations of family obligations, incest, human trafficking and other offenses, if the offense is a result of domestic violence. This provision shows that the Domestic Violence Prevention Act relates to a series of other crimes, which do not fall within the scope of domestic violence. Concurrently, the criminal act of domestic violence is one of the listed criminal offences. Although certain criminal offenses, such as failure to provide maintenance, violation of family obligations and incest can be carried out among family members, in other listed offenses the perpetrator and the victim may or may not be related by family ties. The third reason why this legal text has inappropriate title is that it applies to such criminal offenses (e.g. failure to provide maintenance) where there is no element of violence.

Therefore, there are three reasons why the title of this legislative act is inadequate: 1) its application after the crime has been committed; 2) it applies to a number of offenses which do not constitute a criminal offense of domestic violence; and 3) it applies to criminal offences which do not include violence as an essential element of this criminal act.

The scope of domestic violence is determined in Article 194 of the Serbian Criminal Code (CC), and there is no room for its further expansion. In fact, Article 3 par. 3 of the DV Prevention Act stipulates that domestic violence includes physical, sexual, psychological or economic violence. Comparing this provision with Article 194 CC, we may notice a mismatch, given the fact that the concept of domestic violence has been expanded to include sexual and economic violence. Concurrently, Article 3 par. 3 of the DV Prevention Act envisages that the above forms of violence are aimed at the present or former married or unmarried partner, or a next of kin in the first degree, or a person in the second degree of the collateral line, or a person in the second degree of affinity (in-laws), or a person who is an adoptive parent, adopted child, foster child or foster parent, or another person with whom he/she lives or has lived in the same household. Article 112 par. 28 of the Criminal Code provides that family members are deemed to be: the spouses, their children, the spouses' ancestors in direct line of kinship,

unmarried partners and their children, adoptive parents and adopted children, and foster parents and foster children. Family members are also brothers and sisters, their spouses and children, former spouses and their children, and parents of former spouses if they live in the same household, as well as persons who have a common child or a child about to be born, even though they have never lived in the same household. Family members are also defined in Article 197 par. 3 of the Family Act,<sup>6</sup> according to which family members are considered to be spouses or former spouses, children, parents and other blood relatives, persons related by affinity (in-laws), adoption and foster care, persons who live or have lived in the same household, unmarried partners or former unmarried partners, persons who were or still are in an emotional or sexual relationship, or persons who have a common child or a child about to be born, even though they have never lived in the same household.

Careful analysis of these three provisions brings us to a conclusion that there is inconsistency on the issue who is deemed to be a family member. Therefore, it is necessary to eliminate the discrepancy between these legal texts by defining the concept of a family member in only one legal text, which would enable them to enjoy every possible form of protection (in criminal, misdemeanor and family law) against domestic violence (Čorović, Milić, 2016: 423).

However, if the intention of the legislator has been to provide broader protection to family members, and to prevent equating family members stipulated in the DV Prevention Act with those envisaged in other legal texts, the legislator had to use a different phrase in terms of violence between family members, and thus avoid a reference to the crime of domestic violence. This is just another indicator that, when passing a law, insufficient attention is given to what is stipulated in another law; thus, it happens that the same subject matter is regulated by two or more legislative acts, but in different ways. It generates problems in practice, considering that one law should be given priority, whereas the application or non-application of a specific legislative act determines whether a person will be considered to be the family member or not and, ultimately, whether there is the criminal act of domestic violence or not.

The disciplinary responsibility of judges, public prosecutors and deputy public prosecutors is regulated by Article 6 of the DV Prevention Act, which specifies that any delay in terms of time limits specified in this Act constitutes a disciplinary offence (misdemeanour). Thus, the legislator has implicitly declared the existence of the principle of urgency in dealing with these cases. We may reasonably raise the issue why the legal text has failed to envisage the exception stating that any unwarranted delay in terms of time limits shall constitute a

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6 The Family Act, Official Gazette of RS, no. 18/2005, 72/2011 - etc. Law and 6/2015

disciplinary offense, considering that both the public prosecutor and his deputy may be absent from work (for example, due to a flu epidemic), which is quite possible in public prosecutor's offices employing only one deputy prosecutor, such as those in Aleksinac or Lebane. Another question that may be raised is the expediency and purposefulness of Article 6 DV Prevention Act. As a matter of fact, the mandatory instruction of the Republic Public Prosecutor's Office already specifies that domestic violence cases are urgent and have to be given priority.

Article 7 par. 3 of the DV Prevention Act envisages that victims of domestic violence and victims of some other crimes may be given relevant support by other legal and natural persons and associations. Given the fact that Article 7 paragraphs 1 and 2 of this Act stipulates that support to these victims shall be provided by state authorities and institutions, in order to avoid certain problems in practice it is necessary to adopt a bylaw which would regulate the relationship between the state bodies and institutions, on the one hand, and non-governmental organizations, on the other hand.

The DV Prevention Act envisages an obligation to report domestic violence or direct threat thereof without delay (Article 13 par.1 DV Prevention Act). The requirement to report domestic violence is also envisaged in Article 22 of this Act, whereby this obligation applies to all offenses determined in this legal text. Thus, Article 22 of this Act expands the circle of crime that everyone is obliged to report. However, we may reasonably pose the question concerning the sanction for possible failure to report domestic violence without delay. To provide an answer to this question, we have to refer to Article 332 CC, which criminalizes the offense designated as failure to report a crime or a criminal offender. If we consider the essential elements of this crime through the prism of domestic violence (Article 194 CC), we find that a failure to report domestic violence cannot be subsumed under Article 332 CC because the envisaged punishment for any form of domestic violence is not a term of 30 to 40 years of imprisonment. The same analogy applies to other crimes listed in the DV Prevention Act.

We may also raise the question how appropriate it is to prescribe a failure to report domestic violence as a misdemeanor. It is clear that these provisions derogate some of the basic principle of the Criminal Code. By envisaging this solution, the legislator requires from every citizen to "snitch" and to interfere in the neighbors' lives. In practice, it will generate huge problems related to reporting criminal offenses and offenders. A "good neighbor" must always report violence, even in case where in his subjective opinion violence seems to be present whereas it objectively does not exist. The police are obliged to take the mechanisms to protect the "victim" from "the bully", even though there is no victim and no bully. Thus, a certain level of abuse of this "obligation" may occur

in practice, as citizens may report any “inappropriate behavior in the family” as a sign of violence, fearing that they will sustain some sanction for a failure to report it.

Article 26 of the DV Prevention Act prescribes that a term of imprisonment of up to 60 days shall be imposed on a person who violates an emergency measure that has been imposed or extended. A fine of 50,000 dinar to 150,000 dinars shall be imposed on the responsible person in the state and other agencies, organizations and institutions which fail to report domestic violence to the police or the public prosecutor immediately, or fail to respond to the reported offence or obstruct reporting or reaction to family violence or immediate danger stemming thereof (Article 13, par. 2 DV Prevention Act). Pursuant to the Misdemeanors Act<sup>7</sup>, the conviction for an offense referred to in Article 13 par. 1 of the DV Prevention Act may be executed before the judgment becomes final. By envisaging such a solution, the legislator made use of the most stringent “misdemeanor” repression measures that are allowed in the Misdemeanors Act. Namely, the DV Prevention Act prescribes the strictest possible penalties that may be imposed for a misdemeanor. Namely, under the Misdemeanors Act, imprisonment can be prescribed for a period ranging from one day to 60 days.<sup>8</sup> Under the law or bylaws, a fine may be imposed ranging from 5,000 to 150,000 dinars for a physical person or a responsible person. At this point, we may raise the question whether these misdemeanors actually imply real social danger, for which reason the legislator prescribed the strictest penalty.

The Domestic Violence Prevention Act uses (in Articles 14 and 15, for example) the term “possible perpetrator”, which is not common in criminal law, and as such it is not recognized in any criminal law provision. In other words, when passing the DV Prevention Act, the legislator, should have kept the already well-known criminal procedure concepts: the suspect, the accused, and the defendant. It should be noted that the notion of a “possible perpetrator” is probably equivalent to the concept of a suspect, but the legislator had to use the concept of suspects in order not to create any confusion in the legal text. At the same time, the use of term “the possible perpetrator” leads us to the conclusion that the person has not committed a criminal act of domestic violence. Article 14 of the DV Prevention Act prescribes the obligation of notifying the police officer in charge about violence or immediate danger stemming thereof, whereby there is an obligation of taking the potential offender to the appropriate police organization unit. As the term “potential offender” also relates to already committed domestic violence and the immediate danger of possibly being committed, we

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<sup>7</sup> Misdemeanors Act, Official Gazette of RS, no. 65/2013, 13/2016, 98/2016 (Constitutional Court).

<sup>8</sup> Article 37 par. 1 of the Misdemeanors Act.

can conclude that the use of this term is inadequate for another reason. In relation to the terminology used in this Act, we have to point out that the legislator should be consistent. In fact, if there is "a potential offender", then there can be "victim of the offense," but only "a possible victim of the offense".<sup>9</sup>

Article 16 of the DV Prevention Act stipulates that, when assessing risk, the responsible police officer may refer to the center for social work for opinion. When assessing risks, it is necessary to take care, among other things, whether a potential perpetrator is mentally impaired and/or abuses psychoactive substances. If the possible perpetrator is a mental patient with a medical record or a registered drug addict, this information may be found quickly by referring to competent healthcare institutions; but, there is a problem situation where such data cannot be found, in case a person has no history of mental illness or taking psychoactive substances.

Special training is envisaged for the competent state authorities in cases of domestic violence and crimes defined by the DV Prevention Act. So, under Article 28 par. 1 of this Act, the competent police officers, public prosecutors, deputy public prosecutors and judges applying this Act shall complete specialized training according to the program adopted by the Judicial Academy. The specialized training is implemented by the Judicial Academy for public prosecutors, deputy public prosecutors and judges, in cooperation with other professional institutions and organizations, while the Criminal Police Academy implements the specialized training for police officers (Article 28, par. 2 DV Protection Act).

By analyzing these provisions, we notice two problems. Namely, the first problem is the question of the expertise of the Judicial Academy scholars to devise a program for the treatment of police officers. As a matter of fact, it would be more opportune if the specialized training program were not only implemented but also designed by the scholars and professionals from the Criminal Police Academy (CPA). Therefore, we believe that this legal provision should be changed so that the training of responsible police officers is implemented according to the CPA program by the experts of this higher education institution. Another problem is reflected in the fact that, after finishing the training and being issued the certificates, police officer are not exposed to any additional or continuous training aimed at mastering special skills and obtaining relevant competences to deal with victims of these crimes.

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9 Moreover, the DV Prevention Act (in Article 4) prescribes that the Act applies to other criminal offenses, including the criminal act of "incest" (Serbian: "родоскврнуће"). There is no criminal offense with this name in our criminal law. Article 197 of the Criminal Code criminalizes the incest but uses another term (Serbian: "родоскврњење").



Article 30 of the DV Prevention Act regulates the right to free legal assistance for victims of domestic violence and victims of criminal offenses. The assistance is provided on the basis of a special law, which is embodied in the Draft Act on Free Legal Aid (hereinafter: the Draft FLA Act). Our analysis of the provisions of the Draft FLA Act indicates that there are certain requirements that must be met by each person in order to obtain free legal aid. Namely, free legal aid is conditioned by fulfilling certain conditions prescribed in Article 4 of this Act, which stipulates that the person has to be the user of the right to financial assistance or the user of the right to social assistance. Concurrently, the given person can be the user of the right to free legal aid even if he/she is not a user of the right to financial social assistance or child allowance but he/she fulfills the conditions for being the user of these rights due to the payment of legal assistance in a particular legal matter from his own income. According to the Draft FLA Act, victims of domestic violence or victims of other crimes listed in the DV Prevention Act are entitled to receive free legal aid on the basis of provisions specified in the Draft FLA Act. Yet, the main problem is that the Republic of Serbia has not yet passed a law that would regulate this right, regardless of the fact that the Constitution of Republic of Serbia was passed in 2006.<sup>10</sup>

However, the right to free legal aid can be exercised on the basis of the Advocacy Act<sup>11</sup> and the Local Self-Government Act<sup>12</sup>. Article 73 of the Advocacy Act prescribes that the Bar Association can organize free legal aid for underprivileged citizens independently or in cooperation with the local self-government unit. This legal provision does not result in the obligation to provide free legal aid to citizens, which undoubtedly makes it difficult for them to exercise their rights, particularly when it comes to vulnerable social groups. Article 20 (par. 1, point 31) of the Local Self-Government Act envisages that the municipality organizes the legal aid service to citizens. However, there is the problem with the scope of availability of free legal aid to citizens, and to the victims of the mentioned criminal offenses. There are 167 local self-government units in the Republic of Serbia, only 67 of which have a special legal aid service (Triple A for Citizens, 2013: 26). In other words, victims of domestic violence and victims of other crimes listed in the DV Prevention Act can receive legal assistance but not in all local government units, which leads to their inequality.

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10 Article 67 of the Constitution of the Republic of Serbia, Official Gazette of RS, no. 98/2006

11 The Advocacy Act, Official Gazette of RS, no. 31/2011 and 24/2012 – Constitutional Court decision

12 The Local Self-Government Act, Official Gazette of RS, no. 129/2007 and 83/2014. – other Act

According to the provisions of the DV Prevention Act, in order to provide comprehensive and effective measures for the protection and support of the victim and other members of the family in need of support, an individual plan for victim protection and support has to be drafted by the coordination and cooperation group (Article 31 par.1 DV prevention Act). The mentioned group consists of representatives of the basic public prosecutor's offices, police administrations and centers for social work from the territory for which the group is formed (Article 26 par. 1 DV Protection Act). The problem is that the prosecutor's offices in Belgrade, Nis, Novi Sad and Kragujevac have so-called Service for providing assistance to injured persons and witnesses in criminal proceedings and, in most cases, the competence of this service coincides with the competence of the coordination and cooperation group (Dimovski, Papović, 2017: 146). However, the lack of these services is reflected in the fact that it is a project financed by the Organization for Security and Cooperation in Europe (OSCE) in Serbia, and that such services do not exist in all prosecutor's offices in the Republic of Serbia. Unlike the coordination and cooperation group, the scope of the Services' competences is not limited to the criminal offense of domestic violence and other criminal offenses determined by the DV Prevention Act but it includes all crimes. Concurrently, the Services have a much wider scope of competences because they provide assistance not only to injured persons and family witnesses of criminal offenses but also to all witnesses. Namely, whereas the individual plan for protection and support of the victim by the co-ordination and co-operation group includes the victim as well as other members of the family in need of support (Article 31 par.1 DV Protection Act), the Assistance Service provides expert assistance not only to family members as witnesses but also to other persons who are witnesses of the commission of criminal offenses, whose testimonies are essential for determining the factual grounds of the particular criminal matter. The DV Prevention Act prescribes that the protection measures must provide the safety of the victim, stop the violence, prevent its reoccurrence and protect the victim's rights. It also stipulates that the support measures should enable the victim to get psychosocial and other support for the purpose of recovery, empowerment and independence.<sup>13</sup>

Although the legal solution seems to be without a flaw as it provides support for the victims in the right way, there will be huge problems in practice. Although it "sounds good", there is an issue who will finance the protection measures and what these protection measures include. Moreover, will this support include an economic/financial assistance to the victim of a crime? The existing legal solution may give rise to a paradoxical situation. In this regard, we will only pose one question: if someone has committed "economic violence against a family

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13 Art. 31 par. 3 of the Domestic Violence Prevention Act

member”, which is not prescribed in the DV Prevention Act even though Article 3 par. 3 includes the term economic violence, what would the protection of the victim imply?

The system of supervision and control over persons who are “possible perpetrators of the crime” seems to be very strict. Namely, there are several records which are kept on the “possible” criminal offenders, who remain recorded for a certain period of time. In addition, records are kept on the “victims” as well. Namely, the competent police department, the competent basic court, the competent basic public prosecutor’s office and the competent center for social work keep records on both “the perpetrator and the victim” to which the Act applies. Under this Act, the data are kept in the police records and in the Central Register of Records for ten years, after which they are deleted.<sup>14</sup> Thus, the records on “a possible perpetrator” will be kept for ten years even though he was never indicted or the court did not find that he was guilty of any crime. Such a solution is clearly unacceptable. Similarly, going back to the “good neighbor” who may report the family violence which has never existed, the reported person will thus remain registered in the police files for ten years. Any lawyer may come to the conclusion that this type of registration is more stringent than the registration in criminal records because some perpetrators of criminal offenses are deleted from criminal records much more easily than the “possible perpetrators” of domestic violence from the files prescribed in the DV Prevention Act.<sup>15</sup>

Article 33 of the DV Prevention Act refers to the right of access to records of data on crimes of domestic violence. Thus, for example, the deputy public prosecutor appointed to act under the law has the right to access all the data that exist in the Central Register of Records while other authorities, such as the competent police officers, the competent courts and competent centers for social work, have may access only the part of data related to their field of work. The study of the phenomenon of domestic violence and the reactions of state authorities call for providing the right of access to all information to scholars as well, upon obtaining prior permission of the competent state authority (which might be the public prosecutor’s office).

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14 See Art. 32 DV Prevention Act

15 According to Fuko, «(...) in the second half of the 18th century, the police files began to be introduced even for those who only came into contact with the police or for suspected offenders. About the 1760s, I think, police officers were tasked to make reports on the suspicious persons in two copies, one of which was kept by the police, thus enabling the control of the individual’s whereabouts – provided that the report was properly kept, whereas the second copy was sent to Paris, to the ministry in charge of collecting and forwarding reports to other areas within the jurisdiction of other police lieutenants so that the person could be quickly located in case of changing his place of residence.» Foucault, M. (2005). *Psychiatric Power - Lectures at College de France 1973-1974*, Novi Sad, pp. 75-76.

There is one category of persons to whom the DV Prevention Act does not apply. As stipulated in Article 1 of this Act, it does not apply to minors who commit domestic violence. On the one hand, this solution may seem to be justified arguments, primarily given the fact that it is rather problematic to pronounce an emergency measure to a minor as it gives rise to numerous issues: where he will stay during the emergency measure, to what extent it would jeopardize his schooling, and what kind of negative repercussions it would have on the juvenile. On the other hand, the perpetration of criminal offenses by minors is not uncommon today, which includes criminal acts of domestic violence. Hence, if this legislative act was intended to prevent the commission of domestic violence in all cases, the legislator had to envisage the mechanisms for the prevention of violence to be committed by minors. As it is, immediate action is taken against parents who commit acts of violence against their children but it seems that a minor may commit violence against his parents because this Act does not apply to minors.<sup>16</sup>

The DV Prevention Act does not regulate the manner of execution of urgent measures. Namely, under this Act, the competent police officer is obliged to deliver an order, immediately after notifying the "possible perpetrator", to the basic public prosecutor's office in the territory of the victim's place of domicile or residence, as well as to the competent social welfare center, the coordination and cooperation group, and the victim of violence is informed in writing about the type of emergency measures that have been imposed on the offender. Therefore, the competent authorities and the victim are informed about the imposed emergency measure, but the Act does not specify the authority in charge of its execution. We believe that such a solution will cause numerous problems related to the execution of this measure in practice. The first problem is how to prove that the person who was imposed the measure has breached the court order. However, a more serious problem is the objective impossibility to execute urgent measures, for example, if the victim and the person who has been imposed the measure are employed in the same company, or if the victim and the "potential" perpetrator live in the same building, or if they use the same city transport to go to work, etc.<sup>17</sup>

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16 This solution is another indicator of the inobservance of the basic legal principle stipulating that "the scope of rights and obligations determines the degree of responsibility" Therefore, parents's rights in the field of children upbringing are increasingly reduced, while they are concurrently imposed additional obligations. See: Branislav Ristivojević, B., Milić, I. (2016). Responsibility of Parents for Misdemeanors Made by Their Descendants, (Year LXIV) Belgrade: Annals of the Law Faculty, pp. 154-174.

17 Here, we may raise an issue of the relationship between the DV Prevention Act and the Act on the Execution of Non-custodial Sanctions and Measures, Official Gazette of RS, no. 55/2014.

The DV Prevention Act should clearly prescribe that the competent police officer is obliged to warn the person whom has been imposed the emergency measure about the consequences of any violation of this measures. Therefore, it is essential that the person is aware of the consequences he/she will sustain if he/she acts contrary to the issued order.

We may wonder what will happen if the “victim” induces or provokes the person who has been awarded the emergency measure to violate the measure. The legislator seems to have come from the assumption that such a possibility is impossible. In practice, such situations are likely to occur, in which case it would be almost impossible for the person who has been imposed such a measure to prove that the victim has led him to breach the imposed measure. Even if it is proven as a matter of fact, it remains to be seen whether there is a sanction for such an act committed by the victim. As the legislator has not regulated this issue, such a sanction does not exist.<sup>18</sup>

The relations between family members are dynamic, and so are the “criminal offense” in the family, in contrast to other offenses that are not such. In this regard, perhaps family members might be able to solve their own problems in the family, by themselves, which would certainly be the best solution. On the other hand, since the entry into force of this Act, since the urgent measures are aroused, family members will not be able to reconcile themselves and in this way solve their family problems themselves because they will not be able to communicate.

### 3. Conclusion

Each law shows its good and bad side only after being implemented. Immediately after the application of some laws, we may observe all of the shortcomings that “inhibit” their effective implementation. When it comes to the Domestic Violence Prevention Act, we have pointed out to the significant shortcomings of this Act

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18 At this point, we would like to point to the legal solution of the previously applicable Misdemeanors Act which, in relation to the protective measure “Prohibition of access to the injured person, objects or place of execution of the violation”, prescribed: “The convicted offender who has been imposed a restraining order (banning access to the injured person/victim) by a final judicial decision, but who has breached the order during the period of validity of this measure by approaching the victim or trespassing the premises or the place where the offense was committed, or who makes contact with the injured person in an unlawful manner or in an unauthorized time, shall be punished by a fine amounting to 30,000.00 dinars or imprisonment of up to 30 days. The punishment referred to in paragraph 1 of this Article shall be imposed on the *injured person* who has proposed the adoption of such measures in case his/her actions induce the convicted person to violate the restraining order (prohibition of access)” (Article 55 of the Misdemeanors Act, Official Gazette of RS, no. 101/2005, 116/2008, 111/2009). However, subsequent amendments and supplements to the Misdemeanors Act have eliminated the possibility of punishing the injured person/victim .

which were apparent even before its implementation. Yet, the adoption of this Act has been highly commended, primarily by the general public, which seems to believe that this Act will solve all the problems related to domestic violence. Lately, in our country, the legislator has frequently endeavored and managed to prescribe special measures for certain criminal offenses, aimed at "preventing the perpetrator from continuing to commit a criminal offense". Thus, it is considered that this Act will prevent the perpetrator from committing crimes related to domestic violence, as well as other offenses prescribed in this Act. However, there seems to be a significant disregard of the criminogenic factors, which call for specific activities aimed at reducing the actual causes of violence and, in case violence occurs, it is necessary to take other relevant measures. Once this Act becomes effective, the crime rate regarding the criminal offences envisaged in this Act is most likely to increase, as well as the overall number of divorces and "disrupted" families. Paradoxically, these statistical data may also be presented to the general public as a good side of this Act.

Family relations are a dynamic category, and so is "violence", as compared to other crimes. Under the Domestic Violence Prevention Act, if urgent action is taken, the possibility of "reconciliation" between "the alleged perpetrator and the alleged victim of violence" is prevented. Thus, although the family members may be willing to reconcile and the "perpetrator" shows remorse and wishes to reconcile with the "victim", this is actually impossible because there is a ban on communication and access. In effect, if the "perpetrator" tries to be reconcile with "victim", the legislator has prescribed the toughest punishment that may be imposed for a misdemeanor. Therefore, are we to expect from now on that the family relations will be regulated by the police, the prosecution, the courts and lawyer?

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## **НОРМАТИВНЕ ПРЕПРЕКЕ ИМПЛЕМЕНТАЦИЈЕ ЗАКОНА О СПРЕЧАВАЊУ НАСИЉА У ПОРОДИЦИ**

### **Резиме**

*Једна од последица глобализације у савременом казненом праву јесте и све већа заштита породице и њених чланова. У појединим државама одавно је измењено казнено законодавство на начин што се прописују кривична дела из области насиља у породици, као и мере којима се „насилник“, што је пре могуће, удаљава од осталих чланова породице. Тако се и у нашој држави постепено интервенисало у овој области, пре свега прописивањем кривичног дела насиља у породици, али и увођењем појединих механизма којима се онемогућава комуникација и састајање између „жртве и насилника“. Као „крајњи резултат“ те интервенције у нашој држави је донет нови Закон о спречавању насиља у породици. Иако се са великим нестрпљењем чекало на доношење овог Закона, његова примена ће бити доста „отежана“, јер се приликом његовог доношења није водило рачуна о свим појединоцима важним за његову примену.*

**Кључне речи:** *насиље у породици, превенција, Закон о спречавању насиља у породици.*



# Civil Law Session

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## **PROTECTION OF THE RIGHT TO LIFE: IN THE CONTEXT OF DOMESTIC VIOLENCE AND POSITIVE LAW OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION AND IN THE PRACTICE OF EUROPEAN COURT OF HUMAN RIGHTS**

**Abstract:** *Right to life is an inalienable attribute of every human being and the basic human right protected by a set of international, regional and national acts. The significance of this right is fully acknowledged in the European Convention on Human Rights and Fundamental Freedoms (ECHR), where it is designated as the first and the only right in the corpus of recognized human rights that entails the positive law obligation of states to protect it on the basis of this Convention. Its importance is further underscored in the practice of the European Court of Human Rights (ECtHR), which has taken the stand that all other Convention-based rights are directly preconditioned by the recognition and effective protection of the right to life.*

*The positive law obligations of states regarding the protection of the right to life are related to preventing deliberate and unlawful killing, as well as undertaking appropriate measures for the protection of the lives of individuals under its jurisdiction. According to the ECtHR practice, the violation of the right to life by individuals in the sphere of private law generates the need for an active response of the state. Given the fact that domestic violence is a form of violation of the right to life, the state has an obligation to act in a preventive way, to adopt and implement substantive and procedural regulations on this matter. While “impossible and unreasonable burden” should not be imposed on state, the Court assesses in concreto whether the state has fulfilled the positive law obligations. The authorities may not be exonerated from liability for not fulfilling these obligations if they knew or*

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*must have known that there was a real and immediate risk for a person's life, but they failed to take all necessary measures within the scope of their competences that could have reasonably contributed to eliminating this risk.*

**Keywords:** *right to life, domestic violence, positive law obligations, ECHR, ECtHR practice.*

## 1. Introduction

The right to life is guaranteed by all international and regional instruments aimed at ensuring the protection of human rights. One of them is the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention or the ECHR),<sup>1</sup> which provides for the legal protection of this right in Article 2 ECHR. As stated in the jurisdiction of the European Court of Human Rights (hereinafter: the Court or the ECtHR), in the case *Pretty v the UK*,<sup>2</sup> the "most basic" right is in question, whose protection enables the exercise of all other freedoms and rights from the Convention, and without it all other rights are but an illusion (Korff, 2006:6). As a pre-condition for exercising all other substantial rights, it is non-derogable (Batistić Kos, 2009:148);<sup>3</sup> it is an inalienable attribute of the human being, with the highest position in the hierarchy of human rights,<sup>4</sup> and represents one of the basic values of democratic societies.<sup>5</sup>

Article 2 par. 1 ECHR primarily provides the negative obligations<sup>6</sup> of state authorities to abstain from intentionally depriving a person of life, and stipulates

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1 See: the Act on the ratification of the European Convention changed in accordance with the Protocols no. 4, 6, 7, 11, 12 and 13 with the Convention, the National Gazette of SCG - *International agreements*, 9/03 и 5/05

2 Case *Pretty v the UK*, 2346/02 [2002] §37 [Electronic version]. Retrieved 15 May 2017 from <http://hudoc.echr.coe.int/eng>. The decisions used in this paper have been taken from this site, unless specified otherwise.

3 Art. 15. par. 1,2 ECHR allows for divergence «in the case of war or other public danger which threatens the survival of the nation». The ECtHR does not interpret the term "war" or "the legal war dealings", but in the case *Lawless v Ireland*, 332/57 [1961] § 28, the Court was of the opinion that it implies the "extraordinary situation which threatens the survival of the nation", "a special situation of crisis or the danger which refers to all the citizens and presents a threat to the life of the community of which the state is made of".

4 Case *Streletz, Kessler and Krenz v Germany*, 34044/96 [2001] § 94

5 Case *Makaratzis v Greece*, 50385/99 [2004] § 56; Case *Ahmet Özkan and Others v Turkey*, 21689/93 [2004] § 296

6 Taking into consideration the topic of the paper, the negative obligations will not be analyzed further.

immediate responsibility of the state in case of injury. The same provision establishes the positive obligation of the state to protect the right to life, which is not a common conventional manner of regulation (Batistić Kos, 2009:148; Khrystova, 2014:111). The European Commission for Human Rights (hereinafter: the ECFHR) considers the states to have the obligation "...not only to abstain from the deliberate and illegal taking of life but also to take adequate measures for the protection of life of every individual under their jurisdiction".<sup>7</sup> The ECFHR precisely defines that they must be "interpreted so that they do not impose the impossible or disproportional burdens on the authorities"; moreover, in order to establish the violation of these obligations, "the Court must be persuaded that the authorities knew or must have known, at the time of its existence, for the real and immediate risk for life by a particular individual/individuals from the criminal acts by a third party and that they neglected the opportunity to impose the adequate measures in line with their authorities based on which the impediment of the risk could have been expected".<sup>8</sup>

Domestic violence is a universal phenomenon, an important global problem, the social pathology and violation of human rights (Lukić, 2003; Mršević, 2002; DeMaris, Benson et al., 2003:652-667; Bornistein, 2006:595-606). As the victims of domestic violence are most frequently women, it is made possible by "gender discrimination and the lack of social responsibility for the violence against those who do not have the power nor capability to resist it" (Petrušić, 2006:14, 15), which (too) often leads to bodily injuries and murders<sup>9</sup> and ultimately points to the responsibility of the state. The Convention does not clearly mention it but, in the recent ECtHR practice, the phenomenon has been examined in the context of positive obligations concerning the protection against violence inflicted on other individuals, and the Court has established the connection between the

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7 ECFHR in the Case of *X v UK*, 12.05.1978, according to Bastić Kos, 2009:148.

8 Cases: *L.C.B. v the UK* 14/1997/798/1001 [1998] § 36, *Osman v the UK* 87/1997/871/1083 [1998] §§ 115 and 116.

9 In the Republic of Serbia in the past ten years 328 women were killed, and in 2015 for 72 hours 7 women were killed by a partner or a husband. Over 1000 women leave their home due to violence annually. [Electronic version]. Retrieved 25, June 2017 from <http://mondo.rs/a959248/Magazin/Porodica/Nasilje-nad-zenama-nasilje-u-porodici.html>. During ten months in 2016 over 4500 criminal acts of domestic violence were registered or 15,8% more than in the same period in 2015. Every second woman in serbia has a certain experience of domestic violence, one out of three in Europe, and almost half of the murders are done by an intimate pratner or family member. [Electronic version]. Retrieved 25, June 2017, from <http://www.blic.rs/>. See also *The Specia Report of the Ombudsman for citiyens'rights Belgarde, June 2011*. [Electronic version]. Retrieved 25, June 2017 from <http://www.zastitnik.rs/index.php/lang-sr/izvestaji/posebnii-izvestaji/2106-2012-01-12-13-43-33>).

violation of the right to life and the violation of other Convention rights.<sup>10</sup> Such approach is determined by the general obligation of the states to take the necessary measures for the protection of life of all individuals under their jurisdiction and adopt the approach/attitude that domestic violence is a violation of human rights (Tiroch, 2010; Hawkins, Humes, 2002: 231-257; Thomas, Beasley, 1993: 36-62; McQuigg, 2017; Bettinger-Lopez, 2008). The exclusively private character of family relations does not *derogate* the obligations of the states. Thus, in the CEDAW General Recommendation No. 19<sup>11</sup> of the Convention on the Elimination of all forms of Discrimination against Women, the UN Committee for the Elimination of all forms of Discrimination against Women<sup>12</sup> explicitly determines that the aim of the Convention is to eliminate all forms of violence against women, and that the complete implementation demands from the states the fulfillment of positive obligations. The identical approach is also shared by the Beijing Declaration, i.e. the Action Platform<sup>13</sup> and the Istanbul Convention.<sup>14</sup>

A special importance in fulfilling the positive obligations is given to the "*due diligence*" standard, formulated by the UN Declaration on the Elimination of Violence against Women<sup>15</sup>, as well as by the Inter-American Convention,<sup>16</sup> on the basis of which it has been publicly recognized in the international practice in a well-known case *Velasquez-Rodriguez v Honduras*.<sup>17</sup> In the field of violence

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10 Remarks no. 24, 25, 26. and 27.

11 CEDAW *General Recommendation No. 19: Violence against women*, [Electronic version]. Retrieved 30, May 2017, from [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_3731\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf)

12 The Act on the ratification of the Convention on eliminating all forms of women discrimination, National Gazette SFRY- International agreements, 11/81.

13 The Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, 4(D). [Electronic version]. Retrieved 30 June 2017, from [http://www.e-jednakost.org.rs/kurs/kurs/download/pekinska\\_deklaracija.pdf](http://www.e-jednakost.org.rs/kurs/kurs/download/pekinska_deklaracija.pdf)

14 Council of Europe, *Convention on preventing and combating violence against women and domestic violence*. art. 3(a). [Electronic version]. Retrieved 17 May 2017, from <https://rm.coe.int/168046031c>. In Serbia, it came into force on 1<sup>st</sup> September 2014.

15 General Assembly UN, *Declaration on the Elimination of Violence against Women*, 1993, A/RES/48/104. Art. 4c. [Electronic version]. Retrieved 15 June 2017, from <http://www.un.org/documents/ga/res/48/a48r104.htm>

16 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Para"*, [Electronic version]. Retrieved 10 June 2017, from <http://www.oas.org/juridico/english/treaties/a-61.html>

17 Case 7920, *Velasquez-Rodriguez v Honduras* [1988], Retrieved 15 June 2017, from [http://hrlibrary.umn.edu/iachr/b\\_11\\_12d.htm](http://hrlibrary.umn.edu/iachr/b_11_12d.htm)

against women, this standard is promoted in the case *Maria da Penha Maia Fernandes v Brasil*.<sup>18</sup>

## 2. The positive obligations by the states

The doctrine of positive obligations to prevent and punish the acts of violence committed by private individuals has been developed by the ECtHR in its more recent practice, but the Court has not formulated a unique and authoritative definition of these obligations (Khrystova, 2014: 110). Although in 1998, in the case of *Osman v UK* (§115), the Court assumed the position about the obligation of states to take the necessary precaution measures for the protection against violence by an individual, domestic violence has been intensively discussed by the ECtHR for the past ten years or so. The violation of the right to live has also been discussed in the context of the prohibition of torture and inhuman and degrading treatment or punishment (Art. 3 ECHR),<sup>19</sup> the prohibition of slavery and forced labour (Art. 4 ECHR), the right to a fair trial (Art. 6 ECHR),<sup>20</sup> the right to respect for family life (Art. 8 ECHR),<sup>21</sup> the right to an effective legal remedy (Art. 13 ECHR), and the right to non-discrimination (Art. 14 ECHR).<sup>22</sup>

Thus, in the case *Kontrová v Slovakia*,<sup>23</sup> in the circumstances when the applicant's husband had been performing acts of psychological violence against her, which the police was notified about, the ECtHR concludes that the state failed to take adequate protection measures, which lead to the applicant's murder. Formally, the doctrine of positive obligations is extended to the acts of domestic violence by the standpoint that: "... clearly defined circumstances to an extent, under Art. 2, can also include the positive obligation of the authorities to take the preventive operational measures for the protection of a private individual whose life is threatened by the punishable dealings of another private individual..."; thus, it is

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18 Case 12.052, *Maria da Penha Maia Fernandes v Brasil* [2001], Retrieved 10 July 2017, from <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm>

19 Cases: *E.S. and Others v Slovakia* 8227/04 [2009], *Rumor v Italy* 72964/10 [2014], *Eremia and Others v R. Of Moldova* 3564/11 [2013].

20 Case *Wasiewska v Poland* 9873/11 [2014]

21 Case *Y.C. v the UK* 4547/10 [2012]

22 Cases: *Opuz v Turkey* 3340/02 [2009], *A. v Croatia* 55164/08 [2013]. Видети McQuigg, R.J.A. *The European Court of Human Rights and Domestic Violence: Valiulienė v Lithuania*, IJHR, 2014, 18(7-8), p. 756-773. [Electronic version]. Retrieved 15 May 2017, from [http://pure.qub.ac.uk/portal/files/17206480/european\\_court.pdf](http://pure.qub.ac.uk/portal/files/17206480/european_court.pdf)

A review of decisions of ECHR can be seen in ECHR, *Factsheet - Domestic Violence*, March 2017. [Electronic version]. Retrieved 15 May 2017, from [http://www.echr.coe.int/Documents/FS\\_Domestic\\_violence\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf).

23 Case *Kontrová v Slovakia* 7510/04 [2006]

enough that "the applicant proves that the authorities have not undertaken everything which could be expected from them realistically in order to banish real and immediate dangers to life about which they knew or should have known".<sup>24</sup>

In the case *Bevacqua and S. v Bulgaria*,<sup>25</sup> the ECtHR has, discussing the violation of Article 8, taken the position that the state has failed to ensure the adequate protection of a woman from the violent husband in the pending divorce and children custody case. The obligation of the state is "to adapt and apply the laws which enable the protection from the acts of violence committed by private individuals"; it points out the obligation of the protection of especially vulnerable categories, and the state is responsible for the negligence of the local authorities towards the applicant's complaints (§§ 64, 65,84).

The different character of positive obligations is evident in the abovementioned cases, showing that the theory recognizes three aspects: 1) establishing the legal framework of the protection of the right to life; 2) establishing adequate mechanism for the implementation of the legal framework, including the efficient investigation, and, 3) the preventive measures in certain situations (Batistić Kos, 2009:149). The legal and practical, material and procedural obligations are also discussed (Akandji-Kombe, 2007: 21, 22; Karlsson Norman, Kaf, 2015:15-17). Thus, establishing the legal framework means that there is the obligation of the state to protect it explicitly by the law,<sup>26</sup> i.e. to adopt regulations which are "available, reasonably precise and predictable in application" (Batistić Kos, 2009:150) and, above all, the effective criminal-law regulations. In this sense we must mention the judgments in the case *Tomašić and Others v Croatia* (§§ 55-57) and *A. v Croatia* (§§ 61-80), and the attitude that Croatia does not have an effective legal framework for the protection against domestic violence, especially for the implementation of the protection measures towards the perpetrators (Radić; Radina, 2014:740). It is essential to adopt the laws by which the acts concerning the taking of life are defined as criminal offences, which are to be pursued *ex officio* and punished with adequate sanctions that have a preventive function.<sup>27</sup> Bearing in mind that the national legislations can decide on offence and/or criminal prosecution, the ECtHR points out the need of strict differentiation in order to avoid the double incrimination of the same act and the breach of the

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24 Case *Osman v UK*, §§115-116, and the attitude was taken also from judgements in cases *Kontrová v Slovakia*, *Tomašić and Others v Croatia*, 46598/06 [2009] § 49 and *Opuz v Turkey*, § 128, and *Civek and Others v Turkey*, 55354/11 [2016]

25 *Bevacqua and S. v Bulgaria*, 71127/01 [2008]

26 Domestic violence is regulated in Serbia by The Family Law, *National Gazette RS*, 18/05, 72/11 and 6/15 and The Law on preventing domestic violence, *National Gazette RS*, 94/16

27 Case *Nachova and Others v Bulgaria*, 43577/98 and 43579/98 [2005], §§150, 160.



principle *ne bis in idem* from Art. 4. Protocol no. 7.<sup>28</sup> (Radić; Radina, 2014:745). In the case *Maresti v Croatia*,<sup>29</sup> the attitude has been taken that “legal marking of the act cannot be the only measure of relevance” for the application of this principle; by the application of the so-called “Engel-criterion”,<sup>30</sup> “the same act” exists if “it emanates from the same facts or facts which are essentially the same” (*Maresti v Croatia*, §§ 62-82). It is necessary to establish the effective governmental system and educated and trained staff in all the organizations for crime prevention and discovery of the perpetrators, efficient investigation and sanctions (Grdinić, 2006:1105). The established legal framework must be applied without any tolerance or discrimination (Ponjavić, 2012:162).

In the case *Tomašić and Others v Croatia* (§§ 62-65), the ECtHR repeats the position that the obligation of life protection based on Art. 2 “instructs the existence of a certain form of effective organization in charge of the investigation when a death of the individual has taken place as a consequence of application of violence by the state representatives or private individuals. The basic aim of the investigation is to provide the effective implementation of the national law by which the right to live is protected. The authorities must take reasonable measures which are available in order to obtain the evidence... Any oversight in the investigation which calls into question a possibility to establish the cause of death or the identification of the responsible parties means the risk of violating these standards. No matter which treatment method the authorities decide to take, they must act according to their initiative as soon as they find out about the concrete incident” (§§ 62-65).<sup>31</sup> The investigation must be “serious, effective and thorough”, “with the aim of shedding the light on all the relevant circumstances concerning the death of an individual, discovering the perpetrator or his bringing to justice” and “if it is by any means possible, start the legal pursuit against the perpetrator” (Grdinić, 2006:1113). The positive obligations of the court trial are the criminal prosecution *ex officio*, the independence of the prosecution, the publicity of investigation, and the reasonable deadline for the implementation (Grdinić, 2006: 1114-1117).

In the context of domestic violence, the ECtHR practice points out the positive obligations aimed at prevention. The measures must be prescribed and effectively carried out, subject to fulfilling two conditions: the predictability of

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28 Art. 4, *Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. [Electronic version]. Retrieved 17, May 2017, from <https://rm.coe.int/168007a082>

29 Case *Maresti v Croatia*, 55759/07 [2009] § 56, which is referred to also Radić; Radina, 2014:745

30 Case *Engel and Others v Netherlands*, 5100/71, 5191/71; 5102/71; 5354/72; 5370/72 [1976]

31 Cases *Cann and Others v UK*, 18984/91 [1995] § 161; *Paul and Audrey Edwards v UK*, 46477/99 [2002] § 69 и *Ilhan v Turkey*, 22277/93 [2000] § 63 is also quoted.

events and the reasonability of measures, bearing in mind that it is not relevant for the court if the oversight is a matter of intention or negligence (Batistić Kos, 2009:155). As Article 2 ECHR does not envisage the absolute right of the applicant to initiate criminal prosecution against third parties, the state complies with the positive obligations by establishing the mechanism of civil-law protection (independent or cumulative with criminal-law protection), provided that the violation of right to life is not a consequence of intention (*Tomašić and Others v Croatia*, § 64). The obligation of preventive action is a positive obligation "which surpasses the borders of the obligations of the effective legal protection of life" (Batistić Kos, 2009:156). The police must carry out the legal "control and crime prevention, in the way that completely respects the principles of efficiency and thoroughness" but legal boundaries must be set by operative and preventive activities: investigation activities as well as bringing the perpetrators to justice (Grdinić, 2006:1108).<sup>32</sup>

Life endangerment is also a necessary pre-condition in taking operational prevention measures but, in assessing the responsibility the state, the common ECtHR practice is to take into consideration a number of "difficulties connected with keep peace and order in modern societies", as well as "unpredictability of human behavior and that operational decisions must be made in accordance with the priorities and existing resources" (*Tomašić and Others v Croatia*, § 50; *Osman v UK*, § 116). Thus, the risk must be real and immediate, and the Court must be convinced that there is a relevant moment in the event development in which the authorities knew or should have known about the existence of such a risk. In the case *Tomašić and Others v Croatia* (§ 64), the ECtHR reminds about its position that the state can have an additional obligation to examine the responsibility of civil servants involved in a particular case.

The failure to undertake positive obligations implies the responsibility of the state. However, as compared to the immediate responsibility of the state agents for violating the right to life, a private individual may be held liable only for the oversight to take the necessary and reasonable measures which would prevent the violation of rights (Grdinić, 2006:1106). It is not possible to name all the positive obligations, but they are discussed in greater detail in a number of reports of the special women-*repporteurs* to the UN about the violence against women; the most prominent among these reports is the *Yakin Ertürk Report*<sup>33</sup>, which indicates to the most important positive obligations. In addition to the general

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<sup>32</sup> The author refers to the decisions in cases *Osman v UK*, §§ 115 and 116, and *Paul and Audrey Edwards v UK*, § 54

<sup>33</sup> UN Commission on Human Rights, *Report of the Special Repporter on violence against women, its causes and consequences - "The Due Diligence Standard as a Tool for the Elimination of Violence Against Women"*, (Special Repporteur Yakin Ertürk), further: "Ertürk Report",

obligations, i.e. the measures in the field of prevention, protection, punishment and indemnity, this Report states other special measures and also insists on fulfilling the standard of “*due diligence*” in the implementation, especially those of the preventive nature.<sup>34</sup>

### 3. The “*due diligence*” standard

Article 4 of the UN *Declaration on the Elimination of all forms of Discrimination against Women* formulates the standpoint that the states should take adequate measures without delay and “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”.

As a binding document, the *Convention on the Elimination of all forms of Discrimination against Women* envisages the responsibility of states to control with due diligence the activities aimed at counteracting violence against women, and the CEDAW General Recommendation No. 19 envisages the responsibility of states, under the international law and relevant human rights conventions, if they fail to act with due diligence to prevent violations of rights or to investigate

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[Electronic version]. Retrieved 15 June 2017, from <http://www.refworld.org/pdfid/45377afb0.pdf>

34 *General prevention measures* are: the adoption of special legal solutions by which the acts of private violence are criminally sanctioned, and the provision of legal means including the restraining or eliminating order; development of campaigns, for example of “the zero tolerance” or national days; special training for all the responsible parties; adopting national action plans with the aim of coordinating the activities of special informers (par. 38-46, 78-81). *General measures* refer to the adoption of specialized services for victims: SOS lines, advisory centers, financial aid and similar (par. 49, 82, 83). In order to punish the perpetrators, the adaptation of the law is necessary (introduction of new criminal acts and specialized investigation and prosecution units), as well as the extension of the capacities and jurisdictions of all bodies in charge, the implementation of the programs for tracking the time of the execution of acts of violence, ensuring the legal information to the victims and encouraging them to use their rights ( par. 35, 53, 54). In the area of indemnification of victims, it is noted that it is one of the least developed areas within the standard of due diligence, and the general methods for the compensation of a victim in the civil trial or from the victims’ fund are envisaged. For more information on this issue, see: UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Rights to Development”* (Rashide Manjoo, Special Rapporteur), A/HRC/14/22, 10 June 2015, par. 12-81, Retrieved 10 July 2017, from <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22.pdf>. The indemnification of the victim must be effected so as to provide the position in which the victim was before the violence took place, provide the rehabilitation of the victim through medical, psychological, legal and social services as well as the employment measures and satisfaction, such as are public apology, commemoration of victims and similar.

and punish the perpetrators of such acts of violence, and if they fail to provide compensation to the victims.

The application of the *due diligence* standard was also underscored in the Inter-American Convention and the first Court ruling in the case *Velasquez Rodriguez v Honduras*, as well as in the reports of special women-*repporteurs* to the UN about violence against women.<sup>35</sup> The report from the special woman-*repporteur* *Yakin Ertürk*<sup>36</sup> established this standard as a permanent standard (a unit of measure, "*measuring stick*", Khrystova, 2014:119) for determining if the states fulfill their obligations in combating violence against women and as a means of eliminating such violence (Branković, 2013:51). This standard has to be accepted through the reform of the national legislative framework, in the area of access to justice and organization of special services; moreover, the envisaged legislative framework on preventing and responding to violence against women must be implemented "in good faith" ("*bona fide*"). The practice shows that the application of this standard before the making of *Ertürk Report* was limited to the response of the state and that the obligation to act preventively was neglected (Branković, 2013:51; *Ertürk Report*, 2006; par. 15). Thus, the Report underscores the necessity to adopt special protection measures and envisage criminal offences which articulate new types of behavior, to establish special units of police, and to enlarge the capacities and jurisdiction of the police, investigators and prosecutors (*Ertürk Report*, 2006; par. 50, 82).

The obligation to act in compliance with this standard within the European framework was introduced by the Istanbul Convention,<sup>37</sup> which specifies that "State authorities, officials, agents, institutions and other actors acting on behalf of the State... shall exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors". The concept of due diligence and the states' full commitment to these goals is quite straightforward but its application is "very complex and entails that the relevant court institutions should analyze in detail the circumstances in which the violation of the right of the individual

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35 For example, UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, "Violence against women in the family"* (Radhika Coomaraswamy), E/CN.4/1999/68/ 10 March 1999., par. 22, Retrieved 1 June 2017, from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/103/26/PDF/G9910326.pdf?>

36 UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, "The Due Diligence Standard as a Tool for the Elimination of Violence Against Women"*, (Special Rapporteur Yakin Ertürk), par. 19-55, further: "*Ertürk Report*", [Electronic version]. Retrieved 15 June 2017, from <http://www.refworld.org/pdfid/45377afb0.pdf>

37 *CoE Convention on preventing and combating violence against women and domestic violence*. art. 3(a). [Electronic version]. Retrieved 17 May 2017, from <https://rm.coe.int/168046031c>.

(male or female) took place, examine the existing evidence and establish if the right has been violated, as well as analyze in detail what the state institutions i.e. the representatives of state authorities have or have not done in that particular case” (Branković, 2013:38).

Although it refers to the legislative activity, the introduction of adequate procedures and all other areas of the obligatory actions by the state, its application is especially important in the area of preventing domestic violence and protecting the potential victims from the possible acts of domestic violence. The violation of standards entails providing indisputable proof that the authorities have not taken adequate actions, whereas they could and should have taken action to prevent any acts of violence, and in case the prevention was not possible, that the authorities could have instigated the investigation which is adequate and defined by the law, but they have not done so or have not taken all the possible and available measures in particular circumstances to identify and duly punish the perpetrator and adequately indemnify the victim (Branković, 2013:38). The responsibility of the state is the lack of action, which implies the obligation of means (the intention of achieving the goal), and not of the obligation of result (achieving the particular goal) (Khrystova, 2014:120).

