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INTRODUCTION

The South East European (SEE) countries are sharing common tasks, needs and perspectives for their future membership in the European Union and fulfillment of the Copenhagen Criteria. The legal education system in these countries is of significant importance for guarantying sustainable development of the rule of law and facilitating legal approximation towards the *acquis communautaire*, as well fostering regional integration as main prerequisites for EU accession.

The establishment of the South East European Law School Network (SEELS) in March 2011 was supported by the project “Open Regional Fund for South East Europe - Legal Reform (ORF – Legal Reform)” implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry of Economic Cooperation and Development (BMZ). Today SEELS comprise of thirteen members, public Law Faculties from Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, and Serbia and serves as an institutionalised cross-border platform for regional academic cooperation and intensified legal education, research and publishing.

Recognising the importance of promoting European values in the higher education system to create an overall convergence at European level and the establishment of a joint European Higher Education Area, SEELS contributes to the implementation of high national, European and international standards and requirements by strengthening the high-level of performance and offering quality of the legal education and scientific research in the SEE region.

In the framework of the ORF – Legal Reform, SEELS developed and introduced new regional legal research fora, summer schools for the students and young researchers, post-doc colloquia, various regional publications, exchange of academics and delivery of regional and international lecturers and development and delivery of special tailor-made trainings for the academic staff. Thereby the overall goal is to enhance regional mobility of academics, students and legal professionals and to connect legal community of SEE region to distinguished academic and research institutions and networks in Europe.

Based on the successful experience of the first organized SEE Post-doc Colloquium in Private Law, the second SEE Post-doc Colloquium in Public Law took place on 10th and 11th of April 2014 in Tirana, Albania. The aim of SEE Post-doc Colloquium in Public Law was to gather the most distinguished young researchers from South East Europe, to discuss on specific institutes of Public Law, including international law, human rights, constitutional law, administrative law and criminal law. Its goal was to contribute towards the exchange of knowledge and ideas among the young researchers of the participating Law Faculties members of SEELS.

The SEE Post-doc Colloquium in Public Law was structured and divided into four different working sessions covering various aspects of Public Law: 1. **International Law and Human Rights**; 2. **Constitutional Law**; 3. **Administrative Law**; and 4. **Substantial and procedural aspects of Criminal Law**. Twelve young academics and researchers have been selected to present key findings of their doctoral dissertations and reflected their current research in the respective area of their dissertations.

The SEE Post-doc Colloquium in Public Law provides for creation of a continuing network of researchers and scientists in the field of Public Law in the region. This network will serve in future as a base line for further development and dissemination of the latest research activities in the field of Public Law. This will support the SEELS Network to have available multiple in-depth researches for relevant topics in the field of Public Law that will be available for the further reforms and improve-

ments of Public Law in the SEE countries. In order to have accessibility of these researches to the academics, practitioners and legal community in general, all the academic papers presented at the SEE Post-doc Colloquium in Public Law are comprised in this publication.

The editors anticipate this publication shall encourage future postgraduate and doctoral students and young researches in South East Europe and beyond for carrying out their own scientific research.

We would like to express our gratitude to everyone contributing to the SEE Post-Doc Colloquium and to the publications and hope to continue our successful cooperation in the future!

Skopje, June 2014.

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PART ONE

INTERNATIONAL LAW AND HUMAN RIGHTS

THE IMPACT OF THE ENLARGEMENT PROCESS ON THE DEVELOPMENT OF A MINORITY PROTECTION IN SOUTHEASTERN EUROPE

Antonija PETRIČUŠIĆ*

Abstract

This article presents a study on the development of minority rights protection policies in the Southeastern European countries. It primarily attempts to offer an overview of the constitutional design and the minority rights legislation development during the last two decades, the period in which the majority of the countries concerned have experienced democratic transition and a greater part of them became independent from the Yugoslav federation. Secondly, the article assesses the influence of the EU enlargement process on minority-right regimes and makes the claim that the EU minority conditionality continues to play a pivotal (although differing) role in the development, implementation and accomplishment of minority rights across Southeastern Europe.

Keywords: minority rights, constitutional guarantees of anti-discrimination and equality, Southeastern Europe, EU enlargement

1. Introduction

Southeastern Europe is home to a plethora of ethnicities. Because of historical events that have redrawn borders of the empires, kingdoms, states or federations, each country in this region hosts ethnic groups that are nowadays considered national minorities. To a certain extent, each Southeastern European country has subscribed to relatively recently emerging European (legally binding) minority-rights standards of minority protection.¹ Primarily because all of the countries of the region are parties to the Council of Europe Framework Convention for National Minorities (FCNM) and a good portion of them are also parties of the European Charter for Regional or Minority Languages.² Subsequently, those international minority standards have been transposed into domestic minority legislation, in certain cases with more success and in some cases merely vaguely reflecting the international standards.