Special reports point to the existence of serious problems in the practical application of the *due diligence* standard: there is a lack of serious analyses on the effects of the newly adopted; protection measures are most often taken by the non-governmental sector which is only assisted by the state; the application of the protection orders shows a lack of due diligence; the protection of the victim is, as a rule, short-term (in urgent and acute situations), and there is a lack of long-term measures for avoiding re-victimization; the practice is that the police and courts do not take serious investigation; the common trend is “to solve a conflict”, and not to punish the perpetrators; the punishments are inadequate and largely similar (Branković, 2013:52-55).

The “*due diligence*” standard has been continuously developing through the Court practice and the practical aspect of state obligations stemming from this standard is thus being formed (Hasselbacher, 2010:200). It is helpful in the quantification of the fulfillment of the obligation to respect human rights by all the states (Meyersfeld, 2016:260), but the specific circumstances in different states, the nature of the systematic “intimate” violence,<sup>38</sup> and the responsibility of states for such violence vary from one case to the other. A huge number of relevant factors in every case determine the adequate minimum which is necessary for

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38 The mentioned author deals with the “systematic” violence in intimate relationships, but it can be said that the characteristic of the domestic violence is that it takes place in a longer period of time, i.e. bears the sign of “systematic”.

the authorities to react with due diligence; the most important indicators on the basis of which it is possible to establish the control of its application are: the nature of the violated right, the practical resources and the state's capacities to react, and the repetition of the over (Meyersfeld, 2016:260, 261).

#### **4. The positive obligations and the standard "due diligence" in the ECtHR cases on domestic violence**

In respective decisions the Court had to provide response to the question whether the authorities have done everything to protect all the individuals from criminal activities of other individuals, whereby the obligation does not impose an impossible and disproportional burden to authorities, i.e. it does not constitute a real and immediate life risk (Branković, 2013:64).

In the case *Kontrová v Slovakia* (§§ 52,53), deciding about the responsibility of the police for failure to take the necessary operational preventive measures for the protection of individuals from the acts of domestic violence, which had put the victims in danger, the ECtHR concludes that one of the main aims of the police is the protection of the basic rights and freedoms, life and health; the local police station was informed, based on the previous communication and the phone calls to the emergency police unit, that there were complaints about long-term physical and psychological violence, including the infliction of heavy injuries and threat to death by firearms. According to the Court's assessment, the specific obligations of the police were: to accept and properly file the victim's complaint on domestic violence; to keep proper records on received telephone calls; to share the information with colleagues and superior officers and to take action in case of life-threatening situations involving the use of weapons. The police neglected to fulfill these obligations, and one of the police staff even helped the victim and her husband to change the original criminal charges for domestic violence into a misdemeanor charge, which ultimately resulted in the murder of children.

In the case *Bevacqua and S. v Bulgaria*, the relations between the first applicant and her husband got worse in their marriage, as he became aggressive to such an extent that she had to leave their home and file for divorce. She also asked for the temporary measure by which the children would be in her custody. During the procedure which lasted inadmissibly long, the husband attacked his wife several times, beat her, molested their children and prevented her from seeing the children. The criminal charges which she submitted were dismissed by the Prosecution and civil procedure was suggested because the Bulgarian criminal law does not envisage the possibility of initiating criminal proceedings *ex officio* in case of inflicted minor injuries. The applicant referred to the violation of

Art. 8 ECHR, and the Court took the position that the authorities have neglected to enable her to enjoy the right to respect for family life because they failed to provide her assistance in the domestic violence case, considering it to be a “private matter” and believing that by interfering they would breach their negative obligations. Thus, the ECtHR stands by the position that in certain circumstances the interference of the authorities into private/family life is necessary in certain circumstances, with the aim of preventing the criminal act to be committed (§ 83). The standard of due diligence and urgency of conduct refers to examining the request for temporary injunctions (§ 73).

In the case *Tomašić and Others v Croatia*, the perpetrator had a number of conflicts and threatened to kill the woman he lived with, while they lived together, but he continued threatening her even when he moved out from their mutual home. His death threat was reiterated in the Social Care Center Čakovec, when he stated that he had a bomb and that he would “blow up his ex-wife and their child” (§§ 5 and 8). The Center pressed charges in the police station, and then the wife filed criminal charges stating that her husband came to her parents’ home several times, where she lived with the child, and threatened to kill her if she kept refusing to live with him. During the investigation, the psychiatric evaluation showed that M.M. suffered from a serious personality disorder (§ 13). He was convicted to imprisonment, but after being released, he killed his wife and their daughter, and then killed himself. The ECtHR concluded that the competent authorities did not undertake positive obligations with due diligence because they failed to check his claims on the possession of a bomb and to search his apartment and his car, or take other necessary measures. Also, the psychiatric evaluation showed that his mental disorder required continuous treatment; however, the offender was subject to obligatory psychiatric treatment imposed by the national court (on the basis of interpretation of national legislation), which was underway only for a limited period of time during his time in prison. According to the opinion of the Court, the authorities were not able to prove that such inadequate treatment (not long enough) was duly carried out in prison; moreover, of special importance for the Court was the fact that M.M.’s psychological state immediately before leaving prison, and the real risk to life of his wife and child, was inadequately estimated (§§ 55-61).

In the case *Opuz v Turkey*, the Court judgment contains a number of very important positions about the positive obligations in preventing domestic violence and discontinuing systematic violence, as well as positions related to the requests for the adequate legal framework (including both substantive and procedural provisions). The first question which the Court had to address was if the local authorities could have foreseen the lethal assault of the husband on the applicant and her mother. The circumstances point to the fact that the assaults on

the applicant and her mother had been carried out over a long period of time, during which the police was duly notified. The continuous violence lasted for almost seven years and escalated. Both women reported the perpetrator but the authorities released him from custody and did not take any protection measures although they knew about his death threats. Based on all these facts, and considering the gravity of the previously committed criminal acts against the applicant and her mother (a number of which were processed), the Court concluded that the perpetrator "had previously been known to the police for his acts of domestic violence" and that he presented "a significant risk in the sense of future violence" (§ 134). The reaction of authorities to the applicant's mother's request to take measures came down to taking her deposition, and only two weeks later the perpetrator took her life. Thus, the Court was of the opinion that "the local authorities could have predicted the lethal assault" and that "non-taking the reasonable measures which would realistically lead to a different result and diminish the damage represents a sufficient basis for determining the responsibility of the state" (§§ 135 и 136).

In the case *Opuz v Turkey*, the Court also had to address the question if the authorities had exercised due diligence in preventing the murder of the applicant's mother. Namely, the authorities stopped the criminal proceedings whenever the applicant and her mother withdrew criminal charges; in accordance with the criminal law system in Turkey, the condition to start prosecution in public interest were injuries that make the victim incapable of doing work for a period of 10 days, which was not the case here. The Court assessed all the case circumstances as lacking legislative framework, i.e. not fulfilling the positive obligation in this field (§ 145). The withdrawal of criminal charges was a result of fear due to death threats and undue pressure. The Court remarked that there is not a general consensus of the EU member states concerning the continuation of the criminal prosecution in domestic violence cases where the victim withdraws the charges; based on the national practice, each state determines the factors which must be taken into consideration when deciding on the continuation of the prosecution. These factors are: the gravity of the criminal act; the type of injuries; the use of weapons; making further threats after the assault; planning the assault; the impact of the assault on children (including the psychological effects); the probability for the act to be repeated; the continuity of threats to health and safety of the victim, and others who might be involved; the current relationship between the victim and the perpetrator, and the impact of the possible criminal prosecution on their relationship until that moment; the violence in the past, i.e. the relationship between the victim and the perpetrator; and if the perpetrator had been known to the police, especially in connection with the domestic violence. The graver the act and the greater the risk that it will be



repeated, the greater the need for the prosecution to be continued in the public interest (§ 138, 139).

Furthermore, the Court had to address the question if the local authorities have made the adequate balance between the victim's right to life from Art. 2 and the right to respect for family life from Art. 8 ECHR, which is a problem that is present in cases of domestic violence resulting in death. According to the opinion of the Court, the violence which started immediately after getting married, the long-term exposure of the applicant and her mother to serious threats and physical injuries, psychological pressure, fear and suffering, the use of deadly weapons in some of the assaults (a knife and a rifle), and especially constant death threats are the circumstances which give rise to the conclusion that the assault of the mother (which ended in murder) had been planned, given the fact that he carried the weapon with him before the murder and appeared more often near the house where she lived. These facts lead to the conclusion that the authorities must have known that the violence was possible, i.e. foreseeable. However, all of these factors have not been taken into consideration to a sufficient extent, and the criminal prosecution procedure against the perpetrator was abandoned, which shows that the authorities opted not to interfere into what they believed was "a private matter". The motives of withdrawal of charges were not properly assessed although it was known, based on the deposition given by the killed woman to the State Prosecution, that she and her daughter withdrew the charges due to further death threats and pressure, and that it all happened at the time when the perpetrator was at large. Thus, the Court was of the opinion that Turkey had failed to strike the right balance between the victim's right to life and the right to respect for family life. In the Court's opinion, the rights of the perpetrators of violence shall not prevail over the victim's rights to life, physical and mental integrity (§§ 146-149).

Concerning the obligation to undertake the necessary operative preventive measures in order to protect individuals whose life is in danger, the Court concluded that the perpetrator in this case had been known to the police as a domestic violence offender; thus, the state failed to take "special measures in accordance with the gravity of the situation, in order to protect the applicant's mother". The local state prosecutor or judge of the Magistrates court could have imposed *ex officio* one or more measures envisaged in the Turkish *Act on the protection from domestic violence*, or issue an injunction prohibiting any communication and contact, or a restraining order in line with the *Recommendation (2002)5* of the Committee of Ministers;<sup>39</sup> given the fact that they have only taken statements from the perpetrator at the request of the murdered woman and

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39 Committee of Ministers, Recommendation *Rec(2002)5 on the Protection of Women against Violence*. [Electronic version]. Retrieved 25 July 2017 from <https://www.euromed-justice>.

let him go free, the authorities have not exercised due diligence in terms of the protection the right to live (§§ 146-149).

The Court also considered the efficiency of the murder investigation. The starting point for the Court assessment was the legal provision in Art. 2 par. 1 of the Convention referring to the positive obligation of the state to provide for the functioning of the efficient and independent legal system by which the cause of murder can be established and the perpetrator punished. The key purpose of investigation is to provide efficient implementation of the domestic laws by which the right to life is protected, to establish responsibility of authorities in cases which are within their jurisdiction, to take immediate action with reasonable promptness which is implied in the context of efficient investigation, but bearing in mind the obstacles and hardship which impede the investigation progress in certain cases. However, the prompt investigation of all cases involving the use of deadly force is a general standard and the key element in preserving the public trust in the national authorities and the observance of the rule of law which may preclude the impression that any illegal acts will be tolerated. In the particular case, the comprehensive investigation of the murder had indeed taken place, but the criminal procedure had been underway for six years, which cannot be considered a prompt reaction of the authorities, especially considering that the perpetrator confessed the murder (§§ 150,151).

## 5. Conclusion

The special importance of the right to life within the corpus of human rights has brought about numerous documents on the national, regional and international level, by which the obligation of the state is established in reference to the efficient protection of this guaranteed human right. This right is also regulated by the European Convention on Human Rights (Art. 2), and the practice of the European Court of Human Rights includes numerous cases concerning the fulfillment of the obligations referring to its protection. Apart from the obligation imposed on the states to abstain from the acts which may constitute a violation of the right to life, Article 2 ECHR includes the so-called positive obligations. The paragraph on the responsibility of the state for the acts where the right to life is endangered not only by the state authorities but also by a private individual is the consequence of the doctrine of responsibility of the state for all the individuals under its jurisdiction. Such an approach extends the responsibility of states to the acts of domestic violence committed by individuals; it does not imply direct responsibility for the committed acts but the responsibility stem-

ming from the failure to undertake all the necessary measures to protect the life of an individual who has been exposed to domestic violence. It implies the “obligation of means” rather than the “obligation of result”.

The Court has been dealing with cases involving the potential violation of the obligation of the state in reference to the acts of domestic violence for the past ten years, on the basis of the position expressed in a number of documents that this form of violence represents the violation of human rights. The Court has examined the substantive aspects (circumstances under which the violation took place, and whether or not there is the responsibility of the state) as well as the procedural aspect (whether the state has taken all the necessary and reasonable measures after finding out about the violation in order to investigate the circumstances and identify the perpetrator; and whether the offender has been duly prosecuted and punished). Thus, the following obligations of the state have been recognized: 1) to establish the legal framework for the protection of the right to life; 2) to establish adequate mechanisms for the implementation of the legal framework, including prevention, efficient investigation and processing of the perpetrators of domestic violence, and indemnification of the victim by taking into consideration numerous and grave consequences of the acts of violence in general, and domestic violence in particular; and 3) to take relevant preventive measures and enact relevant legal provisions on this matter. In that context, the practice of the European Court of Human Rights is of special importance. An important contribution of the Court to the protection against domestic violence is the adoption of the standard of “*due diligence*” in taking all the necessary positive measures, including the measures aimed at preventing the acts of domestic violence and especially their re-occurrence and escalation into murder cases.

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## **ЗАШТИТА ПРАВА НА ЖИВОТ, ПОСЕБНО У КОНТЕКСТУ НАСИЉА У ПОРОДИЦИ И ПОЗИТИВНЕ ОБАВЕЗЕ ДРЖАВЕ ПРЕМА ЕВРОПСКОЈ КОНВЕНЦИЈИ И ПРАКСИ ЕВРОПСКОГ СУДА ЗА ЉУДСКА ПРАВА**

### **Резиме**

Право на живот је неotuђив атрибут сваког људског бића и основ-но људско право заштићено низом међународних, регионалних и аката националног карактера. На потенцирани значај његове заштите указује и Европска конвенција за заштиту људских права и основних слобода, која га у корпусу признатих људских права наводи као прво, али и једино право за које позитивна обавеза државе да га штити следи из самог текста Конвенције. Пракса Европског суда за људска права указује на његову вредност ставом о директној условљености свих других конвенцијских права његовим признањем и делотворном заштитом. Позитивне обавезе држава у заштити овог права односе се како на уздржавање од намерног и незаконитог одузимања живота тако и на предузимање свих примерених мера за заштиту живота лица у њеној надлежности. Угрожавање права на живот од стране појединаца, односно у приватно-правној сфери, према пракси Суда условљава, такође, потребу активног деловања од стране државе, а насиље у породици управо је манифестација оваквог угрожа-вања. Стога држава има обавезу превентивног деловања али и усвајања и делотворне примене супстанцијалне и процесне регулативе. Процену испуњености ових обавеза Суд врши *in concreto*, а држави се не сме наметати „немогућ и неразуман терет“. Такође, власти се не могу ослобо-дити одговорности за неиспуњење позитивних обавеза уколико су знале или морале знати да постоји стварни и непосредни ризик за живот поје-динца али су пропустиле да предузму све мере у оквирима своје надлежности којима би, разумно гледано, допринеле избегавању ризика.

**Кључне речи:** право на живот, насиље у породици, позитивне оба-везе државе, Европска конвенција, пракса Суда за људска права.



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## **PATERNALISM TODAY AND CHILDREN'S RIGHTS**

**Abstract:** *It was long believed that children's obedience and submission to adults was an entirely normal and accepted phenomenon, which in no way resulted in resentment or doubt concerning its validity. But, at the same time, the idea of freedom generally was a subject matter of interest. Naturally, this leaves us perplexed as to how it is possible that a relationship of pure submission could have remained unnoticed for many years. This relationship of inequality, which is called paternalism, is best defined by Dworkin: "Paternalism is the inter-ference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced".*

*The evolution of the idea of a complete change in the position of children may be traced back to the works of Hobbes, Locke, and Mill, but it seems that this idea had no clear-cut goals. Today, we can say that the original form of paternalism is losing its battle in all fields, to such an extent that the basic publicly proclaimed principle – an absolute protection of children's rights, is turning into an absurd, thus laying the foundation for a vague and unsettled system where the well-being of a child becomes uncertain. On the other hand, there are areas within the parental right, or more precisely within the children's rights, where the parents' autonomy is almost absolute. Featured facts create a schizophrenic situation in which, while hearing from all sides that children are our only priority, we bear witness of unambiguous jeopardizing of children's rights.*

**Keywords:** *paternalism, children's rights, child's well-being.*

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## 1. Introduction

There was a time when it was hard to protect children from violence and negligence by means of law. There was a time when the American Society for the Prevention of Cruelty to Animals had to take a severely abused eight-year old girl Mary Ellen Wilson under its protective care; as there were no laws on child protection, she was regarded as belonging to the animal kingdom and successfully removed from the violent environment. There was a time when we thought that children did not deserve special legal protection or special rights.

Nowadays, we have a completely different attitude towards children. At least, we think we do. It has been a long journey from Mary Ellen Wilson's case until the present-day, when there are so many organizations and international acts on children's rights and child protection in general. However, there are still situations and areas where the best interest of a child is not seen as of paramount importance and where parents seem to have autonomy to act in a paternalistic fashion, claiming that they thus protect the children's welfare.

## 2. Paternalism and Parental autonomy

Paternalism is a relationship of inequality which is best defined by *Dworkin*: "*Paternalism is the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced.*" (Dworkin, 1971: 108).

This behavior usually has a negative connotation, as it implies limiting someone's liberty. Historically speaking, the position of children as subordinated individuals was completely acceptable and even desirable. In most systems, parents (especially the father) had a great impact on the family and, consequently, on children. He actually had the authority to decide on life and death of his own children. The parents' autonomy was absolute and it was believed that the state had neither the authority nor rights to interfere in private family matters. The home was a private place, escape from society, where relations between partners were developed without public interference (O'Donovan, 1993: 107). This approach was dominant until the 20th century, when certain steps were made towards improving the position of children. The evolution of the idea of a complete change in the position of children may be traced back to the works of *Hobbes*, *Locke*, and *Mill*, but apparently, this idea had no clear goals set. The attitude that parents have the rights as well as obligations towards their children was never abandoned. However, it seems that today the emphasis is on children's rights only, and that almost all legal documents are silent about children's potential obligations. On the other hand, parents do have obligations, but their rights are considerably limited and the paternalistic approach has gained a negative connotation. However, there are many reasons why courts or other

institutions should not be allowed to intervene in cases concerning children. According to *Wald*, there are three main reasons for that:

There is no scientific method to determine what is in the best interest of a child.

All those people or institutions (such as courts, doctors, lawyers, and other professionals) who are involved in deciding what is best for a child are the ones who just drop in and then drop out of the child's life. However, problem could last longer.

The third reason concerns broader implications for the family which may have ensued as a result of courts or other institutions intervening (*Wald*, 1979: 279).

The law should give parents the right to raise and educate their children in accordance with their religious and moral beliefs and in accordance with their views on life,<sup>1</sup> and there is no basis for assuming that decisions regarding the needs of a child would be better (or equally good) if decided by someone else instead of by their parents. Families know their values, priorities and resources better than anyone else. Certainly, the family is the one that will have to live with the consequences of its decision more than anyone else does (*Kelsey*, 1975: 4).

It seems that "paternalism" is a term that may have been invented by its opponents (*Feinberg*, 2011: 2); but, even though the paternalistic behavior started being an undesirable conduct, it is not completely abandoned in family relations. Parents seem to lose part of their autonomy while, at the same time, a certain part of authority over children was transferred to the state. Today, we can talk about paternalism, but in terms of a state–parents relation. What makes this paternalism unacceptable is a certain level of humiliation and the manner of treatment which seems arbitrary and unnecessary and which lacks the trust in relation to adults (*Feinberg*, 1989: 5).

On the one hand, the opponents of paternalism emphasize that every person knows best what is in his/her interest; on the other hand, even if someone else is able to make a better decision, the very fact that someone is forced to act in a certain way reduces the benefit that it brings (*Scoccia*, 2013: 74). However, in order to protect children, we have to establish a balance between parents' autonomy and children's welfare. In order to implement such an approach consistently, some kind of control is certainly necessary but, as seen in this paper, it is not always exercised.

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1 Thus, Article 70 of the Serbian Family Act states: Parents have the right and duty to develop with the child a relation based on love, trust and mutual respect, and to direct the child towards adopting and respecting the values of emotional, ethical and national identity of his/her family and the society (*Family Act, Official Journal of the Republic of Serbia*, 18/2005).

### 3. Children's Rights

It is quite comprehensible that the position of children and their rights have never existed apart from the rights of adults. Consequently, the reduction of parental rights has led to the increase in the rights of children.

There was a time when a little girl Mary Ellen Wilson was severely abused by her foster parents, Francis and Mary Connolly. As there were no organizations or legislation that could protect the girl, she could only be taken into protective care of the American Society for the Prevention of Cruelty to Animals (ASPCA). On the ground that she belonged to the animal kingdom, the member of the ASPCA Elbridge Thomas Gerry took her case to the New York State Supreme Court in 1874. At the time of the trial, Mary Ellen was 10 years old and she testified in court about the abuse she had sustained; consequently, her foster parent Mary Connolly was sentenced to jail for one year. As a result, the New York Society for the Prevention of Cruelty to Children was founded in 1874, as the first organization specializing in child protection. (Freeman, 1983: 104)

When talking about children's rights, it is evident that, for centuries, little attention was given to the rights of children as special individuals. The constitutions of various states contained numerous provisions aimed at protecting health, the inviolability of physical and psychological integrity, dignity and security, and similar rights, but this protection was provided for all people, including children. Yet, there were no special rights designated for children only. In most cases, children were regarded as "little adults". Such an approach was dominant until the 20th century. The so-called "classical model" was dominant by the 1960s, which implied that parents were mediators in the application of constitutional norms related to children. It was the relationship of subordination, which primarily presumed the duty of children towards parents, whereas the parents had duties primarily towards the state and to a lesser extent towards children. In such circumstances, the creation of children's rights was considerably hindered. At the international level, the rights of children were first proclaimed in the Geneva Declaration, and adopted by the League of Nations in 1924. After the Second World War, the Declaration on the Rights of the Child was adopted in 1959, as a result of a huge number of children who were affected by the war. At the international level, there were heated debates as to whether this Declaration should become legally binding. As a result, the work on drafting a special Convention on this matter started in 1978 and lasted until 1989. The UN Convention on the Rights of the Child finally entered into force in 1990.<sup>2</sup>

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<sup>2</sup> Convention on the Rights of the Child, 20 November 1989, Retrieved 5, January 2017, from <http://www.unhcr.org/uk/4aa76b319.pdf>

When talking about children's rights or interests, it is clear that they do not exist in a vacuum, independent of legal claims of parents or others in the community (Bainham, 2005: 98). It implies the discussion about rights and interests of adults, which could be diametrically opposed to the rights and interests of children. When discussing children's rights, the central issue is how to achieve balance and try to protect the interests of both children and adults in the best way possible.

The view that children need special rights was not unanimously accepted in theory (Wald, 1979: 257). In that context, it is necessary to mention the opinion of a Yale Law Professor, *Joseph Goldstein*, who made a clear distinction between children and adults, and considered that the difference is also reflected in the rights enjoyed by these two categories. He stated that: "To be a *child* is to be at risk, dependent, and without capacity to decide what is "best" for oneself. To be an adult is to be a risk taker, independent, and with capacity and authority to decide and to do what is "best" for oneself. To be an *adult who is a parent* is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children" (Goldstein J., 1977: 645).

On the other hand, there is a completely different view expressed by psychologist *Richard Farson*, who claims that the issue of self-determination is at the heart of "children's liberation." In his opinion, children should be free from any kind of control and they should be free to decide what is best for them, which includes "the right to sexual freedom, financial independence, and the right to choose where they shall live" (Farson, 1974: 18).

Being extreme even in current circumstances, *Farson's* approach was certainly unusual at the time it was presented, when the process of children rights development was at the outset. Even today, almost forty years later, when the children's rights protection has advanced considerably and when the development of children's rights seems to have progressed in inversely proportional way with children's obligations, *Farson's* point of view still seems to be unacceptable.

There are natural circumstances that make it impossible for children to have full freedom and independence. Thus, the authors of the famous work *The Best Interest of the Child* state that there are unquestionable differences between children and adults that cannot be ignored, due to which it cannot be said that "children are adults in miniature" (Goldstein, Freud, Solnit, 1979: 13). They primarily highlight the psychological differences, which are necessary when trying to justify the view that children cannot enjoy complete autonomy, as it would be against the natural order. Children must enjoy special protection because they are a special category and, due to their vulnerability, they need special approach and treatment.

The UN Convention on the Rights of the Child refers only to different children rights and says nothing about their obligations. The main goal of the Convention is to protect and promote the rights of all children, and to achieve this, comprehensive child protection systems must be established and consolidated. Such systems should include mechanisms to identify *the best interests of the child* as one of four general principles of the Convention. The best interests of a child should be a primary consideration in all actions affecting children (Article 3). The term *welfare of the child* is used with the same function and aim.<sup>3</sup>

If we really want to find a difference between the terms *rights*, *best interest* and *welfare*, we should first note that the term *welfare* (primarily used in the UK) represents a precise checklist of circumstances that courts should take into consideration when deciding on children. On the other hand, the *best interest* doctrine is more of a framework within which courts have to decide on child-related matters. The distinction between the concept of *welfare* and the concept of *the rights of the child* is further explained by Bainham, who states that the concept of *welfare* is a "highly individualistic notion" and, as such, cannot include all the claims that could be considered as belonging to children. On the other hand, *rights* are "designed to safeguard the interests of *all* children as a class" (Bainham, 2005: 98). Yet, at the end of his explanation, Bainham points out that a terminological distinction of any kind does not have much impact on the content of family relations. It is precisely the *substance* of a certain relationship that is more important than any theoretical explanation we impose on it (Bainham, 2005: 101). Irrespective of how we define and designate these terms, it is essential to recognize the threats and prevent the harmful acts that endanger children in general.

#### 4. Reproduction and its specificity

Parental autonomy and the position of children has a rather different meaning when it comes to the field of reproduction, primarily in the area of medically assisted reproduction (MAR). At the most general level, reproductive autonomy is the freedom to decide when, if at all, to have children. Although this right is often exercised within a partnership relationship, this is primarily an individual right. Reproductive autonomy should have an assumed primacy because the is-

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3 The UK Children Act 1989 states that:

(1)When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

Children Act 1989, s.1 (1), Retrieved 24 January 2007 from <http://www.legislation.gov.uk/ukpga/1989/41>



sue whether or not someone reproduces is a central aspect of personal identity, dignity, and the meaning of life (Robertson, 1996: 30).<sup>4</sup>

The dominant concept of autonomy in the field of bioethics was set up by Tom Beauchamp and James Childress. They emphasize four basic principles in the field of bioethics: autonomy, beneficence, non-maleficence, and justice. However, their primary focus is on autonomy, particularly the autonomous nature of the one's choice or decision rather than the autonomous nature of the individual who makes a decision. A deliberate choice of individuals, stemming from the acquired information and awareness of the nature and consequences of their actions, could be regarded as autonomous. Autonomy in decision-making is a matter of degree and, above all, bioethics has to deal with the character of a particular decision rather than the character of the individual who makes the decision. Therefore, the emphasis is on the type of a decision, not on the individual (Beauchamp, Childress, 2009: 248). Thus, the parents' autonomy in relation to MAR should be limited, bearing in mind different types of decision. All procedures do not demand the same level of deliberation and, considering that all techniques involve certain human, financial or material resources, some limitations have to exist in decision-making processes.

In an effort to determine the nature of reproductive freedom, *Quigley* explains that neither the interest theory nor the theory of choice is adequate, and he accepts *Dworkin's* theory of 'equal concern and respect' (Dworkin, 1977: 370). Namely, if a person wants to have children, it means that every individual in the society must have the same right to 'concern and respect' in terms of the means and opportunities that the society can offer. Notably *Quigley* emphasizes that this includes the techniques of medically assisted reproduction *if society can offer such a treatment* [author's emphasis] (Quigley, 2010: 410).

Furthermore, this right certainly cannot be considered as an absolute right, as it is limited by the same right of other individuals. More precisely, the right to reproduce in this context can only exist if it does not jeopardize the same rights of others. Formulated in this way, this concept of autonomy is in its essence very close to the concept of freedom as determined by *John Stuart Mill*.

However, further analysis will show that children and their welfare and rights are not seen to be of paramount importance in some cases of medically assisted reproduction. The number of problematic situations is significant but in this paper we will address only some of the issues that can cause problems concerning children and their rights.

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4 In the United States, the state imposed a sterilization of "mental retardation" in 1927 by the US Supreme Court in *Buck v. Bell* case, which resulted in 60,000 sterilization for a period of forty years.

## 5. Some disputable issues

Nowadays, having children is regarded as one of the most meaningful goals in life and couples do their best to achieve this goal. When faced with infertility problems, they resort to different techniques that help them conceive. In an endeavour to become parents, they invest a lot of money, time and energy in medically assisted reproduction but the outcome is uncertain. At the same time, they want to ensure that their children will make the most of their lives. Thus, they wish to choose the color of their eyes and hair. They want to choose their IQ, their height, their skills and preferences. They want only the best for their children.

Science in this area is constantly developing and there are numerous techniques in the field of MAR which are difficult to resist as they give hope to a large number of people with different infertility problems. Yet, the law is supposed to prevent all the activities and demands that raise doubts concerning the protection of the child's best interest.

### 5.1. Surrogacy

"Surrogacy is a procedure in which a woman agrees to carry a pregnancy with the intention of giving the child to the couple who ordered a pregnancy" (Ковачек Станић, 2013: 2). The woman who carries and gives birth to a child is called a surrogate mother, irrespective of whether or not her own genetic materials were used for the conception. After childbirth, the child is given to the intended parents who raise and take care of the child (Michael Wells-Greco, 2016:35). This procedure gives rise to many controversial issues. There is a large number of cases that receive huge media attention, but there are many more cases that did not get such publicity, which equally raise questions about some basic children's rights. The most controversial cases seem to arise from cross-border surrogacy arrangements.

Today, there are cases of children being born through surrogacy in the countries permitting this procedure, who are then obliged to wait for two or more years to be allowed to enter the country of origin of the intended parents, in which surrogacy agreements are prohibited. India seems to be a *dream destination* for those couples who cannot become parents (except through surrogacy) and whose states do not allow such a practice. The case *Jan Balaz v. Anand Municipality* was one of the cases that raised the question of the welfare of the child. The case concerned the twins, born to an Indian surrogate mother in 2008. It took two years for the intended parents, a German couple Jan Balaz and Susan Anna

Lohlad, to get an exit permits for the twins. During that period, the twins had neither German nor Indian citizenship.<sup>5</sup>

In another landmark case, *Baby Manji Yamada v. Union of India*, a Japanese couple engaged a surrogate mother in India. The embryo was created from the husband's sperm and a donated egg cell. However, before the child was born, the intended parents separated and the wife was not willing to accept the child. At the same time, the surrogate abandoned the baby after birth. Considering that neither the intended mother nor the surrogate mother wanted the custody of the child, it was impossible to determine the mother of the child in these circumstances, given the fact that revealing the identity of the egg donor was forbidden. Thus, Mr. Yamada was listed as the father and as a single parent. However, the child could not get either Indian or Japanese citizenship. The Indian legislation required at least one parent to be an Indian citizen, and the Japanese legislation dictated that in a case when a child is born out of wedlock to a Japanese father and a foreign mother, the father must recognize the child before birth in order for a child to be recognized as Japanese citizen (Wells-Greco, 2016: 185). Furthermore, he could not adopt the child because India forbids single men to adopt female children. Finally, Japan granted the child a humanitarian (one year) visa and allowed the baby's grandmother (Mr. Yamada's mother) to take the child to Japan on behalf of her son, on the grounds of her genetic ties with the baby. During the case, the Indian Supreme Court ruled that the parent of a surrogate child might be a male and recognized surrogacy as a positive practice.<sup>6</sup>

Both cases show that clear regulation is needed and that the best interest of the child must be taken into account even before the child is born. Thus, in 2010, India made the Draft Bill which *inter alia* prescribes that the intended parents have to provide proper documentation proving that their country of origin permits surrogacy and that the child will be given permission to enter that country (Wells-Greco, 2016: 192). However, this Bill has not yet come into force and its future is still uncertain.

## **5.2. The use of donated genetic material**

In cases where the usage of donated sperm is necessary, there are three possible approaches in terms of regulating this issue. The first possible approach, which

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<sup>5</sup> *Jan Balaz Vs. Anand Municipality*, 11 November 2009, Retrieved 5 April 2017, from <https://www.legalcrysal.com/case/747551/jan-balaz-vs-anand-municipality-6-ors>

<sup>6</sup> *Yamada v. Union of India*, 2008 IND LAW SC 1554 (Sept. 29. 2008), retrieved 25, May 2017 from <https://indiankanoon.org/doc/854968/>. For more about the case, see: <http://indianexpress.com/article/research/karan-johar-surrogate-children-yash-roohi-what-are-the-surrogacy-in-laws-in-india-here-is-everything-you-need-to-know-4555077/>

is almost abandoned, implies complete prohibition of using donated material. The second approach is taken by the countries that allow the use of donated genetic material but forbid disclosure of the donor's identity. Finally, the third approach is taken by the countries that do not allow anonymous sperm donation. At first, anonymous donation was the only possible scenario. This approach was predominant for a long period but it soon raised a question of breaching the child's right to know its origin; thus, countries started changing the legislation and allowing only non-anonymous sperm donation.<sup>7</sup> However, there are many legislations that consider that non-anonymity will lead to a decrease in potential donors; they do not allow children to find out who the donor's identity, thus denying them the possibility to meet their biological parent. On the other hand, in order to ensure the child's right to know one's origin, legal provisions alone are insufficient. It is primarily a matter of the parents' will to disclose the truth about the child's conception; only after that the child will be in a position to pursue the whole truth.

Besides denying the child's right to know his/her origin, there are also some other controversial issues that can occur when the donor's anonymity is prescribed. One of the cases on this issue was the case of "*Donor 9623*". This case concerned Angela Collins and her partner who used reproductive material offered by the sperm bank in Georgia. The sperm bank described Donor 9623 as a "man with an I.Q. of 160 who was healthy and working toward his Ph.D." Seven years later, Ms. Collins discovered the man's identity through a donor sibling group and found out that the donor had a history of mental illness, a criminal record, and that his educational accomplishments had been exaggerated (Hauser, 2016).

It is clear that the data presented by the sperm banks can largely deviate from the truth. This poses a new question as to whether clinics should check all the information they receive from donors or not. In either case, should there be at least a scope of some basic information that has to be verified, and if so, what type of information should it include?

On the other hand, there is a completely different case concerning Ari Nagel, a New York math professor, who has been donating his sperm to women for nearly a decade and now is the father of 22 children (Genova, Towner, 2016). Given the fact that the procedure of donating and using his reproductive material was not performed in licensed clinics, the legal provisions regulating this area could not be applied. As a result, professor Nagel was brought to court by five women who successfully sued him for child support. The case of Ari Nagel represents the altruistic wish of a man whose material was used and whose children could easily find out anything related to his/her biological parent. However, uncontrolled

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7 The first country that prohibited anonymous sperm donation was Sweden in 1985.

usage of the material not thoroughly examined can also be very harmful to the future children with respect to some serious diseases and conditions.

### 5.3. Pre-implantation Genetic Diagnosis

Pre-implantation genetic diagnosis (PGD) is a procedure used prior to implantation to help identify genetic defects within embryos. This serves to prevent certain genetic diseases or disorders from being passed on to a child. The advantages of this technique are huge.<sup>8</sup> As it is conducted before implantation, it enables the couple to decide if they wish to continue with the pregnancy. Furthermore, this procedure enables the couples to pursue biological children, whom they might not have obtained by using other methods. The PGD is particularly important for women given that the risk of giving birth to a child **with a chromosomal abnormality increases with age**.<sup>9</sup> Although most legislations permit the PGD, they do not allow the selection and implementation of embryos with certain defects that have been identified through this procedure. However, cases where people used this technique to get children with some impediment have been reported in practice.<sup>10</sup>

Almost fifteen years ago, a lesbian couple in Canada, *Sharon Duchesneau* and *Candace McCullough* who were both deaf, wanted a deaf child. As one of these women said: "A hearing baby would be a blessing. A deaf baby would be a special blessing" (Mundy, 2002). First, they asked their fertility clinic to provide donated genetic material that would fulfill their wish but the sperm bank refused their request, stating that donors with disabilities were screened out. After that, they turned to a friend with five generations of deafness in his family and succeeded in their intention. The child was born deaf, and the women believed they would perform their parental role better with such a child (Nelson, 2013: 324). In their opinion, deafness was not a disability, and they did not perceive it as bringing a disabled child into this world.

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8 BioCentre, *What is Preimplantation Genetic Diagnosis?*, Retrieved 1 February 2017 from <https://www.bioethics.ac.uk/topics/preimplantation-genetic-diagnosis.php#references>. However, there are many objections to this procedure, which are mostly based on moral/ethical grounds. Some concerns are that it is an alternative for abortions, that it is a form of eugenics, that it is a way of designing babies, etc.

9 Advanced Fertility Center of Chicago, *PGD and IVF – Pre-implantation Genetic Diagnosis and In Vitro Fertilization, Pros and Cons about PGD and PGS*, Retrieved 25, July, 2017, from [http://www.advancedfertility.com/preimplantation\\_genetic\\_diagnosis.htm](http://www.advancedfertility.com/preimplantation_genetic_diagnosis.htm). A survey shows that the risk for women at the age of 25 is 1 in 476 and for women at the age of 45 or more the risk increases to 1 in 15.

10 The legislation of European countries is completely clear on this issue and does not provide such opportunities.

Although it may sound strange to raise an issue whether being deaf is an impediment, many people with *hearing impairment* emphasize that it is not a disadvantage, but rather represents their linguistic and cultural identity (Davis, 2010: 65). In addition, advocates of this procedure consider that hearing children will find it difficult to understand the position of their deaf parents, and that deaf parents will have limited ability to participate in the upbringing of their children (Wert, Dondorp, Shenfield, Devroey, Tarlatzis, Barri, Diedrich, Provoost, Pennings, 2014: 1614).

While trying to accept the lack of hearing as only one aspect of normal and happy life of these people, we cannot overlook the difficulties and challenges they face. It is hard to ignore the fact that it is not easy for deaf people to find a job, and that they have incomes below the national average (Davis, 2010: 72). Someone could argue that the problem is not in being deaf but rather in a societal and legislative response to these issues. Further work on improving the legislation and changing the social attitude towards this problem is certainly something that we should strive to. Nevertheless, in situations where parents are presented with options and voluntarily choose to limit the future opportunities for their children, such a choice should not be regarded with approval.

## 6. Conclusion

Today, we can say that the original form of paternalism is losing the battle to such an extent that the basic publicly proclaimed principle of absolute protection of children's rights has been turning into the absurdity, thus laying the foundation for a vague and unsettled system, where the well-being of a child becomes uncertain. On the other hand, there are areas within parental rights, or more precisely within the children's rights, where the parents' autonomy is almost absolute in its character. Parents succeed in their intentions even though it may endanger the children's position. It is often forgotten that adults are the ones who write laws about children and who determine what is in the best interest of the child. Having in mind all the featured facts, it seems that a schizophrenic situation is created where we keep on hearing that children are our only priority, whereas we concurrently bear witnesses unambiguous jeopardizing of their rights. The field of medically assisted reproduction (MAR) is especially sensitive because it deals with one of the basic human rights.

One of the great 20<sup>th</sup> century achievements was certainly the possibility for people to choose whether they will have children, their number and age difference between them. The revolution in the field of reproduction helped women to prevent conception or to exercise their right to safe abortion. The scientific progress enabled future parents to prevent the transmission of some diseases

onto their children. People have become more aware of their lives, which made them realize they can control the creation of their family. People are now able to decide on the qualitative features rather than the mere quantity of their future children. However, they have also become intolerant to any kind of advice or even legal rule that does not coincide with their wishes. They travel in order to find a dream destination where they can realize their plans. They want to be involved in the selection of certain characteristics of their future child. Some of them advertise their willingness to donate their genetic material to unknown people and many other people are prepared to use this material.

It is very hard to impede one's wish to form a family. It is even harder to say that they are not completely free to use all the existing procedures in the way they want. There are authors who consider that assisted reproduction is a form of child abuse (Blyth, 2008: 506). Nevertheless, can we really limit their wishes? Is it possible to assert that their reproductive liberty is not absolute? We can find pro and con arguments, but it is indisputable that decisions about reproduction are now jointly made by physicians and individuals who are involved in the process – from gamete donors to surrogates (Sabatello, 2013: 90), which eliminates the concept of *privacy* in the process of conception and makes conception more of an issue of public concern. Such developments are justification to intervene in this process and set some limits if we want to protect future generations of children.

As a society, we can pledge for the protection of children and their rights but the adoption of conventions or another legal document is simply insufficient. We must act accordingly, striving to achieve a solution that fits both children and adults, which is certainly a huge challenge for all of us. Although some authors claim that “we have a moral obligation or moral reason to enhance ourselves and our children” (Savulescu, 2016: 517), we still believe that society which provides children with an “open future” (Feinberg, 1980: 126) does not entail an irresponsible and uncontrolled usage of medically assisted reproduction.

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## **ПАТЕРНАЛИЗАМ ДАНАС И ПРАВА ДЕТЕТА**

### **Резиме**

*Дуго се сматрало да је потчињеност деце одраслима била једна у потпуности нормална и прихваћена појава, која ни на који начин није изазивала негодовање, нити сумњу у своју оправданост, док је са друге стране идеја слободе генерално представљала предмет интересовања. Тим пре, остајемо збуњени, како то, да је један однос чисте потчињености, остајао непримећен дуги низ година. Тај однос неједнакости, који називамо патернализам, најбоље је дефинисао Дворкин: „патернализам представља ометање неке особе од стране државе или поједница, противно њеној вољи, правдано тврдњом да ће особи која се омета бити боље, те да ће, на тај начин, бити заштићена од штете“.*

*Еволуцију идеје о потпуној промени положаја деце можемо пратити полазивши од Хобса, Лока, Мила, али чини се да ова идеја није имала јасне циљеве. Данас, можемо рећи да исконски облик патернализма губи битку у на свим пољима, чак до те мере, да основни, јавно прокла-мовани принцип – неприкосновена заштита дечјих права, прераста у апсурд и поставља темељ једном нејасном и несигурном систему, где добробит детета постаје неизвесна. Са друге стране, постоје области у оквиру родитељског, односно дечјег права, где је аутономија родитеља достиже готово апсолутни карактер. Истакнуте реалности, стварају једну шизофрену ситуацију у којој, слушајући са свих страна како су деца једини приоритет, постајемо сведоци њиховог недвосмисленог угрожавања.*

**Кључне речи:** патернализам, заштита права детета, добробит детета.



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## **COMPULSORY OR RECOMMENDED VACCINATION: LEGAL ASPECTS OF CHILDREN VACCINATION POLICIES IN SERBIA**

**Abstract:** Vaccination is one of the most important tools of primary health prevention. However, vaccines are specific and differ from other medical interventions, mainly because they are one of the most common medical measures applied to healthy rather than ill persons. They are aimed not only at ensuring the wellbeing of the individual who receives them but they are also indirectly beneficial for the entire population. This paper examines the issues pertaining to the vaccination of children in light of the Serbian Act on the Protection of Population from Infectious Diseases, adopted in 2016. The authors consider relevant legal aspects of childhood vaccination, and analyse the potential conflict between children's right to protection from diseases and the parents' or legal guardians' right to make a decision regarding the treatment of children. International policies and standards are also explored, with the aim to reach conclusions on the appropriate legal measures to balance the necessity to provide for the protection of public health with the individuals' right to self-determination and freedom of choice.

**Key words:** children, vaccination, public health, right to healthcare, right to self-determination.

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## 1. Introduction

Vaccination is one of the most important tools of primary health prevention. In the past 50 years, vaccination saved more lives worldwide than any other medical product or procedure.<sup>1</sup> Yet, despite a long history of effectiveness, vaccines have always had their critics. Some parents, as well as some doctors, question whether vaccinating children is worth what they perceive as risks. The situation is similar in Serbia. Even though compulsory immunization of children in Serbia was initially prescribed decades ago, it was only the adoption of the Patients' Rights Act<sup>2</sup> in 2013 that brought about a change in citizens' attitudes, as they increasingly began to reject compulsory vaccination of children.<sup>3</sup>

The number of vaccines, both compulsory and recommended, in immunization calendars has grown over the years; but, does this make us healthier? There have been severe disputes lately over this question, and the topic of justifiability of vaccination has been frequently discussed. Ever since the first vaccine against smallpox was discovered in 1796, vaccination has been followed by controversy<sup>4</sup>, and the dispute regarding vaccination of children persists to this day, more than two centuries later. People question whether vaccines do children more harm than good. Are vaccinations dangerous or superfluous? What is the role of the

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1 According to the UK Health Protection Agency (HPA), apart from clean water, vaccination is the second-most effective public health intervention worldwide, saving lives and promoting good health (Fine-Goulden, 2010: 1).

2 Zakon o pravima pacijenata (the Patients' Rights Act), *Sl. glasnik RS*, 45/13.

3 81% of children in the general population received all vaccinations recommended in the national immunization calendar by their third birthday, while this is the case for fewer than half of children in Roma settlements (44%). However, only 66% of children in the general population were fully immunized within the prescribed timeframe (*Full vaccination includes the following: BCG, Polio3, DPT3, HepB3, Hib3 by 2 months of age and Measles (MMR1) by 24 months of age*) See UNICEF Multiple Indicator Cluster Survey 2014 (MICS 5), Retrieved 24, May 2017, from <https://www.unicef.org/serbia/MICS5-English-KeyFindings-10Jul2014.pdf>, See also Annual report on immunization in the Republic of Serbia for the year 2016, 2015 and 2014. (Institut za javno zdravlje, dr Milan Jovanovic Batut, 2017: 3; Institut za javno zdravlje, dr Milan Jovanovic Batut, 2016: 3,4); Institut za javno zdravlje, dr Milan Jovanovic Batut, 2015: 3).

4 For example, when mandatory smallpox vaccinations were introduced by the "Reichsimpfgesetz" (German Imperial Vaccination Act) of 1874, the debate was fierce. Vaccine critics even started a journal "The Vaccination Objector" (*Der Impfgegner*) in order to create a platform for their arguments, opposing such a legal act (Robert Koch-Institute, 2016). A similar issue arose in Great Britain after the 1853 Vaccination Act, introducing compulsory vaccination for 3-month-olds, and Vaccination Act of 1867 which prescribed that every child aged 14 or less has to undergo vaccination, while anyone rejecting vaccination would be sanctioned. This led to the formation of the Anti-Vaccination League and publication of the first anti-vaccination journals (Wolfe, Sharp, 2002).

pharmaceutical industry and its profit motive? One thing is clear: vaccinations are different from other medical interventions as, *inter alia*, they are given to healthy subjects; they do not aim to provide benefit only to the individual who receives it but indirectly to the entire population. Therefore, it is quite justified to demand special care when it comes to vaccinations, and to discuss controversial issues critically, primarily for the reason that vaccines are one of the most common medical procedures of all.

This paper will cover various medical, administrative, and family law aspects related to compulsory vaccination of children in Serbia, including legal dilemmas supported by the new Act on the Protection of Population from Infectious Diseases of 2016<sup>5</sup>. In terms of medical law issues, we will analyze the existing rules on vaccination in the context of right to self-determination and the importance of information given to the patient before vaccination. Among different administrative law aspects of child vaccination, we will discuss the role of the Sanitary Inspection, and particularly deviations from the general regime of administrative procedure in case of rulings of the Inspection. Finally, inspired by several announcements of the line ministry officials, we will look at the real legal risks facing parents who oppose vaccination to be deprived of their parental rights, as a consequence of choosing not to have their children vaccinated.

## 2. About Compulsory Vaccination

Immunization is a process whereby a person is made immune or resistant to an infectious disease, typically by the administration of a vaccine.<sup>6</sup> Vaccines stimulate the body's own immune system to protect the person against subsequent infection or disease. Immunization is conducted by means of immunologic agents, and it can be compulsory or recommended.<sup>7</sup>

In the Republic of Serbia, protection of population from infectious diseases is generally regulated by the Healthcare Act<sup>8</sup> and the 2016 PPID Act covering this

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5 Zakon o zaštiti stanovništva od zaraznih bolesti (the Act on the Protection of Population from Infectious Diseases), *Sl. glasnik RS*, 15/16, hereinafter: 2016 PPID Act.

6 Immunization is a preventive measure of protection of people from infectious diseases by administering vaccines and/or immunoglobulins of human origin, immunobiological products containing specific antibodies, or monoclonal antibodies. *See* Art. 2, para. 1, item 21 of the 2016 Act.

7 Recommended immunization is the immunization recommended by a medical doctor or a specialist of the given medical field, in line with the program of population immunization against certain infectious diseases. *See* Art. 32, para. 5 of the 2016 Act.

8 Zakon o zdravstvenoj zaštiti (the Healthcare Act), *Sl. glasnik RS*, 107/05, 72/09, 88/10, 99/10, 57/11, 119/12, 45/13, 93/14, 96/15, 106/15; The Healthcare Act prescribes compulsory immunization provided in line with the provisions of the 2016 PPID Act.

topic in depth, accompanied by appropriate bylaws.<sup>9</sup> Compulsory immunization is the immunization of a person of a certain age, as well as other persons as prescribed by law, which cannot be refused by the person receiving immunization or the parent or guardian, unless there is a medical contraindication which is determined by a specialized medical doctor, or an expert team for contraindications.<sup>10</sup> Compulsory immunization of a person of a certain age refers to immunization of children, according to a certain schedule and at an age when they are most sensitive and when contracting an infectious disease may carry the highest risk of complications. Since post-vaccination protection reduces with time, certain doses of vaccines are given again to "remind" the immune system and reinforce the defense of the organism.

Immunization calendars differ from one country to another, conditioned by the varieties related to current epidemiological situation, social-economic development, organization of healthcare services and cultural setting (Lončarević, Kanazir, 2011: 4). Compulsory systematic immunization aims at achieving and maintaining 95% or higher coverage of the compulsory immunization program on the level of the entire population of children to be vaccinated according to the immunization calendar (including all children, with all vaccines, without any demographic, territorial or social differences), in order to prevent contraction of diseases, as well as potential complications requiring hospitalization, some of which leave permanent damage and death outcomes (Lončarević, Kanazir, 2011: 4).

In the EU, organization of vaccination programmes differs considerably between countries. Differences relate to the vaccines included in the programme, the type of vaccines used, the total number of doses administered, the timing

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9 See Uredba o programu zdravstvene zaštite stanovništva od zaraznih bolesti, *Sl. glasnik RS*, 22/16; The 2016 PPID Act envisaged a wide range of issues subject to secondary regulation by the Ministry of Health and in respect of immunization and compulsory vaccination two rulebooks to be passed until March 2017 (see Art. 7 para. 9, 39 para. 3 and 87). One was adopted in January 2017 (Pravilnik o vrstama i načinu sprovođenja epidemiološkog nadzora nad заразним bolestima i posebnim zdravstvenim pitanjima, *Sl. glasnik RS*, 3/17) while in the case of the other, an old rulebook still applies (Pravilnik o imunizaciji i načinu zaštite lekovima, *Sl. glasnik RS*, 11/06, 25/13, 63/13, 99/13, 118/13, 65/14, 32/15).

10 Immunization is compulsory for persons of a certain age (against tuberculosis, diphtheria, lockjaw, whooping cough, polio, smallpox, rubella, mumps, hepatitis B virus, diseases caused by haemophilus influenza type B, and diseases caused by streptococcus pneumoniae), but also for persons exposed to certain infectious diseases, persons employed in healthcare institutions against certain infectious diseases, persons at particular risk of specified diseases, and international travelers, as per the requirements of the destination country. See Art. 32 of the 2016 Act.



of vaccinations, etc. (Haverkate, D'Ancona, Giambi, Johansen, Lopalco, Cozza, Appelgren, 2012: 5).

There are also large differences in whether vaccinations included in the national programmes are recommended or mandatory. Mandatory vaccination can be enforced by legislation, even though the term 'mandatory' has to be interpreted differently in individual countries (Haverkate et al., 2012: 2). Mandatory vaccination is a vaccination that every child must receive as prescribed by law without the possibility for the parent to choose to accept the uptake or not, regardless of legal or economical implications of the refusal. Recommended vaccination is a vaccination included in the national immunisation programme for all or for specific groups, state funded or not, implying "vaccine included in the national immunisation plan but not mandatory" (Haverkate et al., 2012: 2).

By analyzing how European countries regulate the matter of childhood vaccination, one may notice two approaches.<sup>11</sup> There are countries, including Serbia, which prescribe compulsory childhood vaccination (Hungary, Slovenia, Slovakia, Poland, Macedonia, Croatia, Italy, etc.).<sup>12</sup> In these countries, the number of compulsory childhood vaccines varies from 11 (Serbia), four (Italy), to two (France).<sup>13</sup> The second group comprises countries that do not prescribe childhood vaccination by law, but rather cherish the policy of "recommended vaccines" (Austria, Great Britain, Denmark, Estonia, Lithuania, Luxembourg, Germany, Norway, Finland and Sweden).

Legal consequences of non-vaccination differ across national legal systems; they may include quite severe pecuniary penalties, conditioning of attending public schools, or even penal consequences for parents, as well as milder ones, including the possibility of choosing to 'opt-out' (Haverkate, *et al.*, 2012: 2). Moreover, enforcement varies in practice. In some countries, the envisaged penalties may never be applied.

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11 A total of 15 EU countries do not have any mandatory vaccinations; 14 EU countries have at least one mandatory vaccination included in their programme. Vaccination against polio is mandatory for all children in 12 EU countries; diphtheria and tetanus vaccination is mandatory in 11 EU countries, and hepatitis B vaccination is mandatory in 10 countries. For eight of the 15 vaccines considered here, some countries have a mixed strategy of recommended and mandatory vaccinations. Usually this means that the vaccination is recommended for the whole population, but that it is mandatory for some risk groups. This data has been taken from the Vaccine European New Integrated Collaboration Effort (VENICE) network. The information was collected from all 27 EU Member States, Iceland and Norway (Haverkate et al., 2012: 2).

12 For more about vaccination by country, see: the European Forum for Vaccine Vigilance website at <https://www.efvv.eu>

13 *Ibid.*

### 3. Key Features of the National Legal Framework

In respect of compulsory vaccination of children, the 2016 PPID Act sets a system similar to the previous 2004 PPID Act, and to a large extent to the ones before it, passed during the former Yugoslavia (hereinafter: SFRY) from the 1970s to the 2000s. As previously stated, under the 2016 PPID Act, compulsory immunisation cannot be rejected, except in cases of temporary or permanent medical contraindication determined by a physician of appropriate specialisation or an expert team for contraindications (Art. 32 para. 2).<sup>14</sup> For children, as "persons of a certain age", vaccination is compulsory against 11 diseases (Art. 32 para. 3).

Earlier legislation also envisaged compulsory vaccination of children but it covered a smaller number of diseases (ten, according to the Act on the Protection of Population from Infectious Diseases of 2004,<sup>15</sup> or eight or six according to the earlier legislation).<sup>16</sup> Hence, there is a constant rise in the number of compulsory vaccines and our country is among those with the highest number of compulsory vaccines for children.

The 2004 PPID Act explicitly envisaged that, in case of compulsory vaccination (of both children and other target groups), a written consent of the vaccinated person was not necessary, nor of the child's legal guardian or of a person deprived of legal capacity (Art. 25 para. 5), which is a solution that, in its practical consequences, corresponds to the present one. A novelty of the 2016 PPID Act relates to designating compulsory vaccination as a condition for enrolment and

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14 The expert team is established according to the Rulebook on immunization and method of protection by drugs (Pravilnik o imunizaciji i načinu zaštite lekovima, *Sl. glasnik RS*, 11/06, 25/13, 63/13, 99/13, 118/13, 65/14, 32/15) – Art. 10.

15 *Zakon o zaštiti stanovništva od zaraznih bolesti*, *Sl. glasnik RS*, 125/04, 36/15, hereinafter: the 2004 PPID Act.

16 Before 2004, these issues were regulated by federal laws of the SFRY and, later on, by the laws of the Federal Republic of Yugoslavia, as well as by the legislation of the federal units (Serbia among them). Federal laws from the beginning of 1970s envisaged compulsory vaccination against six contagious diseases (tuberculosis, diphtheria, tetanus, large cough, childhood paralysis and smallpox – Art. 21 para. 2 of the Act on Protection of Population from Contagious Diseases endangering the whole country (*Zakon o zaštiti stanovništva od zaraznih bolesti koje ugrožavaju celu zemlju*, *Sl. list SFRJ*, 58/78), while the later republic legislation added mumps to the list. *See* Art. 26 para. 1 of the Act on Protection of Population from Contagious Diseases (*Zakon o zaštiti stanovništva od zaraznih bolesti*, *Sl. glasnik SRS*, 58/89, *Sl. glasnik RS*, 44/91, 53/93, 67/93, 48/94). In the mid-1990s, the legislation envisaged compulsory vaccination against eight diseases (tuberculosis, diphtheria, tetanus, large cough, childhood paralysis, smallpox, reddening and mumps – Art. 21 para. 2 of the Act on Protection of Population from Contagious Diseases endangering the whole country (*Zakon o zaštiti stanovništva od zaraznih bolesti koje ugrožavaju celu zemlju*, *Sl. glasnik SRJ*, 46/96, 12/98, 37/02).

attendance of preschool and primary school or institutions for accommodation of children without parental care, except in cases of contraindications (Art. 32 para. 4 of the Act).

In terms of relevant administrative law issues, the 2016 PPID Act applies a traditional method of regulating its professional and inspection oversight. Professional oversight is exercised by competent institutes for public health (Art. 37 para. 2), while inspection oversight lies in the hands of the Ministry of Health, i.e. the Sanitary Inspection (Art. 73-76).

Competences of sanitary inspectors have been regulated in the same or similar manner as in earlier legislation. In respect of compulsory vaccination of children, these include: the right and the duty to order the implementation of all measures prescribed by the Act, including compulsory vaccination (Art. 73 para. 2 item 1), to prohibit further distribution of a vaccine or an immunobiological preparation in case of non-adherence of the cold chain principle (item 9), to initiate a criminal or misdemeanour procedure in relevant cases (item 14), or to inform other competent bodies of the reasons for undertaking measures in their own competence (item 15). Considering the last item, it should be noted that the Act does not envisage, even *exempli causa*, which other competent bodies or measures within their competences this applies to. In relation to these issues, there are no relevant bylaws, such as instructions or similar. Several statements issued by the Ministry of Health officials in the previous years, warning parents who oppose vaccination that they could be deprived of their parental rights (although without a clear legal ground for such an action), represent only one of the problems. Therefore, the Act leaves an enormous gap allowing for various interpretations, thereby supporting legal insecurity.

When mandating a measure, the inspection does so by an individual administrative act – a written ruling (Art. 75), passed in accordance with the General Administrative Procedure Act<sup>17</sup>. In case of extremely urgent matters, necessary to overcome an immediate threat to life and health of the people, these measures can be mandated by an oral ruling (Art. 75 para. 2), which naturally will not be the case when it comes to compulsory vaccination of children.

The first instance ruling can be appealed before the Minister of Health, within eight days, and the appeal does not suspend its execution. By this, the Act sets exceptions from the general regime of administrative procedure, envisaging a general 15-day appeal deadline and the suspensive effect of administrative appeal, as a rule.<sup>18</sup> The final decision of the Minister can be appealed before the

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17 Zakon o opštem upravnom postupku, *Sl. glasnik RS*, 18/16, hereinafter: „GAP Act“.

18 See Art. 153 and 154 GAP Act and Art. 39 of the Act on Inspection Oversight (Zakon o inspekcijskom nadzoru, *Sl. glasnik RS*, 36/15).

Administrative Court, in the procedure of administrative dispute, according to general legislation.<sup>19</sup>

As all laws before it, the 2016 PPID Act contains penal provisions, within which it envisages misdemeanour pecuniary sanctions for different offenders, including health institutions, physicians, legal entities and persons (Art. 77-85). In terms of compulsory vaccination of children, particularly relevant provisions include those on penalties in case of: non-application of measures prescribed by law in general and by a decision of the sanitary inspector (Art. 75 para. 1 item 9 and para. 5); omission of a health institution to organise and implement immunization in accordance with the law (Art. 79 para. 1), or of a public health institute to oversee immunization in accordance with the law (Art. 80 para. 1 item 3); a physician who does not implement immunization or does not keep the prescribed records of immunization (Art. 84 para. 1 item 3); or a person who rejects compulsory immunization (Art. 85 para. 1 item 6).<sup>20</sup>

Misdemeanour penalties for persons (in this case, parents) range between 20.000 and 50.000 Serbian Dinars. However, most applications submitted by sanitary inspectors to the Misdemeanour Courts, based on information from primary healthcare centres, have ended with warnings instead of pecuniary penalties. Healthcare institutions could be penalised if they do not report on these cases and do not implement the prescribed measures by imposing a penalty of 100.000 to 800.0000 Serbian Dinars.

Media reported that in 2016 misdemeanour courts received over a thousand initiatives based on violations of the PPID Act, including cases of rejection to vaccinate children (although their exact number is not publicly available). According to data issued by the Ministry of Health, 40 percent of these cases have been decided in courts. Most cases came from larger urban areas, such as Kragujevac, Subotica, Novi Sad, Belgrade, Nis and Zrenjanin.<sup>21</sup> Similar statistics have been reported in 2017, even though some courts have issued first pecuniary fines.<sup>22</sup>

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19 The Administrative Disputes Act (Zakon o upravnim sporovima, *Sl. glasnik RS*, 111/09).

20 Related to earlier legislation, the 1989 Act envisaged that a parent or legal guardian of a minor would be penalised for certain activities, including rejection of immunization, if that was a consequence of an omission to ensure proper care for the minor (Art. 49 para. 2). Thus, not every rejection of vaccination would be penalised, unless all relevant circumstances could be considered to meet the requirements for an omission to provide proper care, in accordance with the relevant family law regulations.

21 Politika online, „Umesto kazne za nevakcinisanje dece samo opomena“, Retrieved 7. February 2017, from <http://www.politika.rs/scc/clanak/318433/Umesto-kazne-za-nevakcinisanje-dece-samo-opomene>

22 In August 2017, Belgrade Misdemeanour Court had 209 pending cases concerning children vaccination. During the first half of 2017, this court passed 32 judgements, out of which there

## 4. Consequences of Non-Compliance with Compulsory Vaccination of Children

### 4.1. Medical Law Aspects

Even though relevant Serbian laws have supported compulsory childhood immunization for decades, it was only the Patients' Rights Act of 2013 that changed the patients' attitudes and resulted in an increase in refusal of compulsory vaccination (Sjeničić, Miljuš, Milenković, 2016: 326). When refusing to vaccinate their child, parents would often refer to Article 15 of the Patients' Rights Act, which guarantees the right to consent as one of the patient's fundamental rights. The patient is, therefore, entitled to make free decisions about anything concerning his or her life and health, except when this poses a direct threat to the life and health of other persons. This also assured that no medical measure could be conducted on a patient without his or her consent, apart from the exceptional cases prescribed by law and in line with medical ethics.

As the drop in compulsory vaccination coverage started to increase, the Serbian legislator envisaged additional tightening of the measures related to the compulsory character of immunization, prescribing that compulsory immunization is the immunization of a person of a certain age, as well as other persons as prescribed by law, which cannot be refused by the person receiving immunization or the parent or guardian, unless there is a medical contraindication which is determined by a specialized medical doctor, or an expert team for contraindications.<sup>23</sup> However, sadly for the legislator, the expected effect – a greater coverage of vaccinated children – did not actualize, and the very tightening of the measures reopened the question of patients' right to consent to a medical intervention and the right to self-determination.<sup>24</sup> As previously mentioned, the medical law regulations instruct that no medical measure can be conducted without the consent of a person such measure applies to. The right to self-deter-

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were 21 convictions: 18 warnings and three pecuniary fines. B92 online, "U postupku 209 predmeta zbog nevakcinisanja dece", Retrieved 13, August 2017, from [http://www.b92.net/info/vesti/index.php?yyyy=2017&mm=08&dd=13&nav\\_category=16&nav\\_id=1292631](http://www.b92.net/info/vesti/index.php?yyyy=2017&mm=08&dd=13&nav_category=16&nav_id=1292631)

<sup>23</sup> Art. 32, para. 2 of the 2016 PPID Act.

<sup>24</sup> See: Results of compulsory immunizations 2013-2015 made by Statistical Office of the Republic of Serbia (Republički zavod za statistiku, 2016: 85). According to the Institute of Public Health, the main reasons for the drop in the compulsory vaccination coverage are: frequent interruptions in the distribution of vaccines (distribution of vaccines often did not go in line with the distribution plan); refusal of immunization assisted by the action of antiviralists, but also insufficiently strong attitudes and arguments related to the work of pediatricians in primary health care. (Institut za javno zdravlje, dr Milan Jovanovic Batut, 2017: 47).

mination, which is the foundation of the requirement of the patient's informed consent, may be limited in exceptional cases in order to protect the very interests of a patient, or the interests of the society as a whole. Thus, the law does not require a patient's consent in case of an emergency and necessary expansion of a medical treatment, nor in certain cases where the law requires an individual to undergo a medical intervention regardless of their potentially contrasting will. Such cases of so-called forced treatment are explicitly prescribed by the law and involve, *inter alia*, the forced treatment of suspects or prisoners, alcoholics or drug addicts, treatment of persons with mental disorders in certain cases, treatment of pregnant women, as well as compulsory immunization. However, these situations, restricting the patient's right to self-determination, should be observed as mere exceptions from the basic principle of medical law "*salus et voluntas aegroti suprema lex est.*"<sup>25</sup>

On a regular basis, before performing the vaccination, a physician has the duty to provide all relevant information to the person about to be vaccinated; in case of persons under 15 years of age, the information shall be given to a parent or a person who is entrusted with child care and education so that they can make fully-informed decision on whether to participate in the vaccination.<sup>26</sup> The information given before every vaccination must in any case include, *inter alia*, information about the illness to be prevented, any possibilities to treat the infectious disease, advantages of the immunisation for the individual and the general public, information about the vaccine (ingredients, indicating the batch number), information about the beginning, duration of the immunisation protection and the vaccination plan, necessity of booster vaccinations, as well as the conduct after the vaccination, contraindications, possible side effects and/or complications.<sup>27</sup>

In addition, when using vaccines, as with all other medicines, a physician has the duty to report on unforeseen occurrences stemming from the use of medicines, side effects not yet known, the increased occurrence of known side effects, previously unknown intolerances or interactions with other medicines, etc. All relevant information and actions, provided for a patient in an adequate and timely manner, are important not only in terms of ensuring the patient's right to consent and self-determination but also in respect of supporting a better doctor-patient relationships and building greater public trust in this medical intervention.

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25 „The wellbeing of a patient and his or her free will are the highest law.“

26 See Art. 19 of the Patients' Rights Act.

27 For example, see The Austrian Ombudsman Board (AOB), *Child vaccination*, Retrieved 30, May 2017, from <http://volksanwaltschaft.gv.at/artikel/child-vaccination>

#### **4.2. Administrative law aspects**

Sanitary inspection has always exercised oversight over the implementation of immunisation laws since the beginning of 1970s or even earlier (in old SFRY laws). Under the 2016 PPID Act, oversight over different measures for protection against infectious diseases (e.g. urgent disinfection measures and child vaccination) entails the same administrative proceedings and measures.

As outlined above, the Sanitary Inspection can mandate the implementation of certain measures (both within or out of the healthcare system) to patients and their legal guardians (since these cases often involve minors). The inspector passes a ruling in an administrative procedure regulated by the 2016 PPID Act, as a *lex specialis*, alongside with the Act on Inspection Oversight and the GAP Act. In that, the PPID Act envisages two important exceptions from the general administrative procedure regime: a shorter deadline for appeal and the exclusion of its suspensive effect. It should, however, be noted that such solutions are not a novelty. The same provisions were envisaged in the former 2004 PPID Act (Art. 43), as well as the 1989 PPID Act (Art. 40 para. 2).

The same exceptions from the GAP Act apply regardless of the type of measures mandated by the Inspection's ruling and its addressee. Thus, the same administrative appeal deadline and exclusion of its suspensive effect apply to a healthcare institution or a physician that do not implement immunization, as well as to parents who, for whatever reason, challenge the need for compulsory vaccination of their child.

Hence, one could ask which specific reasons for such urgency in execution of repressive measures exist in cases of compulsory vaccination of individual children. It is clear that such reasons exist, for instance, in case of epidemics endangering the whole population. However, since deadlines in administrative procedure as defined by the GAP Act are already short enough, it is questionable if the same reasons could be related to all diverse situations covered by PPID Act.

Examples of shorter appeal deadlines are not rare in administrative law, while the exclusion of the appeal's suspensive effect is less frequent (Tomić, 2017: 556). It is customarily envisaged in cases where it is possible to **restore the prior situation**, if the appeal is justified (e.g. money paid on the account of an unlawful tax ruling). In case of vaccination, if a decision were forcibly executed (which is in theory possible according to the GAP Act provisions on administrative execution), such a reversal certainly would not be possible.

The Inspection Oversight specifically regulates that the exclusion of appeal's suspensive effect is possible if it is in accordance with the specific inspection competence and necessary in case of urgent measures to prevent dangers for,

*inter alia*, life or health of people (Art. 39). This general provision has been transformed into a general rule in case of Sanitary Inspection's rulings according to PPID Act.

In relation to the above, a question is thus posed: in case of postponement of a child's vaccination for another two months, which is the maximum duration of second instance administrative procedure (Art. 174 GAP Act), is the risk for the population so grave that it necessitates the demand to forcibly execute the first-instance ruling of the Inspection? Secondly, does the exclusion of the appeal's suspensive effect (added to the possibility of forcible execution which can be initiated by the first instance inspection itself) in a way make the very idea of appeal pointless.

Related to execution, the Act does not go beyond the GAP Act rules on administrative execution which apply here since compulsory vaccination of a child is a non-pecuniary obligation on the part of the parents. It is, however, unclear how execution would actually be forcibly undertaken, i.e. how a child may be vaccinated by force.

Case law, perhaps fortunately, does not provide answers to these questions since it does not include examples of forcible execution of the Sanitary Inspection rulings in case of compulsory child vaccination. The Administrative Court has not voiced itself on this issue either, not even on the principal level.<sup>28</sup>

Finally, in terms of the enrolment in educational institutions, since the adoption of the 2016 PPID Act, there were some cases of children rejected for enrolment in kindergartens. However, no cases concerning primary schools have been reported so far, given the fact that the first generation of children who are to be subject to this Act started school in September 2017. It should, however, be noted that this provision should be viewed from the perspective of the obligatory character of primary education prescribed by the Constitution (Art. 71), as already deliberated in some other European countries<sup>29</sup>, as well as from the perspective of the legislation in the field of education, which does not yet contain corresponding provisions for any level of education.

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28 For instance, in a rare decision concerning vaccination, the Administrative Court simply states that compulsory vaccination does not demand consent of the vaccinated person or the legal guardian, Judgement of the Administrative Court, II-9 U 11958/2015 of October 20, 2015.

29 For instance, the Czech Constitutional Court held that such an obligation is not an unconstitutional limitation of the right to education as guaranteed by the Czech Constitution. See: Pl. ÚS 16/14 of 27 January 2015, Compulsory Vaccination as Condition for Admission to Kindergarten, Czech Republic, Judgment of the Constitutional Court in the name of the Czech Republic, para 107.



### 4.3. Family Law Issues

In addition to the limitation of the patient's right to self-determination, compulsory vaccination seems to have recently raised another important family law controversy - the old discussion about the limits of family autonomy, including parental rights, versus the right of the state to intervene in family relations. This issue was particularly supported in previous years with several announcements of the Ministry of Health officials in the media<sup>30</sup>, concerning the possibility that parents who oppose vaccination could be deprived of their parental rights on the basis of child neglect. These quite disturbing statements, lacking explicit legal ground, have only increased already existing parents' concerns related to vaccination of their children and, unfortunately, once again confirmed the primarily repressive course that our state is taking in relation to this certainly important public health issue.

It is obviously forgotten that all parents have the right and obligation to care for their child.<sup>31</sup> Therefore, parents are obliged to make decisions about the child always minding the child's best interest, a comprehensive legal standard which can only be appropriately evaluated based on the circumstances of each specific case. Related to this, it must be emphasized that majority of parents love their children and want only best for them. In light of the fact that vaccines may in some cases cause severe adverse reactions, parents are naturally facing the dilemma and concerns on the vaccine safety, caring for the welfare of their child, because they are either unaware of or have doubts about the available scientific evidence.<sup>32</sup>

In these cases, in addition to the state obligation to secure the public welfare, the state also has the responsibility to address parents' concerns complementary to the strength of parents' convictions. It is important to achieve this through adequate and continuous individual and public education activities, by providing parents with all needed information in each specific case, and addressing the risks of their decisions. Furthermore, any state intervention must take into account all relevant circumstances, particularly when having in mind long-term consequences of limiting parental autonomy. Considering the fact that

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30 See, for example, Blic online, *Šta sadrži novi zakon: Šest važnih pitanja o vakcinaciji*, Retrieved 15, April 2017, from <http://www.blic.rs/vesti/drustvo/sta-sadrzi-novi-zakon-sest-vaznih-pitanja-o-vakcinaciji/mejp8y8>; RTS, *Vakcinacija dece izmedju zakona i roditelja*, Retrieved 15, April 2017, from <http://www.rts.rs/page/stories/ci/story/124/drustvo/1894970/vakcinacija-dece-izmedju-zakona-i-roditelja.html>.

31 See Art. 68 of the Family Act (Porodični zakon, *Sl. glasnik RS*, 18/05, 72/11 and 6/15).

32 This is only confirmed by recent controversy surrounding association between the MMR vaccine and autism.

deprivation of parental rights represents the most severe family law sanction<sup>33</sup>, which also affects the child, such a measure should be used with caution and be executed only in cases where all relevant circumstances are considered to meet the requirements for an omission to provide proper care, in accordance with the relevant family law regulations.<sup>34</sup> Any other approach to the issue of vaccination refusal carries the risks of further decrease of public confidence and cooperation, and only undermines the true potential of immunisation programs.

All previously stated is not to say that we cannot envisage some extreme situations in which there may be a need to protect the child by overruling and limiting parental autonomy. However, when considering the ultimate standard of the best interests of the child, as well as one of the most important rights of every child – the right to live in a family and be cared for by parents before all<sup>35</sup>, these situations could only be envisaged as an exemption, not as a rule. Fortunately, in our recent family law practice, we have not found any case in which the court has decided on the deprivation of parental rights exclusively based on the fact that parents have refused to vaccinate their child. Additionally, it seems that professionals in the social work centers are currently not considering to follow the announcements of the ministry officials in their everyday practice. This gives hope that the existing family law measures (both preventive and repressive), mainly imposed within the scope of guardianship authorities<sup>36</sup>, would in time be used to primarily address parents' concerns related to compulsory vaccination, by supporting them to make decisions which serve the best interests of their child and the society, and always abiding by the principle of the least intrusive intervention.

## 5. Concluding Observations

The provided analysis of the Serbian legal framework shows a history of a compulsory approach towards vaccination of children, with a constant increase in the number of compulsory vaccines. As a result, Serbia is among the European countries that envisage mandatory vaccination against the maximum number of infectious diseases.

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33 See Art. 81-82 of the Family Act.

34 Years ago, the American Academy of Pediatrics emphasised that »Continued (vaccine) refusal after adequate discussion should be respected unless the child is put at significant risk of serious harm (as, for example, might be the case during an epidemic). Only then should state agencies be involved to override parental discretion on the basis of medical neglect« (Diekema, Committee on Bioethics, 2005).

35 See Art. 60 of the Family Act.

36 See Art. 79-80 of the Family Act.

The approach of Serbian policy makers is a dominantly repressive one. This is demonstrated through the prominent role of the Sanitary Inspection in monitoring the implementation of the PPID Act and deviations from the general regime of administrative procedure; it entails imposing misdemeanor fines in case of non-vaccination as well as the newly introduced provision making vaccination a precondition for enrolment in educational institutions. Yet, the vaccination coverage is constantly decreasing.

It seems that our legal system lacks a tailor-made approach towards children vaccination, which would take into account all the sensitivities of children as patients as well as the concerns of their parents and legal guardians when making necessary decisions. Unfortunately, we still do not have a systematized body of case law (of both administrative bodies and courts, including the Constitutional Court) which would enable a more thorough legal analysis. Current situation in terms of compulsory vaccination in Serbia also emphasizes the need for a comprehensive analysis of the PPID Act effects by the line ministry and other relevant stakeholders.

Having in mind that vaccination coverage in the past few years has dropped despite its compulsory character, it seems that instead of all coercive measures which currently shade the implementation of our immunization programs it would be valuable to try a different path with all activities that might improve state and family partnership, for the benefit of our children and society as a whole.

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### **ОБАВЕЗНА ИЛИ ПРЕПОРУЧЕНА ВАКЦИНАЦИЈА: ПРАВНИ АСПЕКТИ ВАКЦИНАЦИЈЕ У СРБИЈИ**

#### **Резиме**

Вакцинација је једно од најважнијих средстава примарне здрав-ствене заштите. Међутим, вакцине су специфичне и разликују се од дру-гих врста медицинских интервенција, посебно због тога што представљају једну од најчешћих медицинских мера које се примењују на здраве, а не болесне особе. Њихов циљ није само добробит појединца који их прима, већ су посредно корисне и за целу популацију. Овај чланак истражује тему вакцинације деце у светлу Закона о заштити становништва од заразних болести из 2016. године. Ауторке разматрају релевантне правне аспекте вакцинације деце и анализирају потенцијални сукоб између права деце на заштиту од болести и права родитеља или законских заступника да одлучују о лечењу своје деце. Такође се истражују међународни стандарди и политике у овој области, са циљем извлачења неких закључака о адекватним правним мерама које правилно одражавале потребу за равнотежом између неопходности заштите јавног здравља и права појединаца на самоопредељење и слободу избора.

**Кључне речи:** деца, вакцинација, јавно здравље, право на здрав-ствену заштиту, право на самоопредељење.

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## **THE ENFORCEMENT PROCEDURE FOR SETTLEMENT OF MONETARY CLAIMS BY A JOINT SALE OF REAL ESTATE AND MOVABLE PROPERTY**

**Abstract:** *The 2015 Act on Enforcement and Security of the Republic of Serbia contains new enforcement instruments for the settlement of monetary claims of the enforcement creditor. The enforcement by a joint sale of real estate and movable property is one of the new and special enforcement instruments aimed at settling monetary claims of the enforcement creditor. In certain circumstances, when movable property is located on the real estate, when they are inside or functionally attached to it, it is expedient to cash the real estate and movable assets by selling them jointly. The reason for a joint sale of the real estate and movable property may be the fact that a separate sale could result in a lower selling price both for the real estate and for the mobile assets; thus, given that mobile property is affixed to the real estate, a joint sale could lead to a higher selling price.*

*The competent court in the territory where the real estate is located has exclusively jurisdiction to decide on the proposal for enforcement and execution of enforcement by a joint sale of real estate and movable property, while the real estate and movable assets are exclusively sold at a public sale to the highest bidder (in tender proceedings) for a single total selling price. The purchase of the real estate is conditioned by the previous purchase of movable assets, and vice versa. The author points to specificities of the enforcement procedure by joint sale of the real estate and movable property, the authority of the competent court, the contents of the enforcement proposal, and the rules of assessing the joint value of the real estate and movable assets. The subject matter of analysis are also the legal decisions regarding joint sale by public tender, decisions in case of failure of the public tender, as well as the rules for settling enforcement creditors from the amount of money received by sale.*

**Keywords:** *court, enforcement procedure, enforcement instrument, joint sale, real estate, movable property, public tender, settlement.*

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## 1. Introduction

The Enforcement and Security Act of the Republic of Serbia (2015)<sup>1</sup> regulates the enforcement procedure, where the facts have to comply with the law and where direct or indirect force is used in order to settle the monetary claims of an executive creditor. This Act, as the third one in a row in a more recent history of Serbian statehood, is a result of the process of reforming the national procedural legislation, in which the efficiency, effectiveness and expediency of the procedure of civil-law enforcement were high priority legal-political goals (Stanković, 2016: 7). The introduced law and numerous novelties are compliant with the basic principles of the reform of the judicial system of the Republic of Serbia, which are regulated by the National Strategy of the Reform of Judiciary for the period from 2013 to 2018.<sup>2</sup> One of those principles is efficiency, given that the effective enforcement of court decisions is the basis for the efficient operation of the legal system and exercise of the rule of law.

With the aim of efficient settlement of an executive creditor's claims which can be of monetary and non-monetary nature, there are different enforcement instruments; they entail different methods for a use of force, including various enforcement acts which are undertaken according to certain order in order to settle the executive creditor's claims forcedly (Stanković, Boranijašević, 2017: 89). In an effort to find another efficient enforcement instrument besides the existing enforcement instruments for settlement of monetary claims of an executive creditor, the legislator has regulated a new instrument – the enforcement by a joint sale of real estate and movable property.

The enforcement by a joint sale of real estate and movable property has not caused much interest among legal scholars. Therefore, this paper is only a starting point in analyzing this enforcement instrument and the specificities of enforcement rules which are applied in the procedure for the enforcement by a joint sale of real estate and movable property.

## 2. The Subject of Enforcement

The subject of enforcement in the enforcement procedure by a joint sale of real estate and movable property can be real estate or movable property that fulfills certain conditions. First of all, the real estate or movable property has to be owned by the executive debtor; only then can it be subject to enforcement

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1 The Enforcement and Security Act, *Official Gazette RS*, 106/2015, 106/2016 – the authentic interpretation. Hereinafter: the ESA.

2 National Strategy of the Reform of Judiciary for the period from 2013 to 2018, *Official Gazette RS*, 57/2013.



in compliance with the law. More accurately, real estate and movable property cannot be subject of enforcement if they are excluded from enforcement according to the law.<sup>3</sup>

The next condition is related to the connection between the real estate and movable property that is subject to enforcement. The real estate and movable assets which are owned by the executive debtor can be subject to enforcement by a joint sale in case there is a link between them: if the movable property is attached to the real estate, if it is located inside the real estate, or if it is functionally related to the real estate.<sup>4</sup> Only if this condition is fulfilled, the court will order a joint sale of real estate and movable property. Otherwise, real estate and movable property will be subject to separate enforcement proceedings.

The fulfillment of the condition related to the connection of real estate and movable property point to the need and purposefulness of encashing the real estate and movable property by their joint sale. It is the connection of movable property with the real estate (since it is attached to it, located inside it, or functionally related to it) that points to the fact that their joint sale will yield a higher amount of money as compared to their separate sale (for example, real estate on which there is a business building, inventory and stored goods; a truck and a car; an apartment with in-built closets or tailor-made kitchen cabinets).

### **3. The Authorities of the Court**

The enforcement procedure for a joint sale of real estate and movable property is in the exclusive authority of the executive court. The court is exclusively in charge of defining and implementing enforcement by a joint sale of real estate and movable property. The ESA defines that the court is exclusively in charge of the implementation of enforcement by a joint sale of real estate and movable property, the implementation of enforcement of the obligation of performance, non-performance and endurance, the implementation of enforcement in family-law enforcement issues and enforcement with the aim of returning an employee to work.<sup>5</sup> In other enforcement proceedings, public executors are exclusively in charge of implementing the enforcement.<sup>6</sup>

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3 In compliance with the principle of social justice and in order to preserve a normal and customary life of an executive debtor, the household members and their minimum existence, the legislator has explicitly regulated which real estate and movable property cannot be subject to enforcement (Art. 164, para. 1, and Art. 218 ESA).

4 Article 212, para. 1 of the ESA.

5 Article 4, paragraph 1 of the ESA.

6 The ESA has abolished the parallel system of enforcement which had been valid according to the provisions of the 2011 Enforcement and Security Act, under which the executive

The executive court in the area where the real estate is located is to decide on the enforcement request for settling monetary claims by a joint sale of real estate and movable property. The executive court in the area where the real estate is located is exclusively in charge of implementing the enforcement. In this case, there is attraction of jurisdictions since the exclusive jurisdiction of the court for real estate attracts the jurisdiction of the court for movable property.

Apart from the exclusive authority of the court to decide on enforcement and enforce the joint sale of real estate and movable property, the court is also in charge of bringing a decision on joining the enforcement proceedings on real estate and movable property of an executive debtor. If the competent court has ordered a separate sale of real estate and movable property of an executive debtor and delegated the implementation of separate enforcement implementation procedures to public executors who have been suggested by an executive creditor or executive creditors, in the course of the enforcement implementation procedure the court is also authorized to bring a decision on joining the procedures of implementation of enforcement for the purpose of a joint sale of the real estate and movable property of the same executive debtor (Stanković, Boranijašević, 2017: 224).

#### **4. A Suggestion for Enforcement and a Decision on Enforcement**

The procedure of enforcement by a joint sale of real estate and movable property of an executive debtor is initiated by a filing a motion with the competent court. A motion for enforcement is an initial procedural action of an executive creditor by which he initiates the procedure of compulsory enforcement for settlement of monetary claims. The executive creditor submits a motion for enforcement to the court which has the subject matter and territorial jurisdiction, and requests settlement of his monetary claims by a joint sale of real estate and movable property of the executive debtor. An executive creditor usually requests settlement of claims by a joint sale of real estate and movable property in situations when the amount of claims is high and when he considers that only a joint sale of real estate and movable property of an executive debtor can produce the amount of money sufficient enough for settling the claims in full (Stanković, Boranijašević, 2017: 224).

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creditor defined in the motion for enforcement who was to implement the enforcement: the court, the public executor, or the private executor, except in enforcement cases where the court had an exclusive authority to decide on this issue (Article 2, para. 2 related to Article 35, para. 6 of the Enforcement and Security Act, *Official Gazette RS*, 31/2011, 99/2011 – the other law. Hereinafter: the ESA 2011).

The executive creditor's motion for enforcement has to contain all substantive elements regulated by the law. The central part of a motion is a request for enforcement that is decided upon by the executive court. The court decides on the enforcement request for the settlement of monetary claims of the executive creditor by a joint sale of real estate and movable property by issuing a decision on enforcement, which serves as the legal ground for the implementation of enforcement.

By issuing a decision on enforcement, the court accepts the request for enforcement by a joint sale of real estate and movable property, and orders that the enforcement be implemented by a joint sale of real estate and movable property. In the decision on enforcement, the court will order a joint sale of property in case the movable property is located on or inside the real estate, or if the movable property is functionally related to the real estate. A joint sale means that real estate and movable property are sold at the same public bidding hearing, jointly and for a single total price. The purchase of real estate is conditioned by a previous purchase of movable property, and vice versa<sup>7</sup>, which is a logical consequence of the fact that a joint sale is primarily organized with the aims of achieving a higher selling price. Otherwise, separate enforcement proceedings would be conducted on real estate and movable property.

In order to ensure the settlement of claims, the court may issue a decision on enforcement by a joint sale of real estate and movable property even in the course of the enforcement implementation procedure. Acting upon the proposal (motion) of the executive creditor, the court may bring such a decision even later on in the proceedings (until a certain moment in the procedure), provided that all the legal conditions for joining individual enforcement proceedings on real estate and movable property have been fulfilled.

## 5. The Enforcement Actions

In the procedure of enforcement by a joint sale of real estate and movable property, various enforcement actions are undertaken. In order for real estate and movable property to be sold, it is first necessary to estimate their joint value. After that, a joint sale of real estate and movable property is performed and, in the end, settlement of executive creditors is made by using the amount of money received by a joint sale.

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<sup>7</sup> Article 212, paragraph 2 of the LES.

### ***5.1. The Estimation of Value of Real Estate and Movable Property***

In order to sell and encash the real estate and movable property of an executive debtor for the purpose of settling the monetary claims of an executive creditor, it is necessary to determine their joint value. After bringing a decision on enforcement, the court makes a conclusion and orders an assessment of the joint value of real estate and movable property.

The enforcement action of assessing and establishing the joint value of real estate and movable property is taken by the court. In the provisions on a joint sale of real estate and movable property, the legislator does not regulate the mode of assessment, but refers to the application of the rules concerning the enforcement for settlement of monetary claims by a sale of real estate or movable property.<sup>8</sup> Considering that in individual enforcement proceedings on real estate and movable property the evaluation is performed according to the market price on the day of valuation, the court will determine the joint value of the real estate and movable property according to their market price on the day of valuation.

The evaluation can be performed in different ways. As a rule, the court itself estimates the value of the listed goods that are subject to enforcement. However, there are cases where the court is not competent enough to evaluate the listed goods; then, the court may decide to perform estimation by asking for additional information about the price of the real estate or movable property. The information may be obtained from relevant organizations, institutions, legal entities, or individuals of relevant profession (e.g. an officially registered expert witness in a specific field of expertise, or an entrepreneur performing specific activity).

### ***5.2. A Joint Sale of Real Estate and Movable Property***

After establishing the joint value of real estate and movable property, the court can undertake an enforcement action of their joint sale.

The court is obliged to make a conclusion on a joint sale of real estate and movable property. Although the legislator explicitly refers to certain rules which are to be applied in enforcement proceedings involving real estate, there is no such referral when it comes to contents of the conclusion on sale. It is indisputable that the conclusion on sale must specify the mode and conditions of a joint sale of real estate and movable property.

The mode of sale is regulated by the ESA, which specifies that real estate and movable property may only be sold in the process of public bidding.<sup>9</sup> When it

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8 Article 2016 of the LES.

9 Article 213, paragraph 1 of the ESA.

comes to the conditions of sale, it is necessary to perform individualization of goods in the conclusion on a joint sale. More accurately, it is necessary to define which real estate and which movable property items of the executive debtor's property are subject to a joint sale in public bidding. Also, the conclusion shall include a time limit within which a buyer of real estate and movable items is obliged to pay the selling price.

The conclusion on sale in public bidding is delivered to the parties, lien creditors, participants in the procedure (e.g. a third party, the holder of the servitude right, the debtor of an executive debtor), the holder of the legal right of a more substantial purchase and the holder of the contractual right of a more substantial purchase on real estate which has been entered into the Real Estate Cadastre. The conclusion is published on the court bulletin board, or in any other common way. Both the executive creditor and the executive debtor, at their own expense (depending on the appraisal of their own interest), can post an advertisement which contains a conclusion on a joint sale in public media and inform the sales intermediaries about it.

As a rule, public bidding for a joint sale of real estate and movable property is organized on the court premises. Yet, if it is considered purposeful, the court may organize public bidding in some other place. In the joint sale procedure, there are at least two hearings for oral public bidding. The first hearing for public bidding is held in the period that cannot be shorter than 15 nor longer than 30 days from the day of publishing the conclusion on a joint sale of real estate and movable property in public bidding on the court bulletin board.

In order to participate in public bidding, the interested parties first have to pay a surety bond. According to the law, surety equals one tenth of the determined value of the real estate and movable property, and has to be paid prior to publishing the conclusion on a joint sale of real estate and movable property in public bidding.<sup>10</sup>

According to the law, an executive creditor cannot be a participant in public bidding, nor a buyer of real estate and movable property that are being sold. There are different reasons for that. First, an executive debtor cannot be a buyer of the goods sold in oral public bidding since he is a party in the procedure and the enforcement is performed on the goods in his property in order to settle an

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<sup>10</sup> In order to take part in public bidding, some potential participants in public bidding are excluded from the obligation to pay a surety bond. An executive creditor and pledge executive creditor are excluded from the obligation place a surety bond if their claims reach the amount of surety, and if that amount could be received from the selling price considering the order of settling claims and the appraised value of real estate and movable property (Article 175, para. 3 of the ESA).

executive creditor. Besides, if an executive debtor appeared as a buyer of his own goods, it would be clear that he had acted in bad faith and that he abused his rights by allowing for the enforcement procedure to be undertaken since he had not settled his debts even though he had relevant means to do so (Stanković, Boranijašević, 2017: 224).<sup>11</sup>

Also, in case there is only one bidder, i.e. only one person who has paid a surety bond and who does not dispute that he is a potential bidder even though he has not placed a bid, a hearing for public bidding for a joint sale of real estate and movable property is still held. If there is only one bidder present, public bidding can be delayed. Before the court announces the beginning of public bidding, an executive creditor has the right to suggest delay of public bidding if he considers that conditions for achieving a favorable selling price have not been fulfilled. Then, depending on the the circumstances of the case, the court may delay the public bidding for a joint sale of real estate and movable property. If there is only one bidder in public bidding, who does not place a bid for buying real estate and movable property, whereas the executive creditor has not suggested delay of public bidding, the court makes a conclusion and states that public bidding has not succeeded.

### ***5.2.1. The Course of Public Bidding***

After the court has determined that all the conditions for accessing public bidding have been fulfilled, the public bidding procedure is set in motion. Public bidding starts by announcing the public bidding. After that, a starting joint price of the real estate and movable property is stated, and the participants are invited to place their bids.

The starting price for selling real estate and movable property in the first hearing for public sale equals 70% of their estimated value, and they cannot be sold for a price lower than this in the first hearing. Public bidding actually represents the most favorable way of selling real estate and movable property of higher value since goods are expected to be sold for a price which is higher than the estimated value of the goods. This means that 70% of the estimated value is a starting price. Goods will be sold for the starting price if there is no more favorable bid.

The starting price of real estate and movable property can be higher. Expecting to achieve a more favorable selling price which would help him settle the claims, an executive creditor may suggest that the starting price in the first bidding

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<sup>11</sup> No other person who officially participates in the procedure, nor a person who is a blood relative in the first line or a next of kin in the second line up to the fourth degree of kinship, a spouse, an unmarried partner or an in-law up to the second degree, nor a guardian, an adoptive parent, an adoptee, or a foster parent, can be a buyer of the goods sold in public bidding.

be higher than 70% of the estimated value of real estate and movable property. The parties can also make a joint proposal for the starting price to be higher. In this case, the court is obliged to set a higher starting price in the first public bidding, which has to be higher than 70% of the estimated value of real estate and movable property.

After the starting price is announced, the participants are invited to place their bids. During the public bidding, no bidder can offer a price lower than the starting price. If there are more bidders, every bidder is obliged to offer a price which is higher than the price offered by the previous bidder. A bidder is obliged by the given bid until a higher price bid is placed.

As there is a real possibility that real estate and movable property may not be sold in the first hearing for public bidding, the court is obliged to state that the first sale has not succeeded. Another public bidding for the sale of real estate and movable property is scheduled, which has to begin within a period of at least 15 days and 30 days at the most from the day of termination of the first public bidding.

When another hearing for public bidding has been scheduled, it is necessary to determine a new starting selling price. The new starting selling price for the real estate and movable property items which are subject to sale in the second public bidding cannot be lower than 50% of their estimated value, and the goods cannot be sold for a lower price in the second bidding.

Public bidding for a joint sale of real estate and movable property is closed by the court in case (after being called twice to place a higher bid) none of the bidders offers a higher price. After closing the public bidding, the court checks the validity of the bids and announces which of the bidders has offered the highest price, i.e. which one is the most favorable bidder. After a possible declaration on using the right to a prior purchase, the court makes a conclusion about assigning the real estate and movable property.

*Inter alia*, the conclusion on assigning the real estate and movable property includes the full names or business names of the first three most favorable bidders. In the conclusion, it is especially emphasized that the real estate and movable property will be allocated to the second-ranking bidder who has offered the first most favorable price after the most favorable bidder, or to the bidder who has offered the most favorable price after the second-ranking bidder in case the most favorable bidder and the second-ranking bidder do not pay the offered price within the deadline stated in the conclusion on sale of real estate and movable property.

The law also determines the rules on returning and keeping surety in public biddings. Immediately after closing the public bidding, surety is returned to the bidders whose offer is either invalid or has not been accepted. The second- and third-ranking bidders are returned surety after the most favorable bidder has paid the offered price within the specified period, while the third-ranking bidder is returned surety when the second-ranking bidder has paid the offered price. The surety of the bidder who has not paid the offered price is used to settle the costs of the public bidding and the difference between the offered price and the paid price.

In case the first three bidders do not pay the offered price within the specified period, their surety is used to settle the costs of the second public bidding for a joint sale of real estate and movable property and the difference in price between the first and the second public bidding.

According to the law, public bidding is considered failed if there are no bidders, if none of the bidders places a bid or offers a selling price equal to the starting price or higher within ten minutes from opening the public bidding.<sup>12</sup> Public bidding is also considered failed if none of the bids is valid, or if the first three bidders from the list in the conclusion on the allocation of the real estate and movable property do not pay the offered price during the specified period. The failure of public bidding is confirmed by the court in the conclusion.

In case no joint sale of real estate and movable property is realized in the repeated bidding, the court brings a conclusion in which it orders separate sales of real estate and movable property, and appoints a public executor who is to undertake the enforcement. This means that separate sales of real estate and movable property are organized according to the rules applicable in enforcement proceedings on real estate and enforcement proceedings on movable property. The sale in separate enforcement proceedings on real estate and movable property is performed by a public executor who is exclusively in charge of the enforcement.

### ***5.3. Settlement of Executive Creditors***

In the conclusion on a joint sale of goods, the court specifies the time limit within which a buyer of real estate and movable property should pay a selling price.

When the selling price is paid, the court brings a conclusion on handing over the real estate and movable property. This conclusion is served on all persons involved in the joint sale who are thus informed that the procedure of encashing the subject of enforcement has been successfully completed.

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<sup>12</sup> Article 183, paragraph 1 of the ESA.



After a buyer has paid the selling price, it is necessary to determine which part of a totally paid price is used for buying the real estate and which one for buying the movable property. The evaluation is done by a permanent expert witness.<sup>13</sup>

The settlement of the executive creditors and other people who are entitled to settlement is performed after the permanent expert witness has determined which part of the paid price is considered the part received from selling the real estate and which part of the total price has been received by selling the movable property. The settlement procedure is conducted separately for the real estate and for movable property, and both settlement proceedings are conducted by the same judge, by applying the rules of settlement in the enforcement procedure on real estate and enforcement procedure on movable property.<sup>14</sup>

## **6. Joining Procedures of Conducting of Enforcement**

The legislator envisages a specific legal solution in terms of conducting the enforcement by a joint sale of real estate and movable property. Namely, the court can join the already initiated enforcement proceedings on real estate and movable property, and proceed with the enforcement.<sup>15</sup> This solution constitutes a departure from the rule that a public executor is the only one in charge of conducting the enforcement for settlement of monetary claims on real estate and enforcement on movable property.

The court is exclusively in charge of the enforcement procedure by a joint sale of real estate and movable property. However, it may happen that an executive creditor has filed a proposal/motion for enforcement (thus initiating the enforcement procedure) but has not proposed a joint sale of real estate and movable property. The creditor has not done this because he expected to settle his claims by selling the real estate only or separate parts of movable property only, or he had different claims on the same executive debtor which were due in different periods of time according to the executive documents which had been the basis for ordering of enforcement (Stanković, Boranijašević, 2017: 231). Since the court has ordered the enforcement in separate enforcement proceedings for real estate and for movable property, by issuing the decision on enforcement the court concurrently specifies the local public executors who shall be in charge of conducting the enforcement.

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13 Article 214, paragraph 1 of the ESA.

14 As the discussion on the rules of settlement in the enforcement procedure on real estate and enforcement procedure on movable property exceeds the scope of this paper, for more detail about these rules see: Stanković, Boranijašević, 2017: 198-200, 222-223; Stanković, Boranijašević, 2014: 182-183, 192-193; Jakšić, 2012: 864 – 867; Račić, 2009: 111-112, 123-124.