However, inspection of the normative arrangements vis-à-vis minorities in the countries concerned reveals that some common trends exist in regards to minority protection in all Southeastern European countries. First, and the most obvious, is that in all of the countries a constitutional guarantee for equality and nondiscrimination is established, alongside a constitutional guarantee of minority protection (apart from Bulgaria, where minority-rights guarantee is not part of the constitution). Second, recent normative developments have as a rule set up quite advanced minority

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¹ On the emerging minority rights standard through the practice of the Council of Europe see Emma Lantschner, "Emerging European Standards of Minority Protection through Soft Jurisprudence?", in Emma Lantschner, Joseph Marko and Antonija Petričušić (eds.), *European Integration and Its Effects on Minority Protection in South Eastern Europe* (Nomos, Baden-Baden, 2008), 53–82.

² Ratification of the European Charter for Regional or Minority Languages is still pending in BiH, Macedonia, Romania, whereas in the case of Albania, Bulgaria and Kosovo it has not been signed at all.

egimes, particularly in the Western Balkans³ countries, which were conditioned to improve minority rights upon termination of ethnic conflicts as well as in the course of the European Union (EU) accession process. Third, in spite of numerous normative developments, their partial implementation questions the political will of the Southeastern European governments to realize the rights of minorities in their countries, particularly at the municipal level, at which minority rights are primarily supposed to achieve effective implementation.

This article will proceed in three parts. The first one will scrutinize constitutional provisions that establish a state as a nation or civic one as well as minority-related provisions, arguing that so-called co-titular nations (or numerically stronger minority groups) and smaller minorities (in this article referred as “minorities” *stricto sensu*) have different political claims. Whereas so-called state-forming nations often require a status equal to a titular nation, insisting on “institutional equality, i.e., the right to decide equally on all political decisions not only concerning their own group, but the entire state and society as such.”⁴ Numerically smaller minorities, on the other hand, are bound to subscribe to traditional minority protection that tackles issues relating to the preservation of their culture. The second part of the article will analyze the gap between the normative provisions for minority protection and the actual situation of minorities, relying on the findings delivered in the European Commission’s regular progress reports and through the monitoring of the Advisory Committee on the Framework Convention. Examination of the progress reports and the Advisory Committee’s opinions on the implementation of the FCNM is necessary to learn how those two international organizations assess the level of actual minority protection in the countries of concern. Finally, this article will attempt to offer well-grounded conclusions on the state of art in the field of minority protection in the Southeastern European countries.

2. Minorities in the Constitutions: Different Claims of Titular Co-Nations and Minorities

The constitution building is a process that may be highly contentious, particularly when recent experiences of severe inter-ethnic conflict and corresponding prolonged, embedded social divisions are taken into account. Claus Offe, speaking about democratic transition traps with regard to inclusive nation-building, argued that, in the early stages of democratic transition political “actors are in a position to see which constitutional design and which ethnic boundaries of a state will best serve their interest in policy outcomes, or their passions for ethnic identities and resentments. The situation is replete with opportunities, rightly perceived to be unique in their scope, to improve one’s original endowment, or to take revenge.”⁵ Correspondingly, “principles of justice, freedom, and peace”⁶ can simply be disregarded for certain segments of population. Sujit Chaudhry similarly warned that failure to properly “respond to the challenges raised by the equation of ethnocultural identity and political interest”⁷ in ethnically diverse and divided societies might lead to the extreme

³ The term ‘Western Balkans’ as a politically designated region came into being at the 1998 Vienna European Council while a still, regional approach of the EU towards the region was at stake. The term was announced to mark the distinction among the South-Eastern European countries. The acceding countries of that time, Bulgaria and Romania, were placed in one cluster of the Eastern Balkans countries, whereas Albania, Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia and Macedonia were grouped into the Western Balkans. Although the term ‘Western Balkans’ contains more of a political than geographic implication, its introduction for certain has additionally contributed to the creation of a new geopolitical situation in Southeastern Europe.

⁴ Emma Lantschner and Joseph Marko “Conclusions: European Integration and its Effects on Minority Protection in South Eastern Europe” in Emma Lantschner, Joseph Marko and Antonija Petričušić (eds.), *op.cit.* (Nomos, Baden Baden, 2008), 361.