15 Article 215, paragraph 1 of the ESA.

An executive creditor can subsequently propose the joining of enforcement proceedings which are being conducted by one or a number of different public executors. Joining procedures implies a change of the enforcement instrument, but the court is not authorized to change the enforcement instrument (falling within the exclusive jurisdiction of a public executor), except upon a proposal filed by an executive creditor. Thus, later in the course of the proceedings, an executive creditor may file a proposal, asking the court to join the enforcement proceeding on real estate and enforcement proceeding on movable property of the same executive debtor, if the conditions for a joint sale are fulfilled: if movable property is located on or inside the real estate, or if it is functionally attached to the real estate, which implies the use of the real estate for a specific purpose. The real estate by purpose is movable property which is attached or belongs to the real estate, thus making a functional and legal entity with it (Civil Law Lexicon, 1996: 401). The real estate by purpose is movable property which serves the real estate; its purpose has been determined by the owner or by law, and the owner of both real estate and movable property is the same person.

It involves a situation where one or more executive creditors have initiated the enforcement procedure against the same executive debtor but on different subjects of enforcement – real estate and movable property. Regardless of the number of public executors who may conduct one or more enforcement proceedings on real estate and movable property aimed at settling monetary claims of an executive creditor, the court can bring a conclusion on joining the already initiated enforcement proceedings. Given the fact that the court has the exclusive authority to conduct enforcement proceedings on the joint sale of real estate and movable property, acting upon the proposal of an executive creditor, the court may join the already initiated enforcement proceedings previously conducted by one or more public executors. The conclusion on joining these proceedings may be brought until the moment of publishing the conclusion on a sale of real estate or conclusion on a sale of movable property at the latest, depending on the fact which of these conclusions has been published first.<sup>16</sup>

Issuing the conclusion on joining the enforcement proceedings on real estate and movable property causes a derogation of authority of a public executor who had exclusive authority to conduct the enforcement proceedings on real estate and the enforcement proceedings on movable property (Stanković, Boranijašević, 2017: 232). By issuing this conclusion, the court in fact changes the decision on enforcement regarding the enforcement instrument and the subject of enforcement because it orders a joint sale of real estate and movable property which is the exclusive authority of the court, and then proceeds with the enforcement (Stanković, Boranijašević, 2017: 232).

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<sup>16</sup> Article 215, paragraph 2 of the ESA.

In case of joining separate enforcement proceedings for the sake of a joint sale of real estate and movable property, there is no procedure for assessing the value of property because the value of the real estate and movable property is determined in the course of foregoing enforcement proceedings.

The issue of costs of procedure before public executors until the moment of joining the enforcement proceedings has also been raised. As an executive creditor is obliged to give an advance to a public executor conducting the enforcement, the question is raised what is done with the advance paid by the executive creditor in case of joining the enforcement proceedings. According to the Public Execution Tariff, if the court, acting upon the proposal of an executive creditor or ex-officio, brings a conclusion on joining the enforcement proceedings and on a joint sale of the real estate and movable property, and then proceeds with the enforcement, the public executor keeps the advance received as reimbursement for preparing, conducting and archiving the case, and reimbursement for individual actions taken and for the real costs they have had up to the moment of issuing the conclusion on joining the enforcement proceedings, but transfers the rest of the advance to the executive creditor.<sup>17</sup>

If no joint sale of real estate and movable property occurs after joining the separate enforcement proceedings which had been underway, nor in the repeated public bidding, the court issues a conclusion ordering the public executor or public executors (who had been conducting the separate enforcement proceedings before the court's decision on joining the proceedings) to proceed with the enforcement procedure they had been appointed for (Stanković, Boranijašević, 2017: 230).

## 7. Conclusion

By regulating the rules on enforcement procedure by a joint sale of real estate and movable property, the legislator has introduced a new enforcement instrument which will especially suit executive creditors whose claims are large and who will use this enforcement instrument as a successful tool for settling their claims. The legislator has stressed the specificities of this enforcement instrument used to settle monetary claims of an executive creditor by regulating the exclusive authority of the court and conditions that have to be fulfilled for property to be subject to a joint sale, as well as by regulating the procedure of selling real estate and movable property and separate settlement of an executive creditor. On the other hand, the legislator also points to the applicable rules in the course of enforcement proceedings on real estate and enforcement on movable property. Of special importance is the authority of the court to join the

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<sup>17</sup> Article 7, paragraph 4 of the Public Execution Tariff, *Official Gazette RS*, 59/2016.

already initiated separate enforcement proceedings on real estate and movable property in the course of conducting enforcement, which ensures a joint sale of real estate and movable property in public bidding for the sake of procedural efficiency. Thus, by derogating the authority to a public executor and changing the decision on the enforcement, the court proceeds with the enforcement by a joint sale of real estate and movable property, which is in its exclusive authority.

Concerning the relatively short period of validity of the new Enforcement and Security Act (2015), it is not possible to conclude whether the enforcement by a joint sale of real estate and movable property will be a commonly used enforcement instrument. The court practice will show whether there will be any possible perplexities and problems in the practical application of the rules of enforcement by a joint sale of real estate and movable property.

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## **ПОСТУПАК ИЗВРШЕЊА РАДИ НАМИРЕЊА НОВЧАНОГ ПОТРАЖИВАЊА ЗАЈЕДНИЧКОМ ПРОДАЈОМ НЕПОКРЕТНОСТИ И ПОКРЕТНИХ СТВАРИ**

### **Резиме**

Закон о извршењу и обезбеђењу Републике Србије из 2015. године предвиђа нова средства извршења ради намирења новчаног потражи-вања извршног повериоца. Извршење заједничком продајом непокретности и покретних ствари управо представља једно од нових и посебних средстава извршења ради намирења потраживања извршног повериоца новчане природе. У одређеним ситуацијама, када се покретне ствари налазе на непокретности, када су унутар ње или су у функционалној вези са непокретношћу, целисходно је непокретност и покретне ствари уновчити њиховом заједничком продајом. Разлог за заједничку продају непокретности и покретних ствари може бити чињеница да се одвојеном продајом може остварити нижа продајна цена како за непокретност тако и за покретне ствари, односно, да ће се заједничком продајом, због повезаности покретних ствари са непокретношћу, добити виши новчани износ. За одлучивање о предлогу за извршење и спровођење извршења заједничком продајом непокретности и покретних ствари искључиво је надлежан суд на чијем подручју се налази непокретност а непокретност и покретне ствари се продају искључиво на јавном надметању, по једној укупној цени. Куповина непокретности је условљена претходном куповином покретних ствари и обрнуто. У раду ће бити указано на специфичности поступка извршења заједничком продајом непокретности и покретних ствари, на надлежност суда, садржину предлога за извршење, процену заједничке вредности непокретности и покретних ствари. Биће анализирана и законска решења у погледу заједничке продаје на јавном надметању, решења у случају неуспеха јавног надметања, као и правила о начину на који се из продајом постигнутог новчаног износа намирују извршни повериоци.

**Кључне речи:** суд, поступак извршења, средство извршења, заједничка продаја непокретности и покретних ствари, јавно надметање, намирење.



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## **RESTITUTION OF CULTURAL PROPERTY ACQUIRED BY STATE ON BEHALF OF WAR REPARATIONS**

**Abstract:** *The article is inspired by a case brought before Belgrade Higher Court by the Prosecution Office in Bologna at the end of 2015, which concerned a request for an interim seizure and restitution of eight Italian paintings exhibited in the National Museum in Belgrade. The masterpieces in question were acquired by Yugoslavia in the aftermath of the Second World War on behalf of war reparations. Given that restitution request was based on the premise that the paintings were owned by Italy, the preliminary issue was to clarify the matter of ownership. Therefore, the paper examines this issue from the legal point of view and endeavours to respond to the question concerning the actual ownership of the contentious masterpieces. To that end, the author first discusses which law is applicable in this specific case. Then, the author examines whether all the preconditions for derivative acquisition were fulfilled at the time of acquisition of possession: who was the prior owner of the paintings; what was the legal basis for the acquisition; and how the delivery took place. Additionally, the author analyzes whether the rules on adverse possession could be triggered as an alternative way to acquire ownership, especially considering that it is a useful instrument for proving ownership. After that, the author elaborates on international obligation rules regarding the restitution of cultural property in general, as well as the Serbian legislation on this matter, with the aim of ascertaining whether some special rules are provided for this subject matter. In order to gain a global insight, comparable interstate disputes and their outcomes will be explored.*

**Keywords:** *cultural property, restitution, war reparations, derivative acquisition of ownership, adverse possession.*

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## 1. Introduction

The paper examines the legal regime of movable cultural property received by a state as war reparations. In that sense, it is essential to determine whether, and possibly under what conditions, a receiving country could claim its ownership over such artworks. Given the exclusivity of ownership right (Станковић, Орлић, 2014: 58), an ownership title of the receiving state could lead to the rejection of a potential restitution request and retention of the disputed cultural property in its possession. Conversely, failing to prove its ownership, the receiving state would be ordered to return the contentious pieces of art to the country of their origin upon its request.

This subject matter has gained momentum in Serbia recently. Through media, the public was informed about a letter rogatory filed by the competent Italian authority – the Public Prosecution Office in Bologna, asking the Serbian authority – Belgrade’s High Court for mutual assistance. The request was, *inter alia*, aimed at ordering seizure of eight Italian renaissance paintings displayed in the National Museum in Belgrade. Allegedly, the request referred to the paintings which Yugoslavia received by the Allies in the aftermath of the Second World War as war reparations. Although the case is at a standstill for the time being, it has been an incentive for a legal survey on this case. Besides, the research was underpinned by a study *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, commissioned at the European Union level by Directorate General for Internal Policies, and published in 2016.<sup>1</sup>

Against this backdrop, the article pinpoints some questions which would possibly arise in a potential restitution case concerning artworks received as war reparations. These questions touch upon different legal fields, thus creating numerous pitfalls of which the author is entirely aware.

## 2. General remarks on cultural property restitution

Literature and legal texts employ few expressions to designate the process of recuperating cultural property which was illegally or unethically acquired. Two of them, *restitution* and *return*, are commonly used, whereby one could rarely stumble upon the third one: *repatriation*.

The term *restitution* underlines a need for establishing *status quo ante*. This expression depicts the particular nature of cultural objects, in that the request is

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1 Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigation (2016), Directorate General for Internal Policies, Retrieved 13 August 2017 from: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL\\_STU\(2016\)556947\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf)



regularly directed at the return of the very artwork which was illegally removed or which went missing under dubious circumstances. In other words, the request is, as per rule, neither aimed at returning a potential equivalent of the removed cultural object, nor of its pecuniary counter-value. In the doctrine, this is marked with a principle of identification and principle of territoriality, whereby the first suggests that the request is referred to the retrieval of the piece of art which was taken, while the latter implies that a cultural object ought to be returned in the place from which it was illicitly removed (Stamatoudi, 2011: 15, 16).

In some cases, however, recovery of cultural object may not entail upon legal terms, though a return seems to be justified on moral grounds.<sup>2</sup> For instance, it could happen that limitation periods for requesting a return had lapsed, or that an artwork was considered legally acquired at the time of its removal, though from the today's standpoint it would be deemed illicitly taken. In such cases, a term *return* appears to be more pliable compared to *restitution*. Lastly, locution *repatriation* alludes that cultural object has its *patria* – a homeland from where it originates and where it belongs. (Stamatoudi, 2011: 17, 18)

Disputes initiated by restitution requests regularly include an international element complicating, thus, their resolution. Therefore, before focusing on substantive matters, an authority addressed with a request needs to establish if it is eligible to hear the case at all. This is to be designated in accordance with Private International Law rules governing conflict of jurisdictions. The next step would concern determining the applicable law with the help of the conflict of law rules, which again falls within the field of Private International Law. Connected therewith, it should be borne in mind that numerous aspects with this regard are regulated in international instruments. They should, provided that certain conditions are met, take supremacy over national stipulations. In order to check if these requirements are fulfilled, some basic rules of Constitutional law and Public International Law ought to be consulted. Following that, in order to proceed, the authority has to make sure that time limits within which the request may be filed have not yet expired. In addition to that, during the hearing, an adjudicating authority would most probably encounter the issue of possessor's good faith.

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2 A difference between legal and moral duty to give back cultural property which was taken at some point is well demonstrated in a study conducted by John Henry Merryman in the article "Thinking about the Elgin Marbles", Michigan Law Review, Vol.83, No. 8, 1985, 1880-1923. It offers a minute analyses of the circumstances under which ornaments and sculptures from Acropolis of Athens were detached and then shipped to England. The valuable parts are known as the Elgin Marbles, after their exporter. They are displayed in the British Museum in London.

For this perplexity, doctrine underscores advantages of different alternative dispute resolution mechanisms such as: negotiations, mediation, conciliation and arbitration. It is pointed out that these models of solving disputes help avoiding "black and white" solutions by observing legitimate interests of both parties. (Cornu, Renold, 2010) Given the susceptible nature of disputes involving cultural property, one of the major advantages of the alternative mechanisms is that besides legal also ethical principles and convictions, as well as reciprocal interests of the contested parties may be taken into account. (Renold, Chechi, 2016: 7)

### **3. Relevant legal rules with regard to the eight renaissance masterpieces held in the National Museum in Belgrade**

In the following paragraphs, we will lay out legal rules relevant for the case briefly presented in the introduction. To this end, we will examine only international and national legal rules which could be applicable if the case would be heard before the Serbian court. At the same time, we will point at some changes proposed in draft laws, as well as in international and supranational standards, which have not yet been implemented in Serbian law.

#### ***3.1. Establishing jurisdiction***

The primary issue to be clarified is whether Serbian courts could, at all, hear the dispute concerning potential request brought by Italy seeking the restitution of eight paintings exhibited in the National Museum in Belgrade. In Serbia, the answer is to be found in *Act on Resolving Conflict of Laws with Regulations of other Countries* of 1982<sup>3</sup>. Article 54 para. 1 of this Act stipulates: "In proceedings concerning claims under property law, a court of the Republic of Serbia shall have jurisdiction if the property of the defendant *or the item sought by the action is situated within the territory of the Republic of Serbia*", (emphasis added by the author). Given the fact that contentious paintings are currently located in Serbia, its courts would be eligible to entertain the proceedings.

In this respect, it should be noted that final Draft Act on Private International Law, which was published in June 2014,<sup>4</sup> contains a few novelties within its Section IV - Property Law Relations. One of them directly refers to our case. It may be found in Art. 124 point 6, which reads: "Court of the Republic of Serbia

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3 Act on Resolving Conflict of Laws with Regulations of other Countries, Official Gazette of SFRY, No. 43/82 and 72/82 – Amend. Official Gazette of SFRY, No. 46/96 and Official Gazette of RS, No. 46/2006 - oth. Law.

4 Draft Act on Private International Law (2014), Retrieved 14 August 2017 from <https://www.mpravde.gov.rs/obavestenje/6274/konacna-verzija-nacrta-zakona-omedjunarodnom-privatnom-pravu-iph>

shall be competent to hear disputes on restitution of movable cultural object provided that it is situated within the Republic of Serbia at the time when the proceedings commence.” Applied to our case, the provision leads to the same conclusion that Serbian court would be competent to entertain restitution proceedings upon Italy’s request.

Within the national realm, jurisdiction would probably be vested in Belgrade’s High Court. Namely, *Civil Procedure Act*<sup>5</sup> in Art. 40 para. 1 prescribes: “In civil disputes against the Republic of Serbia [...], general territorial jurisdiction shall lie with the court on whose territory the assembly of the relevant territorial organisation is located”, whereas Art. 23 para. 1 point 7 of *the Act on Court Organisation*<sup>6</sup> enshrines that “High Court adjudicates in civil disputes where the value of the subject of litigation allows review”. Currently, the “review is not permitted in property disputes, unless the value of the subject of litigation, in its contested part, exceeds the amount of 40,000 EUR calculated upon official daily mean exchange rate of the Central Bank of Serbia on the date of filing of the action”.<sup>7</sup> Although, the value of eight paintings has not yet been disclosed, it could be assumed that their amount would exceed the mentioned threshold.<sup>8</sup>

### **3.2. Applicable law**

The next question to be clarified is which national law would be applicable to the substance of the case. Given the rule that domestic court applies domestic collision norms (Станивуковић, Живковић, 2008: 233, 240), the answer, at present, needs to be looked for in the *Act on Resolving Conflict of Laws with Regulations of other Countries*. In this respect, Art. 18 para. 1 of this Act prescribes a well entrenched rule known as *lex rei sitae*: “The law applicable to ownership relationships and other *ius in rem* shall be the law of the place in which the property is located.” As already mentioned in the introduction, the core of this dispute oscillates around the ownership title. This renders the cited provision applicable and leads us to Serbian substantive law.

Nevertheless, with this regard, it should be noted that the Draft Act on Private International Law (in Art. 132) provides *lex originis* as potentially applicable.

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5 *Civil Procedure Act, Official Gazette of RS, No. 72/2011, 49/2013 (Decision of Constitutional court), 74/2013 (Decision of Constitutional court), 55/2014.*

6 *Act on Court Organisation, Official Gazette of RS, No 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011, 101/2013, 40/2015, 106/2015, 13/2016, 108/2016.*

7 See Art. 403 para. 33 of Civil Procedure Act

8 For comparison, see: The Telegraph, Titian painting sells for £10.6m at New York auction, Retrieved 14 August 2017 from <http://www.telegraph.co.uk/culture/art/art-news/8287726/Titianpainting-sells-for-10.6m-at-New-York-auction.html>

Namely, "If a thing which was declared as cultural property of a specific country was *illegally* removed from its territory, upon that country's return request its law will apply, unless it chooses the law of the country on whose territory the thing is located at the moment of filing a return request" (emphasis added by the author). *Lex originis* is suggested in literature as desirable applicable law to restitution claims (Renold, Chechi, 2016: 42, 43). In this case, it would lead us to Italian law. Nevertheless, it is disputable if it would be appropriate for the case under discussion. Namely, at this moment, it is not clear whether the eight paintings were *illegally* removed from Italy. Until now, it has not yet been clarified how the paintings were acquired during the War, *id est* whether they were regularly bought or forcibly sold, looted or simply appropriated without money reimbursement being paid to their owners. Therefore, it may be difficult for a competent court to distinguish between these occurrences, especially taking into account the possible lack of solid evidence (Renold, Chechi, 2016: 23).

Given the fact that, for the time being, *lex originis* is only a suggested conflict of law rule, not yet in force, we will continue disentangling the case in accordance with the currently applicable Serbian law.

### 3.2.1. Relevant international rules applicable in Serbia

*The Constitution of the Republic of Serbia*<sup>9</sup> sets out the hierarchy of domestic and international general legal acts. In Art. 194 para. 4 and 5, it lays down that "Ratified international treaties and generally accepted rules of the international law shall be part of the legal system of the Republic of Serbia. Ratified international treaties may not be in noncompliance with the Constitution. Laws and other general acts enacted in the Republic of Serbia may not be in noncompliance with the ratified international treaties and generally accepted rules of the International Law." Accordingly, ratified international treaties, save some exceptions (Vodinić, 2014: 82-86), are placed below the Constitution and above laws and other general acts. Therefore, it needs to be checked if Serbia or its legal predecessors, have ratified any international treaty relevant for the subject matter of the hypothetical restitution case.

Examination reveals that Serbia is, by way of notification of succession,<sup>10</sup> a Contracting party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts and its First Protocol, which Yugoslavia signed in 1954 and afterwards ratified.<sup>11</sup> At international level, the Convention entered into force on 7 August 1956.

9 Constitution of the Republic of Serbia, *Official Gazette of RS*, No. 98/2006.

10 States Parties to the 1954 Hague Convention Retrieved 15 August 2017 from <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha>

11 *Official Gazette of FPRY* – International treaties – addendum No. 4/56.

For the case at hand, the First Protocol seems to offer some guidelines. Its first part sets forth that: "Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property as defined in Article I of the Convention, which is in its territory, if such property has been exported from a territory occupied during an armed conflict. *Such property shall never be retained as war reparations.*" (emphasis added by the author). It goes on stating that: "The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, *shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph*" (emphasis added by the author).

This article appears to be clear. It refers, *inter alia*, to movable cultural property of great importance to the cultural heritage of every people, such as works of art<sup>12</sup>. What could cause problems when construing our case is whether eight Italian renaissance paintings deserve being qualified as "cultural property of great importance to the cultural heritage of every people". Provided that the paintings would merit such qualification, the next thing to be ascertained would be whether the paintings were exported from Italy while it was occupied in relation to the Second World War. Provided these criteria were met, it appears that the paintings could not be retained by Serbia as war reparations. In other words, this stipulation seems to prevent acquisition of ownership title over property received as war reparations. Some authors suggest that in such cases return should be unconditional (Toman, 1996: 345).

However, there is one important detail which may not be disregarded. It concerns the application of the 1954 Hague Convention in terms of time. As already mentioned, the Convention entered into force at the international level on 7 August 1956. This means that Yugoslavia, and subsequently Serbia, could not have been bound by it before that date. (Станивуковић, Живковић, 2008: 50-54) Given the long standing principle of non-retroactivity of international treaties, which is fortified in the *Vienna Convention on the Law of Treaties* of 1969<sup>13</sup>, it is questionable if the First Protocol of the 1954 Hague Convention could be applied to the restitution case between Italy and Serbia. As a matter of fact, the application of the First Protocol of the 1954 Hague Convention in concrete case would depend on when the transfer of Italian artworks to Yugoslavia on behalf of war repara-

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12 See: Article 1 *Definition of cultural property* of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts.

13 Article 28 of the *Vienna Convention on the Law of Treaties* (1969) states: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

tions actually took place. If the takeover occurred after the Convention, and its First Protocol became effective at the international and national level, then the elaborated rules would come into play. Contrariwise, if the delivery happened before that date, the court should seek applicable rules in its national sources. The court would need to determine the actual time of the transfer of contested paintings as a factual question.

### 3.2.2. *Relevant national rules*

Before getting down to relevant national sources, some general rules on the conflict of laws in time, *i.e.* "intertemporal or transitory law" (Vodinelić, 2012: 102-110), will be briefly recalled. The matter touches upon a rule known as *lex retro non agit*. It is commonly regarded that an act which took place at some point of time should be governed by the law in force at that time. In other words, a general rule is that retroactive application of laws is forbidden, unless otherwise explicitly provided. This principle shall not be overlooked, given that hypothetical restitution case deals with occurrences which took place decades ago.

The first dilemma to be solved with regard to Italy's hypothetical restitution request would be: could the request still be filed after approximately seventy years? In other words, does Serbian national law bar restitution actions after some time? For the time being, this question has not yet been separately regulated with regard to cultural property, and therefore general property law rules need to be invoked.

Unlike some foreign jurisdictions, Serbian law does not envisage any time limitations for filing an *actio rei vindicatio* – an action by which a purported owner seeks a return of his individually specified thing from its current possessor. This entails from a long standing rule, widely accepted in domestic doctrine, that ownership may not be extinguished by way of prescription (Gams, Petrović, 1980: 261). Nowadays, this view is also taken in the *Act on Foundations of Property Law Relations*<sup>14</sup>, which lays down in Art. 37 that: "The right to file the action for return of individually singled out thing shall not fall under the statute of limitations".

Accordingly, Italy's request would be admissible and the court could get into the *meritum* of the case. As already pointed out, this is not a special rule concerning the restitution of cultural property but a provision which governs return of individually singled out things in general. This is contrary to the solutions

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14 Act on Foundations of Property Law Relations, *Official Gazette of SFRY*, No. 6/80, 36/90, *Official Gazette of FRY*, No. 29/96, *Official Gazette of RS*, No. 115/2005.

accepted in international and EU law which provide time limitations for filing restitution of cultural property requests.<sup>15</sup>

In order to succeed with the action, Italy would need to prove that it is an owner of the paintings and that they are in Serbia's possession. On the other hand, Serbia, as defendant, could contend that it has meanwhile acquired ownership over the artworks by filing *exceptio posterioris dominii* (Станковић, Орлић, 2014: 134-135), seeking, thus, rejection of the action as legally unfounded. To succeed with the objection, Serbia would have to prove that it can be regarded as the owner.

However, it is questionable in accordance with which rules the acquisition of ownership should be ascertained. Recalling *intertemporal law*, the applicable law should be the law which was in force at the time when the acts relevant for the transfer of possession over the paintings took place. If we assume that the transfer took place between 1946 and 1954 – the time during which the Commission for Reparations of the Government of Federal People's Republic of Yugoslavia<sup>16</sup> was in operation (Jovović, 1976: 8, 9), the presumption would bring us to the application of pre-war legal rules on acquisition of ownership through adverse possession (Gams, 1980: 205-212). This entails from Art. 4 of the Act on Invalidity of Laws and Regulations Enacted before 6 April 1941 and During Enemy Occupation of 1946,<sup>17</sup> which provides that: "Legal rules contained in laws and other regulations which were in force up until 6 April 1941, and which lost their legal effectiveness, and which have not yet been declared applicable by Presidium of National Assembly of Federal People's Republic of Yugoslavia, or by presidiums of national assemblies of national republics, could be applied to relations which have not been regulated by new rules, provided that they do not run contrary to the Constitution of Federal People's Republic of Yugoslavia, constitutions of national republics, new laws and regulations and provided that they not run against principles of the Federal People's Republic of Yugoslavia and its republics" (Николић, 2016: 182-185).

To prove ownership, for Serbia it would be the easiest strategy to rely on the rules on adverse possession. Here, however, the adjudicating court would need to make sure that at the relevant point in time none of *lex specialis* excluded the

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15 See Art. 8 of Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast) and Art. 3 para 3 and 4 and Art. 5 para. 5 of 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

16 It was established on 15 February 1946 and dissolved on 9 March 1954. For more information, see: Jovović M. Reparaciona komisija Vlade FNRJ 1945-1954, Beograd, 1976.

17 The 1946 Act on Invalidity of Laws and Regulations Enacted before 6 April 1941 and During Enemy Occupation, *Official Gazette of FPRY*, No. 86/46, 105/46, 96/47.

possibility of state owned cultural property being acquired by way of adverse possession.<sup>18</sup> It seems that § 928 of the Serbian Civil Code of 1844, as well as § 1472 of the Austrian Civil Code of 1811, envisaged a possibility of acquisition of ownership through adverse possession which could be applicable in our case. Moreover, § 1477 of the Austrian Civil Code provides rules on absolute adverse possession (Gams, 1980: 207-209). Besides expiration of time, it is crucial that the possessor was in good faith during the entire period needed for the acquisition of ownership. Nevertheless, good faith is presumed (§ 328 of Austrian Civil Code), and the plaintiff shall carry the burden of rebutting it.

For some time, the meaning and the content of the good faith standard has significantly evolved in international and supranational cultural property law. Nevertheless, new rules, which imply the reversal of burden of proof and its shifting to the possessor, have not yet been implemented in Serbian law (Midorović, 2016: 962-968). As the law now stands, this would mean that Italy, as the plaintiff, would need to invest efforts and try to overthrow the presumption on good faith and prove that Yugoslavia was in bad faith at any moment during the time needed for adverse possession. In this sense, some facts could be indicative; for instance, if the paintings were publicly exhibited or were hidden during that period, if they were published in form of catalogs, if Italy had reported the paintings as missing through diplomatic channels during that time, and if Yugoslavia could have had any knowledge about that, etc.

These are some aspects that could be brought up during the potential court hearing initiated by Italy's restitution request. As it could be noticed from the survey, which is not aimed at being exhaustive, the case would leave some maneuvering space for both parties. The outcome would depend on all facts of the case and defense strategy, with considerable prospects for Serbia to win the case before domestic court.

#### **4. Alternatives to court litigation**

Cases dealing with restitution of cultural property involving international elements are not common in domestic court's practice, which renders questionable how much expertise, if any, courts could demonstrate with that regard. Besides, court is bound by legal rules, which prevents it paying attention to the ethical aspects of the case, notwithstanding if the solution reached would be fair and

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18 Currently, Cultural Property Act (Official Gazette of RS, No. 71/94, 52/2011, 99/2011) provides in its Art.14 para.2 that: "The ownership right to state-owned cultural property may not be acquired by means of adverse possession". Similar provision is contained in Art. 17 in conjunction with Art. 16 of the Public Ownership Act (Official Gazette of RS, No. 72/2011, 88/2013, 105/2014, 104/2016, 108/2016).



just. Additionally, cases like this carry potential to outreach the dispute itself. They could cause deterioration of inter-state relations and produce antagonism, not to mention potential political dimension of the dispute, especially in the context of Serbia's EU accession negotiations. Therefore, both parties could consider settling the dispute out of court. In that sense, negotiations have so far proven to be the most fruitful alternative means for overcoming artwork disputes. All the more, the practice has already corroborated a few successful examples in which flexible solutions have been achieved (Renold, Chechi, 2015: 196-199). During negotiations in our case, at least two possibilities could be considered: co-ownership of Serbia and Italy over the disputed paintings with an interchangeable possession, or Serbia's commitment to loan the paintings to Italy from time to time.

## **5. Conclusion**

If Italy would file official request against Serbia seeking restitution of eight renaissance paintings displayed in Belgrade's National Museum, the parties could opt between two solutions: court proceedings or out of court settlement.

In the first case, the Serbian court – most probably Belgrade's High Court, would be competent to hear the dispute. As domestic conflict of law rules now stand, the court would apply Serbian law. With regard to applicable law, the court would need to ascertain if the First Protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts could apply in the concrete case. If it could, the court would have to order restitution of the paintings. That could potentially entitle Serbia to file an indemnity request against the Contracting Party to the Convention whose obligation it was to prevent the exportation of cultural property from occupied Italy. If the Protocol could not apply based on the long standing principle of non-retroactivity of international treaties, the court should apply domestic substantive rules on the restitution of individually specified things. Accordingly, the request would be admissible, given that no time limits for such actions have been foreseen. Provided that Italy could prove its ownership title, Serbia could still contend that meanwhile Italy has lost its entitlement to the paintings due to the rules on adverse possession, which were in force at the time of their delivery. To prove the entitlement over the paintings, Serbia would need to prove only that Yugoslavia was possessor throughout certain time limit. How long that time limit should exactly last would depend on which pre-war rules the court would find applicable in the relevant case. On the other hand, Italy could prevent acquisition of ownership by Serbia if it would succeed in overthrowing the possessor's good faith presumption.

In the second case, out of court settlement in the form of negotiations would leave enough space for mutually acceptable solution. Foreseeable possibilities could be the agreement of co-ownership over consented paintings with their interchangeable possession between Serbia and Italy, or Serbia's undertaking to temporarily loan the paintings to Italy from time to time. This option could help avoiding painful outcome for one of the parties and facilitate maintaining of sound inter-state relations.

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## **РЕСТИТУЦИЈА КУЛТУРНИХ ДОБАРА СТЕЧЕНИХ ОД СТРАНЕ ДРЖАВЕ НА ИМЕ РАТНИХ РЕПАРАЦИЈА**

### **Резиме**

Чланак је инспирисан случајем који је крајем 2015. године покренуло државно тужилаштво при Основном суду у Болоњи пред Вишим судом у Београду захтевом за привремену заплону и реституцију осам уметничких слика изложених у Народном музеју у Београду. Сlike су предате Југославији након Другог светског рата на име ратних репарација. С обзиром на то да се захтев за реституцију заснива на премиси да је Италија власник слика, претходно треба разрешити питање власништва. Стога ће у раду, са правне тачке гледишта, бити испитано коме припадају спорне слике. У ту сврху, најпре ће бити одређено које је право меродавно за конкретан случај. Потом ће бити анализирано да ли су у време преноса државине на сликама били испуњени услови за деривативно стицање својине, односно, да ли је претходник био власник, по ком правном основу су слике стечене и како је извршена њихова предаја. Додатно ће бити размотрено да ли су испуњени услови за позивање на правила о одржају, будући да се она користе и као алтернатива за доказивање стварног стицања. Затим ће се приказати правила о реституцији културних добара установљена међународним изворима, са циљем да се испита да ли постоје специјална решења која су релевантна у овом случају. Како би се стекла глобална слика, у раду ће бити истражени поједини слични међудржавни спорови и њихови исходи.

**Кључне речи:** културна добра, реституција, ратне репарације, деривативно стицање својине, одржај.



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## **THE ROLE OF ROMAN LAW IN THE CREATION AND DEVELOPMENT OF CONTEMPORARY LAW**

**Abstract:** *In legal science and theory, there is a common perception that Roman law played a special and major role in the development, design and interpretation of modern law. Although indisputable, this statement is just a global assessment of Roman law which does not provide a detailed analysis and answers to a host of questions: which stage in the development of Roman law had the most influence on the creation and design of modern law; which Roman law institutes found its place in the modern law through reception; what is the role and importance of Roman law on further development of modern law; and, ultimately, why is there a specific need for further study of Roman law?*

*Therefore, the study and analysis of codifications in modern European law is not only a cornerstone for observing the development of modern law but also an opportunity to speak about Roman law, to define its role and place in this process, and to provide answers to many related questions. This paper explores the following issues: the meaning of Roman law in modern legal terminology; the applicability of Roman law institutes in the conditions of market economy; the role of Roman property law institutes, and their fortitude and similarity to the contemporary property law institutes; and characteristics of Roman contracts and their impact on contemporary law contracts. Only in this way can we provide a substantial answer to the question concerning the specific kind of contribution and impact that Roman law has had in the creation of modern legislation (primarily in the area of private law), and discuss the justification of studying Roman law in further legal education at the university level.*

**Keywords:** *globalization, Roman law, universality, role of Roman law, contemporary law.*

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## 1. Introduction

In legal science and theory, there is the prevailing view that Roman law had a special and very significant role in the emergence, development and interpretation of modern law. Although indisputable, this is just a general statement which does not provide a detailed analysis and answers to a number of related questions: which stage in the development of the Roman law was most influential in terms of the emergence and creation of modern law; which institutes of Roman law found their place in modern law through reception; what is the role and importance of Roman law in further development of modern law; and, ultimately, what is the specific need and rationale for further study of Roman law? Thus, the study and analysis of Roman law represents is not only the foundation for assessing its role and significance in the development of the contemporary law but also an opportunity to observe the evolutionary development of both Roman private law and Roman public law, and their role in the development of contemporary legal institutes and modern European codifications. In this way, we can provide the crucial answer to the question concerning the specific kind of contribution and impact that Roman law has had in the creation and development of modern legislation, primarily in the area of private law, and discuss the rationale for further study of Roman law in legal education at the university level (Ignjatović, 2012: 55-71).

## 2. The "first life" of Roman law

Before embarking on the research and analysis on the role of the Roman law in the creation of modern law, there is a need to learn more about the general circumstances in the period when it emerged and developed. Considering the fact that Roman history had been developing for 13 centuries, it is necessary to precisely determine the period when the need for standardizing particular legal rules emerged (Ignjatović, 2014: 4).

According to the generally accepted view, Roman law is understood as a legal system that was implemented in the Roman state from its formation in the 8<sup>th</sup> century BC (754 BC), to its final breakup after the death of emperor Justinian in 565 AD. A lot of law historians divide this long period of development of the Roman state and law into four periods.

In the first period (754 BC – 509 BC), known as "*the age of kings*" or "*the age of military democracy*", the law was characterized by strict formalism, rigidity, lack of elasticity, scarcity of legal institutes, inequality of citizens before the law, patriarchal slavery, and existence of death penalty. In this period, the main source of law was the Law of the Twelve Tablets, which was the first codification of the customary law created until that point.



The second period (509 BC–27 BC), known as *the age of the Republic*, was marked by the expansion of the Roman state and general development of socio-economic relations, which were reflected in the development of law. In this period, Roman law progressed since it gradually became free of strict formalism, which was often used as a cover for a number of speculative actions, especially in the circulation of commodities. The process of doing away with formalism was accompanied by the creation of numerous legal institutes, especially in the field of the law of obligations, considering the expansion of the state territory and the development of the market economy. During this period, praetors played a very important role in the Roman society; they created the system of *ius honorarium* (honorary law) aimed at making all people equal before the law and instituting fairness in judicial proceedings.

The third period (27 BC – 284 AD), known as *the age of the Principate* or “*the golden age*,” was the period during which the Roman state became a great world power. This period was marked by a great number of legal sources and significant thoughts of educated jurists, the most prominent of whom were the famous five Roman classical jurists: Ulpian, Papinian, Paulus, Modestinus and Gaius, known as “the Senate of the dead”, whose legal thought became part of the Roman legal tradition.

The fourth period (284 BC -565 AD), known as *the age of the Dominate*, was characterized by general decadence of the Roman society. It was the period when all the power was in the hands of a single ruler (“*dominus et deus*”). Thus, in this period, all the laws were designed and created by the ruler himself and the legal thought started to lose its creative power because its role was confined to quoting the works of educated jurists. Finally, during the reign of Emperor Justinian, the codification of the entire Roman private law was created by passing *Corpus Iuris Civilis*.<sup>1</sup>

This brief overview of the historical development of Roman law was necessary in order to provide answers to two crucial questions: which of the four mentioned periods in the development of the Roman law had most influence on further development of the modern, primarily private law; and what was the influence of Roman law on the legal science?

Bearing in mind the level of development of the Roman society in the first period of the Roman history and, to a certain extent, in the second period (until

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1 Precisely, the Western Roman Empire fell in 476 AD, while the Eastern Roman Empire continued to exist and implement the legal institutes created in the Roman state until the death of Emperor Justinian, who was (as noted by some authors), the last Roman and the first Byzantine ruler in 565 AD. Thus, it is clear why the Roman legal institutes had influence on Byzantine law and Slavic people.

the Punic wars), it is quite explicable why these first two periods did not have a significant role in the creation of modern law. However, the situation is very different in the third and fourth periods, particularly if they are observed in terms of law in the classical and the postclassical period. Namely, the classical period is the age when the creativity of Roman jurists came to the fore to the greatest extent possible. This was the period featuring the legal thought of a host of famous jurists (Modestinus, Ulpian, Papinian, Paulus, Gaius), who left behind them some important legal works which served as a foundation for the development of legal science. By passing the law *Lex citationis* in 426 AD, these works were given the power of law, which ensured their survival in the Dominate period, as the last period of the Roman history. On the other hand, the fact that they were given the power of the law enabled the editors of Justinian's codification (forefronted by jurist Tribonian) to use these works in the process of preparing a codification of the entire Roman law created before that period, which was embodied in the grandiose endeavour to codify *Corpus iuris Civilis*. Later on, in the period of reception of Roman law, this endeavour facilitated the process of re-examining Roman law and determining its practical value, primarily within the scope of modern private law.

### 3. The "second life" of Roman law

The decline of the Roman Empire and its disappearance from the historical scene was not the end of Roman law history. It continued to exist, but in a slightly different form. It was no longer forcefully imposed by Roman conquerors; instead, it started being applied in a practical way. Accordingly, this period is known as the period of "long life" of Roman law.

Roman law experienced another revival in the late 11<sup>th</sup> century, when Roman law was recognized as the positive law in medieval cities in Europe. That was a unique case that legal systems of a non-existent civilization continued to be applied a few centuries after its decline (Stanojević, 2001: 96).

Thanks to the reception of Roman law in the vast area of Europe, Justinian's codification was highly appreciated at the University of Bologna (which was at that time a model for other European universities), which particularly refers to its most important parts: *Digesta* and *Institutiones*. In European medieval cities, the reception of Roman law was not done by adopting legislation (i.e. by using legal texts) but in a customary way *via facti*. Having been educated at Bologna University, a lot of educated jurists used Roman law, which they had previously studied and which was much more developed than the domestic law in terms of its content and systematization (Ignjatović, 2006: 303). The Roman law texts were not only studied in university circles but also read by many lay

people. Legal professionals and the judiciary were required to have an excellent knowledge of Roman law and to be able to put it in practice.

In the late 15<sup>th</sup> century, apart from Italy, the process of reception of Roman law was underway in France as well. At that time, France was united in terms of political organization but not in terms of law. Each province had its customary law (*coutumes*) and, for that reason, inhabitants of other provinces were perceived as foreigners in another province. The customary laws were used in Paris, Bordeaux, Burgundy, Brittany and other provinces, whereas the southern parts of the country, for historical reasons, instituted Roman private law. Concurrently, at the normative and factual level, there was a new tendency in legal science. The newly created school of “elegant jurisprudence” turned to studying the history of Roman law, thus giving up the idea of *glossators* and *post-glossators* who preferred the application-oriented approach. Consequently, as a counterpart to the Italian way of studying Roman law (*mos docendi italicus*), there was a new French way of studying law (*mos docendi galicus*) which spread beyond the territory of France.

However, beside scientists who exclusively studied the history of Roman law, there were also those who were dedicated to the issues of the implementation of Roman law in practice. These scholars were the *Pandectists*, called after the most important part of Justinian’s codification: *Pandectae (Digesta)*.

In addition to the Pandectists, *the school of natural law* emerged in the 18<sup>th</sup> century. This school of thought wanted to create a unique law system based on the principles of common sense. Its most prominent representative was Grotius. The proponents of this school criticized certain provisions of Justinian’s codification and insisted that the law should be unified; thus, instead of having the legal order composed of two layers of legal regulations (domestic provisions and Roman law provisions), they urged for enacting uniform legal rules which should be explicitly prescribed in the form of legislation. This doctrinarian request was suitable for the circumstances in France of that time, where domestic regulations were applied as primary legal sources and Roman law was used only as a subsidiary source.

#### **4. The “third life” of Roman law**

Inspired by the school of natural law conception, in 1789, French bourgeois revolution demolished the feudal society. The basic goal posed by the young bourgeois was codification and unification of laws across France. The codification of civil matter in a single legislative act was undoubtedly of utmost importance for the development of public relations and for citizens’ everyday life, given the fact that it regulated social relations which were massively underway. This way of regulat-

ing social relations by means of law had considerable advantages as compared to the already existing practice because all legislative acts were contained in a single text; besides, this legislative endeavour contributed to raising awareness about the relevance of law and facilitated its enforcement; above all, it provided for a better interpretation of the envisaged legal norms.

The creation of a society regulated by the law (*ubi societas, ibi ius*) was not the product of the new bourgeois revolution. It was an entirely Roman conception, which originated many centuries ago and under which the law is perceived as the basic instrument for regulating public relations. The systematization of legal matter into a single legal act was also the basic Roman idea, put into effect through *Corpus iuris civilis*, which is the cornerstone of all modern European codifications.

Yet, the prevailing opinion of the time was that the need for civil codifications was caused by the desire to create new conditions and to ensure further development of private law by abandoning the old norms, especially the Roman law rules. Thus, a special Dutch act was adopted for the purpose of derogating the legal rules of Roman law; Article 1 of this Act explicitly stated that the authority of Roman law was abolished (Zimmerman, 2001: 3). Thus, the legislator laid grounds for the development of new law and a new legal system.

However, in spite of all attempts to abolish the Roman law rules, Roman law and its institutes found their place in the *Code civil*. The renaissance of Roman law took place, both at the theoretical and practical level, in the period of enacting huge bourgeois codifications, although it was contrary to the expectations and intentions of the legislator. Although legal theoreticians gradually stopped dealing with Roman law, new private law codifications were only regional or national versions of a general tendency: to transform and adjust Roman law to modern law, and establish a contemporary version of Roman law. Due to this surprising phenomenon, Roman law got its third life, its third renaissance. It was mostly expressed in the French Civil Code (*Code civil*).

The influence of Roman law on *Code civil* was apparent. The editors of Code Civil accepted the rules of Roman law, as they suited the needs of the young bourgeois and presented *ratio scripta* (written reason), which was particularly important in the domain of property law given the fact that the development of personal property in civil society was based on Roman law, which contained everything that the modern age society aspired to.

On the other hand, the systematization of *Code civil* follows the system of rights envisaged in *Corpus iuris civilis*, such as: the classification into law pertaining to persons, things and actions. In *Code civil*, just like in *Corpus iuris civilis*, the individual has the central position; an individual has both rights and duties,

i.e. a person can be the holder of rights and obligations. The classification of persons into natural persons and legal persons (entities) was also taken from Roman law. However, bearing in mind the slavery features of Roman law, the framers of the **Code civil** did not fully accept the Roman status law, which did not include the definitions of legal capacity and legal sources. In contrast, **Code civil** defines the concept of legal capacity. Moreover, the old Roman law provided protection to the heads of Roman families (*pater familias*), “who created the civil community in their gatherings, and kept kept the benefit of its institutions only for themselves” (Horvat, 2002: 114); by contrast, the French legislator had no social need to envisage such an obsolete legal solution. On the other hand, it is interesting that certain solutions of the old Roman law served as a source of inspiration for newly formed relations. In France, until the enactment of **Code civil**, there was a similar situation concerning family relations, which in some details reminded of the authority of *pater familias* in Rome. The authority (power) of the *pater familias* was dominant only in some French provinces. It was influenced by the return to the agricultural economy, which made this authority legitimate (Ignjatović, 2010: 167-174). Regarding the woman status, the French **Code civil** initially followed the Roman law solutions. This was mainly related to the inheritance rights of a wife, i.e. widow endowment rights. Thus, the Code initially contained an article (taken from Roman law) regulating that, in case of a husband’s death, the wife was legally incapable to inherit; in a subsequently modified provision, the Code envisaged that a married woman had the party autonomy and competence to inherit. Yet, in the opinion of many legal scholars, the use of this provision differed in practice; namely, the **Code civil** included no provisions on women’s civil rights, in spite of the fact that “the Catechesis placed the woman in a subordinate position, officially imposing submission and making her incapable to inherit” (Villey, 1945: 56). When it comes to the institution of custody, the French law took over the solutions of Roman law. The tendency to make the positions of younger and older minors equal, which was present in **Corpus iuris civilis**, was continued in **Code civil**. In the 16th century, Loazel pointed out that the tutelage and custody were the same (Girard, 1923: 248). Although the medieval law solutions were accepted in the organization of the tutor’s function, on the whole, legal provisions from this field were inspired by the provisions from Justinian’s Code. Generally speaking, the concept of legal incapacity (envisaged in modern legislation) also existed in **Corpus iuris civilis** (Villey, 1945: 69).

The second part of **Code civil** (Articles 516 -700) is dedicated to the law relating to things (*in rem*). In this part, the central place is taken by property, as a natural right of a man. French legislature imitates the Roman law provisions, but goes even further; relying on the basic property authorizations determined

in Roman law (*usus, fructus, abusus*), **Code civil** defines the ownership right as indestructible, divine, exclusive, absolute and without any limitations. Such a definition of property suited the circumstances of that period because the bourgeoisie tried to protect their property by referring to the Roman law provisions. However, this concept of ownership was just a bad interpretation of Roman law because Roman law defined the ownership right as *plena in re potestas*, the most extensive but not absolute legal authority, as it was then clear that it had certain limitations. Certain limitations of the ownership rights were envisaged in Roman law; some of them were even predicted in *Lex Duodecim tabularum* (one must leave uncultivated the borderline of certain width against the neighbour's property; one must tolerate the branches of the neighbour's tree above certain height; occasional collecting of fruits which fell on the ground must be allowed; one mustn't change the water course on one's land; any third interested party shall be allowed free access to the river). Moreover, it is unknown whether there was the abuse of rights in Roman law, which may have given rise to certain limitations not only for owners but also for all legal holders. Bearing all these reasons in mind, we have to underline the third argument; namely, given that Romans were not prone to devising definitions and particularly absolute definitions, referring to the Roman law definitions on the ownership right is highly disputable indeed. Further similarities with Roman law may also be found in the provisions on property protection, especially those from Justinian's time. Roman law did not recognize the system of subjective rights, and it provided protection to the recognized subjects of rights via certain complaints. The French legislature created the system of subjective rights but retained the Roman system of complaints. Except for the complaint *actio petitoriae*, which implies a petition for the protection of a specific right, the complaint *actio possessoria* is available to the person seeking to defend their possession. These complaints must be primarily available to the owner of things. In order for someone to be the holder of things, they first had to prove their right. The tenant, depositary and pledgee are not the holders as they are not pretendents to the ownership right. Such a solution of the French **Code civil** is nothing but the solution from the late Roman law (Justin. Inst. IV, 15).

The third part of the **Code civil** (Article 711-2281) regulates different ways of obtaining property, which follows the classification of rights envisaged in Justinian's *Institutiones*. According to the classical jurist Pedit (2<sup>nd</sup> century AD), the essence of any contract is agreement. "*Nullum esse contractum, nullam obligationem, quae non habet in se conventionem*". In the classification of contracts according to their form, the French **Code civil** follows the classification established in Roman law, while retaining the classification of contracts into real and consensual contracts, whereby all contracts can be made in both

oral and written form. As for wrongful acts (torts), the *Code civil* follows the Roman law rules.

The provided examples prove to what extent some provisions of the French *Code civil* were inspired by the Roman models. Some rules were fully incorporated in the modern French law, while other provisions are modified versions of the Roman law solution, adapted and adjusted to the modern legislation; in other words, they are a contemporary version of the Roman law rules. Given the fact that *Code civil* had a direct impact on enacting the Austrian Civil Code (1811), that the Austrian Civil Code influenced the Serbian Civil Code (1844), and that the Serbian Civil Code influenced the General Property Code of Montenegro (1888), which in turn influenced the German Civil Code (1900), there is clear evidence of the huge influence of Roman law and the law of modern European civil societies. Relying on the Gaius classification of civil law (law on persons, things and actions), these codes revived the Roman law matter and made it part of contemporary legislation. On the other hand, nowadays, there is a total of 150 paragraphs of the modern French Civil Code which directly represent the reception of Roman law. Thus, it can be truthfully said that Roman law lives to this day in the modern legislation. It is a peculiar experiment performed by life (Polenak-Akimovska, 2001: 297).

## 5. Instead of conclusion

Based on everything previously stated, it is a cogent fact that Roman law has been permanently present in the science of law, which primarily relates to law studies of Roman private law. However, the influence of Roman law on modern law and its role in the creation of modern legislation has been the topic of constant debates. "That Roman characteristic, with which our law is tinged to the bone and of which everyone is aware in more or less chaotic manner, is not to everyone's taste" (Villey, 1945: 115). Roman law was subject to ample criticism. Disdain towards Roman law recurred in the past and, in Villey's opinion, became "part of the common mindset". The most prominent critics were legal scholars in Germany at the end of the 19<sup>th</sup> century in Germany, who called themselves *Germanists*. By negating Roman law, members of this school strived to build a new system of law rooted in Germanic law, which they considered to be superior to Roman law. In that context, an American jurist stated: "We do not see the advantages that Roman law achievements have brought, as the roots of our law lie in Frankish rather than Roman law, whereas nowadays it is considered that many ideas, which are cited in textbook and taken as the starting point, belong to *Lex Salica*, which had impact on life in Tacitus' *Germania*" (Villey, 1945: 115).

Similar negation of Roman law is present even today in the contemporary law. It is frequently reiterated that Roman law is pure historicism and should be abandoned in the contemporary law studies, that Romanists' discussions are deprived of any allure and that only trained specialists or erudite scholars interested in the history of "dead societies" can participate in them. However, classifying Roman law under historicism would be incorrect because it can easily be applied to the legal institutes pertinent to positive law subjects, which used to exist not so long ago; as a consequence of transition processes, they are no longer part of positive law but they have become part of legal history. This fact should be recurrently emphasized in order to preclude the misleading conceptions of the youth "thirsty for judicial knowledge" and prove that all civil law institutes actually originate from the ancient times.

Consequently, there is a need for further research of Roman law, primarily by using the historical method. Only in this way can future jurists gain the basic legal knowledge; thus, Roman law is "a laboratory for jurists who do not have an opportunity to educate themselves through experiments and laboratory practice"; by exploring Roman law, law students can trace the development of modern law which has its origin, evolution and course of development from early civilizations until the present day (Polenak-Akimovska, 2001: 297). Thus, Polenak's statement that Roman law is a peculiar experiment performed by life is accurate. By studying Roman law, students receive certain didactic knowledge; the study of legal sources encourages proper contemplation on the spirit of legal provisions and drawing conclusions in the spirit characteristic of Roman jurists. Moreover, Roman law plays a huge role in the process of acquiring certain skills concerning the application of the normative method. It is generally known that Romans were first to use the scientific method for creating the normative framework of legal rights and obligations. This normative method certainly implied prior knowledge on legal technique. Romans were famous for their judicial knowledge gradually developed by regulating cases arising from everyday life disputes which were placed within legal frames. Finally, it should be noted that Latin legal terminology today has also survived in the conditions of modern law. "The usage of Latin terms, definitions and phrases is still present in the modern the civil (property) law science and, in some cases, it is given priority. In principle, it is the best proof of their Roman origin and prolonged application in the medieval period and later on in different schools of law. Latin legal terms and phrases are so well-known and numerous that there is no need to cite them individually" (Grupče, 1996: 53).

Relying on the provided examples and discussion, we come to the answers to the specific questions posed at the beginning of this article. Therefore, regarding the phase in the development of law which most substantially affected the



creation of modern law, there is no doubt that these were the classical and the postclassical law periods, when the development of Roman science reached its peak, primarily through the works of classical Roman jurists and (thereupon) through their legal validation: initially, by passing *Lex citationis* and, then, through the codification of certain parts of *Corpus iuris civilis*. This period is known as the “first life” of Roman law. The “second life” of Roman law implied the subsequent reception of Roman law and emergence of numerous law schools (even in the medieval times) which made further research on Roman law possible. The “third life” of the Roman law started with the French *Code civil* (1804), by means of which Roman law continued influencing the law in the modern society. Considering that *Code civil* had certain influence on other civil codes in Europe of that age, it can be concluded that Roman law continued to influence the modern law through modern civil codifications. It clearly proves that it is not the law of the “dead society”. Quite the reverse to that common belief, it is a universal law of permanent character and priceless value. Finally, it can be said that the study of Roman law in the contemporary environment is the prerequisite for attaining solid legal knowledge and raising awareness of general and legal culture, whose understanding can contribute and even practically improve the modern law. Therefore, Roman law should be studied by all those who aspire to become prominent and educated jurist.

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## **УЛОГА РИМСКОГ ПРАВА У НАСТАНКУ И РАЗВОЈУ САВРЕМЕНОГ ПРАВА**

### **Резиме**

У правној науци и теорији, глобално посматрано, преовладава схватање да је римско право одиграло посебну и велику улогу у настанку, креирању и тумачењу савременог права. Иако неоспорна ова конста-тација, чињеница је да је она само глобална оцена римског права без детаљне анализе и одговора на питања која је то фаза у развоју римског права највише утицала на настанак и креирање савременог права, који су то институти римског права који су преко рецепције нашли своје место у савременом праву и каква је улога и значај римског права на даљи развој савременог права, па самим тим и каква је конкретна потреба за даљим изучавањем римског права. Отуда, проучавање и анализирање кодифи-кација савременог европског права представља не само полазну основу за посматрање развоја савременог права, већ и прилику да се проговори о римском праву, и да се одреди његова улога и место у овом процесу, као и да се дају одговори на многа питања почевши од значења римског права у савременој правној терминологији; применљивости института римског права у условима тржишне економије; улога римских института стварног права, и њихова сличност или чак непроменљивост, у односу на институ-те у савременом стварном праву, као и да се укаже на обележја римских уговора и на њихов утицај на уговоре савременог права. Само на овај начин, може се доћи и до суштинског одговора колики је и какав је допри-нос римског права у стварању савременог, пре свега, приватног права, а потом и одговра на питање о оправданости римског права у даљем правничком образовању на универзитетима.

**Кључне речи:** глобализација, римско право, универзалност, значај и улога римског права, савремено право.



# **Trade and Economic Law Session**

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## ***ENSURING ECONOMIC RIGHTS OF CITIZENS OF BELARUS AND FRANCE: COMPARATIVE ANALYSIS***

**Abstract:** *In this paper, we consider the rules of the Civil Code of the Republic of Belarus and the French Civil Code on property, property rights, mortgage, contracts on sale, and others. The focal point of research and analysis are citizens' property rights. In that context, we first explore the French Civil Code and its effects on the legislation of other countries, and analyze the Civil Code provisions which were amended after its promulgation. Then, we examine important international agreements in the field of human rights in this area, and compare the rules on property and property rights as envisaged in the French Civil Code and the Belarus Civil Code, respectively. The observed differences are presented in the provided table. In particular, we draw attention to the shortcomings of the Belarus Civil Code. In the conclusion, we propose solutions that may improve the effectiveness of legislation on property relations.*

**Keywords:** *Civil Code, France, Belarus, property, property rights, mortgage, sale contracts, human rights, economic rights, the law, the state.*

### **1. Introduction**

The modern status of subjects of human rights in different spheres of activity is the result of long-time experience in law-making, most of which belongs to foreign law. A considerable role is given to the experience of the French legislator, as historically it has demonstrated outstanding examples of French rule-making in the field of human rights and civil law to ensure the rights of the owner and private interests, in general.

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The history of France in the second half of the XVIII was distinguished by the presence and dissemination of reformist ideas on different spheres of society. Montesquieu, Voltaire and Rousseau are among the most famous thinkers in France. The significance of their work is illustrated in many of their well-known works, such as Rousseau's "The Social Contract or Principles of Political Rights" published in Amsterdam in the last quarter of the XVIII century (Rousseau, 1762: 170). Montesquieu gained popularity not only in France but also far beyond (Гласникъ, 1851: 3). Montesquieu's work was repeatedly cited in the discussion on the project of the French Civil Code of 1804, and among the enlightened monarchs of Europe it was considered a sign of good manners to refer to his correspondence with Voltaire (Кони, 1844: 159). The most famous act was the French Civil Code, which was a product of the Revolution of 1789. This period was mostly characterized by the fact that it was the first time to provide real protection of the rights and interests of the owner; the property institutions which had already been recognized in French law were improved, thus providing guarantees not only for the protection of rights of the citizens of France but also the rights of entrepreneurs.

## 2. Novelties in the French Civil Code

At the beginning of the XIX century, there were several laws that gave effect to the provisions contained in the French Civil Code. Interestingly, these laws were developed alongside with the Civil Code, which fully ensured harmonization of the legislative process and eventually contributed to the creation of the new French legal system and its uniform application. The Law Schools Act was adopted on 13<sup>th</sup> March 1804, specifically in order to ensure the study of the Civil Code as well as the new French substantive and procedural law. This Act marked the beginning of organized study and dissemination not only of the provisions of the Civil Code but also of new ideas which served as the cornerstone for creating the new French law. The law was the result of a sensible policy, aimed at promoting common French civil law.

One of the key guarantors of the implementation of the Civil Code norms, their consolidation and improvement was the notary system in France. The revolutionary events did not result, as might be expected, in the elimination of notaries who were in the minds of the French associated with the old regime. The **Notaries Act** was drafted but the discussion was not exactly too easy. The main discussion on the Draft Act took place on 2<sup>nd</sup> December 1802, and was accompanied by a significant number of comments and suggestions. Introduction to the protocol of the meeting shows that only one handwritten amendments to the articles of the Notaries Act turned 22 pages (Code civile, De L'imprimerie



de la République, 1804). In the end, the **Notaries Act** was promulgated on 16<sup>th</sup> March 1803 by Napoleon Bonaparte. Interestingly, the Act was promulgated a year earlier than the Civil Code. Thus, the hard work of the Code did not affect the discussion process and promulgation of the **Notaries Act**. In fact, the virtually simultaneous consideration of the two laws allowed legislators to do the job more efficiently.

### **2.1. Civil Rights**

The French Civil Code was significantly updated over the last decades of the 20<sup>th</sup> century. The institutional basis of the Code and the desire of the legislator to preserve the tradition of rule making made it possible to amend the Code without changing its shape and structure. The Code was supplemented with new civil and legal institutions, and their implementation in the Code structure was provided by using the well-known structural elements: titles, chapters and individual articles. The structure of the Civil Code shows that the Civil Code contains the majority of the traditional of civil law institutions. This concept was observed in the Napoleon's Code for a long time. This code was intended solely for the regulation of civil relations, with a few exceptions. In the XX century, and especially since the second half of the XX century, the modern French legislator departed from the original plan of the founders of the Civil Code. This is primarily manifested in the fact that the Civil Code was increasingly filled with public law principles. It may be illustrated by Book I "Of persons", which was placed in front of Title I "Of civil rights". In contrast to the Preliminary Title, Title I "Of Civil Rights" was subject to significant changes, particularly in terms of its structure and content of the articles (for example, Articles 7 and 8 are the only ones provided in the original wording of the Act of 26<sup>th</sup> June 1889.

Of particular importance is Article 8 of Title I, which says that every French person enjoys civic rights. Expressed constitutively, this provision assumes its implementation by means of norms of other legislative acts of the Republic of France and the international human rights conventions. The French legislative acts are: a) N° 46-940 Act of 7 May 1946 relating to natives of the French overseas territories, including Algeria; and b) N° 70-589 Act of 9 July 1970 relating to the content of the civil rights of the commune in the overseas territories.

Among the international acts, whose provisions were to be implemented into the French law, are: a) the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 «*Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*» (Decree N° 74-360 dated May 3, 1974) (Recueil Dalloz et BLD 1974. 181); and b) the International Covenant on Civil and Political Rights, adopted by the General Assembly of the

United Nations on 19 December 1966. «*Pacte international de New York relatif aux droits civils et politiques*» (Decree N° 81-76 dated 29 January 1981) (Recueil Dalloz et BLD 1981. 79).

Article 9 of Title I of Book I acts as amended by Act N° 70-643 of 17 July 1970. Article 9 para. 1 contains the important rule that everyone has the right to respect for his private life. Act N° 83-520 of 27 June 1983 extended the application of Article 9 of the Civil Code in the French overseas territories (Recueil Dalloz et BLD 1983. 315).

Act N° 78-17 of 6 January 1978 found that information shall not be injurious to a person's identity, nor privacy, nor personal or political freedom (Recueil Dalloz et BLD 1978. 77).

Article 10 of the Civil Code contains provisions relating to legal action and collaboration with the court, assessed as the promotion of justice with a view to establishing the truth. This article acts as amended by Act N° 72-626 dated 5 July 1972.

To a large extent constitutively expressed, Article 11 of the Civil Code establishes that an alien (foreigner) in France enjoys the same civil rights as those that are granted or will be granted to French nationals by the international agreements (treaties) of the State to which the foreigner belongs. Ordinance N°45-2658 dated 2 November 1945 (Recueil Dalloz 1946. L.24) established the general conditions of entry and residence of foreigners in France. Subsequently, these provisions were developed in various legislative acts, including: Act N° 93-1027 dated 24 August 1993; Act N° 84-622 of 17 July 1984; Act N° 52-893 of 25 July 1952; Decree N° 54 -1055 of 14 October 1954; Decree N° 60-1066 of 4 October 1960; Act N° 69-3 of 3 January 1969; Decree N° 94-211 of 11 March 1994. Articles 12 and 13 of the Civil Code (containing provisions from the **Nationality Act of 10 August 1927**) were repealed.

## **2.2. The principles of public law**

The most significant changes in Title I (on Civil Rights) of Book I of the Civil Code were introduced in Chapters II and III. Chapter I (on the Enjoyment of Civil Rights) essentially repeated the wording provided in Title I (on Civil Rights). The current structure of this chapter includes Articles 7, 8, 9, 9-1, 10, 11, 14 and 15. Notably, Article 9-1 (enacted by Act N° 93-2 of 4 January 1993) refers to the presumption of innocence.

Chapters II and III contain rules on the new Civil Code institutions, which may be atypical in terms of the meaning and the basic principles of the Civil Code. The content of these chapters is largely burdened by public law principles. Chapter II

(on Respect of Human Body) contains provisions on the rights and safeguards concerning the respect for the human life, body and integrity. This chapter contains eleven articles (Articles 16 to 16-9). Article 16-1 states that human body is inviolable, that everyone has the right to be respected in relation to his body, its elements and its products, which may not be subject to property rights. According to Article 16-1-1 respect for the human body does not cease with death. These rules take into account the version of the Act № 94-653 of 29 July 1994 as a separate legislative act. The provisions of this Act could be used without the Code, but their further development would be confined to Act № 94-653 of 29 July 1994. These rules could be placed in another code which was adopted earlier; it is the Code of Public Health (*Code de la santé publique*), which was adopted in 1953 and then significantly revised in 2000. But the French legislator has found it essential to include provisions on the rights to personal integrity and dignity and respect for the human body in the Civil Code (Богоненко, 2014: 175).

### **3. Comparison of the French Civil Code and the Civil Code of Belarus**

The French Civil Code of France is an example of the simultaneous use of traditional codified forms (Code), the traditional name (civil) and non-traditional content (significant increase in the number of public law rules). The French Civil Code demonstrates a bright example of how human rights' norms migrate from the scope of public law into the private law. In this sense, it is the code name of default value, suggesting a broad interpretation of the entire range of relations, which are governed by this codified act.

The French Civil Code was borrowed by many countries. It is a good example of consolidation of ownership rights (Book II on Property and Various Modifications of Ownership, Articles 517 to 639). The Civil Code is often called "the economic constitution". The provisions on the sale of goods are envisaged in Book II Title VI (Of Sales), covering the nature and forms of sale, the parties and object of sale, parties' obligations, delivery, warranty, avoidance and rescission of sales, redemption, auction, and assignment of claims and other incorporeal rights (Articles 1582 to 1701).

The Civil Code of the Republic of Belarus (1998) is a relatively new code. Table 1 provides a comparative overview of the legal rules envisaged in the French Civil Code and the Belarus Civil Code, which illustrates the observed differences between the two codes.

Table 1. Comparison of the French Civil Code and the Civil Code of Belarus

Civil Code ( France )	Civil Code ( Belarus )
<b>Transformation of economic human rights in the private-law-based forms: freedom of industry and commerce - legal entities</b> (foundation, legal capacity, chartered capital, etc.).	
Book I Title I on Civil Rights Book II Chapter II on Movables	Chapter III Citizens ( Natural Persons ) Chapter IV Juridical persons
<b>Citizens as Civil Law Subjects. Capacity. Right to engage in entrepreneurial activities. Social and legal aspects of the legal personality. The rights of foreigners and stateless persons, etc.</b>	
Book I Title I on Civil Rights	Chapter III Citizens ( Natural Persons )
<b>Commercial rights of the citizen. Freedom to acquire property and real property</b>	
Book III Title VI on Sales Art. 1582-1701	Chapter 30 Purchase and sale Art. 424-537

As the focal point of research and analysis in this paper are citizens' property rights, we will focus on property-related issues. In accordance with Article 13 of the Constitution of the Republic of Belarus, property can be public or private. The State guarantees to everyone equal opportunities of unlimited use of property for entrepreneurial purposes. The State regulates economic activities on behalf of man and society. It provides direction and coordination of public and private economic activity for social purposes.

The subsoil, waters and forests are the exclusive property of the state. Agricultural land is owned by the state. The law may specify facilities that are only owned by the state, or specify the special terms for their transition to private ownership.

At this point, we draw attention to the shortcomings of the Civil Code of the Republic of Belarus considering the rules on property, property rights, mortgage, contracts on sale, and others. It is necessary to supplement the Belarus Civil Code with the rules of movable and immovable property, registration of real estate and disputes on real estate. The Belarus Civil Code can also be supplemented

by the rules on partnerships. These additions may improve the position of the owners. On the whole, the Belarus Civil Code lacks the following rules:

- property formation in general
- real property unit and its boundaries;
- legal relations between neighbours;
- special provisions on compulsory purchase;
- right to electrical power;
- priority on grounds of title registration;
- partition and amalgamation;
- transfer of receivables and other rights;
- lawful excuse;
- junior lien;
- fraudulent sale;
- ability to repurchase;
- effect of a party being dispossessed of real property following protest, etc.

As compared to the French Civil Code, it may be noted that the Civil Code of Belarus contains a significantly smaller number of provisions on sale of goods. In contrast to France, in Belarus the rules on mortgage are not contained in the Belarus Civil Code; they are mainly located in the special Mortgage Act. The Civil Code of the Republic of Belarus includes only a few rules on servitudes.

#### **4. Conclusion**

As compared to the French Civil Code, the Belarus Civil Code is a relatively new code. However, the provided analysis of the legal rules envisaged in the two codes indicates considerable differences, particularly considering the rules on property, property rights, mortgage, contracts on sale, and others. In Belarus, the rules on mortgage are mainly located in the separate Mortgage Act, and the Belarus Civil Code includes only a few rules on servitudes. Considering the observed shortcomings of the Belarus Civil Code on property-related issues, the inclusion of these provisions into the Belarus Civil Code may significantly improve the effectiveness of legislation on property relations. It is particularly important in light of the new rules relating to property envisaged in the French Civil Code, which belong to the sphere of personal rights. Such a new institute

is the institution of civil agreement of the community, envisaged in Book I of the Civil Code.

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## **ОБЕЗБЕЂИВАЊЕ ЕКОНОМСКИХ ПРАВА ГРАЂАНА БЕЛОРУСИЈЕ И ФРАНЦУСКЕ: КОМПАРАТИВНА АНАЛИЗА**

### **Резиме**

*У ово раду се анализирају одредбе Грађанског законика Републике Белорусије и француског Грађанског законика које се односе на имовину, имовинска права, хипотеку, купопродајне уговоре, и друга слична права. Нарочита пажња посвећена је имовинским субјективним правима грађана. У том контексту, најпре истражујемо француски Грађански законик и његов утицај на законе других земаља, уз анализу измена и допуна овог законика наког његовог проглашења. Затим разматрамо одредбе важних међународних споразумима у области људских права, и дајемо компаративну анализу прописа који се односе на имовину и имовинска права грађана садржана у француском Грађанском законнику и Грађанском законнику Републике Белорусије. Уочене разлике су представљене у посебној табели, при чему се нарочито скреће пажња на недостатке Грађанског законика Републике Белорусије. У закључном делу рада, предлажемо решења за унапређење ефикасности законодавства у области регулисања имовинских односа.*

**Кључне речи:** *Грађански законик, Француска, Белорусија, имовина, имовинска права, хипотека, купопродајни уговори, људска права, економска права, право и држава.*





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## **JUDICIAL REVIEW OF ARBITRAL AWARDS IN INTERNATIONAL TRADE ARBITRATION: PRACTICAL PROBLEMS**

**Abstract:** *In the contemporary world inevitably linked into ever more intricate network of international trade relations, international trade arbitration has an increasingly significant role as a dispute resolution method which is much better suited for resolving disputes arising from these relations. Its application is burdened with numerous problems including, in particular, the serious ones related to the challenge of arbitral awards, by which disputes are resolved on the merits and arbitral proceedings are finalized. The issue is further aggravated by the fact that such circumstances impose the need to shift from the sphere of private judiciary towards the public domain protected by the mechanisms of state power. In numerous states, courts have already addressed or endeavored to address many of these issues, more or less successfully. As a result, there is a vast and fairly coherent body of case law developed through judicial practice. The jurisprudence is rather consistent, notwithstanding the fact that judges come not only from various countries but also from different legal traditions. In this paper, the author explores and analyzes some of the most important problems underlying the judicial review of arbitral awards in international trade arbitration, and identifies how these problems have been solved in different states.*

**Keywords:** *arbitration, recognition, enforcement, recourse against arbitral award.*

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## 1. Introduction – Recourse against award

The option of making recourse against arbitral awards in front of the State judicial authorities, to some extent, contradicts the basic principle that the arbitration is grounded on the will of the parties (Janićijević, 2005: 68-69). However, the exercise of the right to make such a recourse exclusively depends on the will of the party who is not satisfied with the outcome of arbitration, and the State judicial authorities cannot initiate the recourse proceedings *ex officio*, which practically means that the will of the parties retains the key significance in activating the judicial control mechanisms pertaining to the arbitral awards (Kandare, 1986: 12). Parties, however, by their dispositions, may not influence the existence of the possibility to make recourse against arbitral awards, by stipulating the right to appeal to different arbitration tribunal, which would preclude them from initiating proceedings in front of the State courts (Triva, Belajec, Dika, 1986: 707).

The recourse against an arbitral award may be made only by invoking the grounds enumerated by the provisions of the law, and these ground generally correspond to those referring to refusal of recognition and enforcement of foreign arbitral awards (Knežević, 1996: 79).

The provision of Article 34 of the UNCITRAL Model Law provides uniform grounds upon which recourse against an arbitral award may be made. In Paragraph (1), it is stipulated that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (Paragraph (3)). The Model Law also allows parties to arbitration proceedings to seek court control by way of defense in enforcement proceedings under Articles 35 and 36. The motion to set aside is limited to action before a court (state judicial body). The Model Law enumerates exhaustively the grounds upon which an award may be set aside. This list is essentially the same as the provision of the Model Law that pertains to the enforcement and recognition of foreign arbitral awards, which is similar to the provisions of Article V of the 1958 New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards.

Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, a practical difference should be noted. An application for setting aside may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance, depending on the law applied by the courts in different States who decide on setting aside or enforcement.

## **2. Setting aside Proceedings**

### ***2.1. Legal Nature of Setting Aside Proceedings***

Courts in numerous jurisdictions have made clear that setting aside proceedings are not appeal proceedings in which evidence is re-evaluated and the correctness of the arbitral tribunal's decision on the merits is examined.<sup>1</sup>

The underlying rationale for that approach is that the arbitral tribunal decides the case finally instead of the State court, and does not merely constitute a first instance authority.<sup>2</sup>

In describing the nature of setting aside proceedings, a court held that the “applicable review in annulment proceedings is that of an external trial, (...) in such a way that the competent court examining the case solely decides on the formal guarantees of the proceedings and the arbitral award, but cannot review the merits of the matter”.<sup>3</sup>

Moreover, courts have regularly emphasized the exceptional character of the remedy as courts should in principle not interfere with the decision of the arbitral tribunal.<sup>4</sup> The reason given by a court in Singapore for this “minimal curial intervention”, which respects the finality of the arbitral process, is that it “acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.”<sup>5</sup>

### ***2.2. Party autonomy***

In practice, parties sometimes make efforts to agree on the available recourse against an award, either by excluding or modifying the right to recourse against an award. This raises the question of party autonomy under Article 34 to exclude or limit the right to apply for setting aside the award. Divergent court decisions have been rendered regarding possible exclusions or limitations of the right to apply for the setting aside of an award. A Canadian court held that the parties may agree to exclude any right they would otherwise have to apply to set aside an award under Article 34, as long as their agreement does not conflict with any mandatory provision of the legislation enacting the Model Law, and does

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1 Apa Insurance Co. Ltd. v. Chrysanthus Barnabas Okemo, Ltd, Sofia v. Tintoreria Paris,, Cairo Court of Appeal, Egypt, 3 April 2007, case No. 123/119

2 Oberlandesgericht Karlsruhe, Germany, 10 Sch 01/07, 14 September 2007

3 Sofia v. Tintoreria Paris

4 Quintette Coal Limited v. Nippon Steel Corp. et al.

5 CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK

not confer powers on the arbitral tribunal contrary to public policy.<sup>6</sup> A similar position was adopted by a court in New Zealand. After expressing sympathy for a “contractual stipulation which further limits the grounds upon which review is available, merely supplements Article 34, and does not derogate from it”, the court held that a right to apply for a review of a violation of the rules of natural justice could not be excluded.<sup>7</sup> The court further held that the waiver of legal recourse in the arbitration rules applicable to the arbitral proceedings in that case did not cover setting aside proceedings, but was meant to exclude review of the merits of the case.

A more restricted position has been adopted by the Indian Supreme Court. It held that the exclusion of any recourse against an arbitral award is not valid.<sup>8</sup> In Tunisia, the Court of Cassation differentiated in this respect between arbitrations involving parties that have their headquarters, domiciles, or places of business in Tunisia and those that do not. Only the latter could exclude by agreement the possibility to set aside an award. If both parties have their place of business in Tunisia, such an agreement would be void.<sup>9</sup>

Even greater differences exist as to the approaches adopted by courts in relation to the question of whether and to what extent the parties may modify or extend the rules on recourse against an arbitral award or otherwise limit the finality of an award. A court in New Zealand held that due to the “exclusionary terms” of Article 34, the parties could not grant the courts further reaching powers to review an award.<sup>10</sup> The Indian Supreme Court, for the same reasons, considered void a clause which provided a party which disagreed with a first award rendered in proceedings under the auspices of an Indian institution with a right to start new proceedings in London. It considered that the parties could not question the validity of an award in proceedings other than in setting aside proceedings.<sup>11</sup>

## ***2.3. Admissibility of setting aside Proceedings***

### *2.3.1. General considerations*

Article 34 deals with the admissibility of actions to set aside an award, as well as the applicable standards thereof. In relation to the admissibility of such ac-

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6 Noble China Inc. v. Lei Kat Cheong

7 Methanex Motunui Ltd. v. Spellman and Bayerisches Oberstes Landesgericht

8 Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.

9 Court of Cassation, Tunisia, 18 January 2007, case No. 4674

10 Methanex Motunui Ltd. v. Spellman

11 M/S. Centrotrade Minerals & Metal. Inc. v. Hindustan Copper Ltd.

tions, there is no guidance in the Model Law on matters such as the required form of applications, their content or the admissible evidence. These issues are regulated in the domestic procedural or arbitration law. Applications which do not comply with such domestic legislation will usually be rejected. A Bulgarian court, for instance, rejected an application to set aside an award as inadmissible as the letter sent to the President of the Bulgarian Supreme Court did not fulfill the requirements for a proper application to set aside an award under Bulgarian Law.<sup>12</sup> Equally, a court rejected certain evidence submitted in the context of such action as the submission did not comply with the relevant legislation.<sup>13</sup>

The German Federal Court of Justice held that compliance with the requirements to be met by an application for requesting the setting aside an award had to be examined by the court on its own motion, irrespective of any challenge on that matter by the other party.<sup>14</sup>

### *2.3.2. Jurisdiction to hear an application under Article 34 (Scope of application—territorial element)*

It is usually considered that, pursuant to Article 1 (2), Article 6 and Article 34 (2) of the Model Law, a court has jurisdiction to hear an application for the setting aside of an arbitral award under Article 34 only if the place of arbitration is within the national jurisdiction of such court.<sup>15</sup> Where the parties have agreed that the place of arbitration shall be within a State, only the courts of that State will have jurisdiction to hear an application under Article 34<sup>16</sup> even if all hearings of the arbitral tribunal are held in another State.<sup>17</sup> However, if the place of arbitration is neither agreed upon by the parties nor determined by the arbitral tribunal, the courts at the effective place of arbitration, i.e. the place where all relevant actions in the arbitration have taken place or, if this cannot be determined, the place of the last oral hearing, have been considered to have jurisdiction under Article 34.<sup>18</sup>

By contrast, Indian courts have assumed jurisdiction to set aside awards rendered in arbitral proceedings which had their place of arbitration outside India.

12 Supreme Court of Cassation, Bulgaria, Commercial Chamber, case No. 106 of 1 December 2009

13 Baseline Architects Ltd. and others v. National Hospital Insurance Fund Board Management

14 Bundesgerichtshof, Germany, III ZB 53/03, 27 May 2004

15 Oberlandesgericht Dusseldorf, Germany, 6 Sch 02/99, 23 March 2000, and PT Garuda Indonesia v. Birgen Air

16 Cairo Court of Appeal, Egypt, 16 January 2008, case No. 92/123

17 PT Garuda Indonesia v. Birgen Air

18 Oberlandesgericht Dusseldorf, Germany, 6 Sch 02/99, 23 March 2000

One of the arguments was that the Indian enactment of the Model Law in defining its scope of application omitted the explicit statement found in article 1 (2) that its provisions would "only" apply in arbitrations which have their seat in India.<sup>19</sup> In later decisions, courts have adopted a low threshold for assuming that the parties to arbitration proceedings taking place outside India have, at least implicitly, excluded the application of the Indian Arbitration Act.<sup>20</sup>

### 2.3.3. *Arbitral award*

Setting aside proceedings under Article 34 are admissible against all types of arbitral awards, irrespective of whether they completely terminate the proceedings or are awards finally determining only certain claims. The mere fact that a party consented to an award on agreed terms does not prohibit it from applying for the setting aside of the award. Thus, courts considered that where the award on agreed terms was obtained by fraud, it may be set aside.<sup>21</sup> Equally, separate awards on costs may be considered in setting aside proceedings.<sup>22</sup>

A controversial issue is whether setting aside proceedings are admissible against an award that merely determines preliminary questions of the claim. There is no uniform terminology for such awards. They are in practice often referred to as "interim awards" or sometimes as "partial awards". A German court considered setting aside proceedings to be inadmissible in a case where a "partial award" determined merely the liability of the respondent for a breach of contract but left the determination of the amount of damages to a second stage. The court considered that the final outcome of the arbitral proceedings was still open. Notwithstanding the determination that the contract had been breached, the claim might still be rejected if no damages could be established.<sup>23</sup>

A different approach has been adopted in two decisions of a court in Canada. In the first case, the setting aside proceedings had been initiated against an "interim award" in which the arbitrator had determined that only some claims were justified. For the court, the relevant question for the admissibility of setting aside proceedings was whether the arbitrator's decision was final on the merits of the case, or was a procedural order or a non-binding decision.<sup>24</sup> In the second case, the action for setting aside had been initiated against a decision by

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19 *Venture Global Engineering vs. Satyam Computer Services Ltd. & Another*

20 *Yograj Infrastructure Ltd. vs. Ssang Yong Engineering and Construction Co. Ltd. and Sakuma Exports Ltd. v. Louis Dreyfus Commodities Suisse S.A.*

21 *Bundesgerichtshof, Germany, III ZB 55/99, 2 November 2000*

22 *VV. and Another v. VW*

23 *Oberlandesgericht Frankfurt, Germany, 26 Sch 20/06, 10 May 2007*

24 *The Gazette, Une division de Southam inc v. Rita Blondin et al.*

the arbitral tribunal ordering the production of certain documents. The court did not question the admissibility of the application and it rejected the action on the merits, holding that the arbitrator did not exceed his powers in making such decision.<sup>25</sup>

Courts have held that setting aside proceedings against procedural orders of arbitral tribunals are inadmissible.<sup>26</sup> According to the decision of a court in Tunisia, an interim award ordering interim protection measures was not an award in the meaning of Article 34, and consequently a motion to set aside such an award was not admissible.<sup>27</sup> In another case, a court also held that no action could be initiated against the preliminary fixing of the arbitrators' fees in the award.<sup>28</sup>

A court does not have jurisdiction under Article 34 to set aside a decision of an arbitral tribunal that does not constitute an arbitral award within the meaning of the Model Law.<sup>29</sup> In one case, it was found that a decision of an arbitral tribunal constituted an arbitral award if it entailed a decision on the merits of the case,<sup>30</sup> while in another case it was stated that a decision of an arbitral tribunal could be considered as an arbitral award if it met the formal requirements of Article 31 of the Model Law.<sup>31</sup>

However, in a number of other decisions, assertions that the award did not meet the requirements of Article 31 have not been considered sufficient to make Article 34 inapplicable, but have rather been considered to constitute possible grounds for setting aside the arbitral award.<sup>32</sup>

#### *2.3.4. Award on jurisdiction*

Diverging court decisions have been rendered on the question whether decisions of arbitral tribunals declining jurisdiction could be subject to the setting aside procedure under Article 34. A court in Singapore has considered that such decisions of arbitral tribunals did not constitute an award in the meaning of Article

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25 Endorecherche inc. v. Universite Laval

26 Oberlandesgericht Koln, Germany, 9 Sch 06/03, 3 June 2003 and *The Gazette, Une division de Southam inc v. Rita Blondin et al.*

27 Court of Appeal, Tunisia, 8 May 2001, case. No. 83

28 Court of Appeal, Amman, Jordan, 4 March 2009, No. 218/2008

29 Oberlandesgericht Koln, Germany, 9 Sch 06/00, 20 July 2000

30 Hanseatisches Oberlandesgericht Hamburg, Germany, 14 Sch 01/98, 4 September 1998

31 Oberlandesgericht Koln, Germany, 9 Sch 06/00, 20 July 2000

32 *D. Frampton & Co. Ltd. v. Sylvio Thibeault and Navigation Harvey & Freres Inc. and Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001*

34.<sup>33</sup> By contrast, the German Federal Court of Justice has come to the opposite conclusion, at least if the decision of the arbitral tribunal was rendered in the form of an arbitral award.<sup>34</sup> The issue has been addressed in the national laws of some countries. Under the Austrian law, the erroneous denial of jurisdiction constitutes an additional ground for setting aside an award. Section 611 (2) No. 1, which corresponds to Article 34 (2)(a)(i), reads as follows: "An arbitral award shall be set aside if: (1) a valid arbitration agreement does not exist or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement."

#### *2.3.5. Applications by third parties*

A third party intervener in the arbitration has been allowed to bring an action for the setting aside of an arbitral award where the parties and the arbitral tribunal have, at least tacitly, consented to the intervention and where the intervener has a legal interest in the outcome of the arbitral proceedings.<sup>35</sup>

A court in New Zealand, however, held that an application to have an award set aside could only be made by parties to the arbitration agreement. Even those third parties who had interest in the outcome of the arbitral proceedings or who would be directly affected by it lacked legal standing to initiate setting aside proceedings.<sup>36</sup>

#### **2.4. Burden of pleading and burden of proof**

Few decisions have dealt explicitly with the burden of pleading and the burden of proof issue in international arbitration. Concerning the burden of pleading, some courts decided that the grounds for setting aside an award listed in paragraph (2)(b) were to be considered *ex officio* by the courts and that they could be raised even if the time limit referred to in paragraph (3) had expired.<sup>37</sup> Concerning the burden of proof, a court stated that, under paragraph (2), the applicant has the burden of proving a ground on which the award should be set aside.<sup>38</sup>

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33 PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S.A., relying in its reasoning also on the definition of the term "award" included in the Singapore International Arbitration Act

34 Bundesgerichtshof, Germany, III ZB 44/01, 6 June 2002

35 Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002

36 Methanex Motunui Ltd. v. Spellman

37 Bundesgerichtshof, Germany, III ZB 55/99, 2 November 2000

38 Re Corporation Transnational de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.



### **3. Recognition and enforcement of awards**

#### ***3.1. International awards***

By treating international commercial arbitration awards in a uniform manner irrespective of where they were made, the Model Law distinguishes between “international” and “non international” awards instead of relying on the traditional distinction between “foreign” and “domestic” awards (Richard, 1987: 13-27). This new line is based on substantive grounds rather than territorial borders (Gaja, 1980: 5). The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions.

By modeling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements it, without conflicting with the regime of recognition and enforcement created by that successful Convention (Sanders, 1979: 231-247; Van den Berg, 1981: 284-287).

Under Article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of Articles 35 (2) and 36. Based on the desire to overcome territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement. It was amended in 2006 to liberalize formal requirements and reflect the amendment made to Article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under Article 35 (2).

#### ***3.2. Mandatory character of recognition and enforcement of arbitral awards***

Both recognition and enforcement are mandatory, subject only to the specific exceptions listed in Article 36.<sup>39</sup> The existence of a residual jurisdiction to refuse enforcement for other reasons is generally denied.<sup>40</sup> However, in a country where the legislation enacting the Model Law had omitted the word “only” contained in

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39 *Europcar Italia S.p.A. v. Alba Tours International Inc.*

40 *Aloe Vera of America, Inc. v. Asianic Food (S) Pte. Ltd.*

article 36 (1), a court held that it had general discretion to refuse enforcement on grounds other than those defined in Article 36.<sup>41</sup>

Discretion is assumed in the opposite case – when in principle a ground to refuse enforcement exists. A Canadian court, for example, held that even if one of the circumstances set out in Article 36 (1) existed, enforcement could still be ordered in the exercise of judicial discretion.<sup>42</sup> Equally, courts in Hong Kong have declared awards enforceable irrespective of the fact that the arbitral tribunal had been appointed by the wrong subdivision of the chosen arbitral institution.<sup>43</sup>

### ***3.3. Applicable procedure***

Proceedings for the recognition and enforcement of awards under Article 35 are court proceedings, and the procedural rules of the country where recognition and enforcement is sought apply to such proceedings.

It was determined by a Canadian court that only the formal requirements of Article 35 applied to an application for recognition and enforcement of arbitral awards under the legislation enacting the Model Law, to the exclusion of any other requirements in the domestic procedural law of the country where enforcement was sought.<sup>44</sup> The law applicable to the merits is irrelevant.<sup>45</sup>

The law of the State where recognition and enforcement is sought is also relevant for the determination of time limits within which a party must apply for the relevant action. It has been held by a Canadian court that a declaration of enforceability of an award may be time-barred if also a domestic arbitral award cannot be enforced any longer. In the case at hand, the court did not apply the ten-year time limit for judgments, but the shorter two-year period for other decisions.<sup>46</sup> According to the court, the starting point for the limitation period was the time when the award could no longer be set aside in the country of origin.

### ***3.4. Jurisdiction to hear an application***

It follows from the abovementioned nature of the proceedings that the court where an application is lodged must have jurisdiction to hear the case. A Ca-

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41 *Resort Condominium v. Bolwell*

42 *Europcar Italia S.p.A. v. Alba Tours International Inc. and Robert E. Schreter v. Gasmac Inc.*

43 *China Nanhai Oil Joint Service Corporation, Shenzhen Branch v. Gee Tai Holdings Co. Ltd*

44 *Dunhill Personnel System v. Dunhill Temps Edmonton*

45 *Oberlandesgericht Munchen, Germany, 34 Sch 14/09, 1 September 2009*

46 *Yugraneft Corp. v. Rexx. Management Corp.*, where the court held that time limits under the applicable statute of limitation constituted authorized "rules of procedure" under article III of the 1958 New York Convention.

nadian court concluded that the Model Law granted the competent courts in the country where recognition and enforcement were sought the jurisdiction to hear an application for enforcement of an arbitral award notwithstanding the fact that such courts would not have had jurisdiction to hear contractual disputes between the parties.<sup>47</sup> By contrast, a German court refused to assume jurisdiction over a defendant which was domiciled in a foreign country and had no assets in Germany.<sup>48</sup>

The court's power under Article 35 is limited to decide whether the award will be recognized and enforced in its own jurisdiction, and cannot extend to the setting aside of an award.<sup>49</sup> Setting aside falls within the competence of the courts at the seat of arbitration.<sup>50</sup>

### **3.5. Arbitral award**

Whether a decision by an arbitral tribunal constitutes an arbitral award is determined primarily on the basis of the law of the State where recognition and enforcement is sought, according to several court decisions.<sup>51</sup> The fact that an arbitral award has been confirmed by a judgment in the jurisdiction where the award was made, does not exclude the enforcement of the award. A Canadian court decision confirmed that such an award should not be considered as having been merged with the judgment and should therefore be enforced as an arbitral award and not as a foreign judgment. The argument given by the court was that otherwise the purpose of the enforcement provisions of the Model Law would be defeated.<sup>52</sup>

In case of international awards rendered in the State where enforcement is sought, the arbitration law determines what constitutes an award, in particular the formal requirements.<sup>53</sup> Certain courts considered that the absence of signatures on the award does not prevent the issuance of a declaration of enforceability if reasons are given.<sup>54</sup> Notwithstanding the fact that in principle an award has to be signed by all arbitrators, a court considered that an arbitral tribunal's

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47 Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific Specialties Ltd.

48 Kammergericht Berlin, Germany, 20 Sch 07/04, 10 August 2006

49 Cairo Court of Appeal, 7th Economic Circuit, Egypt, 2 July 2008, case No. 23/125

50 Cairo Court of Appeal, Circuit 91 Commercial, Egypt, 16 January 2008, case No. 92/124

51 Oberlandesgericht Dusseldorf, Germany, I-26 Sch 05/03, 19 January 2005 and Robert E. Schreter v. Gasmac Inc.

52 Robert E. Schreter v. Gasmac Inc.

53 Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 12/03, 10 July 2003

54 Oberlandesgericht Koln, Germany, 24 April 2006

decision which was intended to be binding was an award even if no reasons were given for the absence of signature by one of the arbitrators.<sup>55</sup>

Awards on agreed terms have been recognized and enforced on the same terms as any other arbitral awards.<sup>56</sup> Equally, preliminary rulings in the sense of Article 16 (3) in which the arbitral tribunal confirms its jurisdiction have been declared enforceable, at least where they contain a final decision on costs.<sup>57</sup>

In enforcement proceedings where the respondent claimed that the lack of specificity in the arbitral award would make enforcement impossible, the court found that the form and scope of the award did not hinder a declaration of enforceability, since the possibility of ordering actual enforcement measures was not a prerequisite for such a declaration of enforceability under Article 35.<sup>58</sup>

### **3.6. Content of award**

On several occasions, courts have dealt with applications either by the applicant or the party resisting enforcement to alter the operative part of the award. The prevailing view is that such alterations are in general not possible. Thus, one court refused to make deductions from the amount awarded as that would de facto have resulted in reevaluating the merits.<sup>59</sup>

Alterations of the dispositive have been allowed by courts where they merely corrected obvious spelling or calculation mistakes – for example where the dates were obviously wrong.<sup>60</sup> Equally, references to statutory interest rates have been supplemented by actual figures, or interests awarded for a certain period were calculated.<sup>61</sup>

### **3.7. Confidentiality**

In accordance with the *travaux préparatoires*, one aspect of the recognition of an arbitral award is the right to rely on such an award in other proceedings (A/CN.9/264, Analytical commentary, which provides that recognition not only constitutes a necessary condition for enforcement but also may be standing

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55 Oberlandesgericht Munchen, Germany, 34 Sch 26/08, 22 June 2009

56 Bundesgerichtshof, Germany, III ZB 55/99, 2 November 2000

57 Bundesgerichtshof, Germany, III ZB 35/06, 18 January 2007

58 Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 31/99, 27 June 1999

59 *Apa Insurance Co. Ltd. v. Chrysanthus Barnabas Okemo*, High Court, Nairobi, Kenya, 24 November 2005, Miscellaneous Application 241 of 2005

60 Oberlandesgericht Munchen, Germany, 34 Sch 15/09, 29 October 2009

61 Oberlandesgericht Hamm, Germany, 29 Sch 2/03, 02 December 2003 and *Ras Pal Gazi Construction Company Ltd. v. Federal Capital Development Authority*

alone, for instance, where an award is relied upon in other proceedings). For instance, the Bermuda Privy Council found that a party was entitled to invoke in different proceedings an arbitral award, despite the fact that the confidentiality agreement contained in the arbitration agreement governing the first arbitration proceedings expressly provided that the award should not be disclosed at any time to any individual or entity which was not a party to the arbitration.<sup>62</sup>

Concerns as to a breach of the confidentiality of the arbitral proceedings have also been raised in enforcement proceedings before courts. A court in Singapore ruled that confidentiality should not be used in an effort to thwart or hinder effective enforcement of an otherwise valid award.<sup>63</sup> Equally, a Canadian court has determined that reliance on the arbitral award in enforcement proceedings does not constitute a breach of a confidentiality duty under an arbitration agreement. The court also rejected an application for an order to keep the enforcement proceedings confidential as no special circumstances existed which could justify such an order.<sup>64</sup>

### **3.8. Formal requirements**

Courts have held that enforcement of an arbitral award should not be refused where formal deficiencies in the original application for enforcement were corrected either by the applicant or the arbitral tribunal which registered the award with the court.<sup>65</sup>

The legal nature of the requirements in paragraph (2) and the role of the courts in particular in relation to the scrutiny of the arbitration agreement have been an issue in a number of decisions.

Certain courts have consistently qualified those requirements as mere rules of evidence but not as requirements for the admissibility of an application to have foreign awards declared enforceable.<sup>66</sup> Consequently, non-compliance with them only becomes an issue if the other party challenges the existence or authenticity of the award or the arbitration agreement. Along the same lines, a Spanish court held that the obligation to submit with the application the arbitration agreement

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62 Associated Electric & Gas Insurance Services Ltd. v. European Reinsurance Company of Zurich

63 International Coal Pte. Ltd. v. Kristle Trading Ltd.

64 Gea Group AG v. Ventra Group Co. & Timothy Graham

65 Medison Co. Ltd. v. Victor (Far East) Ltd. and Clement C. Ebokan v. Ekwenibe & Sons Trading Company

66 Oberlandesgericht Munchen, Germany, 34 Sch 19/08, 27 February 2009

does not entitle a court to examine the validity of the arbitration agreement on its own motion.<sup>67</sup>

Divergent court decisions have been rendered regarding the extent and the nature of the court's obligation to examine compliance with Article 35 (2), or its equivalent in Article IV of the 1958 New York Convention, in particular if the existence of a valid arbitration agreement is challenged. The High Court of Singapore held that the enforcement process is a mechanistic one. Consequently, the obligation for the applicant to submit the arbitration agreement does not require a judicial investigation by the court into the existence of the arbitration agreement. It is for the party opposing enforcement to prove that one of the grounds for resisting enforcement exists, i.e. that the tribunal lacked jurisdiction.<sup>68</sup> By contrast, other courts have made a distinction between the conclusion of an arbitration agreement to be proven by the applicant, if contested, and its validity.<sup>69</sup>

#### **4. Conclusion**

In the contemporary world inevitably linked into ever more intricate network of international trade relations, international trade arbitration has an increasingly significant role as a dispute resolution method which is much better suited for resolving disputes arising from these relations than litigation. Its application is burdened with numerous problems including, in particular, the serious ones related to the challenge of arbitral awards, by which disputes are resolved on the merits and arbitral proceedings are finalized. The issue is further aggravated by the fact that such circumstances impose the need to shift from the sphere of private judiciary towards the public domain protected by the mechanisms of state power. In numerous states, courts have already addressed or endeavored to address many of these issues, more or less successfully. As a result, there is a vast and fairly coherent body of case law developed through judicial practice. The jurisprudence is fairly consistent, notwithstanding the fact that judges come not only from various countries but also from different legal traditions.

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### **СУДСКА КОНТРОЛА АРБИТРАЖНИХ ОДЛУКА У МЕЂУНАРОДНОЈ ТРГОВИНСКОЈ АРБИТРАЖИ – ПРАКТИЧНИ ПРОБЛЕМИ**

У условима све комплексније увезаности читавог света у мрежу пословних односа, међународна трговинска арбитража, као метод много примеренији решавању спорова који настају из ових односа, све више добија на значају. У њеној примени јављају се многобројни проблеми, а нарочито озбиљни су они везани за побијање одлука којима је арбитражни поступак мериторно окончан, будући да у овој тачки треба учинити прелаз из сфере приватног правосуђа, ка домену заштићеном механизмима државне власти. Са многим од ових питања судови различитих држава већ су покушавали, и многи од њих и успевали, да изађу на крај, тако да је изграђена богата судска пракса, која је и прилично уједначена, имајући у виду чињеницу да потиче од носилаца судских функција који потичу, не само из различитих држава, већ и из разнородних правних традиција. Неки од најзначајнијих проблема судске контроле арбитражних одлука, као и начини њиховог превазилажења у различитим државама, предмет су пажње аутора овог рада.

**Кључне речи:** арбитража, признање, извршење, тужба за поништај арбитражне одлуке.



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## **THE IMPACT OF THE SARBANES–OXLEY ACT 2002 ON TURKISH COMPANY LAW AS A RESULT OF GLOBALISATION**

**Abstract:** *The Anglo-American legal system has had a very different course of development as compared to the European-Continental legal system. Since the establishment of the United States until the present day, laws have been considered as an instrument for achieving political and economic goals, and meeting practical needs which are far removed from the philosophical foundations of law in the USA. Thus, the basic concept of US corporate law is “corporation”: a business entity which may have both local/regional and global impact, which may be involved in transnational activities, and which generates large capital accumulations (not only company contracts). As a result of globalization, the developments in US corporate law inspired changes in the European-Continental legal system and influenced the EU member states and candidate countries to embark on the codification of company law by adopting EU directives in this area. In 2002, in order to restore confidence in capital markets, the US legislator enacted the “Public Company Accounting Reform and Investor Protection Act”, which is generally known as the Sarbanes-Oxley Act (SOA). Although it is originally an American legislative act, the scope of SOA affiliated companies has expanded all over the world due to the transnational company mergers and acquisitions. The principles of SOA such as independent audit, corporate governance and transparency have exerted a significant impact on Turkish company law system, given the fact that Turkey has been concentrated on harmonizing its legislation with the EU legislation ever since 1999, when Turkey obtained the EU candidate status at the European Council Helsinki Summit. The impact of this Act and EU directives on Turkish company legislation may be observed in three most*

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*important legislative acts: the Banking Act 2004, the Capital Market Act 2012 and the Code of Commerce 2012.*

**Keywords:** *Sarbanes–Oxley Act, global impact, EU legislation, Turkish company law.*

## **1. Introduction**

The US legal system has experienced a very different development as compared to the Continental-European legal system. Since the establishment of the United States until the present day, law has always been considered as an institution expected to contribute to achieving political and economic goals, and meeting practical needs which are far removed from the theoretical and philosophical foundations of the US law. This approach is also applicable for company law. As a matter of fact, under the US Federal Companies Uniform Act, the main concept of company law is "corporation", defined as a business entity which may have both local/regional and global impact, and which may be involved in transnational activities that generate large capital accumulations (not only company contracts). However, as a result of globalization, developments in US corporate law have also inspired changes in the Continental-European legal system and influenced the codification of company law of EU member and candidate countries through the EU Company Law Directives. The Sarbanes Oxley Act (hereinafter: the SOA) is an American law but, due to transnational corporate mergers and acquisitions, the SOA has broadened the scope of companies all over the world. Therefore, this paper aims to examine the Sarbanes Oxley Act, which has exerted a strong impact on Turkish Company Law.