⁵ Claus Offe, “Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe”, 71 (3) *Social Research* (2004), pp. 501-528, at 508.

⁶ *Ibid.*

⁷ Sujit Chaudhry, “Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies”, in Sujit Chaudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008), pp. 3-40, at 5. See also Arendt Lijphart, “Constitutional Design for Divided Societies”, 15 (2) *Journal of Democracy* (2004), pp. 96-109.

consequences: discrimination and exclusion, forced assimilation, civil war, ethnic cleansing and even genocide. He explained, therefore, that specifically “constitutional design in divided societies bears a particularly heavy burden”.⁸ Apart from serving a regulatory role, i.e. the one pertaining to institutional and decision making set-up, “in a divided society, a constitution must go further and constitute the very demos which governs itself under and through the constitutional regime”.⁹ Chaudhry furthermore argued, that in ethnically divided societies “the constitution is often the principal vehicle for the forging of a common political identity, which is, in turn, necessary to make that constitutional regime work. To some extent, the constitution can foster the development of a common political identity by creating the institutional spaces for shared decision making among members of different ethnocultural groups. Concrete experiences of shared decision making within a framework of the rule of law, and without recourse to force or fraud, can serve as the germ of a nascent sense of political community. For the same reason, against the backdrop of division and a lack of trust, the process of debating and negotiating a constitution can also help to create the political community on whose existence the constitutional order which results from that process depends”.¹⁰ Fred Riggs similarly considered that viable systems of constitutional government, i.e. those in which “power is exercised responsibly and effectively, offer the only hope that ethnonational violence can be replaced by the nonviolent politics of ethnic competition”.¹¹

Normative changes in the texts of constitutions of new nation-states emerging out of Socialist Yugoslavia did not take ethnic diversity into account and in this way added to ethnomobilisation.¹² References to state-forming quality of the majority ethnic group in numerous constitutions presented below disclose that the Southeastern European states predominantly opted for ethno-nationalist and exclusionary constitutional foundations, revealing bigoted preference for the ethnic majority.¹³ Such constitutional solutions, at the outset of the nation-state formation period, additionally contributed to societal divisions among ethnic lines. Nenad Dimitrijević considers that as long as constitutionally acknowledged “ethnically perceived statehood stands, policy-framed privileges for minorities will remain at mercy of majoritarian preferences, which are too often and too easily in countries of the region legitimised by claiming the primacy of majority rule”.¹⁴ Constitutions, instead, in ethnically diverse societies should be symbolic documents where minority rights are brought into balance with majority rule.¹⁵ Constitutions should, in addition, provide the ultimate expression of a country’s dominant political values and should indicate if not prevailing, then at least desired political culture. Finally, in the states that were home to several ethnic groups, they should serve as symbolic fora for recognition of multi-ethnic character of the state.

Nevertheless, ascribing minority status to those ethnic groups in newly formed nation-states that used to enjoy the status of the nation, inevitably increased tensions, and more than once escalated into ethnic conflicts. That was, according to Will Kymlicka, because those were “conflict involving large, territorially concentrated groups who have manifested the capacity and the aspiration to govern themselves and to administer their own public institutions in their own language, and who typically have possessed some form of self-government and official language status in the past. They

⁸ Sujit Chaudhry, *op.cit.*, at 5.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Fred W. Riggs “Ethnonational Rebellions and Viable Constitutionalism”, 16 *International Political Science Review* (1995), pp. 375-404.

¹² Mitja Žagar, “Constitutions in Multi-Ethnic Reality”, 29-3 *Razprave in gradivo* (1994/1995), pp. 143-164.

¹³ Nenad Dimitrijević, “Ethno-Nationalized States of Eastern Europe: Is There a Constitutional Alternative?”, 54 *Studies in East European Thought* (2002), pp. 245-269.

¹⁴ *Ibid.*

¹⁵ Sujit Chaudhry, *op.cit.*

have mobilized for territorial autonomy, official language status, minority language universities, and consociational power-sharing mechanisms".¹⁶ At the same time, the newly achieved nation-states at large did not acknowledge those minority groups' claims in their constitutions.