## **2. The Sarbanes–Oxley Act (SOA) as a Reform**

### ***2.1. Codification of Sarbanes–Oxley Act***

The Sarbanes-Oxley Act is the most popular codification in US corporate law that came into force in the last 20 years (Ambler, Massaro, Stewart, 2017: 2-7). The SOA was enacted on 30.07.2002 after the scandals of Enron, Worldcom, Parmalat and Xerox, which have a bad reputation (Anand, 2007: 10; Moeller, 2004: 1,2; Green, 2004: 6; Jackson, Fogarthy, 2005: 2, 3; Marchetti, 2007: 1; Krimmer, 2006: 7-11). These scandals have caused serious concerns in the US domestic market (Holt, 2008: 4; Moeller, 2004: 2; Green, 2004: 6; Jackson, 2005: 3; Krimmer, 2006: 11). For this reason, the legislator preferred to take precautions to avoid repetition and speed up the SOA's entry into force (Green, 2004: 6; Lander, 2003: 1). In the United States where free market economy dominates, it is desired to control and regulate capital markets through the SOA (Krimmer, 2006: 22),



which is aimed to take measures by means of punitive sanctions regarding company managers and auditors (Holt, 2008: 6; Moeller, 2004: 9; Ambler, 2017: 2-7).

The SOA has been considered as a reform act in the American and European legal literature. The most important reason for this is the concretization of rules on corporate governance principle through the SOA (Rezaee, 2007: 3). Thanks to the SOA, accounting standards have been improved and controls over the financial reporting of companies have been made more solidified (Holt, 2008: 31, 41; Moeller, 2004: 13; Marchetti, 2007: 11). In addition, the position of transparency in corporate law has been strengthened and it is aimed to make independent auditing dominate company law. In order to attain the objectives envisaged in the SOA, criminal sanctions against company managers and auditors have been made legitimated in company law (Moeller, 2004: 35; Landers, 2003: 9; Ambler, 2017: 2-9).

The official name of the SOA is the "Public Company Accounting Reform and Investor Protection Act" (Green, 2004: 1). However, the Act is called as the Sarbanes-Oxley Act because of Paul Sarbanes and Michael Oxley, the two senators who stood out in the drafting of the Act (Anand, 2007: 15; Jackson, 2005: 2). The Act regulates the scope of activities of all publicly traded companies operating in the US stock market. Nevertheless, the Act affected the EU legislation and the company law legal systems of the EU member states and the candidate countries (Holt, 2008: 45; Krimmer, 2006: 22). This effect has been manifested in the Turkish Commercial Code and the Capital Markets Law, as well as in the sub-regulations which entered into force in Turkish legislation in 2012.

## ***2.2. Objectives of the Sarbanes-Oxley Act***

The objectives adopted by the SOA, and also clearly observed in the effect of Turkish Company Law, may be listed as follows (Anand, 2007: 44):

- 1) The management of the company should be more accountable (Green, 2004: 8; Krimmer, 2006: 34);
- 2) Transparency in the management of the company should be increased (Landers, 2003: 10);
- 3) The duties and authorities of the public institutions and independent persons and institutions that are revising the companies should be increased;
- 4) Disputes of interest between the company management, auditors and consultants should be removed (Moeller, 2004: 4);

5) The auditor should be placed in a stronger position and an institution supervising the auditing institutions should be legalised (Holt, 2008: 41; Moeller, 2004: 4; Green, 2004: 8; Krimmer, 2006: 32);

6) Accounting standards should be developed (Moeller, 2004: 14);

7) The power of the Securities Exchange Commission, authorized by the regulation and supervision of the capital markets, shall be made more effective.

## **2.2. Corporate Governance, Independent Audit and the Sarbanes-Oxley Act**

If required to specify a few keywords for the SOA, these keywords should be "the corporate governance principle" and "independent audit" (Holt, 2008: 11; Rezaee, 2007: 3, 49; Krimmer, 2006: 25). Indeed, according to the SOA, the CEO and the CFO have to give approval requiring their financial responsibility for the financial reports prepared by the company in accordance with the legislation of the capital market (Moeller, 2004: 16; Ambler, 2017: 2-10; Marchetti, 2007: 11). The events, operations and developments of the company which are important for the partners and shareholders will be announced simultaneously to the public. The audit committee will be formed (Marchetti, 2007: 34). The audit committee and independent auditors are required to provide independence standards (Moeller, 2004: 28; Marchetti, 2007: 34). Alternative campaign methods such as whistle-blowers will be used to reveal corruption in the company. Accordingly, those who disclose corruption in the company to the public and to the company will be encouraged (Moeller, 2004: 4). The company will not be able to fire whistle-blowers. On the other hand, the company will take measures to encourage new whistle-blowers. Independent auditors will be subjected to rotation regularly. Violation of the rules related to the capital market, such as the fact that the authorized persons of company giving misleading information about the financial situation, leads to criminal liability (Moeller, 2004: 35; Landers, 2003: 9). In this respect, it is aimed to avoid misleading financial reports that will affect the decisions of the company partners and the third parties who will enter into legal relations with the company or invest in the company.

By the SOA, radical measures have been taken, especially under the auditing of joint stock (public limited) companies (Holt, 2008: 15). These measures have led to the independence of the audit. Independent audit, which was targeted by the SOA, is appropriate but it also leads to additional costs for companies. For this reason, there is also a tendency for joint-stock companies to give up public debts. The increase in costs undertaken to ensure compliance with the SOA has led companies to reduce their budgets for research and development, and take advantage of external resources. For this reason, while creating a healthy capital market in the long term, risks are emerging in the short term concerning the balance of the companies. One of these risks is related to the legal and

criminal responsibility of the managers (Moeller, 2004: 35). In the SOA, the legal and criminal responsibilities of top executives of the company have been increased (Holt, 2008: 31). The possibility of overdrive in the arrangement of these responsibilities causes the senior executives of the company to escape responsibility and not take the initiative. The SOA has resorted to extreme measures to ensure corporate governance and transparency (Rezaee, 2007: 87). One of these measures is to increase documentation and paperwork. Thus, on the one hand, the costs have increased and, on the other hand, the system provided by the Act has been difficult to observe. This leads to the transformation of companies subject to the SOA into non-public companies and limited liability (private limited) companies (Holt, 2008: 23; Jackson, 2005: 15).

### **3. The Reflections of the Sarbanes-Oxley Act in Turkish Company Law**

The Sarbanes Oxley Act has been influential in codification studies, especially since the middle of the 2000s in the Turkish Company Law. The deep economic crisis that broke out in 2001 due to the banking sector, as well as Turkey's EU candidate state status since 1999, has become a driving source of codification efforts that have undergone drastic changes in the Turkish Company Law system (Kendigelen, 2012: 10). The most significant codes are: the Banking Act<sup>1</sup> No. 5411 dated 01.11.2005, the Turkish Commercial Code<sup>2</sup> No. 6102 dated 01.07.2012 and the Capital Market Code<sup>3</sup> No. 6362 dated 30.12.2012 (Bilgili, Demirkapı, 2014: 8)

#### **3.1. The Sarbanes-Oxley Act and the Turkish Banking Act**

It is possible to summarize the regulations in the Banking Act that have the traces of SOA as follows. The operational subjects that banks can perform are clearly listed and based on the limited number principle in order to determine the scope of effective oversight and control (Reisoğlu, 2007: 197). The permits for establishing and operating the banks are designed as parts of a more comprehensive, open and cautious audit (Tekinalp, 2009: 127). The cancellation of permits issued by permission applicants has been associated with corporate governance provisions and protective provisions. It has been adopted that in the direction of transparency principle, the rejection decisions against the request for permission are justified (Tekinalp, 2009: 205).

The banks have been subjected to the transparency principle (Reisoğlu, 2007: 283). As a result of this, the obligation of banks to publish their own contracts on their own internet pages has been legalized. The banks will not be able to

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1 Official Gazette, Publication date: 01.11.2005, No: 25983, Volume: 45.

2 Official Gazette, Publication date: 14.02.2011, No: 27846, Volume: 50.

3 Official Gazette, Publication date: 30.12.2012, No: 28513, Volume: 53.

resort to internal resources while increasing capital to protect its shareholders' economic interests. It is only possible to make cash payments in capital increases. It is stipulated that the shareholders with qualified shares have the characteristics requirements of the founders of the bank in order to ensure the trust of the bank and to prevent the abuse of this trust. In addition, indirect shareholding structure has been observed in the banks, and changes in the shareholding structure of the legal entity shareholders holding ten percent or more shares in the capital have been subjected to the permission of the Council of Banking Audit and Regulation (Tekinalp, 2009: 206).

It has been desired to validate corporate governance principles in the banks (Reisoğlu, 2007: 369). It has been compulsory to establish a minimum two-person audit committee to be elected from among the members of the board of directors who would assist the board of directors in performing audit and surveillance activities and who don't have executive duties. In addition, audit standards have been rearranged in banks and provisions relating to independent auditing, internal audit, internal control and risk management have been harmonized with international practices. Independent auditing, appraisal and support services have been obliged to insure liability insurance to cover losses that may arise from the services they provide (Reisoğlu, 2007: 406).

One of the provisions regarding corporate governance principle is about financial reporting systems of banks (Reisoğlu, 2007: 509). The financial reporting system has been made part of the corporate governance. The banks are obliged to prepare the activity reports. Annual activity reports require an independent audit report, summary board report, financial statements and other information and documents related to the bank (Tekinalp, 2009: 221).

In order to ensure accountability, the board of directors has been held responsible for credit operations. Procedures and principles regarding the evaluation and decision-making processes related to delegation of authority for credit extension and credit operations have been regulated. Provisions have been regulated for the prohibition of exploitation of the bank resources, for the safe functioning of the banks and for the protection of their financial strength, for the limits of donations and for the transfer of hidden profits. In order to provide the system envisaged in the Banking Act, criminal sanctions have become valid. These sanctions may be applied against the members of the board of directors and general managers and their assistants, as well as against third parties (Tekinalp, 2009: 287).

### ***3.2. The Sarbanes-Oxley Act and the Turkish Capital Market Code***

The Capital Markets Code (CMC) has also come to the fore as a code that has felt the SOA's influence very strongly. The system of receiving the capital market instruments on the register of the Capital Markets Board (CMB) has been abandoned. The system of prospectus to be approved by the CMB has been adopted in accordance with the EU Law. The right to withdraw their claims within two business days of the publication of the amendments made at the prospectus has been vested.

The notion of prospectus validity period has been mentioned for the first time in Turkish law. The costs of repeating pre-export approval, registration and advertisement processes and preparing different statements for each vehicle have been reduced. Thus, exports have been made easier. All information, events and developments that may affect the value of capital market instruments, market prices or investors' investment decisions have been subjected to public disclosure. In other words, it is aimed to make public disclosure more effective. The listing requirement of the joint stock company has been increased to 500 shareholders by the Code, and it has been regulated that the companies have to apply to the stock exchange to be traded within two years after open joint stock company status is reached (Pulaşlı, 2011: 491). In this respect, corporate governance principle has deepened (Pulaşlı, 2011: 499).

The CMB has been given the authority to subject companies traded in the stock market to corporate governance principles in whole or in part. The CMB has also been given the authority to impose administrative fines, cancel the transaction and take remedial measures in case the regulations are not respected. In terms of open joint stock companies, the "right to leave" has been regulated for the first time, which gives the right to sell shares to the shareholders who have voted unfavourably by participating in general assemblies where important decisions are taken. It has also been possible to remove privileges in public companies. Accordingly, the company has to suffer a loss for five years without any break. In this case, the concessions are removed at the first general assembly meeting. Thus, the groups with the holders will behave in accordance with the interests of the other partners and shareholders, and those who will manage the company better by changing the inefficient administrations may come to the point of view.

Public disclosure documents have been regulated in the CMC as a separate concept for the first time. The CMC also regulated the issue of investors who are trading on the grounds of false, misleading and incomplete information on the basis of compensation documents, the compensation rights and presumption for release from the responsibility of persons. In this way, investor confidence

is established. A balanced approach is adopted in terms of determining responsibilities arising from the information.

In case of open joint stock companies, the members of the board of directors are subrogated for administrative fines that the company has to bear due to the transactions contrary to the capital market legislation. This is an obligation. In this respect, it is aimed to protect the property rights of the company legal entity and investors and to prevent the decrease of profits. It is aimed to prevent possible conflicts of interest in the management mechanisms of the multi-partner companies with the corporate governance principle. The interests of the company are protected against the interests of managers or investor groups. As a reform related to corporate governance, protection mechanisms such as independent board membership have been validated.

As a reflection of the public disclosure principle, it has been determined as a standard that financial reports should be prepared in accordance with international standards and quality, and that these reports should be subject to independent audit in accordance with international standards (Pulaşlı, 2011: 504). Open joint stock companies and capital market institutions have been subjected to independent audit. Because of this, the Public Oversight, Accounting and Auditing Standards Institution have been established. The Investors Compensation Centre was established in order to compensate the investors in case of financial difficulties of the organizations that are in capital market activity.

The scope of the audit in the CMB is described in more detail. It is stated that the persons assigned to the audit are not authorized to examine, access and receive samples of the information systems including all records and documents including the tax-related records of the auditors, including those kept in electronic environment and including other information. Assigned auditors are authorized to examine the records of the auditors with respect to the tax, all books and documents and all records including those held in electronic form and other means of information, and information systems. The authorities may request access to these records and may take samples thereof.

Measures were taken to ensure the effectiveness of the audit. Accordingly, during the course of the audit activities, it is the obligation to keep confidential information and documents in order to prevent them from disclosing the contents of the examination and the the requested documents to third parties. In addition, penalties are imposed on those who disclose such data or who use them for their own benefit or for the benefit of others, and for disclosing the secret knowledge they learn from the capital market institutions or their clients.

Amendments have been made in the Code regarding market crimes and sanctions. Some new crimes have been committed. The scope of existing offenses and

the penal sanctions imposed on these offenses have been updated on the basis of economic sanctions. Information abuse (insider trading) has been extensively redefined, taking EU regulations into account, and criminals are considered to be perpetrators. In addition, the scope of the offense of information abuse has been expanded within the framework of compliance with the EU Directive. Accordingly, disclosure to third parties or disclosure of information to a third party by the public, or advice or appeal to third parties to obtain or dismiss the capital market vehicle to which this information relates is taken into account for the misuse of information.

The sanction on information abuse has been changed. Accordingly, punishment of imprisonment for a period of two to five years or a fine has been envisaged. On the other hand, in case of a judicial penalty (fine) for this crime, the amount to be awarded shall not be less than twice of the amount of the benefit obtained through the crime. The economic consequences of crime have been aggravated. Imprisonment or criminal fine is foreseen. If a judicial fine is imposed, a judicial fine will be applied first, and if the money is not paid or if the crime is repeated, the imprisonment penalty will come into effect. In this respect, the CMC aims to introduce a system of sanctions that will further deter economic crimes.

The type of crime, known as manipulation, is now called “Market Fraud”, and the type of crime known as insider trading is now designated as “Information Abuse”. These crime types have been re-imposed on the basis of the EU directives. In this context, it is stated that capital market instruments are subject to the related crimes, as well as the ability to influence their prices and investment decisions. The Code also includes provisions on criminal liability of those who do not disclose the information they are obliged to disclose.

Implicit profit transfer crime has been re-regulated in the CMC. This area is intended to connect the increasing violations to appropriate criminal sanctions. The definition of criminal acts has been expanded. The acts which are sanctioned as a criminal offense in the Turkish Criminal Code are defined in a more comprehensive manner in accordance with the characteristics of the capital market, and they are linked to criminal sanctions parallel to the offense of abuse of trust.

### ***3.3. The Sarbanes-Oxley Act and the Turkish Code of Commerce***

The new Turkish Code of Commerce No. 6102 came into force on 01.07.2012. The SOA has been effective in the preparation process of this Code. As a matter of fact, legislator has directly referred to the grounds of the SOA. In the preamble of the Turkish Code of Commerce (TCC), the legislator stated that it had been inspired by the SOA in the legal regime related to public limited companies. In addition, among the comparative legal regulations that inspired the TCC, a

special title in the preamble has been set aside for the SOA. Provisions related to corporate law that have been validated in the TCC under the influence of the SOA can be listed as follows:

Measures have been taken regarding the principles of protection of safe enterprise and capital in joint-stock companies (Bilgili, 2017: 165). The method of provincial establishment was abolished and the minimum capital amount was raised to 50,000 Turkish Liras. The company's own shares have been tied to harsher conditions of business and alternative systems have been sought for the protection of the interests of lenders and shareholders (Pulaşlı, 2011: 557; Üçışık, Çelik, 2013: 18). Regulations were made in accordance with the principle of transparency and public disclosure (Kendigelen, 2012: 19). Special emphasis has been placed on corporate governance principle, the organizational structure of the company has been improved, and the general assembly and board have been restructured. Independent auditing was adopted and auditors have been specifically regulated (Kendigelen, 2012: 288). Public limited companies have been subjected to international financial reporting standards.

In public limited companies, attention has been paid to the principles of protection of safe enterprise and capital (Pulaşlı, 2011: 557; Bilgili, 2014: 164). Accordingly, capital will be in the ownership of the company. Measures have been taken to determine the real value of the capital. It has been regulated that the establishment of the company will not be realized until the capital is actually brought to the company (Pulaşlı, 2011: 603). The scope of prohibitions also includes the return of the capital to the joint stock company. In this respect, the legal regime for both the protection of the capital and the safe establishment has been strengthened. As a requirement of the principle of protection of the capital, it has been prohibited to distribute the profit from the capital or legal reserves which are considered as complementary to the capital (Pulaşlı, 2011: 557). It has been regulated that the legal reserve funds cannot be transferred to the shareholders and cannot be added to the capital, and can be spent to the specified positions, unless they exceed a certain amount of the capital. Profit share cannot be distributed until previous period losses have been closed. As the principle of protection of the capital and as a reflection of corporate governance, the company's own shares have been subjected to a special and strict legal regime (Kendigelen, 2012: 242).

In the law of public limited companies, gradual establishment institution has been abolished by the TCC. The gradual establishment is an ungainly and complex method, which has not been included in the TCC (Bilgili, 2014: 165). Instead, completion of the immediate foundation of company with the public offering and foundation with public offering has been validated. As a reflection of corporate



governance, the principle of equal treatment of shareholders has been strengthened (Kendigelen, 2012: 242). In addition, shareholders have been banned from borrowing from the company, and the principle of protecting the capital has been strengthened. One of the aspects of corporate governance principles in the Turkish Commercial Code relates to the board of directors of the company. Professionalism and transparency requirements have been carefully considered in the organization of the board of directors. Board meetings have been made possible in electronic environment.

For public limited companies whose shares are traded on the stock exchange, the establishment of the risk early detection and management committee has become compulsory as a requirement of the corporate governance principle. The auditors have been excluded from being the body of the public limited companies. In public limited companies, independent audit has been validated. In this respect, professional, impartial, holistic, continuous and compulsory audit has been accepted (Bilgili, 2014: 255). The subject of audit is the audit of the entire accounting, including the company's year-end financial statements, annual reports and inventory. The audit will be conducted in accordance with Turkish Accounting Standards, in compliance with International Financial Reporting Standards. No other relationship shall be established between the auditor and the company other than audit.

One of the most important regulations showing the SOA effect in the TCC is related to the year-end financial table. Financial reporting includes both the accounting and the annual financial statements. In addition, intermediary accounts are included in the scope of financial reporting. Accounting systems must comply with the TAS in accordance with the IFRS.

The position of the shareholder against the company and the management of the company have been strengthened with the TCC (Pulaşlı, 2011: 869). The list of shareholder rights has been expanded to include asking for special control, leaving the company, and requesting equal treatment. The shareholder is entitled to merge, split and change the type, as well as to initiate new lawsuits by filing a complaint request, opening a cancellation case, and opening a liability case. Instruments such as Internet pages that increase shareholder transparency have been enhanced (Üçışık, 2013: 61). As a benefit for shareholder, it has been obligatory for the board of directors to report on certain issues. Minority rights have been expanded and strengthened against the company entity.

The founder interests have been specially regulated in the TCC for the first time. Thus, no benefit can be given to the founders of the company, which may result in a decrease in the capital of the company, such as giving money and bonus shares in return for the expense they incur in establishing the company

(Üçışık, 2013: 207). A provision contrary to this rule cannot be brought by the company contract. In addition to this prohibition, which is a requirement of the corporate governance principle, the principle of equal treatment of shareholders has been validated. Shareholders are banned from becoming indebted to the company. The obligation of board members to be shareholders of the company has been abolished. In case of minority rights, the right to take part in the management of the company has been granted. Members of the board of directors can be insured against damage they may incur with their company during their duties. The application of the bankruptcy measure in the event of a bankruptcy has been defined as a duty for the board of directors. The validity of the internal regulation of the general assembly has been granted. Privileged voting has been restricted. The members of the board of directors have to fulfil their responsibilities in proportion to their faults. Board members have been subjected to criminal liability (Pulaşlı, 2011: 1927).

#### **4. Evaluation and Conclusion**

The SOA and EU Directives have been the most important motivation sources in the core codifications in Turkish law since the beginning of the 2000s. There is a parallel between the SOA and the development in Turkish company law. For this reason, the permission of the state is required in the establishment of companies for the existence of the markets for which control was provided. The Ministry may sue the company for termination due to the contradictions in the establishment and continuation of the companies. In the establishment of banks, it has been regulated as a necessity to obtain permission from the BRSA, an autonomous institution. The joint-stock companies whose shares are traded on the stock exchange market have been subjected to the supervision of the CMB. On the other hand, we must note that the Banking Act has changed 15 times since its entry into force, the Turkish Commercial Code has changed 8 times and the Capital Market Code has changed 3 times. Given the fact that all three codifications have been carried out with the aim of establishing a legal regime compatible with EU law and global markets, we must admit that despite the good efforts of the legislator, these codification efforts have failed. This failure is due to the efforts of the actors of the trade life to maintain their long-standing habits rather than to prepare themselves for international standards and the positive reception of these efforts, as well as due to the populist approach demand by the political authority.

The scope of independent audit, which is a must for both the SOA and EU company law directives, has been narrowed by the amendment that the Code had not yet been enacted, whereas the criteria used in determining the joint stock

companies which are subject to independent audit is applicable to one percent of all the companies in Turkey. In addition, the criteria to be determined by the Council of Ministers pertaining to the companies subject to independent audit each year shows that the expected benefit from the independent audit regulation in the Code is open to political influence. An institution that leads to the responsibility of the founders, such as the declaration of the founders in the establishment of the company, has also been removed from the TCC by introducing amendments (Üçışık, 2013: 132). The companies' webpages obligations have been abolished and, as a result of this, one of the most important mechanisms to ensure transparency has not gained efficiency. In addition, companies have no obligation to employ legal counsels anymore. Amendments have also been made to the provisions relating to criminal liability to be applied to founders, board of directors and auditors, and the provisions on their criminal liability have been softened. Thus, the legislator has moved away from the goal of taking deterrent measures against corruption, one of the most important motivations that led to the adoption of the SOA.

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## **УТИЦАЈ САРБАНЕС-ОКСЛИ ЗАКОНА 2002. НА ТУРСКО КОМПАНИЈСКО ПРАВО ПРИВРЕДНИХ ДРУШТАВА КАО ПОСЛЕДИЦА ГЛОБАЛИЗАЦИЈЕ**

### **Резиме**

Англо-амерички правни систем је имао потпуно другачији ток развоја у односу на Европско-континентални правни систем. Од оснивања Сједињених Америчких Држава до данас, закони су средство за постизање политичких и економских циљева, и задовољавање практичних потребе које су далеко од филозофских темеља права у САД-у. Основни концепт у америчком компанијском праву је „корпорација“, привредни субјекат од локалног/регионалног и глобалног значаја који се може укључити и у транснационалне привредне токове, и који осим склапања уговора генерише огромну акумулацију капитала. Као резултат глобализације, америчко корпоративно право инспирисало је промене у европско-континенталном правном систему и извршило значајан утицај на државе чланице ЕУ као и земље кандидате да приступе у кодификацији компанијског права усвајањем директива ЕУ у овој области. Како би се обновило поверење у тржиште капитала, у САД-у је 2002. године усвојен „Закон о реформи рачуноводства у јавним компанијама и заштити инвеститора“, који се познатији као Сарбанес-Оксли Закон (СОА). Иако овај закон у начелу амерички правни акт, његов домет се непрестано ширио услед утицаја глобалних трендова, спајања и припајања транснационалних компаније. Принципи који су постављени у овом закону, као што су независна ревизија, корпоративно управљања и транспарентност, су имали значајну улогу у реформи турског компанијског права, с обзиром на чињеницу да је Турска у процесу усклађивању свог законодавства са законодавством Европске уније још од 1999. године, када је добила статус кандидата на Самиту у Хелсинкију. Утицај овог закона и европских директива на турско законодавство огледа се у одредбама најважнијих законских аката из ове области: Закона о банкарству из 2004. године, Закона о тржишту капитала из 2012. године и Законика о трговини из 2012. године.

**Кључне речи:** Сарбанс-Окслеи закон (САД), законодавство ЕУ, глобални утицај, компанијско право, Турска.



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## **TAX STRUCTURES IN SERBIA: FACING GLOBALIZATION CHALLENGES**

**Abstract:** *The traditional concept of tax structure, which includes the appropriate combination of indirect and direct taxes, has been affected by new global trends and tendencies. Due to globalization, the problem of providing a favorable fiscal environment exerts pressure on national tax policy makers to provide more favorable tax regimes for mobile (flexible) tax bases. Given the need to ensure a certain level of tax revenues and to reduce the fiscal deficit, most contemporary states have opted for introducing more stringent consumption taxation.*

*In such circumstances, the development of optimal tax structures is an additional challenge for countries (such as Serbia) which already have a huge participation of indirect taxes in tax burden. Yet, tax policy makers should exert further efforts aimed at establishing a more balanced relationship between different types of taxes. Otherwise, ongoing reliance on consumption taxes will deepen the injustice that may be currently observed in the Serbian tax system. Therefore, it would be advisable to shift the taxation focus to property and income. Measures taken in the field of tax administration, particularly in terms of more efficient tax collection and reducing tax evasion, would contribute to the affirmation of property tax. The existing shortcomings of the income tax system should be eliminated by adopting appropriate legislation, within the expected reforms. It would not only strengthen the fiscal capacity of these two forms of taxation but it would also ensure more fair taxation.*

**Keywords:** *tax structure, globalization, consumption taxation, income tax, property taxation, tax fairness.*

## 1. Introduction

Globalization, as a multidimensional process, has influenced changes in many areas of social life and reality. Taxation has not been excluded from these developments. Traditionally, tax structures implied the appropriate combination of indirect and direct taxes. Nowadays, under the influence of globalization, there is a change in the formation of individual taxes and the tax system as a whole. Under the pressure of the need to ensure the conditions for economic growth, the developmental function of tax is in the focus of literature and tax practice. There is a change in taxation of income, which actually represents a deviation from the requirement for equity of taxation when forming a model of taxation. Tax on profits of corporations loses fiscal importance due to reduction of tax burden on the economy. The lack of revenue in the budget is superseded by the increasing reliance of the state on value added tax, which affects the fairness of the tax system due to the regressive nature of this tax.

## 2. Current changes in tax structure

The chronic need for foreign capital in the absence of one's own and as the mobility of capital due to globalization have led to the trend that capital gains are taxed more smoothly in the system of taxation of individuals' incomes. The fear of the negative effect on savings due to high rates in the conditions of globalization mobility of capital leads to a change in tax treatment of capital. Instead of a tax that implies equal tax treatment of all income regardless of sources, in response to global capital mobility, the creators of national tax policies resort to a more favorable tax treatment of capital income. By taxing the total income (income from labor and income from capital), by using progressive rates, the synthetic tax was suitable for achieving a redistributive role. The two alternative models, however, go in the direction of cedularisation, since there is a separation between labor income and income from capital; thus, in dual tax, labor income is taxed at progressive rates whereas, in flat tax, the original model does not tax income from capital but only the income from work at proportional rate. The application of dual and flat tax means the moving of the income tax system towards the consumption-oriented model of economic power absorption (Анђелковић, 2004: 108).

Solving the tradeoff justice and efficiency has changed over time. During the 20<sup>th</sup> century, the advantage in shaping tax systems was given to the horizontal and vertical equity of taxation. In the mid-1980s, with the wave of tax reforms, the movement was to improve economic efficiency. In taxation of income, there was a reduction in tax rates, an expansion of the tax base and the abolition of a large number of tax incentives. These reforms were driven by the need to provide



a competitive fiscal environment, encourage investment and entrepreneurship, and increase incentives for work (Owens, 2006: 131). Changes in taxation have arisen as a result of the negative experience of economists and tax policy makers with high marginal rates from the 1970s through the 1990s (Steinmo, 2003: 230). Unlike in the previous period, there is a growing conviction that high tax rates are generally inefficient in redistribution of income and wealth. Several studies in developed countries have found that progressive rates have surprisingly poor redistribution effects. Although the ability of income tax to influence the redistribution of income varies from country to country, in general, according to some authors, there are serious restrictions on the use of the income tax return system, especially in developing countries and countries with high inequalities (Bird, Zolt, 2005: 20). There has been a shift in the value points of economic theoreticians and tax policy makers. Instead of vertical justice, the emphasis is on efficiency (Sandford, 2000: 162). However, the attitude of giving full advantage to economic efficiency cannot be fully accepted, as other factors also influence economic growth. Some countries have achieved growth through capital accumulation, while others attained it through a combination of other productivity factors. We cannot give a complete answer to the question of causality, as it is unlikely that the same development-oriented tax policy will be equally successful for all countries (Myles, 2009: 38,52).

One of the consequences of globalization and liberalization is harmful tax competition; for, in the conditions of high mobility of some tax bases, some tax jurisdictions use more favorable tax regimes to attract them. Tax competition becomes an instrument for attracting mobile capital that requires lower fiscal costs in search of rapid fertilization (Анђелковић, 2012: 197). It can lead to adverse consequences for other tax jurisdictions in the form of a reduction in tax revenues. Under such conditions of securing a favorable tax environment and maintaining the level of tax revenues, it is very difficult for the states to freely determine the rates of tax on capital income in accordance with their tax sovereignty. Capital exporting countries have the role of moderators of modern tax systems, which exercise this role through powerful international financial organizations in order to protect their interests (Димитријевић, 2015: 289). The pressure on tax structures is so strong that they are forced to explicitly renounce the horizontal equity of taxation (Zee, 2005: 6). Thus, there is a forced change in the tax structure. As countries are forced to reform their tax systems in directions that are not always welcome, this process is described in the literature as "tax degradation" (Tanzi, 1996: 3, 21).

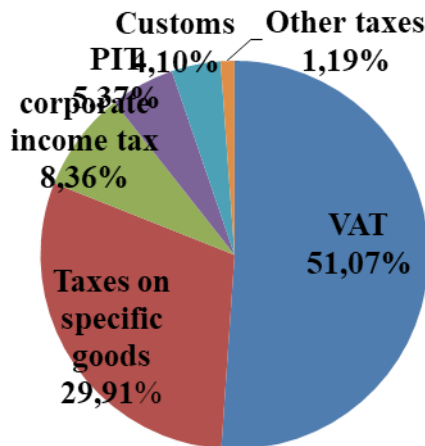
The shift of focus from income taxation to taxes with a less mobile tax base results in a stronger taxation of consumption. Thus, in the tax structure of developed countries, in addition to the income tax, Value Added Tax (VAT) has

more and more significant contributions. As a very generous form of taxation, VAT can compensate for the reduction of tax revenues due to tax exemptions, but it does not have a beneficial effect on the equity of taxation because it is regressive. The literature points to the need to give more importance to property tax. It is good for economic growth because it is the least distortive and does not affect the increase in inequality (Johansson, 2008: 45).

### 3. Serbia between the incentive tax environment and the equity of taxation

Comparing the data provided in Figure 1, one can notice a large share of VAT in total tax revenues in Serbia.

**Figure 1. Structure of tax revenues in Serbia**



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*Source:* Билтен јавних финансија Р.Србије (Public Finance Bulletin of the Republic of Serbia), December 2016, pp-57-58

Similar conclusions can be made by comparing revenue from income tax and VAT.

**Table 1. Comparative presentation of income tax revenue and value added tax presented in absolute amounts in Serbia for 2016 (in mil. Dinars)**

	<b>Income tax</b>	<b>VAT</b>
The budget of Serbia	47.672	
The budgets of municipalities and cities	102.380	
<b>Total:</b>	<b>150.055</b>	<b>453.502</b>

Source: Билтен јавних финансија Р. Србије (Public Finance Bulletin, R. Serbia), December 2016, pp-57-58

The tax income policy makers in Serbia are facing a challenge. Should they introduce a synthetic tax on citizen's income, greater attention would be paid to the vertical equity of taxation, but the pressure to secure a favorable tax environment is high. Bearing in mind the existing situation in Serbia, it can be assumed that the optimal solution would be a variant of dual tax. If we tax capital income at a proportional rate, there will be a possibility for their favorable tax treatment. This can also be achieved by retaining the existing rate of 15%, where the tax paid would be considered a final tax liability. By abolishing the annual tax on citizens' income and introducing a progressive taxation of labor income, vertical equity in taxation would be achieved, which is almost nonexistent. The existing income tax, although it has a lower proportional rate (10%), is ideal for lower income layers. Due to the low personal deduction for the existential minimum (which amounts to about 11,000 RSD), people with very low salaries are involved. On the other hand, the tax rate remains the same for taxpayers who are on a high income scale, since the threshold for taxation of the annual income tax is very high (about 2.300.000 RSD per year). By introducing a progression with several tranches, taxpayers with higher income would pay higher taxes. Such a solution would be advantageous for lower income segments, by imposing a lower tax rate in the first tranche. This would also be achieved by introducing a personal deduction for an existential minimum, the height of which would be better measured than the existing one that cannot cover basic living needs. Progressive taxation of labor income would not necessarily mean a higher tax burden on labor; it is a problem of high fiscal burden on labor in Serbia due to high fees for social insurance.

It seems that in resolving the classical trade-off between economic efficiency and equity for Serbia, due to the challenges posed by globalization, a more acceptable solution would be the choice of a modern trend in income taxation. As

the overall effects of equity taxation are observed for the whole tax system, this means that the progress in improving equity can be achieved by certain measures within and outside the income taxation system.

The formulation of relevant legal provisions should involve various forms of manifestation of the taxpayers' economic power. This is the case with the rental income of the real estate. Holding an existing rate of 20% (in relation to lower rates of other capital income) would be quite justified. Also, there is a requirement in the literature for introducing the so-called imputed rent, in order to reduce the space for tax evasion. In practice, most taxpayers who generate income from renting the real estate do not pay this tax (Ранђеловић, 2013: 64). Tax on the imputed income stemming from ownership of real estate would be paid by persons who own more than one immovable property for that real estate in which they do not have a place of residence or do not perform an independent activity.<sup>1</sup>

Other taxes are also available to tax system creators. Certain effects can be achieved by tax on property. Since the fiscal reform during the 1990s, this tax did not play a major role in the tax structure. Due to the underestimation of the tax base, there was almost insignificant share in total tax revenues in Serbia. An important step in increasing its fiscal capacity was made by changing the way of determining the tax base during 2014. According to the new legal solutions, the market value of immovable property is determined by the average market price of a square meter in the zone in which the real estate is located. Pursuant to the decision of the competent authority of the units of local self-government, zones are determined according to communal infrastructure, equipment for public buildings, traffic infrastructure and other services. The average price of the respective real estate by zones is determined by the act of the competent authority of each local self-government unit, based on the prices realized in the turnover of the respective real estate in the period from January 1 to September 30 of the year preceding the year for which the tax is determined (i.e. for the current year).<sup>2</sup>

Certain shifts can be achieved with regard to taxes on the use, holding and carrying of goods, such as motor vehicles, floating stations, yachts, aircrafts and mobile phones, which are a special manifestation of the economic power of taxpayers. Therefore, a change in the way used to determine the tax base for

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1 The draft amendments to the Act on Citizens' Income Taxes of 2013 included this provision, but it was not adopted in the parliamentary procedure.

2 Чл.6 Закона о порезима на имовину (Art. 6 of Property Tax Act), *Сл. гласник РС*, 26/01, 45/03, *Сл. лист СРЈ*, 42/02, *Сл. гласник РС*, 80/02, 80/02, 135/04, 01/07, 05/09, 101/10, 24/11, 78/11, 75/12, 42/13, 68/14.

motor vehicles should be considered. According to the current legal provisions, when registering a vehicle, an individual or a legal person extends the registration, replaces the license plate, and pays the tax according to the workload of the engine (power), whereby the prescribed amount of tax is deduced in certain percentages for vehicles which are over 5 years old.<sup>3</sup>

Although the method of determining the tax base according to the workload of the engine (power) is quite common, this does not mean that there is no possibility of determining the tax base according to the market value of motor vehicles.<sup>4</sup> This would be a better tax base compared to the existing one because the price of motor vehicles is influenced not only by the strength of engines (cubic power) and the age of the vehicle but also by taking into account other technical characteristics (additional equipment, average consumption, etc.) as well as the perception of “popularity” of certain brands of cars. In this way, the real economic strength of their owners would be assessed. From the administrative technical aspect of taxation, there is no problem with determining the market value of motor vehicles. For used motor vehicles, there are official portals where the prices of cars of all brands and years of production are determined.<sup>5</sup>

#### 4. Conclusion

One of the challenges of globalization is the creation of an optimal tax system. The contemporary tax structures will inevitably be affected by the creation of global market, where national borders are not an obstacle for the movement of goods, capital and labor, as well as by the rapid development of information technologies. Numerous modification processes are present in tax systems as a whole, as well as in the design of individual taxes. Due to the exceptional capital mobility, national tax policy makers are forced to reduce capital tax rates on capital gains or to exempt them from paying taxes. The second component of

3 Чл. 4 Закона о порезима на употребу, држање и ношење добара (Art. 4 of Act on Taxes on the Use, Holding and Carrying Goods), *Сл.гласник РС*, 26/01, 80/02, 43/04, 132/04, 12/05, 114/06, 118/07, 114/08, 31/09, 101/10, 24/11, 100/11, 120/12., 113/13, 149/14., 109/15, 112/15, 105/16.

4 The (cubic) power of the engine is a frequent tax base for paying taxes on motor vehicles. For example, in Croatia and Montenegro, the motor vehicle tax is paid according to the engine power (cubic) but the age of the vehicle is taken into account. In Serbia, during 2016, there were announcements in the media that the tax would be paid on the basis of market value. In practice, the problem of older vehicles of greater power was pointed out, whose owners, under the current law, pay higher taxes than the owners of new vehicles of smaller cubic power.

5 The evaluation of the value of used motor vehicles would be done according to the Catalog of the Motor Vehicle Center of the Automobile Union of Serbia, which is already in use by the Tax Administration of Serbia, the agencies dealing with vehicle-related transactions and insurance companies.

income tax, taxation of labor income, has also sustained changes. Some countries apply progressive rates while others use lower, proportionate rates. Yet, generally speaking, due to the relative mobility of this tax base and the development of the Internet, an increasing number of taxpayers is not available to the national tax administration. A growing reliance on consumption taxation affects the traditional requirement that we should take care of equity of taxation when designing the tax system.

The tax system of Serbia is distinguished by a large share of sales tax (VAT and excise), as well as the unjust character of the personal income tax (PIT) system. The question arises how the general trend of moving towards consumption patterns, which in itself represent a departure from the fairness of taxation, will be reflected on the (already unfair) existing tax system of Serbia.

In terms of shaping the tax structure, creators do not have at their disposal a tax on profit. Increase of revenue is not expected from this tax. Due to the commitment to creating an incentive tax environment, tax rates will not be increased.

With regard to property tax, a shift in fiscal outlook was made, as participation of property tax in the structure of local government revenues has increased. In addition, this change in the method of establishing the tax base is also significant from the aspect of equity of taxation. The price realized in the market is a real indicator of the value of the real estate, which ensures taxation according to the actual economic strength of the taxpayer. With the application of progression on tranches, taxpayers who have higher value real estate will bear higher tax liabilities. This can achieve a certain compensatory effect in relation to the regression of VAT and excise taxes, but not as close to the effect which would be achieved by instituting a good system of taxation of income of individuals.

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## **ПОРЕСКА СТРУКТУРА У СРБИЈИ ПРЕД ИЗАЗОВИМА ГЛОБАЛИЗАЦИЈЕ**

### **Резиме**

Традиционално поимање пореске структуре, које подразумева адекватну комбинацију непосредних и посредних пореза, добија нове тенденције. Проблем обезбеђивања повољног фискалног амбијента, у усло-вима глобализације, врши притисак на креаторе националних пореских политика да пруже повољније пореске режиме мобилним пореским осно-вицама. Због потребе обезбеђивања одређеног нивоа пореских прихода, у циљу смањења фискалног дефицита, у већини савремених земаља направљен је помак ка јачем опорезивању потрошње.

У таквим условима, за земље које већ имају изражено велико учешће посредних пореза, попут Србије, изградња оптималне пореске структуре представља додатни изазов. Упркос томе, напори креатора пореске политике требало би да се наставе у правцу успостављања уравнотеженијег односа пореских облика. У противном, даље велико ослањање на опорезивање потрошње може само да продуби постојећу неправичност пореског система Србије. Отуда, тежиште опорезивања било би пожељно усмерити ка имовини и доходу. Мере предузете у домену администрирања, у смислу ефикасније наплате пореза и смањења пореске евазије, допринеле би афирмацији пореза на имовину. Такође, формулисањем одговарајућих законских решења, у оквиру очекиване реформе, отклонили би се недостаци постојећег система пореза на доходак. Тиме би се, не само ојачао фискални капацитет ова два пореска облика, већ омогућило и правичније опорезивање.

**Кључне речи:** пореска структура, глобализација, опорезивање потрошње, порез на доходак, порез на имовину, правичност опорезивања.



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## **RESOLVING SHAREHOLDERS' DISPUTES BEFORE EUROPEAN COURTS: IS THERE A NEED FOR UNIFICATION?**

**Abstract:** *The presented paper intends to explore different manners in which shareholders' disputes are resolved in selected European jurisdictions, covering statutory law and practice of countries such as: Poland, Germany, United Kingdom, Italy, Spain and Denmark. It particularly refers to those disputes which may arise in the event of passing by shareholders such resolutions that are legally defective and/or affect the position of shareholders in a company or in any other way influence shareholders' interests.*

**Keywords:** *EU company law, shareholders, dispute resolution.*

### **1. Introduction**

In the event of passing the resolution which violates the law, under the legislation of most European countries, shareholders may challenge the resolution before a court. Measures to be taken may range from the action for the declaration of nullity of the resolution (as is the case in Poland) to the action by which shareholders may request the court to set aside (annul) the resolution (as is the case in Italy, where most violations of law may result in the annulment of the resolution and not in the declaration of nullity). While the latter action is always subject to relatively short time limits (Poland, Switzerland, Germany, Denmark, Sweden, Italy, Spain), the action for the declaration of nullity may remain unrestricted (Switzerland, Germany, Spain), though it does not have to (Poland and, in most cases, Italy). Also, what does matter in most jurisdictions (except for Poland) is the gravity of violations of law. If the infringement is serious, the resolution may be null and void by operation of law, while 'lighter' violations may result in the action against the company, and the final consequence of it may be the an-

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annulment of the resolution (Italy, Spain, Germany, Switzerland). In common law jurisdictions, such as the United Kingdom, there is no similar court action but its role may be played, though it rarely is, by an unfair prejudice claim.

Divergences and affinities between varied manners of opposing the defective resolutions by shareholders will be outlined below and the purpose of this inquiry will be to determine if the discrepancies allow for the success of the approximation measures which have been taken so far.

## 2. Poland

Polish law recognizes two types of defective resolutions: those which are contrary to the law and those which violate the articles of association or good customs<sup>1</sup>. Shareholders' resolutions which violate the law are null and void, and they may be contested by means of the court action for the declaration of nullity of the resolution. The nature and legal effects of this action is still disputable despite the fact that the Polish Code of Commercial Companies and Partnerships has been in force for more than 15 years. Some authors, if not most of them, consider the action for the declaration of nullity to be declaratory in its nature (Sołtysiński, S., 2016: 702; Gutowski, M., 2010: 245; Dąbrowska, J., 2016: 271; Popiołek, W., 2007: 23; Szczurowski, T., 2014: 845; Pinior, P., 2014: 55). Yet, others are of the opinion that the said action is constitutive, which means that the nullity of the resolution may be raised only if the court has formally decided that the resolution violates the law (J Frąckowiak, J., 2001: 687-688; Frąckowiak, J., 2014: 31-32; Koch, A., 2007: 4; Bilewska, K., 2016: comments on Article 425 CCC; K Bilewska, K., 2007: 1100; Stelmach, B., 2012: 402). The latter opinion was confirmed by the Polish Supreme Court<sup>2</sup>. As it is not the right place to attempt to decide which view is more justified, it should be stressed though that pursuant to the Polish Code of Commercial Companies and Partnerships only the violations of law may be the ground for the action for the declaration of nullity, while the violations of articles of association or good customs may give rise to the action for the annulment of the resolution. The annulment implies that the resolutions may be considered ineffective only after the relevant court decision has been passed.

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1 Violation of law or good customs is not enough to challenge the resolution in a court of law. Such a resolution must simultaneously contravene the company's interest or the purpose of the resolution must be detrimental to the interest of an individual shareholder. See the resolution of the Supreme Court of 10 March 2016, Case No. III CZP 1/16.

2 The resolution of the Supreme Court of 1 March 2007, Case No. III CZP 94/06; the resolution of the Supreme Court of 18 September 2013, Case No. III CZP 13/13.

In Poland, the action for the declaration of nullity may be brought within 6 months from the date on which those who may contest the resolution learnt about the resolution and not later than 3 years from the date on which the resolution was passed.<sup>3</sup> The action for annulment may be brought within one month from the date on which those who may contest the resolution learnt about the resolution but not later than 6 months from the date on which the resolution was passed. It should be noted that time limits for the latter action are much shorter than those for bringing the action for the declaration of nullity of the resolution which has violated the law.

### 3. Italy

In Italian law, shareholders' resolutions which are contrary to the law may be contested by bringing the action for the declaration of nullity or the action for annulment. This is a different approach than that in Polish law, in which passing the resolution in contravention of the law may give rise exclusively to the action for the declaration of nullity and not to the action for annulment. This is an important distinction as in Italy only some significant defects in the contents of the resolutions (defects concerning the substance of the resolution) or significant defects in passing the resolution or calling the meeting (procedural defects) may justify the action for the declaration of nullity. Other violations of law may lead to the action for annulment. Italian law places more emphasis on stability and certainty as only some violations of law may be contested by the action for the declaration of nullity in relatively long time limits (3 years and in case of some violations without time limits – Article 2379 CC<sup>4</sup>), whereas most of those violations may be raised in the action for annulment which is subject to a short time limit of 90 days (Article 2377 CC).

Pursuant to Article 2379 CC the cases of nullity are as follows: the meeting has not been summoned (*mancata convocazione dell'assemblea*); the minutes of the meeting have not been taken (*mancaza del verbale*); or the subject matter of the resolution is impossible or illegal (*impossibilità o illiceità dell'oggetto*). In Italian law, the reasons for nullity of the resolution form a closed list (*numerus clausus*). Any other cases in which the resolution is contrary to the law may give rise to the action for the annulment of the resolution.

It should be noted that in Italy serious violations of law may be taken into account by the judge *ex officio* (*l'invalidità può essere rilevata d'ufficio dal giudice*), whereas

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3 In stock corporations, the time limits differ slightly: time limits for the declaration of nullity are laid down in Article 424(1) and (2) CCC, while actions for annulment are subject to time limits specified in Article 425(1) and (2) CCC.

4 *Codice Civile* of 16 March 1942, hereinafter referred to as 'CC'.

in Poland the judge is not authorised to consider the resolution null and void if the resolution has not been contested by means of the action for the declaration of nullity or the party failed to raise a defence of nullity in other proceedings.

#### 4. Switzerland

Swiss law, similarly to Italian legislation, splits the violations of law into two distinct categories: the violations referred to in Article 706b OR<sup>5</sup> and other violations mentioned in Article 706 OR. Only the violations included in the first group may make the resolution null and void (*nichtig*), while the latter may only give rise to the action for the annulment of the resolution (*Anfechtungsklage*). Whether or not a particular violation of law belongs to the first group is crucial: if it does, the violation may be raised by an interested party in any court proceedings without any time limits and without the need to bring the action for the declaration of nullity (Dubs, D., Truffer, R., 2016: 1063; Jermini, D., Domeniconi, A., 2014: 2243; Böckli, P., 2009: 2305; Forstmoser, P., Meyer-Hayoz, A., Nobel, P., 1996: 266-267; Schott, B.G., 2009: 61; Tanner, B., 2016: 755; Riemer, H.M., 1998: 138-139). The null and void resolution produces no effects from the date of passing it (Dubs, D., Truffer, R., 2016: 1062; Jermini, D., Domeniconi, A., 2014: 2243; Schott, B.G., 2009: 4; Tanner, B., 2016: 755). On the contrary, if the violation belongs to the second group, the entitled person will need to bring the action for the annulment of the defective resolution but the action is subject to a very short time limit of two months from the date of the meeting (Article 706a (1) OR).

Since violations of law may lead to varied consequences, it is crucial to determine which violations may produce nullity (*Nichtigkeit*) and which may allow for contestability of the resolution by the action for its annulment (*Anfechtung von Generalversammlungsbeschlüssen*). Article 706b (1) OR provides that the resolutions of the general meeting are null and void if they remove or restrict the right to participate in the general meeting, the minimum voting right, the right to take legal action or other shareholder rights that are mandatory in law (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die das Recht auf Teilnahme an der Generalversammlung, das Mindeststimmrecht, die Klagerechte oder andere vom Gesetz zwingend gewährte Rechte des Aktionärs entziehen oder beschränken*)<sup>6</sup>. Pursuant to Article 706b (2) OR the resolutions are null and void if they restrict the shareholders' rights of control beyond the legally permissible degree (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die Kontrollrechte von Aktionären über das gesetzlich zulässige Mass hinaus beschränken*).

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5 *Obligationenrecht* of 30 March 1911, hereinafter referred to as 'OR'.

6 Those violations are referred to as „*Eingriffe in die unentziehbaren Kernrechte des Aktionärs*“ (Böckli, P., 2009: 2306).

Under Article 706b (3) OR the resolutions are null and void if they disregard the basic structures of the company limited by shares or the provisions on capital protection (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die die Grundstrukturen der Aktiengesellschaft missachten oder die Bestimmungen zum Kapitalschutz verletzen*). As opposed to Italian law, Swiss legislation provides an open list of violations which may produce the nullity of the resolution. Under Article 706b OR „Nichtig sind insbesondere [in particular] Beschlüsse der Generalversammlung, die (...)“ (see also Dubs, D., Truffer, R., 2016: 1062; Riemer, H.M., 1998: 119; decision of the Bundesgericht of 24 June 2008, Case No. 4A\_197/2008, item 2.1).

## 5. United Kingdom

Irrespective of differences between Polish, Swiss and Italian legislation, which seem to concern several aspects of the law on remedies aimed at declaring the nullity of shareholders' resolutions or annulling such resolutions, one should bear in mind that all those legislations derive from the same root of continental law. In all of those jurisdictions, problems which are likely to arise, are virtually the same. They concern the distinction between nullity and annullability of the resolutions, time limits which restrict the right to contest the resolutions before a court of law, or the entitled persons who hold the right to contest the defective resolution.

There are, however, legal systems in which such problems do not exist since the law which concerns the rights of shareholders to challenge the resolutions is significantly different. In particular, the case of English law shows that the legal regime of challenging the resolutions does not have to be constructed as a coherent system of legal rules contained in a single piece of legislation. In the UK, there are no rights of shareholders the direct purpose and consequence of which would be to set aside the defective resolution or to declare its nullity. Instead, the role of measures which in continental law serve the purpose of challenging defective resolutions is played by other instruments. As H. Fleischer noted, while comparing German law and English law, in the latter jurisdiction “*minority protection is assured by means of common law principles applying to amendments of the articles of associations and – primarily with regard to privately-held companies – an unfair prejudice claim (Sections 994–999 CA 2006)*” (Fleischer, H., 2005: 24). This means that English legislation is incomparable as far as the examined problem is concerned. This conclusion may also undermine the view of those who are of the opinion that continental law and common law jurisdictions are possible to approximate as far as the area of private law is concerned.

## **6. Efforts aimed at approximating the law on challenging shareholders resolutions**

No matter how different common law developments are from continental law approach to challenging the resolutions of shareholders, one could ask whether it would be possible to approximate the law of continental countries in respect of the measures that may be taken by shareholders to eliminate the consequences of defective resolutions. The initiators of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) finally concluded that the Regulation should contain no provisions on contesting shareholders' resolutions and the matter should be governed by national law. The same approach was presented in the Proposal for a Council Regulation of 25 June 2008 on the Statute for a European Private Company (COM/2008/0396 final - CNS 2008/0130) and the Proposal of 27 November 2009 for a Council regulation on a European private company (2008/0130 CNS). Both pieces of proposed legislation stated that shareholders' right to challenge the resolutions should be governed by national legislation.

A different approach was presented in the European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company COM(2008)0396 - C6-0283/2008 - 2008/0130(CNS). Article 27(4) of this proposed regulation provided that shareholders' resolutions might be declared ineffective on the basis of an infringement of the provisions of the articles of association, provisions of this Regulation and the applicable law. There was only one measure aimed at eliminating defective resolutions, irrespective of the nature of defects. It was not important whether the resolutions violated the law or articles of association. It should be noted that pursuant to the proposed regulation, resolutions might be declared ineffective only by means of an action which should be brought by any shareholder within one month from passing such a resolution.

The topic of shareholders' resolutions is also present in the European Model Company Act (hereinafter referred to as 'EMCA'). The final version of this act was published online on 30 March 2017,<sup>7</sup> a day before the ceremony of the official publication of the EMCA which took place in Rome on 31 March 2017. Section 11.28 of the EMCA provides that legal proceedings can be instituted by a shareholder or a member of the management board if a resolution passed by the general meeting has not been lawfully passed or is contrary to this Act or to the company's articles of association. Legal proceedings must be instituted no later than three months after the date of the resolution, or the resolution

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7 the European Model Company Act (EMCA), available at: [http://law.au.dk/fileadmin/Jura/dokumenter/forskning/projekter/EMCA/2017-03-30\\_EMCA\\_withlinks.pdf](http://law.au.dk/fileadmin/Jura/dokumenter/forskning/projekter/EMCA/2017-03-30_EMCA_withlinks.pdf)

will be deemed to be valid. It should be noted that violations of law and violations of articles of association are equally important and may result in the same court proceedings. Still, some violations may be contested after time limits; for example, there has been a serious failure to comply with the rules governing notice of general meetings. Though there is only one measure aimed at contesting defective resolutions, there is a hierarchy of violations; some of them are so significant that they may lead to elimination of a defective resolution without any limitations. Nevertheless, as a general rule, under the EMCA, the stability of resolutions is emphasized, rather than the right of shareholders to contest it, even if the resolution violates the law. Obviously, pursuant to the EMCA, the correctness of a resolution is not an issue.

## **7. Conclusions**

Whether or not a particular set of legal rules should be subject to approximation efforts is a tough question to respond to. The same applies to the law which concerns the problem of defective shareholders' resolutions. Bearing in mind the diversity of legal traditions of common law systems and continental jurisdictions, the conclusion could be that there is no point in any approximations efforts, in particular in the area of private law, to which company law belongs. There are also some differences within continental law itself, though they are more likely to annihilate.

As far as soft law proposals are concerned, it can be doubted if all or at least most of European governments would be eager to implement them. Nevertheless, I consider those efforts valuable since the result of them, at least in some instances, is the determination of the best solution. Soft law proposals are often drafted by international experts and they seem to take into account the developments from various jurisdictions. Based on those developments, major trends present in most jurisdictions are determined and the basic principles are established, which might be then followed by national governments. In case of the measures aimed at challenging defective shareholders' resolutions, such principle is the stability of shareholders' resolutions. In most cases, even if the resolution violates the law, it is more reasonable to maintain that resolution than to consider it null and void. Moreover, the violation of law does not need to result in the annulment of the resolution as is demonstrated by Italian or Spanish legislation. Provisions contained in the EMCA are based on the same principle, a solution which is difficult to overestimate.

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**РЕШАВАЊЕ СПОРОВА АКЦИОНАРА ПРЕД ЕВРОПСКИМ  
СУДОВИМА: ДА ЛИ ПОСТОЈИ ПОТРЕБА ЗА УНИФИКАЦИЈОМ?**

**Резиме**

*Циљ овог рада је да истражи различите начине решавања акцио-нарских спорова у законодавствима одабраних европским земаља: Пољске, Немачке, Велике Британије, Италије, Шпаније и Данске, кроз анализу њихових статутарно-правних оквира и судске праксе. То се нарочито односи на спорове који настају у случају када акционари донесу одлуке које су правно мањкаве и/или имају негативан утицај на положај акционара у предузећу, или на било који други начин утичу на интересе акционара.*

**Кључне речи:** *Европско компанијско право, акционари, решавање акционарских спорова.*

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## **JOINT VENTURE CONTROL UNDER THE EU COMPETITION LAW: APPLICATION OF THE FULL-FUNCTION CRITERIA**

**Abstract:** *Globalization is a major reason why market participants use joint ventures (JVs) as a means to achieve their business strategies. The formation of international JVs has taken place at an unprecedented rate over the last two decades and international JVs are very common today.*

*The EU competition law and merger control rules can have a critical impact on the establishment of JVs because JVs, by their nature, frequently involve cooperation between actual or potential competitors in a way which can impede competition on the EU market. It is commonly accepted that a JV is an undertaking which is jointly controlled by several other market participants, but it is up to the parent companies creating a JV to determine whether their JV is compatible with competition law rules, i.e. whether the JV satisfied the full-function criteria. The answer to this question will determine the legal framework applicable to each case.*

*This paper gives an overview of the European Commission's guidance and decisional practice in merger control cases concerning the application of the full-function criteria which delineate the scope of the merger control rules regarding the creation of JVs. The author points to various JV scenarios and shows that the Commission's guidance and decisional practice are inconsistent as to when and to which operations the full-function criteria must be applied. The uncertainty of the concept of full-functionality is the result of the Commission's guidance and case-by-case analysis.*

**Keywords:** *joint venture, full-function criteria, merger control, control of concentrations, EU competition law.*

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The findings, interpretations, and conclusions expressed in this paper reflect the author's position on the topic and do not necessarily reflect the view of the Commission for Protection of Competition of Republic of Serbia.

## **1. Introduction**

As a world-wide phenomenon, the globalisation of the economy has generated markets that know no national boundaries, giving rise to a wide variety of cross-border mergers and acquisitions. Such cross-border transactions increase the competitive pressure on companies and the pressure on domestic competition regimes requiring them to deal with a new threat to competitiveness of national markets that cannot be ignored. The increasing impact of globalisation on the business activity has paralleled the spread of competition law regimes; so, most countries in which multinational companies do business have competition law and a competition authority.

In the globalised market, companies thereby face different competitive conditions in the various countries in which they operate, caused mostly by different legal and regulatory regimes that affect their business activities. The differences in merger review approaches and proliferation of merger control regimes are important challenges for multinational companies since the national competition authorities so often apply merger control rules to mergers between undertakings based abroad and reach beyond their territorial borders to protect competition within domestic markets.

The possibility of extraterritorial application of the merger control rules results directly from the objective criteria on which the notification thresholds are based. To be specific, any cross-border merger which meets the relevant turnover thresholds will be caught by the national merger control regime, irrespective of the place of business and registration of undertakings concerned.

Global proliferation of merger control means that major international transactions may require filings in a dozen or more jurisdictions which have resulted in heightened caution and strengthening of national controls, i.e. in extension of the reach of national merger control rules. In today's globalized world, cross-border elements are a typical feature of a significant number of merger transactions which may impact competition in numerous jurisdictions. Therefore, this paper focuses on the debate on the proper extent of extraterritoriality in merger control and highlights the sensitivity of extraterritorial application of national competition rules to foreign-to-foreign transactions.

## **2. The definition of cross-border mergers**

It has been pointed out that merger control is a unique aspect of competition law and policy and it would be important in this context to emphasise the role that merger control should have in practice. Concentrations are a business phenomenon and are, therefore, distinct in fundamental respects from other key anti-

trust conduct, such as cartels and abuse of dominance. Concentrations involve structural, as opposed to transient behavioural issues. They have the potential to fundamentally effect future development in a sector of the economy as they alter the very structure of an industry (OECD, 2011: 23). Hence, merger control is the area that has had the most impact on the globalised economy, and which, in geographical terms, has expanded.

By definition, “transnational merger” means a merger that is subject to review under the merger laws of more than one jurisdiction (OECD, 2005: 4). According to the OECD, in relation to the structure, a merger can be considered to have a cross-border dimension if it involves firms established in more than one jurisdiction. Thereby, they are called foreign-to-foreign mergers, i.e. mergers between companies based abroad. In relation to the effect, such dimension can be said to exist where, regardless of the place of establishment of the merging firms, the merger affects the markets in more than one jurisdiction (OECD, 2011: 22).

### **3. Issues concerning the assessment of cross-border mergers**

When it comes to regulating cross-border mergers, the fact that notification of the merger needs to occur in more than one jurisdiction could cause the same issues (or problems) in different countries. In comparative law, there are no specific rules regarding cross-border mergers and competition authorities apply the general merger control rules to foreign mergers, i.e. the laws on protection of competition, provided that the respective jurisdictional thresholds are met.

Some of the issues related to cross-border merger operations are competition policy considerations; jurisdictional, procedural and substantive issues relating to merger control; business interests; and global, regional and domestic interests and considerations. Such issues are also important to all types of economies around the world, whether small or large, developed or developing. A particular difficulty arises in the context of setting the jurisdictional thresholds (or jurisdictional nexus) at an appropriate level because of the risk that these thresholds may be set too high or too low.

The jurisdictional question is particularly important in relation to cross-border mergers given the practice of mandatory *ex ante* notification about these transactions in many jurisdictions. The countries should assert jurisdiction only where a cross-border transaction has an appropriate nexus with their jurisdiction because appraisal of mergers involving companies based abroad inevitably involves extraterritoriality in merger control.

The questions which arise in the practice of the competition authorities are whether and how to apply the competition rules to companies established out-

side the territory of the country concerned, as well as how to comply with a general (territoriality) principle in public international law that one country can apply its competition rules only to undertakings' conducts performed on its territory. In addition, a particular problem also arises where several competition authorities investigate the same transaction and have different assessments of whether the concentration should be allowed.

Nevertheless, in modern competition law, the principle of extraterritoriality departs from the traditional territoriality principle since competition authorities have the power to regulate conduct performed outside of its territory that affect or could affect the competition on the domestic market. The possibility of extraterritorial application of the merger control rules in comparative law results directly from the objective criteria on which the thresholds are based. Consequently, a number of concentrations carried out by undertakings based in third countries or having their seat or headquarters there can easily reach the turnover threshold and, therefore, fall under control pursuant the national rules.

However, it must be pointed out that public international law does not provide an adequate answer to the problems that arise when the competition authority has extraterritorial enforcement jurisdiction. At the same time, national merger control rules do not contain specific provisions with respect to its international scope, since the only criterion for the applicability of merger control rules is the fulfilment of one of the turnover thresholds prescribed by the laws. Therefore, any cross-border merger that meets the turnover thresholds triggers a filing obligation, and is subject to merger control before national competition authority. Cross-border mergers are thus regularly reviewed by the national authorities, as long as any of the turnover thresholds are satisfied.

The extraterritorial application of national merger control rules became very common because the territorial scope of the national rules was not the issue on which competition authorities took position during the preliminary assessment of merger notification. The national laws are applied independently of the location of the undertakings concerned, whether within or outside the domestic market, although in numerous countries it is stipulated that the laws could apply to conducts performed outside of its territory only if such conducts affect or could affect the competition on the domestic market.

Nevertheless, the question that often arises in practice is whether a concentration of undertakings based abroad could be considered as subject to national jurisdiction. Undertakings sometimes submit that the concentration is conducted within the territory of a third country and that the Commission could adopt "domestic/local effects doctrine".

However, comparative practice is not fully supporting the view that a concentration, besides meeting the thresholds, also needs to have an effect on competition in domestic market in order to trigger a filing obligation. Such “domestic effects doctrine” has been very rarely adopted by the national authorities because the purpose of merger control in a country is the assessment of (potential) effects of the transaction on domestic market, which is only relevant once jurisdiction has been established. Nevertheless, in practice it is very hard to limit extraterritorial scope of merger control rules.

With the aim to identify existing or potential restrictions to competition in domestic market, merger control procedure starts with the question of jurisdiction, i.e. whether a particular merger falls within the scope of the law and whether the relevant turnover thresholds are satisfied. This is what triggers the entire process of substantive merger appraisal. If the jurisdictional thresholds are met, the notification of the merger will be necessary and consequently the competition authority will assess notified merger.

The territorial scope of competition law is not the issue on which competition authority takes position during the preliminary assessment of merger notification because the law is applied independently of the location of the undertakings concerned, whether within or outside the domestic market. The competition law does not require that the undertakings in question must be established in the country concerned or that the production activities covered by the concentration must be carried out within a territory of the country. Such requirement does not make any distinction between production or sale activities, and the figures relating to the turnover are not disputed. Accordingly, the competition authority could justify its jurisdiction on the basis that effect assessment must be carried out, but only after the notification of concentration and before its realisation. The assessment of effects is therefore only relevant once jurisdiction has been established.

Well-established comparative practice shows that numerous concentrations that have little effect within the national markets have to be notified because of the way in which the thresholds in the countries operate. For example, a joint venture between two undertakings that brings about a merger of their widget businesses abroad could be notifiable under the national merger control rules, even though the joint venture will have no presence or effect on the national market, if the parents exceed the turnover thresholds in the rules. In addition, under such criteria, this means that a foreign company acquiring shares could become subject to the merger control in concerned country even if the company does not have physical presence in the domestic market (e.g. there are no branch, subsidiary

nor assets belonging to the company, but are present indirectly (imports/sales), even in the event that a target has neither assets nor sales in domestic market).

The requirement for respective thresholds creates an assumption that there is an appropriate nexus between the transaction and domestic market ("local nexus") and that competition authority only reviews those mergers that have an impact in its jurisdiction. Therefore, the competition authority does not assess the local nexus criteria because the notification thresholds, by definition, seek to include in review transactions that most likely have material impact in a national jurisdiction. In such cases, competition authorities assess the impact of the concentration on competition within the national market, having in mind that competition might be affected due to "potential effects" of a transaction. Increase of market power through the revenue generated from the concentration could indirectly affect domestic market by way of increasing the parties' market power in country.

The criteria in the merger control rules apply to undertakings irrespective of their place of business and registration. The existence of such thresholds, therefore, activates the competition authorities' jurisdiction to examine the concentration even when the merging parties have no actual presence in the country concerned. Neither the nationalities of the entities involved in the transaction nor the location of their manufacturing facilities is material in this respect. The criteria which determine the application of the merger control rules are only the financial thresholds calculated pursuant to the rules.

## **4. Comparative practice**

### ***4.1. European Union***

In the EU, there is an established practice of extraterritorial jurisdiction over mergers external to the EU on the basis of EU law and the doctrine of territoriality under international law. When the Commission determines that a cross-border merger meets the objective criteria as a concentration and meets the financial thresholds establishing a Community dimension, the Commission starts effects assessment of such concentration.

As already mentioned, EU merger control rules do not contain provisions which limit the extraterritorial application of merger control jurisdiction by the Commission since they apply to all concentrations with a Community dimension. Consequently, as long as the concentration has a Community dimension, the Commission can control even cross-border mergers.



According to Regulation 139/2004, a concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.<sup>1</sup> This means that Community jurisdiction is triggered on the basis of direct sales to EU purchasers and accordingly covered by the territoriality principle, as universally recognized in public international law.

The “effects doctrine” has never been explicitly recognised by the EU Courts, although in *Gencor* case there is an allusion to the applicability of the effects doctrine for establishing jurisdiction, but based the existence of the Commission’s jurisdiction on the implementation of the merger agreement in the EU (Colombani, Kloub, Sakkers, 2014: 1158). The Court took position on the issues of the territorial scope of the EU Merger Regulation and compatibility of the merger control with public international law.

The Court stated that European Merger Regulation applies to all concentrations with a Community dimension, and that it does not require, in order for a concentration to be regarded as having a Community dimension, that the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory. In addition, it is verified that application of the Merger Regulation to a merger between undertakings based outside EU is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community. It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in cases of control of cross-border mergers.<sup>2</sup> It can be concluded that the effect doctrine is compatible with EU legal order (Faull J. et al, 2014: 305).

In European countries, it is also accepted that competition authorities can assess cross-border mergers as soon as thresholds are satisfied. For example, in Sweden, such transactions are caught if they meet the relevant turnover thresholds, since there are no specific rules for foreign-to-foreign transactions under the Swedish merger control legislation. There is no requirement for a physical presence in Sweden (Sweden, 2017).

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1 Recital n. 10, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *Official Journal*, L. 24/2004).

2 Case T-102/96 *Gencor Ltd v Commission of the European Communities* [1999], para. 78, 79, 90, 92. For further information on extraterritorial application of EU merger control rules, see Ezrachi, 2012: 528-529; Ezrachi, 2001: 137-146. Fiebig, 1998: 79-100; Feeney, 2002: 425-494; Broberg, 2000: 172-182; Alford, 1992: 1-50.

In Spain also, there are no specific rules for foreign-to-foreign transactions, and it could be said to be irrelevant if one or both of the parties do not have a subsidiary, a branch or any assets in Spain. Thresholds can be achieved simply on the basis of local sales. Hence, if transaction is deemed a concentration and if any of the thresholds are met, it is caught by merger control legislation (Spain, 2017).

In addition, in France, provided that it does not fall within the scope of the EU Merger Regulation, any foreign-to-foreign transaction which meets the relevant turnover thresholds will be caught by the French merger control regime, even if none of the parties to the transaction has any “physical” presence in France (France, 2017).

Portuguese Competition Act provides that cross-border mergers are caught to the extent that they have, or may have, *effects in the territory of Portugal*. The Act thus may apply whenever both parties and the target alone achieve, directly or indirectly, sales in Portugal, despite the fact that neither of the undertakings concerned is established in Portugal. The Competition Authority confirmed such practice and accepted the wide meaning of its jurisdiction. Moreover, concentrations where the acquirer is not at all present in Portugal and only the target achieves sales in Portugal, even if through an agent or distributor, are subject to mandatory filing (Portugal, 2017).

Danish merger control rules apply, even if there is no increase in market shares (i.e. no “horizontal” overlap). Local presence in Denmark is not necessary for a transaction to be subject to the Danish merger control rules. Cross-border mergers are thus caught by the merger control rules if the undertakings concerned have turnovers in Denmark and the thresholds are met (Denmark, 2017).

#### **4.2. South-Eastern Europe**

In the countries of former Yugoslavia (Croatia, Serbia, Bosnia and Herzegovina, Montenegro and Macedonia) and Albania, any foreign-to-foreign merger is subject to merger control if the jurisdictional thresholds are met. The national competition authorities have not yet adopted any guidelines which would exempt certain cross-border mergers and have not expressly recognised a domestic effect doctrine, although national competition laws provide that the laws apply to all forms of distortion of competition that have an effect in domestic market, even if they result from acts carried out outside of national territory.

The decisional practice so far is not supporting the view that a transaction, besides meeting the jurisdictional thresholds, also needs to have an effect on competition in domestic market in order to trigger a filing obligation. Hence, foreign-to-foreign transactions that meet the jurisdictional thresholds trigger

a filing obligation before national authority and are regularly reviewed by such authorities. It is not necessary for foreign undertakings to have an established legal entity or subsidiary in these countries (Croatia, 2017; Serbia, 2017; Bosnia and Herzegovina, 2017; Montenegro, 2017; Macedonia, 2017; Albania, 2017).<sup>3</sup>

### **4.3. United Kingdom**

The UK Enterprise Act does not specifically provide or require that any of the merging parties should be UK registered companies or carry on business in the UK in order to notify cross-border merger. The UK's Court of Appeal confirmed that the competition authority has jurisdiction to prohibit a foreign-to-foreign merger where the potential purchaser, although physically located outside the UK, carries on business in the UK.<sup>4</sup> Accordingly, due to the manner in which the jurisdictional thresholds operate, at least the target must be active in the UK, whether through a subsidiary or cross-border sales, and the substantive assessment test focuses on the competitive impact of the merger in the UK. Still, since notification of concentrations is not compulsory, it is often the case that a cross-order merger which meets the jurisdictional thresholds but has no substantive impact on competition in the UK would not be notified (United Kingdom, 2017; Coleman, 2013).

### **4.4. Germany**

Under German law the obligation to notify concentrations is not triggered by every transaction that amounts to a concentration within the meaning of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) and reaches the turnover thresholds stipulated in the GWB. Additional essential prerequisite under the GWB is that the concentration has sufficient effects within Germany ("domestic effects").<sup>5</sup> Therefore, merger clearance obligation exists if the undertakings concerned meet certain turnover thresholds and the transaction produces appreciable effects in Germany. This approach is different from EU merger control regime where jurisdiction is triggered whenever the turnover thresholds are satisfied.

In order to clarify such conditions, the *Bundeskartellamt* published a guidance note on appreciable effects in merger control – *Guidance on domestic effects in*

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3 For further information on Serbian merger control rules and competition policy, see Rakić, 2009; Rakić, 2012; Rakić, 2014.

4 Case ME/5319/12 Akzo Nobel NV of Metlac Holding S.R.L, 23 May 2012.

5 Domestic effects can be expected where a concentration is likely to have a direct influence on the conditions for competition in markets that cover part of or the entire territory of Germany (OECD, 2016: 2)

*merger control* (the "Guidance"). This Guidance is designed to help companies and their advisers assess whether the effects of a concentration in Germany are sufficient to fulfil the requirements of the domestic effects clause in the GWB and trigger the obligation to notify the concentration. The Guidance is based on the *Bundeskartellamt's* case-practice as well as the case-law of the competent courts. It also takes into account the International Competition Network's Recommended Practices for Merger Notification Procedures

The Guidance analyzes typical cases that have "domestic effects" and where a notification is required, as well as other cases which lack effects and where no notification is required:

Cases in which domestic effects can clearly be identified : Transactions with only two parties involved will always have domestic effects if the domestic German merger control turnover thresholds are met (e.g. acquirer and target company in case of an acquisition of sole control). If there are more than two companies involved in the concentration, not all cases in which the turnover thresholds are exceeded also lead to sufficient domestic effects. If a joint venture is active at least also in Germany, it will clearly have sufficient domestic effects if prescribed turnover are achieved. In all other cases, i.e. if the joint venture's domestic turnover is lower (especially in cases of newly formed joint ventures), the question of whether sufficient domestic effects can be expected requires a case-by-case assessment and will depend on the circumstances of each individual case (Guidance, 2014: 5-6).

Cases in which domestic effects can be clearly ruled out: a) joint venture is only active on markets outside Germany, and b) parent companies do not compete on the joint venture's relevant product market (or on upstream or downstream markets) (Guidance, 2014: 5-6).

Case-by-case assessment of all other cases: For all case scenarios which cannot be attributed to one of the categories identified above, it will depend on the circumstances of each individual case whether they can be expected to have sufficient domestic effects. They all have in common that they involve more than two parties to the concentration (Guidance, 2014: 8-11). In fact, in such cases it should assess whether transaction have "marginal" domestic effects.

To conclude, in German law, in order for a notification obligation to be compatible with the requirements under international law, it is sufficient that the domestic turnover thresholds are exceeded by at least two companies involved in the concentration. But, in some cases the assessment of a concentration's domestic effects raises complex questions and if it is obvious that the concentration will not raise any competition concerns, a more detailed examination of domestic effects is not necessary (Bardong, 2015: 477-491).

#### **4.5. Turkey**

The Turkish law provides no exemption for the notification of foreign-to-foreign transactions. Cross-border mergers are thus subject to merger control, provided that the turnover thresholds are triggered even if the relevant undertakings do not have local subsidiaries, branches, sales outlets (etc.) in Turkey, i.e. regardless of whether the merging entity will have operations and/or generate turnover in Turkey. This means that even mere sales into Turkey by the merging parties fall within the scope of the Turkish merger control rules.

The practice of competition authority contains a number of decisions where cross-border mergers with extremely low or even no effects at all on Turkish markets were notable and where the approval has been granted by the competition authority. Such practice is based mostly on the grounds that the increase of market power through the revenue generated from the merging entity would “indirectly” affect Turkish markets by way of increasing the parties’ market power in Turkey (Gürkaynak, 2015).

The competition authority’s approach is confirmed by the High State Court in the event of a Total/TCA case. In this case, the Competition Authority argued that merger control rules automatically implied a review of “potential effects” of a transaction as opposed to “actual effects” and challenged its duty to even look into the question of whether effects of a transaction were actually borne in the Turkish markets, arguing that most transactions take years to really produce effects anyway (Gürkaynak et al, 2015).

Nevertheless, in some exceptional cases (e.g. Sorgenia/KKR 14.07.2011, 11-43/919-288), cross-border mergers were found to be outside the scope of the Turkish merger control regime pursuant to Article 2 of the Competition Law that provides the agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the boundaries of Turkey fall under Competition Law. In Sorgenia/KKR the Competition Authority did not find the transaction to be notifiable, since the JV’s products (generation and wholesale of electricity) could not in any possible scenario be sold in Turkey due to direct infrastructure constraints (Gürkaynak G., Yıldırım K.K., 2012: 441)

#### **4.6. Austria**

The Austrian competition law applies to agreements and practices only if that may impact the Austrian market. This means that notification of cross-border merger might not be required if it has no domestic effect, despite meeting the turnover thresholds. In general, it could be said if the target is not active in

Austria and the transaction is also not apt to enhance the acquirer’s market position in Austria there is no mandatory notification. Hence, the Cartel Court has been rather negligent in declining a notification obligation for lack of domestic effects (Austria, 2017).

Nevertheless, the Supreme Cartel Court did not support the decision of Cartel Court, since it stated that a strengthening of resources, such as an increase of financial power of concerned undertaking in Austria, alone would not suffice in order to establish an effect on the Austrian market, if the target undertaking is active in a different limited geographic market (not including Austria) and has no turnover in Austria (Austria, 2017).

#### **4.7. Norway**

In Norway, there are no special merger control rules on cross-border mergers, and such transactions are covered by Norwegian law, provided that the relevant turnover thresholds are met, regardless of whether or not the undertakings concerned are established in Norway, regardless of the place of business of the parties, and regardless of whether the undertakings have subsidiaries or other legal entities in Norway.

However, the Competition Act contains provisions on a “local effects test”, according to which cross-border mergers are subject to control if mergers have effect, or are liable to have effect, within Norway or in a market of which Norway is a part.

With regard to this question, the Norwegian Competition Authority issued certain guidelines on this matter, based on the request of National Bank to issue an opinion in case in which the Government Pension Fund of Norway was to acquire real estate outside Norway together with another undertaking. The Norwegian Competition Authority was asked to clarify whether the geographical scope of the Norwegian Competition Act affects the obligation to notify of transitions where the turnover thresholds in Norway are met, but where the transaction has no effects in Norway.

The Guidelines state that such concentration does not have to be notified if it does not have effect or is not liable to have effect within Norway. However, the Norwegian Competition Authority clearly points out that such interpretation should be applied strictly, and that most cross-border mergers where the turnover thresholds are met will be deemed to have, or be liable to have, effect in Norway (Norwegian Competition Authority, 2011; Norway, 2017).

## 5. Conclusion

To conclude, the best comparative practice in general demonstrates that cross-border mergers are regularly subject to merger control under national merger control rules, including EU law, although there are some exceptional examples (Austria, Turkey and Norway) in which there was no obligation to notify such mergers due to no possible effects on domestic market.

Nevertheless, it can be said that comparative practice is in accordance with the effects doctrine of public international law, i.e. it is consistent with public international law because international law does not contain unequivocal criteria for determining the extent of the national jurisdictions. Still, each jurisdiction is free to examine whether concentrations restrain competition within its territory.

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## **ЗАЈЕДНИЧКО УЛАГАЊЕ КАО ПРЕДМЕТ КОНТРОЛЕ У ПРАВУ КОНКУРЕНЦИЈЕ: ПРИМЕНА FULL-FUNCTION КРИТЕРИЈУМА**

### **Резиме**

Глобализација је главни разлог зашто учесници на тржишту путем заједничког улагања (joint venture) настоје да остваре своје пословне стратегије. Међународна заједничка улагања се последње две деценије користе у великом обиму и данас су постала уобичајена пракса у пословном свету.

Право конкуренције ЕУ и правила о контроли концентрација могу утицати на заједничка улагања, јер заједничко улагање, по својој природи, укључује сарадњу стварних или потенцијалних конкурената којом би се могла нарушити конкуренција на тржишту ЕУ. Општеприхваћено је да се заједничким улагањем сматра учесник на тржишту над којим заједничку контролу заједно врши неколико других учесника на тржишту, а на учесницима у заједничком улагању је да утврде да ли је то улагање у складу са правом конкуренције, тј. да ли оно испуњава full-function критеријуме. Од одговора на ово питање зависи и која правила ће се у конкретном случају применити.

У раду се даје преглед смерница и праксе Европске комисије у поступцима контроле концентрација у погледу примене full-function критеријума, који одређују обим примене правила о контроли концентрација на заједничка улагања. Аутор указује на различите ситуације које настају заједничким улагањем и напомиње да је пракса Европске комисије неконзистентна када треба одговорити када и на које трансакције се морају применити full-function критеријуми. Несигурност у погледу примене ових критеријума је условљена смерницама Европске комисије и њеном анализом која се разликује у сваком појединачном случају.

**Кључне речи:** заједничко улагање, full-function критеријуми, контрола концентрација, право конкуренције, ЕУ.

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<sup>6</sup> Ставови изнесени у раду лични су ставови аутора и не одражавају нужно ставове Комисије за заштиту конкуренције Републике Србије.

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## **GUARANTEES IN BITS AGAINST POLITICAL RISKS, WITH REFERENCE TO BITS OF THE REPUBLIC OF SERBIA**

**Abstract:** Political violence, expropriation and other forms of deprivation of property-ownership rights, as well as the risks associated with currency transfer and repatriation of funds, represent the traditional non-commercial risks that investors face when considering investing in a foreign country. In order to provide legal protection for their investors abroad, and to attract more foreign investments and keep them on the national territory, states have resorted to concluding bilateral agreements on mutual protection of investments (BITS) and creating bilateral legal frameworks for protection of foreign investments in international law. In addition to regulating the general standards of treatment of foreign investments, bilateral agreements on the protection of investments also envisage the guarantees against the aforesaid political risks.

This paper aims to provide a brief overview of guarantees against political risks that the bilateral agreements provide for foreign investment. Bearing in mind the huge number of bilateral agreements on investment protection, the limited scope of this paper and the author's endeavour to offer relevant research on this matter, the analysis is based on standard bilateral agreements on mutual protection of investments in different countries, with special reference to bilateral agreements in force in the Republic of Serbia. Although each bilateral agreement on protection of investments regulates their protection only on the bilateral level, without the *erga omnes* effect, contractual practices are often replicated, leading to the creation of internationally accepted approach to the protection of foreign investments against political risks in bilateral agreements. While such approach seems to be quite common, the aim of this paper is to show that Serbian practice does not diverge much from such practices.

**Keywords:** BITS, protection against political risks, foreign investment, BITS in Serbia.

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## 1. Introduction

Political risk in terms of investment law refers to the possibility of an intervention of a government or other authorities of a country resulting in depriving an investor of his rights and reducing the value of his investment (Цветковић, 2002: 726). However, not only acts but also omissions and not only government and political institutions but also minority groups and separatist movements may cause political acts that can be classified as political risks.<sup>1</sup> Thus, a broader definition may perhaps be more appropriate classifying political risk as "the probability of disruption of the operations of companies by political forces and events, whether they occur in host countries or result from changes in the international environment."<sup>2</sup> In academia, political risks are subsumed into three basic and relatively broad categories: (i) risks connected to currency conversion and transfer, (ii) risks of expropriation and other deprivations of investor's property rights, and (iii) risks connected to political violence: war, coup d'état, revolution, rebellion, riot, insurrection, terrorism, sabotage or civil strife (Hober, Fellenbaum, 2015: 1519 §5; Linn Williams, 1993: 59).

The existence of political risks and threats thereof for foreign investors were identified at state level quite a while ago. Certain levels of protection for foreign investments and investors have undertaken to be reached and set by utilising various instruments of (international) law. Unfortunately, general principles of law and minimum standards of customary international law aimed at protecting investors did not reach a satisfactory level and the endeavours to establish multilateral agreements regulating solely foreign investment in its variety of issues remained unfruitful (Vujinović, 2016: 144-146). Therefore, in an attempt to still secure the necessary legal protection for their investors abroad on a general level, states started concluding bilateral investment treaties (Sornarajah, 2010: 174,183; Kronfol, 1972: 35).<sup>3</sup>

A bilateral investment treaty (hereinafter: BIT) is an investment agreement concluded between two countries in which each of the contracting parties guarantees certain protection to investors and foreign investments from the other (Comeaux, Kinsella, 1997: 101), thereby establishing a legal framework under international law and terms and conditions for investments by nationals and companies of the one state in the other. By doing so, the risk that the host state

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1 MIGA, *World Investment and Political Risk 2011*, Retrieved 3 August 2017, from [www.miga.org/documents/WIPR11.pdf](http://www.miga.org/documents/WIPR11.pdf), p. 21.

2 Ibid.

3 For a comprehensive elaboration on historical developments of international investment treaties consult UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, Retrieved 3 August 2017, from [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf), pp. 121-127.

would, using its sovereign rights, endanger foreign investments is reduced (Đundić, 2008: 100). Developing countries, on the other hand, enter into such BITs in order to ensure that they recognise certain standards of protection of foreign investment and thereby attract foreign investment and secure their inflow (Dolzer, Schreuer, 2008: 16; Salacuse, Sullivan, 2005: 77; Guzman, 1997: 688).<sup>4</sup> Thus, a BIT between a developed and a developing country is “founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future” (Salacuse, Sullivan, 2005:77), which is argued both to have been (Salacuse, Sullivan, 2005:111) and not to have been the case (Yackee, 2011: 397-441; Yackee, 2016: 55-71). Furthermore, countries of similar economic development have begun to conclude BITs. However, it is worth noting that the term itself is not static since a previously less developed state may expand its potential and become a capital exporting country (Squierios, 1994: 258).

The paper at hand aims to offer a brief analysis of the guarantees against political risks which BITs provide for foreign investments. Firstly, a short overview of the beginnings of BITs and their current state of existence is provided. Thereafter, analyses of their guarantees against political risks are offered based on model BITs of various influential countries with special reference to Serbian bilateral investment treaties currently in force.

## 2. Briefly on BIT's in general

The era of modern bilateral investment treaties begun in 1959 with the conclusion of the first BIT between Germany and Pakistan (Dolzer, Schreuer, 2008: 17-21; Brown, 2013: 3-11). Yet again, bilateral treaties influencing and regulating investment, the so-called treaties on “friendship, commerce and navigation”, precursors of today's BITs, had been in force since 18<sup>th</sup> century (Sornarajah, 2010: 180 et seq.; Brown, 2013: 4-6). The expansion of bilateral investment treaties started in 1960s and 1970s when developing states started gaining importance and outnumbering developed ones in the General Assembly of the United Nations.<sup>5</sup> They aimed to create a “New International Economic Order” in which the national control over all foreign investment would be established (Sornarajah, 2010: 183; Guzman, 1997: 644-651). In order to still secure an appropriate level of protection of their investors and foreign investments, being aware that no such protection would be achieved multilaterally, developed countries strived to conclude bilateral investment treaties with the developing countries with which they did business.

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4 The claims that the existence of BITs influences the investment flows are however contested in Sornarajah, 2010: 187. For opposing opinion, see Poulsen, 2010: 539-573.

5 On the General Assembly's Resolutions from that period, see Dolzer, Schreuer, 2008: 14-15.

In their aspirations, capital exporting countries have also developed prototype model bilateral investment treaties. These model BITs are not legally binding (Dolzer, Schreuer, 2008: 8) but reflect principles and goals which the state establishing the model considers of importance and normally insists on when concluding BITs. Model BITs form the basis of BIT negotiations (Brown, 2013: 10; Comeaux, Kinsella, 1997: 102; Dolzer, Schreuer, 2008: 8-9) and may play a bigger or a smaller role, depending on the respective state's influence and bargaining power (Shan, 2012: 364; Siqueros, 1994: 257). With the growth of importance of developing states and their increasing role in emerging markets, they themselves started investing in some other countries. These developments created the need for establishing model BITs among developing countries respectively and led to the widespread phenomenon of existence of model BITs both among developing and developed states (Dolzer, Schreuer, 2008: 9). The importance of model BITs also rests on the fact that consistency in treaty practice of a country proves to be quite helpful for interpretation of the scope of rights and obligations stipulated in its concluded treaties (Brown, 2013: 10-11).

When it comes to figures, only 53 BITs have been signed by the end of 1970s, increasing to 243 in the 1980s. Thereafter, a real "BIT bang" occurred in the 1990s (Sornarajah, 2010: 172). In the 2000s, it was believed that the number of BITs reached 2,600 (Sornarajah, 2010: 172) and in 2011 there were 2,833 BITs signed (Brown, 2013: 1). In the last 5 years, the number of BITs has somewhat further increased. As of 3 August 2017, a total of 2,954 BITs have been concluded out of which 2,366 treaties are in force.<sup>6</sup>

Despite the enormous number of BITs concluded between different countries, the systematisation adopted in these BITs does follow more or less the same scheme (Sornarajah, 2010: 178-179; Siqueros, 1994: 258 et seq.): the declaration as to the aim of the BIT is followed by its scope of application (defining eligible investors and investments), preceding the standards of treatment with respective guarantees of protection and the dispute settlement procedure. Concerning the aims of a BIT, reciprocal encouragement and protection of investments are usually stated as the aims of concluding a bilateral investment treaty.<sup>7</sup> BITs define at the very beginning to which investments and investors they are applicable, and thereby delimitate the spectrum of protection offered. When it comes to defining both investments and investors, various approaches and different scopes of protection are present in practice; raising issues such as to notion of property,

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6 Figures taken from UNCTAD's Investment Policy Hub. Retrieved 3 August 2017, from <http://investmentpolicyhub.unctad.org/IIA>.

7 For potential problems arising with respect to the statement of purpose such as whether they contain duties to encourage investments and benefit the economic development see Sornarajah, 2010: 188-190.

cover of portfolio investment and approach to the determination of nationality of a corporation in a respective BIT (see Sornarajah, 2010: 190-201). After delimitating their scopes of application, BITs normally continue to declare the standards of treatment and protection secured for foreign investment. Among the variety of standards of treatment provided for in different BITs, the usually included ones encompass national treatment, international minimum standard of treatment, fair and equitable treatment, most-favoured-nation treatment and full protection and security.<sup>8</sup> In addition, dispute resolution provisions are normally included in BITs as well. These usually refer to arbitration as neutral means of dispute settlement, but in such a variety of ways that “there is no uniform pattern or commitment to arbitrate which emerges from the different treaties” (Sornarajah, 2010: 217). However, references to the ICSID, the UNCTRAL, the ICC and *ad hoc* arbitration are common (Shan, 2012: 62). Last but not least, BITs address political risks in particular, stipulating individually rights to repatriate profits of foreign investors, compensation in cases of nationalisation or comparable loss and in case of armed conflict, as well as protection of undertaken commitments.

### **3. BIT’s protection against political risks**

As previously mentioned, among other provisions, BITs also stipulate protection against certain political risks. Bearing in mind the enormous number of both concluded BITs and BITs in force as well as the limited scope of this paper, the provided analysis is restricted to addressing and analysing relevant provisions of model BITs of predominantly EU Member States (hereinafter: EU MSs), but also beyond. In addition, BITs in force are analysed with regard to protection against political risks on the example of BITs of the Republic of Serbia.

#### ***3.1. BIT’s protection against political risks in general***

To start with, political risk of currency transfer and inconvertibility will be addressed first. Making profits and repatriating these, as well as any other payments, back to the home country is one of the main goals of foreign investment, needs of foreign investors and objects of protection of bilateral investment treaties (Kern, 2015: 871 §2; Shan, 2012: 56). Therefore, BITs stipulate the right to

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8 The ambiguities as to the interpretation of these standards, their scopes and issues connected to them, such as e. g. performance requirements, are beyond the scope of this paper. For detailed analyses, see Dolzer, Schreuer, 2008: 119-194; Sornarajah, 2010: 201-206 and Shan, 2012: 19 et seq. Extremely comprehensive elaborations on each of the standards of treatment are available in Bungenberg M., Griebel, J., Hobe, S., Reinisch, A., 2015: 700-1031.

repatriate profits as well as some other transfers<sup>9</sup> either as an absolute or to a certain extent restricted one (Shan, 2012: 56). Absolute rights of repatriation are claimed to be unrealistic, as *inter alia* balance-of-payment difficulties in the host state might force it to introduce currency controls – raising the question of possible justifications for the introduction of such measures in times of real necessity (Sornarajah, 2010: 206-207). Anyhow, some countries guarantee free and unrestricted transfer of funds in their model BITs.<sup>10</sup> Nevertheless, other states have acknowledged potential problems and decided to include in their model BITs delimitations of the right to repatriate profits connected to the following three categories: situations of exceptional balance of payments difficulties, anti-money laundering and anti-terrorism as well as duties to register or report (Shan, 2012: 56; Kern, 2015: 878-880). When it comes to restrictions of transfer of profits due to exceptional balance of payments difficulties, states have provided for restrictions to this right in their model BITs<sup>11</sup> but Article 66 TFEU also provides a more general exception for the EU MSs.<sup>12</sup> Furthermore, concerning the EU, in judgements against Austria, Sweden and Finland, the ECJ ruled that by allowing unrestricted transfer of funds in old BITs and not enabling exceptions due to which the EU might restrict transfers in certain cases, the EU MSs'

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9 Most model BITs contain indicative list of covered transfers, e. g. Article 9 (1) Austrian Model BIT (2008), retrieved 3 August 2017, from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4770>; Article 5 Dutch Model BIT (2004), retrieved 3 August 2017, from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2859>; Article 5 (4) German Model BIT (2009), retrieved 3 August 2017, from [http://www.iilcc.uni-koeln.de/fileadmin/institute/iilcc/Dokumente/matrechtinvest/VIS\\_Mustervertrag.pdf](http://www.iilcc.uni-koeln.de/fileadmin/institute/iilcc/Dokumente/matrechtinvest/VIS_Mustervertrag.pdf). Article 6 (1) Italian Model BIT (2003) retrieved 3 August 2017, from <http://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf>, whereas exclusive list of covered transfers are present respectively. See Article 7 (1) French Model BIT as reproduced in: Brown, 2013: 274.

10 Article 5 Dutch Model BIT (2004) and Article 5 German Model BIT (2009). Yet again, both Netherlands and Germany are EU MSs and thereby subject to potential restrictions under Article 66 TFEU, as mentioned later on. Still some other model BITs provide unrestricted transfer of funds. See Article 6 Serbian Model BIT, retrieved 3 August 2017, from <http://mtt.gov.rs/download/novi%20tipski%20EN.pdf>.

11 Article 6 (4) Italian Model BIT (2003); Article 7 (4) French Model BIT (2006), Article 7 (2) in connection with Article 6 UK Model BIT (2008), retrieved 3 August 2017, from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>.

12 Article 66 TFEU states: "Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary." [Emphasis added].



conduct is inconsistent with EU law.<sup>13</sup> Thus, some of the EU MSs' model BITs now expressly address possibilities of restrictions resulting from EU membership and fulfilment of international obligations.<sup>14</sup> Coming back to restrictions of transfer for the purpose of combating money laundering and terrorism, certain countries explicitly include exemptions for such restrictions in their model BITs.<sup>15</sup> Moreover, transfer of funds is sometimes not actually restricted but controlled by means of imposing obligations to register certain monetary transactions<sup>16</sup> or to report transactions in excess of certain value.<sup>17</sup> The approach to somehow restrict repatriation of profits in times of balance-of-payment problems as well as in other extraordinary cases seems to be a more realistic approach to which the practice of concluding BITs as well as of drawing model BITs seems to predominantly adhere to (Sornarajah, 2010: 207; Shan, 2012: 56). Nevertheless, the inclusion of the right of repatriation of profits of foreign investors out of the host country, even as to a certain extent in certain specific circumstances restricted one, is an invaluable provision of greatest importance for any foreign investor and bilateral investment treaty (Shan, 2012: 376).

Closely connected to the elaborated repatriation of profit i.e. transfer of money is the question in which currency this may occur and at which exchange rates. Namely, exchange of currency and its conversion into a currency different from the one of the host country is normally addressed by model BITs with only few exceptions present.<sup>18</sup> The majority of model BITs stipulate that the currency

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13 CJEU, case C-205/06, *Commission v. Austria*; CJEU, case C-249/06, *Commission v. Sweden*; CJEU, case C-118/07, *Commission v. Finland*. Consult also Brown, 2013: 572-573.

14 Article 7 (5) French Model BIT (2006) and Article 5 (4) German Model BIT (2009) address such possibilities in general, whereas Article 7 (4) Latvian Model BIT (2009) as reproduced in Brown, 2013: 451 and Article 7 (1) c) UK Model BIT (2008) specifically address restrictions resulting from EU membership.

15 Article 9 (4) Austrian Model BIT (2008).

16 E. g. in Germany, although freedom of capital and payments is recognised and unrestricted according to §1(1) of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz - AWG*), the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung - AWV*) in §67 establishes the obligation to register monetary transfers in value higher than 12,500 Euro. See §67 Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) retrieved 3 August 2017, from [http://www.gesetze-im-internet.de/englisch\\_awv/englisch\\_awv.html#p0521](http://www.gesetze-im-internet.de/englisch_awv/englisch_awv.html#p0521) as well as Shan, 2012: 376.

17 E. g. in Australia all monetary transfers above \$10,000 must be reported to the Australian Financial Transaction Reports and Analysis Centre (AUSTRAC) according to Article 15 (1) Financial Transaction Reports Act 1988, retrieved 3 August 2017, from <https://www.legislation.gov.au/Details/C2016C00783>. For further analyses on the Australian model, consult Shan, 2012: 164-167.