Constitutions are thus at the forefront of minority protection in a country, prescribing primarily equality of all citizens and a guarantee of nondiscrimination. They might even specify which ethnic communities are recognized as national minorities within the country. They may also refer exclusively to the rights of a titular nation, which can be a trigger for an ethnic conflict. Studying political claims of various ethnic groups within a single country, Joseph Marko distinguishes between constituent peoples (as it is case for Bosniaks, Croats and Serbs in Bosnia and Herzegovina) or co-nations or state-forming minorities (like Albanians in Macedonia, Serbs in Kosovo, Serbs at the beginning of 1990s in Croatia) and minorities (in a traditional sense). Those minorities *stricto sensu*, according to Florian Bieber, could be classified into six categories. The first group is made of marginal minorities, those that are small in size and often under threat of assimilation (e.g., Roma in Bosnia and Herzegovina and groups such as Vlachs in Macedonia, Czechs in Croatia or Bulgarians in Serbia). To the second group belong the socially excluded groups (Roma, Ashkalia, and Egyptians) characterized by poverty and exclusion from the economic and social life of the majority. The third category encompasses larger minorities that are able to sustain their own culture and enjoy kin-state support and have not been part of the conflicts of the 1990s. This primarily includes the Hungarian minorities in Serbia and Croatia and Italians in Croatia. A fourth group of minorities has been directly affected by the conflicts of the 1990s and thus minority–majority relations are often particularly tense. Such communities include Serbs in Croatia and Albanians in Southern Serbia. A fifth community incorporates the minorities that emerged as a result of intra-Yugoslav migrations, such as most Bosniaks/Muslims in Croatia and Macedonians in Serbia. The last category comprises *de facto* minorities who are "state majorities which find themselves in a situation where they live as minority in particular parts of the country".¹⁷

In the following paragraphs, constitutional and normative guarantees of minority protection *vis-à-vis* different categories of minorities will be analyzed. Namely, being a minority *stricto sensu* in a country in which there is more than one titular nation, such is the case in Bosnia and Herzegovina, Macedonia and, to a certain extent, Kosovo too, inevitably leads to factual marginalization of so-called traditional minorities.¹⁸ Excessive emphasis placed by Bosnia and Herzegovina's (BiH) legal framework on the status of the 'constituent peoples' (i.e., Bosniaks, Croats, and Serbs) has an adverse effect on the protection of minorities that do not belong to these 'constituent peoples'. Namely, the constitution of BiH defines Bosniaks, Serbs, and Croats as constituent peoples, whereas the rest—i.e., national minorities—are referred to as 'the Others'.¹⁹ Such a categorization hampers Bosnia and Herzegovina's evolution towards a state based on citizenship rather than on ethnic representation. In a country in which ethnicity has been deeply institutionalized,²⁰ the fact that the

¹⁶ Will Kymlicka, "National Minorities in Post-Communist Europe: The Role of International Norms and European Integration", in Zoltan D. Barany and Robert G. Moser, *Ethnic Politics After Communism* (Ithaca, NY: Cornell University Press, 2005), pp. 191-217, at 205.

¹⁷ Florian Bieber, "The role of the Framework Convention for the Protection of National Minorities in selected countries of South-Eastern Europe after two monitoring cycles", at http://www.coe.int/t/dghl/monitorings/minorities/6_Resources/PDF_IACConf_Report_FBieber_en.pdf, 2.

¹⁸ On constituent peoples, co-nations and minorities in South East Europe see Emma Lantschner and Joseph Marko, *op.cit.*, 361-362.

¹⁹ Antonija Petričević, "Kako osigurati opstanak „Ostalih“: dokidanje institucionalne diskriminacije nacionalnih manjina u Bosni i Hercegovini", in Željko Potočnjak, Ivana Grgurev, Andrea Grgić (ed.), *Perspektive antidiskriminacijskog prava* (Zagreb: Pravni fakultet u Zagrebu, 2014), 199-136.

²⁰ Compare, e.g., Florian Bieber, "Power Sharing after Yugoslavia: Functionality and Dysfunctionality of Power-sharing Institutions in Post-war Bosnia, Macedonia, and Kosovo" in Sid Noel, *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (McGill-Queen's Press, 2005), 85–103.