18 Article 6 Italian Model BIT (2003) does not address issues of currencies or exchange rates.

exchange should be made in a freely convertible currency,<sup>19</sup> while certain model BITs go even further to guarantee the transfer in the currency in which the investment initially occurred.<sup>20</sup> The exchange rate applicable is normally the market rate on the date of the transfer<sup>21</sup> in the host country,<sup>22</sup> but alternatives are offered if a market for foreign exchange does not exist<sup>23</sup> or difficulties to ascertain the market rate occur.<sup>24</sup>

Not only do BITs elaborate on rights to repatriate profits but they also acknowledge certain standards of protection when it comes to nationalisation and expropriation and all their forms, including creeping expropriation (Sor-narajah, 2010: 2018). Mostly only prohibiting expropriation, nationalisation or measures having equivalent effect, BITs neither define them nor stipulate what exactly they may encompass (Đundić, 2008: 102).<sup>25</sup> The reasoning behind this is the inconsistency in practice of understanding which measures are prohibited (Đundić, 2008: 105). The developments in modern history and law have influenced the understanding of legality of expropriation. That being said, modern approaches generally accept and classify non-discriminatory expropriation for public purpose in public interest undertaken in accordance with due process of law and compensated for as legal (Reinisch, 2008: 171-199; UNCTAD, 2012: 27-52).<sup>26</sup> BITs omit to define discrimination and public interest. Nevertheless, this

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19 Article 9 (2) Austrian Model BIT (2008), Article 7 (2) Latvian Model BIT (2009), Article 5 Dutch Model BIT (2004) but it omits to address the issue of exchange rates.

20 Article 6 UK Model BIT (2008) and Article 14 (2) Canadian Model FIPA (BIT), retrieved 3 August 2017, from <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

21 Article 7 (3) French Model BIT (2006), Article 5 (2) German Model BIT (2009), Article 6 UK Model BIT (2008).

22 Article 9 (2) Austrian Model BIT (2008), Article 7 (2) Latvian Model BIT (2009).

23 Article 9 (2) Austrian Model BIT (2008) and Article 7 (3) Latvian Model BIT (2009) foresee that in such a case "the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights".

24 Article 5 (3) German Model BIT (2009) provides in such cases for "the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights".

25 Certain model BITs even define what constitutes an indirect expropriation and which factors are to be considered by its establishment. See Article 7 (2) Colombian Model IIA (2009) as reproduced in Brown, 2013: 223. Furthermore, certain BITs in force do the same. See Article 6 (3) Kuwait Serbian BIT (2004), retrieved 3 August 2017, from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5188>.

26 Article 7 (1) Austrian Model BIT (2008), Article 7 (2) German Model BIT (2009), Article 5 (2) Italian Model BIT (2003), Article 6 Dutch Model BIT (2004), Article 5 (1) Latvian Model BIT, Article 5 (1) Serbian Model BIT. Yet again, certain model BITs set forth some further conditions of legality such as expropriation being in social interest and done in good faith.

does not seem to have caused problems for tribunals in practical cases (see Kriebaum, 2015: 1019-1021 §219-224). When it comes to due process of law as a prerequisite of legality of expropriation, one may note that this is not an omnipresent condition (Reinisch, 2008: 193). However, some model BITs encompass an additional provision entitling an investor to the right to prompt and independent review of its case and valuation of its investment by a competent authority of the expropriating state.<sup>27</sup> In such legality review by host state's authorities, the applicable procedure is the one of the domestic law of the host state and the material norms relevant for the legality of expropriation are the ones contained in the respective BIT, which is also normally explicitly stated in the BIT's provisions themselves (Đundić, 2008: 106-107). BITs without exception establish the obligation to pay compensation for takings of foreign-owned property. The terms used for compensation due prove to vary among the countries, employing in majority of cases the Hull formula of "prompt, adequate and effective compensation",<sup>28</sup> but also "prompt and adequate",<sup>29</sup> "adequate"<sup>30</sup>, "fair", "just"<sup>31</sup> and "due" compensation.<sup>32</sup> These differing terms used for compensation and certain issues connected to it disputed in practice are complemented with other inconsistencies, such as the question of which state acts are to be considered expropriation or which standards are to be used for determining due compensation (Đundić, 2008: 101). Despite this, it has to be emphasised that many standards such as the determination of the moment when the value of the expropriated asset is to be established or that spreading the information on expropriation is not to influence the determined value of compensation are broadly accepted and stipulated in various model BITs.<sup>33</sup> More importantly, notwithstanding various wordings used to describe due compensation, all these

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See Article 7 (1) Colombian Model IIA (2009). For further elaborations on the legality of expropriation consult Kriebaum, 2015: 1017-1029 §216-257.

27 Article 5 (5) Italian Model BIT (2003); Article 4 (2) German Model BIT (2009); Article 7 (3) Austrian Model BIT (2008); Article 13 (4) Canadian Model FIPA (BIT).

28 Article 5 (1) Latvian Model BIT, Article 5 (1) UK Model BIT (2008), Article 13 (1) Canadian Model FIPA (BIT).

29 Article 6 (2) French Model BIT (2006).

30 Article 5 (1) Serbian Model BIT.

31 Article 5 (3) Italian Model BIT (2003), Article 6 Dutch Model BIT (2004).

32 For comparative overview of around 20 jurisdictions and their approaches see Shan, 2012: 48,53 and UNCTAD, 2012: 40 et seq.

33 Article 7 (2) Austrian Model BIT (2008), Article 13 (2) Canadian Model FIPA (BIT), Article 7 (2) German Model BIT (2009), Article 5 (3) Italian Model BIT (2003), Article 5 (2) (b) Latvian Model BIT, Article 5 (1) UK Model BIT (2008), Article 5 (2) Serbian Model BIT.

normally end up referring to fair or real market value.<sup>34</sup> Thus, it should be universally recognised that BITs do consistently protect foreign investment from unlawful and discriminatory distortion of property and stipulate for monetary restitution in case any form of nationalisation or expropriation should occur.

Last but not least, model BITs also address one further political risk, namely the risk of political violence. In case of investments being damaged by political violence in the host country, model BITs normally offer non-discriminatory treatment in terms of either both national and most favoured nation treatment<sup>35</sup> or only national treatment<sup>36</sup> in respect of restitution, indemnification, compensation and any other settlement (see Schreuer, 2012: 9-14; Sornarajah, 2010: 213-215). When it comes to forms of political violence covered, model BITs mostly name war, revolution and insurrection as examples but go further to encompass any other similar events respectively.<sup>37</sup> However, certain model BITs foresee exclusive list of forms of political violence covered and hence name all covered instances.<sup>38</sup> Moreover, certain countries go one step further in their model BITs to provide for compensation of damages occurred though acts of host state authorities which were not required by the necessity of the situation<sup>39</sup> or not caused in combat actions.<sup>40</sup> The importance of this so-called extended war clause rests on the fact that it contains absolute standards and the right of an investor to compensation in the prescribed circumstances, in contrast to the aforementioned non-discrimination, which only ensures the same treatment but nothing further (Schreuer, 2012: 10-11; Salacuse, Sullivan, 2005: 86).

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34 Article 7 (2) (b) Austrian Model BIT (2008), Article 5 (3) Italian Model BIT (2003), Article 13 (2) Canadian Model FIPA (BIT). Yet again, Article 6 (c) Dutch Model BIT (2004) and Article 5 (1) UK Model BIT (2008) refer to "genuine value". For further information on fair market value see Ripinsky, Williams, 2008: 182-188.

35 Article 8 (1) Austrian Model BIT (2008), Article 4 (1) UK Model BIT (2008), Article 7 Dutch Model BIT (2004), Article 6 (1) Latvian Model BIT, Article 4 Italian Model BIT (2003), Article 4 (3&4) German Model BIT (2009), Article 6 (3) French Model BIT (2006).

36 Article 7 Colombian Model BIT (2009).

37 Article 8 (1) Austrian Model BIT (2008), Article 6 (1) Latvian Model BIT, Article 4 Italian Model BIT (2003).

38 Article 4 (1) UK Model BIT (2008) and Article 7 Dutch Model BIT (2004) name "war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot" whereas Article 4 (3) German Model BIT (2009) states "war or other armed conflict, revolution, a state of national emergency or revolt".

39 Article 8 (2) (b) Austrian Model BIT (2008), Article 6 (2) (b) Latvian Model BIT.

40 Article 4 (2) (b) UK Model BIT (2008).

As evident, countries, judging by model BITs of the analysed ones, offer significant level of protection with respect to political risks. Furthermore, they seem to have established similar approaches as to the protection they offer.

### ***3.2. Protection against political risks in Serbian BITs***

The Republic of Serbia has currently some 52 BITs, out of which 49 are in force, mainly with European countries but also with Canada, some Middle Eastern, Asian and African countries.<sup>41</sup> Furthermore, the country has prepared the draft of its own Model BIT.<sup>42</sup> It is evident from the analyses of all these treaties that almost identical treaty language has been employed within the country's BITs.<sup>43</sup>

Firstly, Serbian BITs guarantee, usually upon payment of fiscal and other financial obligations and sometimes subject to national laws and regulations<sup>44</sup>, the right to transfer payments connected to investments,<sup>45</sup> indicatively listing some applicable transfers with two exceptions which provide exclusive lists of admissible free transfers.<sup>46</sup> Moreover, the country's BITs, with the exception of the Russian Serbian BIT (1995) and the Swedish Serbian BIT (1978) which do not address this issue, stipulate that the transfer should be made without delay in freely convertible currency, while certain BITs go even further to guarantee the transfer in the currency in which the investment initially occurred.<sup>47</sup> The exchange rate applicable is normally the market rate on the date of transfer in the host country, but alternatives are offered in case a market rate is unavail-

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41 Data on Serbian BITs as well as treaties themselves retrieved 3 August 2017, from <http://investmentpolicyhub.unctad.org/IIA/CountryBits/187#iiaInnerMenu>. Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia provides the list of the respective treaties in Serbian. Retrieved 3 August 2017, from <http://mtt.gov.rs/download/Pregled%20Zemalja.pdf>.

42 Retrieved 3 August 2017, from <http://mtt.gov.rs/download/novi%20tipski%20EN.pdf>.

43 All Serbian BITs, with the exception of Zimbabwe Serbian BIT (1996) which could not be accessed, have been analysed; however, for the sake of not overburdening the references, when same solutions are offered among BITs, only some of them will be referred to here. These have not been chosen by any other criteria than the endeavour to include different geographical areas.

44 Article 6 (1) Chinese Serbian BIT (1995).

45 Article 6 French Serbian BIT of 1974 does the same, but without any further elaborations apart from the stipulation about the transfer being free and without delay.

46 Article 4 (1) Swedish Serbian BIT (1978) and Article 8 (1) Iranian Serbian BIT (2003).

47 Article 6 (2) Serbian Model BIT, Article 6 (1) (a) Israeli Serbian BIT (2004), Article 6 (2) Serbian Montenegrin BIT (2009), Article 6 (2) Algerian Serbian BIT (2012), Article 6 (2) Belarus Serbian BIT (1996), Article 8 Ghana Serbian BIT (2000), Article 6 (2) Egyptian Serbian BIT (2005), Article 7 (2) Indian Serbian BIT (2003), Article 6 (3) UK Serbian BIT (2002).

able<sup>48</sup> or a market for foreign exchange is absent.<sup>49</sup> Although the majority of Serbian BITs provide for an absolute right to transfer, making them even more favourable to foreign investors, restrictions are envisaged to ensure investors' compliance with host states national legislation in certain areas,<sup>50</sup> or measures adopted by the EU,<sup>51</sup> or in cases of (serious) balance of payments difficulties<sup>52</sup> or circumstances threatening to cause serious difficulties for macroeconomic management, particularly monetary and exchange rate policies<sup>53</sup> or to protect rights of creditors.<sup>54</sup> Furthermore, limiting transfers is in some BITs allowed for maintenance of the safety, soundness, integrity or financial responsibility of financial institutions or when those transfers would be restricted under the WTO law.<sup>55</sup> As evident, Serbian BITs slightly diverge from the common approaches when it comes to protection of this political risk. Nevertheless, the majority of country's BITs stipulate an unrestricted right to transfer – thus, this deviation actually goes in favour of foreign investors – whereas BITs which delimitate this right do not employ any substantially different delimitation criteria.

Be that as it may, deprivations of investor's property rights, expropriation, nationalisation as well as measures having equivalent effect thereto, sometimes specifically referring to indirect measures,<sup>56</sup> are prohibited in all Serbian BITs

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48 Article 7 (2) Azerbaijani Serbian BIT (2011) suggests that "the applicable rate of exchange shall be the most recent rate of exchange for conversion of currencies into Special Drawing Rights".

49 Article 7 (4) Finnish Serbian BIT (2005), Article 6 (3) Slovenian Serbian BIT (2002), Article (2) UAE Serbian BIT (2013) and Article 7 (3) Kuwait Serbian BIT (2004) foresee the rate to be used to be "the most recent exchange rate for the conversions of currencies into Special Drawing Rights". See also Article 7 (3) Danish Serbian BIT (2009).

50 See Article 7 (3) Azerbaijani Serbian BIT (2011), Article 11 (3) Canadian Serbian BIT (2014), Article 7 (3) Finnish Serbian BIT (2005), Article 7 (5) Indonesian Serbian BIT (2011), Article 7 (3) UAE Serbian BIT (2013).

51 Article 6 (2) Lithuanian Serbian BIT (2005), Article 6 Maltese Serbian BIT (2010)

52 Article 7 (5) Finnish Serbian BIT (2005), Article 6 (2) (a) Israeli Montenegrin BIT (2004), Article 6 (3) Kazak Serbian BIT (2010), Article 5 (3) Dutch Serbian BIT (2002).

53 Article 7 (4) Azerbaijani Serbian BIT (2011).

54 Article 6 (3) Moroccan Serbian BIT (2013). Moroccan Serbian BIT (2013) is concluded but not in force yet.

55 Article 11 (6) and (7) Canadian Serbian BIT (2014).

56 Article 10 (1) and Annex B.10 Canadian Serbian BIT (2014), Article 5 (1) Croatian Serbian BIT (1998), Article 7 (1) Belgo-Luxembourgish Serbian BIT (2004), Article 5 (1) Finnish Serbian BIT (2005), Article 5 (1) Kazak Serbian BIT (2010), Article 6 (1) (a) & (3) Kuwait Serbian BIT (2004), Article 5 (1) Maltese Serbian BIT (2010), Article 3 Swedish Serbian BIT (1978), Article 4 (1) Turkish Serbian BIT (2001), Article 4 (1) Romanian Serbian BIT (1995), Article 6 (1) UAE Serbian BIT (2013).

in force without exception. As mentioned in the general analyses, BITs normally do not define what expropriation, nationalisation, or indirect expropriation are, but limit themselves to stating their prohibition only, with the exception of the Kuwait Serbian BIT (2004) which in Article 6 (3) lists the measures amounting to expropriation.<sup>57</sup> Notwithstanding the prohibition of expropriation, nationalisation and measures equivalent thereto, non-discriminatory measures for public purpose in the public interest undertaken in accordance with due process of law and compensated for are considered legal and allowed in all country's BITs and its draft Model BIT, the only exception being the French Serbian BIT which does not address non-discrimination.<sup>58</sup> The terms for due compensation employed in Serbian BITs are the same as those generally present: "prompt, adequate and effective compensation", "adequate and effective", "prompt and adequate", "adequate", "prompt", "fair and equitable", or only "compensation", as well as an exceptionally employed term "reasonable compensation".<sup>59</sup> Still, compensation in Serbian BITs<sup>60</sup> amounts to market value – fair market value,<sup>61</sup> real value<sup>62</sup> or full and genuine value<sup>63</sup> – unaffected by the knowledge on the expropriation. Thus, compensation of the market value of a legally expropriated investment is a common standard guaranteed in Serbian BITs, in spite of various formulations.<sup>64</sup>

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57 Article 6 (3) Kuwait Serbian BIT (2004) states: „For the purposes of this Agreement, direct or indirect expropriatory measures include freezing or blocking of funds, levying of arbitrary or excessive taxes on the investment, compulsory sale of all or part of the investment or any other intervention or measure by a Contracting state depriving the investor in fact from his ownership, control or substantial benefits over his investment or resulting in loss or damage to the economic value of the investment, or any other measure or measures having equivalent effect as expropriation.“ [original text in Serbian, translated into English by the author].

58 Article 5 French Serbian BIT (1974). Furthermore, this very old treaty also grants protection unilaterally to French investors from expropriation of back then Yugoslav authorities. The treaty practice of reciprocal protection of foreign investors by not specifying which country is the home country and which the investment recipient country has been established thereafter.

59 Article 4 Chinese Serbian BIT (1995).

60 With the exception of Swedish Serbian BIT (1978) which omits to address this aspect.

61 Article 6 (2) Azerbaijani Serbian BIT (2011), Article 4 (2) Bosnian Serbian BIT (2001), Article 10 (2) Canadian Serbian BIT (2014), Article 5 (2) Danish Serbian BIT (2009), Article 5 (2) Finnish Serbian BIT (2005), Article 4 (2) Moroccan Serbian BIT (2013), Article 6 (2) UAE Serbian BIT (2013).

62 Article 5 Belarus Serbian BIT (1996), Article 5 (2) Bulgarian Serbian BIT (1996), Article 5 (1) Czech Serbian BIT (1997), Article 5 (2) Maltese Serbian BIT (2010), Article 4 (2) Turkish Serbian BIT (2001).

63 Article 7 (1) (a) Ghana Serbian BIT (2000).

64 For further information on valuation methods for determination of compensation see Ђундић, 2015: 1845-1860 as well as Ripinsky, Williams, 2008: 192-226.

Thus, Serbian BITs do not deviate from the commonly established standards when it comes to deprivations of investor's property rights.

Furthermore, Serbian BITs and the Serbian draft Model BIT (in Article 4), with the exceptions of the French Serbian BIT of 1974 and the Swedish Serbian BIT of 1978 (both have been concluded some time ago), offer national and most-favoured nation treatment in respect of restitution, indemnification, compensation and any other settlement in case of investments being damaged by political violence in the host country – that being war, revolution and insurrection and other similar events respectively, or exclusively listed forms of violence.<sup>65</sup> Moreover, country's BITs, with some exceptions,<sup>66</sup> also provide for compensation of damages incurred through acts of host state authorities requisitioning or destroying property which were not required either by the necessity of the situation<sup>67</sup> or caused in combat actions.<sup>68</sup> Obviously, in these terms as well, Serbian BITs in force prove to follow internationally accepted standards. However, a slightly different protection is offered in Article 7 of the Canadian Serbian BIT (2014). It prescribes non-discriminatory treatment for compensation of losses resulting from armed conflict, civil strife or state of emergency, including natural disaster. The inclusion of natural disaster in this provision as a ground for compensation is a specific feature limited solely to this particular Serbian BIT. Yet again, it should be reiterated that Serbian BITs currently in force follow internationally accepted standards.

#### 4. Conclusion

As elaborated, BITs address political risks and provide for significant level of protection of foreign investors against these. Standards employed in various (model) BITs are claimed to represent efforts to agree on regulations applying to relationships between the two contracting parties and their investors without

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65 Article 5 Chinese Serbian BIT (1995) and Article 4 (1) Ukrainian Serbian BIT (2001) provide only for most-favoured nation treatment.

66 German Serbian BIT (1989), Belgo-Luxembourgish Serbian BIT (2004), Bosnian Serbian BIT (2001), Bulgarian Serbian BIT (1996), Ghana Serbian BIT (2000), Indian Serbian BIT (2003), Iranian Serbian BIT (2003), Maltese Serbian BIT (2010), Romanian Serbian BIT (1995), Russian Serbian BIT (1995), Nigerian Serbian BIT (2002), Turkish Serbian BIT (2001) and Macedonian Serbian BIT (1996).

67 Article 6 (2) (b) Albanian Serbian BIT (2002), Article 5 (2) Azerbaijani Serbian BIT (2011), Article 6 (2) Danish Serbian BIT (2009), Article 6 (2) Finnish Serbian BIT (2005), Article 6 (2) Indonesian Serbian BIT (2011), Article 7 (2) Dutch Serbian BIT (2002), Article 6 (2) Spanish Serbian BIT (2002), Article 5 (2) Slovenian Serbian BIT (2002).

68 The remaining 25 Serbian BITs in force, which were not quoted in fn. 66 and fn. 67 *supra*, provide for compensation of damages caused in combat actions.



“any more grandiose motive” (Sornarajah, 2010: 209) such as the establishment of common standards. However, despite the fact that such motives might not exist among the two countries concluding a BIT and despite the fact that BITs are indisputably not binding to any third country, contracting practices of influential countries are often emulated. This leads to similar practice and standards of protection stipulated in bilateral investment treaties, which has been shown as a result of analysis of similar legal practices of various model BITs. Thus, it is argued that thereby internationally accepted common approaches of protection of foreign investment against political risks in BITs have been established. Furthermore, as shown, Serbian BITs in force employ the same approaches and do not substantially deviate from these internationally established practices.

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**ГАРАНЦИЈЕ БИЛАТЕРАЛНИХ СПОРАЗУМА О УЗАЈАМНОЈ  
ЗАШТИТИ ИНВЕСТИЦИЈА ОД ПОЛИТИЧКИХ РИЗИКА, СА  
ПОСЕБНИМ ОСВРТОМ НА БИЛАТЕРАЛНЕ СПОРАЗУМЕ О  
УЗАЈАМНОЈ ЗАШТИТИ ИНВЕСТИЦИЈА РЕПУБЛИКЕ СРБИЈЕ**

**Резиме**

*Политичко насиље, експропријација и друга одузимања стварних права као и ризици повезани са валутним трансфером и репартијацијом средстава представљају традиционалне некомерцијалне ризике са којима се улагачи сусрећу при разматрању улагања у стране земље. Да би са једне стране обезбиједиле правну заштиту њихових инвеститора у иностранству а са друге привукле страна улагања и очувале их на домаћој територији након тога, државе су почеле закључивати билатералне споразуме о узајамној заштити улагања (енг. BITs) и стварати билатералне оквире правне заштите страних инвестиција у међународном праву. Поред регулисања општих стандарда третмана страних улагања, билатерални споразуми о заштити улагања предвиђају и гаранције од претходно поменутих политичких ризика.*

*Наведени рад настоји да понуди кратки преглед гаранција од политичких ризика које наведени билатерални споразуми пружају страним улагањима. Имајући у виду огroman број закључених билатералних споразума о заштити инвестиција, ограничен опсег овог рада као и вољу да се упркос томе понуди релевантно истраживање, спроведена анализа се базира на типским билатералним споразумима о узајамној заштити инвестиција различитих земаља нудећи посебан осврт на билатералне споразуме на снази у Републици Србији. Иако сваки билатерални споразум о заштити инвестиција регулише заштиту истих само на билатералном нивоу, без икаквог дејства erga omnes, уговорне праксе се често имитирају доводећи до стварања међународно прихваћених приступа заштите страних улагања од политичких ризика у билатералним споразумима. Циљ овог рада је показати да су се такви заједнички приступи искристалисали, истовремено показујући да српска пракса не одступа значајно од истих.*

**Кључне ријечи:** *билатерални споразуми о узајамној заштити улагања, заштита од политичких ризика, стране инвестиције, билатерални споразуми о заштити улагања Републике Србије.*



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## **SPONSORSHIP CONTRACTS**

**Abstract:** *In 2003, the Marketing and Advertising Commission of the International Chamber of Commerce (ICC) brought international rules on sponsorship. The adoption of these rules was justified by the fact that sponsorship has become a major source of financing international events, and that the globalization of the world economy requires from the international business community to enact uniform rules. Therefore, the need to adopt rules on sponsorship at the global level is indisputable. As nothing has been done in this area ever since, there are many unresolved issues and concerns. The focal point of this paper is the question of the legal nature of a sponsorship contract. In that context, the author provides a comparative law analysis of the attitudes on the legal nature of the sponsorship contracts in Italian, French, Swiss and German legal theory and jurisprudence. Hopefully, the systematization of positions on the legal nature of sponsorship contracts will be useful in clarifying concerns arising from sponsorship and it may possibly help courts and arbitrators in disputes regarding sponsorship contracts.*

**Keywords:** *sponsorship contracts, international rules, comparative law, sponsorship disputes.*

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## 1. Introduction

Determining the legal nature of a contract, i.e. its legal characterization, is a process that aims at determining the position of the specific agreement in the classification of contract types. The legal nature of a contract is not determined by its name but by its content. Consequently, determining the legal nature of a particular contract requires a careful analysis of contractual rights and obligations, economic interests pursued by contracting parties as well as the aim of the contract (Martinek, 1991: 21).

The issue of the legal nature of a sponsorship contract causes great confusion and disagreement in jurisprudence. Surely, one reason for this is the complexity of the nature of the relationships established between *the sponsor* and *the sponsored party* by concluding the sponsorship contract. In most countries, sponsorship contract is not regulated by the modern civil codes or special laws so that it can be concluded *prima facie* that it is an *innominate* contract.<sup>1</sup> Yet, it has to be noted that it is not the matter of general opinion, even in this case. In Italian and French legal doctrine, there are authors who have tried to attribute sponsorship contracts to some of the law-regulated contract types, so-called *nominated* contracts.

Considering the authors arguing that the sponsorship contract is an innominate contract, disagreements arise regarding the issue which type of innominate contracts include sponsorship agreement: a mixed contract or a *sui generis* contract? As a reminder, contracts whose content consists of two or more simple contracts which are combined to represent a single contract are called *mixed contracts* (Perović, 1981: 214). *Sui generis contracts* are contracts in which the rights and obligations of the contracting parties cannot be categorized as the elements of a nominate contract (Antić, 2004: 96). Disagreements actually arise from the fact that the sponsorship contract is a 'contract with a thousand faces', so we cannot claim that any of the attitudes on the legal nature of a sponsorship contract is *a priori* false.

The issue of the legal nature of a sponsorship contract is of great significance for the understanding of this contract. In this paper, we will consider the attitudes in foreign legal theory and case law relating to the legal nature of a sponsorship contract and provide comparative law analysis on this issue. First, we will

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1 The exception in this regard is the Republic of Romania, which in 1994 adopted the Sponsorship Act. In the provided definition, it envisages that the sponsorship contract is concluded in written form and prescribes the most important contents of this contract, including the scope of the contracting parties. Therefore, it can be said that the sponsorship contract in Romanian law is a nominate contract.



consider the attitudes on the legal nature of a sponsorship contract that exist in Italian, then French, Swiss and German legal theory and case law.

## 2. Sponsorship in the economic literature

In order to be able to analyze the legal nature of the sponsorship contract at all, it is first necessary to consider sponsorship from the standpoint of economy. In fact, to be able to understand the sponsorship contract in its entire complexity and material forms, it is essential to understand the economic essence of sponsorship. The economic literature defines sponsorship as the business relationship between a person that provides means, resources or services, and the individual, event, or an organization, which in turn offer certain rights and associations that can be used for commercial purposes (Sleight, 1984: 4). The reasons why potential sponsors decide on sponsorship can include the promotion of a sponsor, image and brand in the particular geographic area, strengthening the position in existing markets, winning new markets, constant presence in public and permanent relationship with customers (Surbatović, 2014: 243). However, based on the economic literature on sponsorship, it can be concluded that the immediate purpose for which the potential sponsors decide on sponsorship is that they want to be in some way connected with the sponsored party; in other words, the sponsors expect from sponsorship something which is in the economic literature known as “image transfer”.

What is actually the image and “image transfer”? The image represents the result of interaction among all the experiences, impressions, beliefs, feelings and knowledge of people about any physical or legal person, or event, or, more simply, the image represents the overall impression the public has of a natural or legal person, or event (Santos, Mestre, De Magalhaes, 2011: 356). Image transfer means the transfer of certain action from one image holder to another by association. The mode of operation consists in the fact that the suitable target-sponsored selection can exploit its beneficial influence to affect the image transfer through psychological technique of association (Grohs, Reisinger, 1999: 26). Applied to the image transfer in some sponsorship engagement, it means that the characteristic features of the sponsored party are brought into relationship with the company or product name. But this happens only under the assumption that a third party as the evaluator provides a positive assessment on the sponsored facility.<sup>2</sup>

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<sup>2</sup> For example, the image of an athlete is made of his name, character, sports results by which he/she is identified in public. Sponsors use the sports image because they can easier, faster and better approach potential customers and buyers through it, and ensure the company's success in the market. Numerous sponsors contract agreements with athletes because sport is

### 3. General notes on a sponsorship contract

Sponsorship contract is a contract by which one party, the sponsor, obliges to the other contracting party, the sponsored party, that he shall pay a certain sum of money for the purpose of supporting his activities, hand over certain things in ownership or use, provide certain services (or a combination of these obligations), whereas the sponsored party in turn gives permission to the sponsor, for the purpose of promoting his business names, visual identity symbols, his products and services, to use the image of the sponsored party, as well as to promote the business name, visual identity symbols, products or services of the sponsor in an agreed manner. In practice, sponsors are often legal entities such as business entities, whereas the sponsored parties are commonly physical persons (e.g. sportsmen) and legal entities (e.g. sports associations); the sponsorship of an event can be distinguished as a special kind of sponsorship whereby a sponsorship contract is concluded with the organizer of the sponsored event, which may include both natural and legal persons.

If we discuss a sponsorship contract in general, it could be said that the performance of sponsors can be designated as the performance of support, whereas the sponsored party takes communicative counter-performance. The essential feature of all sponsorship contracts is the performance of support on the part of sponsors, communicative counter-performance of the sponsored party, and the specific objective of a sponsorship contract which is referred to as 'image transfer'. Yet, the fact is that there is no single type of a sponsorship contract in practice. The way in which the performance of support and the communicative counter-performance are manifested in this particular case depends on the agreement of the contracting parties. Practically, it could be said that the obligations of the contracting parties under the sponsorship contract, in particular obligations of the sponsored party are limited only by the imagination of the contracting parties. However, certain obligations characteristic of sponsorship contracts have been in some way settled in practice in certain areas of sponsorship, and they are regularly contracted.

In general, the obligation of the sponsor always implies the payment of a certain amount of money, transfer of some property into the ownership of the sponsored party, handing certain things for use or providing certain service to the sponsored party, or a reciprocal combination of these obligation. On the other hand, the obligations of the sponsored party are so diverse that it is basically impossible to frame them. However, on the basis of shared characteristics, the obligations of the sponsored party can be grouped into: the obligations wherein

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a personification of health, youthful lifestyle and beauty. The values that sports sponsorship brings to the sponsor are health, youth, energetic, fast, lively, and manly life.

the sponsored party allows the sponsor to use the image of the sponsored for promotional purposes; the obligations relating to promoting the sponsor, so-called obligations of good conduct; and obligations arising from the exclusivity clause.

In practice, the use of the sponsored party's image for promotional purposes is realized in such a way that the sponsor actually acquires permission to use the name, image, or symbols of visual identity of the sponsored party as integral parts of the image. The obligation to promote the sponsor covers very different obligations in sponsorship contract practice. However, due to some common features, they can be divided into three groups. Thus, the first group includes obligations that, considering their common features, may be defined as the obligations of drawing public attention to the sponsor; they include the obligation of the sponsored party to prominently display the symbols of the visual identity of the sponsor, as well as the obligation of the sponsored party to publicly promote the business name of the sponsor. The second group includes obligations that, considering their common features, may be defined as the obligations of an active promotion of the sponsor, and they practically consist of participation of the sponsored party in various marketing activities for the sponsor. The third group comprises a diverse range of obligations that are regularly contracted in practice as a form of sponsor promotion; but, considering their diversity and the fact that they do not have other common characteristics, they cannot be allocated to one of the previously mentioned groups.

The obligation of the sponsored party to publicly use only the products that the sponsor put at his disposal can be categorized as the most important obligation of the sponsored party from this group. The obligations of good conduct are manifested in two aspects. Firstly, the sponsored party agrees to refrain from all the actions that might directly and negatively affect the image of the sponsor during the term of the sponsorship contract. Secondly, the sponsored party agrees to refrain from all the actions that may adversely affect the sponsor's image during the term of the sponsorship contract. The practical consequence of including the exclusivity clause in the sponsorship contract is that the sponsored will not be able to enter into other sponsorship contracts for the duration of the specific sponsorship contract.

As regards the legal characteristics of a sponsorship contract in legal science, it can be said that there is no disagreement. Thus, the sponsorship contract is informal, mutually binding on both parties, chargeable, involving permanent performance of obligations, causal, individual, independent, a contract which may be subject to concluding a preliminary contract, commutative and a contract

which may contain aleatory elements<sup>3</sup>, a contract with contractually agreed content, and a contract which can be concluded as an *intuitu personae* contract or regardless of personal characteristics (Kindler, 2009: 29). In this domain, the consent of legal science relating to a sponsorship contract is unquestionable. However, as we have already said, when the issue of the legal nature of a sponsorship contract is raised, there is a real confusion in the legal doctrine. We shall find out below the scope of disagreement on this issue.

#### **4. The legal nature of a sponsorship contract in the Italian legal theory and case law**

In the Italian legal theory, a sponsorship contract is defined as a contract by which the sponsor commits to give the sponsored party money or replaceable things, or both, so as to receive advertising of his own characters and products in turn (Capri, Tocchi, 2007: 112). The views on the legal nature of sponsorship contracts in the Italian legal theory and jurisprudence range from attempts to include a sponsorship contract into some of the law-regulated contract types to the attitudes that a sponsorship contract is an innominate contract. However, it is necessary to point out that the Italian authors in the analysis of a sponsorship contract dealt mostly with a sponsorship in sports; therefore, these attitudes are valid primarily for sports sponsorship contracts, although they can be extended by analogy to sponsorship contracts in other fields of sponsorship.

Some Italian authors tried to qualify a sponsorship contract as some of the law-regulated contract types, the so-called innominate contracts, including contracts on providing services, temporary service contracts, partnership contracts and the employment contract. Due to the obligations taken by the sponsored party pursuant to a sponsorship contract, which may be the subject matter of a service contract or temporary service contract, some Italian authors tried to qualify the sponsorship contract as a service contract (Bianca, 1990: 122), or a temporary service contract (Vidiri, 1993: 423). In the Italian civil law, there is no distinction between service contracts and temporary service contracts in terms of activities that may be the subject matter of these contracts. Both types of contracts may have the same type of work as the subject matter of the contract. The difference lies in the person that may perform the activities. The activities from a service contract are always performed by an organization, primarily small and medium-sized enterprises whereas, when it comes to temporary service contracts, the activity must be carried out by personal engagement. In ad-

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<sup>3</sup> For example, if the premium payment was planned for the sponsored under the sponsorship contract depending on his sports results, the sponsorship contract will contain elements of the aleatory.

dition, the activities from the temporary service contract should be performed by one's own means, thus accepting the performance risk.

The attitude that the sponsorship contract can be qualified as a service contract did not meet with the approval of the Italian legal theory and jurisprudence. The criticism was supported by the fact that activities arising from a temporary service contract are commonly performed by small and medium-sized enterprise but, given that sports associations are not enterprises, the attitude that the sponsorship contract represents a service contract cannot be accepted (Landi, 2007: 137). The attitude of the Italian case law on this issue can be observed in a judgment of the Court of Cassation in Turin, wherein it was stated that although the sports associations can be viewed as companies that perform activities of organizing sports events, they certainly are not companies that provide advertising services; therefore, a sponsorship contract cannot be a service contract.<sup>4</sup> Also, the one who performs the activities pursuant to the service contract should carry out the activities with his own means, accepting the risk of the work. Thus, as he guarantees the result, his obligation is an obligation of result, unlike the obligation of the sponsored party under a sponsorship contract which would be an obligation of means since he is obliged to fulfill his contractual obligations but he does not guarantee advertising refund to the sponsor (Mormando, 1988: 40). The attitude that the sponsorship contract may qualify as a temporary service contract was not met with approval in the Italian legal theory either. As already noted, the activity pursuant to a temporary service contract must be performed by personal engagement. The point of criticism with regard to this attitude was made since the activities performed by the sponsored party under the sponsorship contract often exceed the boundaries of mainly personal services (Martinez, 2003: 292).

In the context of the Italian legal theory, there were attempts to qualify a sponsorship contract as a partnership contract. This attitude is based on the fact that the typical elements of a partnership contract can be identified in a sponsorship contract: 1) the relationship of trust which is reflected in the fact that the contracting parties under the sponsorship contract necessarily accept some interference in their affairs by another contracting parties, 2) the involvement of the society since there is a correlation between the image of the sponsor and the sports activities of the sports team; and 3) continuity of relationship (Dal Lago, 1988: 38). However, this attitude has been largely criticized in the Italian legal theory in terms that, should this attitude be accepted, it would mean that the basis of a sponsorship contract is in a joint performance of sports activities, for example, which further implies that contracting parties would jointly share

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<sup>4</sup> Corte di cassazione 174/1971.

gains and losses. The sponsorship contract includes a relationship of service exchange in which each party is to achieve his objective (De Sanctis, 2006: 20).

In the context of attitudes that a sponsorship contract can be interpreted as one of the law-regulated contract types, some Italian authors have tried to qualify a sponsorship contract as an employment contract (Colantuoni, 2009: 122). However, this attitude was rejected since there is no relationship of subordination between the sponsor and the sponsored party, i.e. the sponsor is not allowed to manage the work of the sponsored party, which is a necessary element of employment (Mormando, 1988: 53).

Part of the Italian legal theory held that the sponsorship contract is an innominate contract. In this part of the doctrine, there is disagreement as to which type of innominate contracts a sponsorship contract belongs to, i.e. whether a sponsorship contract is a complex (mixed) contract or a *sui generis* contract. The Italian Supreme Court indicated legal aspects and elements for distinguishing complex contracts and mutually related contracts in a judgment stating: "In the case of complex contracts, the elements of different contracts connected to a single *causa* can be found, whereas in mutually related contracts there are several different *causae* but they are mutually related so that the validity and effectiveness of each of these contracts affect the validity and effectiveness of the other".<sup>5</sup> Accordingly, the sponsorship contract would be a complex contract because a number of different activities that are mutually combined and covered by a single *causa* can be found in sponsorship (De Silvestri, 1983: 133). The attitude in the Italian legal theory that the sponsorship contract is a *sui generis* contract in its legal nature is based on the fact that the sponsorship contract is the result of freedom of contracting in order to meet the needs of modern enterprises to communicate. In fact, it is a completely new and original phenomenon in relation to known contract types (Frignani, Dassi, Introvigne, 1993: 56).

In the Italian legal theory, some authors approach the study of a sponsorship contract in a way that is different from all previously mentioned ones. They analyzed individual sponsorship contracts in practice and came to the conclusion that all sponsorship contracts contain a characteristic social economic function of sponsorship, occurring in practice through different contract forms, which may be simple, complex, typical or atypical (Fusi, Testa, 1985: 475), depending on the specific circumstances.

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5 La Suprema Corte 751/1977.

## **5. The legal nature of a sponsorship contract in the French legal theory and case law**

The attitudes relating to the legal nature of a sponsorship contract in the French legal theory and jurisprudence range from attempts to define a sponsorship contract as some of the law-regulated contract types to attitudes that the sponsorship contract is an innominate contract. In so doing, unlike the Italian authors, there is no disagreement among French authors as to the type of the innominate contract which the sponsorship contract belongs to. French authors agree that the sponsorship contract is a complex contract. However, it is necessary to emphasize that in the analysis of a sponsorship contract both the Italian and French authors mostly dealt with the sponsorship in sports; therefore, these attitudes are valid primarily for sports sponsorship contracts, although by analogy they can cover sponsorship contracts in other fields of sponsorship.

There were attempts in part of the French legal theory to qualify a sponsorship contract as one of the law-regulated contract types such as a contract for the purchase of advertising space, a service contract, a contract of loan for use, donation contract (deed of gift), and an employment contract. The attitude that the sponsorship contract may be qualified as a contract for the purchase of advertising space is present in part of the French legal theory (Buy, 2009: 367). This view actually assumes that a sponsorship contract is basically a contract for the purchase of advertising space, which is reflected in the fact that the sponsored party undertakes to put the brand of the sponsor on the playgrounds billboards or on the sports equipment of sports teams, for example. This attitude has been criticized due to the fact that advertising the sponsor's brand is not the only form of this contract and that, in case of a contract concluded in that way, the relationship of cooperation between the contractors that characterizes the sponsorship is not visible (Marmayou, Rizzo, 2010: 64).

The attitude that the sponsorship contract can be qualified as a service contract is also included in the French legal theory. If the sponsored party undertakes, pursuant to a sponsorship contract, to promote the image of the sponsor by various advertising actions, then the sponsorship contract could be a service contract. However, as the sponsor may undertake to perform himself the obligations that may be the subject matter of a service contract, the qualification of a sponsorship contract as a 'service contract with two parties' is suggested (Delebecque, Dutilleul, 2007: 790). Like the previous one, this attitude has been criticized due to the fact that such simplification of the sponsorship contract cannot cover all its manifestations (Marmayou et.al., 2010: 65).

The following sponsorship contract case was considered in the French legal theory, wherein the sponsor commits to deliver the equipment that shall be

used by the sponsored party but without providing a counter-service to the sponsor; in this regard, the question was raised whether in such a situation a sponsorship contract may be qualified as a contract of loan for use or as a deed of gift, depending on whether the sponsored party was obliged to return the equipment or whether it was donated by the sponsor. The French jurisprudence provided a negative answer to this question: "Contract of loan for use means that the loan is provided without 'essential compensation'. However, as the sponsor always hopes for the advertising return, this business is not without interest to the sponsor. This contract, which *prima facie* resembles a contract of loan for use, does not represent the contract of clear beneficial effect since the lender and the borrower are able to benefit from the use of vehicles in the agreed objectives".<sup>6</sup> The attitude that the sponsorship contract may be qualified as a deed of gift was also rejected by the French jurisprudence: "The rules of a deed of gift cannot be applied to a sponsorship contract which is a bilaterally-binding contract without the intention to donate, and which imposes reciprocal obligations on each party".<sup>7</sup>

In the French legal theory, there were some attempts to qualify a sponsorship contract as an employment contract. However, this view was subject to the same criticism as in the Italian legal theory. The relationship of the sponsor and sponsored party under a sponsorship contract lacks the element of subordination as an essential element of employment, i.e. the right of an employer (in this case the sponsor) to manage the work of the employee (in this case the sponsored); so, the sponsorship contract cannot be an employment contract (Marmayou et. al., 2010: 68).

The viewpoint that the sponsorship contract may be qualified as an innominate contract is also presented in the French legal theory. In this respect, sponsorship contract is a complex contract which, depending on the circumstances of the case, may contain elements of a temporary service contract, a sales contract, a lease contract, a brand license contract, a loan contract (Marmayou et. al., 2010: 73). In support of this viewpoint, there is the case of the judgment of the Court of Arbitration for Sport in Lausanne: "The Contracting Parties were linked by an innominate contract containing elements of a license contract, a contract of proxy, an agency agreement, all of which makes a contract that is often found in sports practice and commonly referred to as the supplier contract, therefore, a complex contract involving elements of various nominate and innominate contracts".<sup>8</sup>

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6 Cass 1/1966.

7 CA Versailles 112/2007.

8 Case 91/45 (1992).



## **6. The legal nature of a sponsorship contract in the Swiss legal theory and case law**

In the Swiss legal theory, a sponsorship contract is defined as a contract between two or more parties, in which the sponsor provides the sponsored party with services in the form of financial resources, material goods or services, whereas the sponsored party develops an activity and leaves personal rights and intangible assets to the sponsor for the purpose of increasing level of familiarity and the image profiling (Hauser, 1991: 318). As for the legal nature of the sponsorship contract, there is the standpoint that it is an innominate *sui generis* contract containing elements of a licensing contract and a mandate contract.

The elements of the license contract are reflected in the fact that the sponsored party by entering a sponsorship contract leaves the use of personal rights and intangible assets to the sponsor. The elements of the mandate contract are embodied in the fact that the sponsor under a sponsorship contract undertakes to provide the sponsored with various services. As for the elements of the license contract, the conclusion is that the sponsorship contract contains typical elements of the license contract. However, in terms of the elements of the mandate contract, a sponsorship contract demonstrates atypical elements. Atypical elements are related to the right of revocation of the order that exists for the mandate contract. As far as the sponsorship contract is concerned, the right of revocation is not consistent with the objective of a sponsorship contract because it would make the transfer of image impossible. The conclusion is that, if one observes the essence of a sponsorship contract in its entirety and takes into account the interest position of the contracting parties, the legal qualification results in the fact that the sponsorship contract is a *sui generis* contract that has its characteristic internal unity (Hauser, 1991: 281).

## **7. The legal nature of a sponsorship contract in the German legal theory and case law**

First of all, it is necessary to point out the definition of a sponsorship contract which was given in a judgment of the Higher Regional Court of Dresden: "Sponsorship contract commits one contracting party, the sponsor, to put at the disposal of the other party, the sponsored, for the purpose of supporting his activities in the sports, cultural, social, or related significant socio-political field, money and other items or services, whereas the sponsored, as a counter action, obliges to support the communicative goals of the sponsor in a certain way through the development of supported activities".<sup>9</sup> Regarding the standpoints on the legal

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nature of a sponsorship contract in the German legal theory and case law, there is a general opinion is that the sponsorship contract represents an innominate contract. However, there are differences in terms of the categories of innominate contracts which a sponsorship contract belongs to. The attitude of the majority is that the sponsorship contract is a *sui generis* contract. However, there is an opinion that the sponsorship contract is a mixed contract.

The authors arguing that a sponsorship contract is a *sui generis* contract, define sponsorship contract in the following manner. Sponsorship contract is a contract by which one party, the sponsor, obliges to the other party, the sponsored, to provide him with the money, material resources or services for the purpose of promoting his activities in the sports, cultural, environmental or social level, whereas the sponsored as a counter action, undertakes to support the communicative goals of the sponsor through the implementation of stimulating activities (Weiland, 1993: 96). After comparing a sponsorship contract with other law-regulated contract types, it can be concluded that many sponsorship contracts contain elements of innominate contracts but that none of those contracts can cover all forms of a sponsorship contracts. Thus, the sponsorship contract can be defined as a contract of cooperation which comprises elements of a partnership contract and, depending on how it is formulated, it can further comprise the elements of a lease contract, a service contract and a contract on warranty. The general conclusion is that the sponsorship contract is a new creation which has certain characteristics that are repeated, and which cannot be defined as the law-regulated contract types or mixed contracts; so, the sponsorship contract is a *sui generis* contract (Röhrborn, 1997: 150).

Some authors who argue that the sponsorship contract is a *sui generis* contract have a special approach to the study of this contract. The essence of this approach lies in the fact that one should not try to give a definition of a sponsorship contract nor compare this contract with other law-regulated contract types but, instead, one should provide a large number of practical examples while analyzing the contracting clauses they include (Poser, Backes, 2010 197). It is important to point out that the German case law holds the viewpoint that the sponsorship contract is a *sui generis* contract. Thus, the Supreme Court states: "If the various sponsorship contracts should be uniformly defined, there is only the possibility to qualify them as *sui generis* contracts".<sup>10</sup>

The part of the German legal theory arguing that the sponsorship contract is a mixed contract defines the sponsorship contract as follows: Sponsorship contract is a legal business in which the sponsored party provides the communication performance (through active advertising or providing advertising

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opportunities that are defined by activity or personality) and in turn receives from the sponsor encouraging performance in the form of payment of money, things, indulging in the use of services, or services (or a combination thereof). At the same time, within the framework of this legal business, the activities of the sponsored party serving to supra objectives are encouraged, the implementation of which can be risen up to additional contractual obligation of the sponsored (Schaub, 2008: 725). Analyzing sponsorship contracts leads to the conclusion that they can be divided into three types, depending on the type of obligations taken by the sponsored party under this contract: 1) sponsorship contracts by which the sponsored party undertakes to actively advertise the sponsor; active advertising includes independent implementation of advertising measures by the sponsored party for the sponsor and, in such a case, the rules of the temporary service contract or service contract shall apply to the obligations of the sponsored party; 2) sponsorship contracts on the basis of which the sponsored party gives the sponsor the right to advertise; in such a case, the rules of the lease contract shall apply to the obligations of the sponsored party, or the licensing contract if the sponsored party allows the commercial use of its personal rights; 3) sponsorship contracts including the communication performance provided by the sponsored party which contain both elements: the active advertisement for the sponsor and assignment of advertising rights to the sponsor. Regarding the obligations of the sponsor, the rules of sale contracts, lease contracts or service contracts shall apply to them, depending on the circumstances of the case (Schaub, 2008: 726).

## 8. Conclusion

The provided analysis shows that numerous authors have different opinions on the legal nature of a sponsorship contract. The reason for this is certainly the complex nature of the relationship established between the sponsor and the sponsored party by concluding a sponsorship contract. In addition, in most countries, the sponsorship contract is not regulated by the modern civil codes or subject-specific laws. Another important fact is that there is no single type of a sponsorship contract in practice. However, it can be stated with certainty that the essential features of all sponsorship contracts are the support performance of the sponsor, the communicative counter-performance of the sponsored party, and the specific objective of a sponsorship contract which is referred to as “the image transfer”. Considering the need to determine the legal nature of a sponsorship contract, we may conclude that the sponsorship contract is a *sui generis* contract, given the fact that it largely includes the characteristics of this type of contract. We believe, however, that it would be the most precise to accept the standpoint advocated in the Italian legal theory by Fusi and Testa, who had

a slightly different approach to the study of sponsorship contracts. They analyzed individual sponsorship contracts in practice and came to the conclusion that all sponsorship contracts include a distinctive socio-economic function of sponsorships, which have various contractual forms in practice and, depending on the specific contractual circumstances, may be qualified as simple, complex, typical or atypical sponsorship contracts.

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## **УГОВОРИ О СПОНЗОРСТВУ**

### **Резиме**

*Комисија за маркетинг и рекламу Међународне трговачке коморе је 2003. године донела Међународна правила о спонзорству, образлажући то тиме да је спонзорство постало један од главних извора финансирања међународних догађаја, као и да глобализација светске економије изискује од међународне пословне заједнице усвајање јединствених правила. Дакле, потреба за усвајањем правила о спонзорству на глобалном нивоу несумњиво постоји. Ипак, од тада на том пољу ништа није урађено, а многе недоумице су остале. Предмет пажње аутора у овом раду је питање правне природе уговора о спонзорству, тј. упоредно-правна анализа ставова који о правној природи уговора о спонзорству постоје у италијанској, француској, швајцарској и немачкој правној теорији и судској пракси. Систематизација ставова о правној природи уговора о спонзорству, надамо се, биће од користи приликом појашњавања недоумица које произлазе из спонзорства, као и евентуално помоћ за судове и арбитраже у споривима у вези спонзорства.*

**Кључне речи:** *уговори о спонзорству, међународна правила, упоредно право, спорови.*