Dayton Peace Agreement prescribed a direct applicability of major international human rights instruments, including those relating to a realization of the rights of minorities, means almost nothing to the real minorities of BiH. The Law on the Protection of the Rights of the Members of National Minorities²¹ passed in 2003 prescribed a number of minority rights provisions (including the right to proportional representation and the right to education in minority languages). Nevertheless, this law is just partly implemented. Although it has foreseen protection for 17 ethnic-minority groups, there are numerous interpretations that, besides minorities *stricto sensu* in BiH, even members of the constituent peoples should be treated as minorities in areas in which other constituent people constitute a majority.²²

Macedonia, which used to be defined in the 1974 Constitution of the Socialist Republic of Macedonia as the national state of the Macedonian nation and state of the Albanian and Turk nationalities, was proclaimed in 1991 a national state of the Macedonian people.²³ This change, which established Macedonians as the only titular nation and abolished some provisions from the Communist time that allowed for the official use of minority languages, lacked guarantees of political representation of minorities, and introduced the Macedonian language and its Cyrillic alphabet as the official ones, caused dissatisfaction particularly on the side of the Albanian minority. The fact that the Macedonian Constitution of 1991 was in its nature a civic constitution that should have been ethnicity blind, meant nothing to Macedonian Albanians. Being dissatisfied with such a constitutional arrangement, the ethnic Albanian leaders demanded state-forming 'constitutive' status for the Albanian community with veto powers and the recognition of the Albanian language as an official language. This eventually was agreed to in the text of the Ohrid Agreement that restored peace in Macedonia in August 2001 through addressing the multiethnic character of the country in the constitution.²⁴ This assured equitable representation of minorities in the public sector and provided for the future decentralization process.²⁵

The Croatian Constitution of 1991²⁶ also defined the country as a nation state of the Croatian nation (and the state of the members of autochthonous national minorities), which aggravates dissatisfaction on the side of the former second titular nation in Croatia, the Serbs. Despite numerous other constitutional provisions dealing with the rights of minorities, the constitution did not suit Croatian Serbs because it 'degraded' them to the status of a national minority from previously being one of the republic's constituent nations.²⁷ This constitutional change has been widely used as an argument by the Serb political leaders for ethnically mobilizing the Serbs in Krajina to start violent

²¹ Law on the Protection of the Rights of the Members of National Minorities, Official Gazette of Bosnia and Herzegovina 12/2003. One of the two BiH entities, the Republic Srpska passed the Law on Protection of Rights of National Minorities of Republic Srpska, Official Gazette of Republic Srpska, 2/2005. The second one, the Federation of Bosnia and Herzegovina, has not done this yet.

²² Compare Slobodanka Milikić, "Bosnia and Herzegovina", Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 297–340.

²³ The Constitution of the Republic of Macedonia, Official Gazette of the Republic of Macedonia No. 52/1991.

²⁴ Detailed overview of the Ohrid Framework Agreement in Zoran Ilievski, "Macedonia", in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 189–209.

²⁵ Joseph Marko, "The Referendum on Decentralisation in Macedonia 2004: A Litmus Test for Macedonia's Interethnic Relations", in 4 *European Yearbook of Minority Issues* (2004/05), 695–721.

²⁶ The Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia No. 41/2001.

²⁷ Antonija Petričušić, "Nation-Building in Croatia and the Treatment of Minorities: Rights and Wrongs", 249–250 *L'Europe en Formation, Journal of Studies on European Integration and Federalism* (2008), 135–145.

uprisings. The Badinter Commission²⁸ requested the development of a minority rights regime in Croatia, which was eventually achieved in the 1992 Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities. Eventually, the new Constitutional Law on the Rights of National Minorities was passed in late 2002, guaranteeing a broad spectrum of minority rights, but not re-introducing any form of territorial autonomy for the Serbs contained in a previous constitutional minority law.²⁹ The expulsion of the Serb population in the aftermath of the state-led liberating operations in 1995 justified for the government officials the exclusion of a territorial-autonomy clause, because the Serbs no longer constitutes a significant portion of the population.³⁰ The EU accession has contributed to a steady improvement of the minority rights regime in the country, particularly in the course of the EU accession negotiations. The fact that the minority parties and minority MPs have been coalitional partners in the last two consecutive governments also played a role in expanding minority rights. Firstly, the minority MPs managed to negotiate return of all national minorities in the text of the Constitutional preamble. Secondly, minorities achieved to introduce some amendments in the text of the Constitutional Law on the Rights of National Minorities and the law dealing with political participation.³¹

The Constitution of the Republic of Serbia passed in November 2006 defines Serbia as a nation-state of Serbian people and all citizens who live in it.³² In the preamble, Kosovo is defined as an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations. The constitution furthermore prescribes protection of the rights of national minorities “for the purpose of exercising full equality and preserving their identity”. The Law on Protection of Rights and Freedoms of National Minorities passed by the Yugoslav Federal Parliament in February 2002 continues to be applied after the dissolution of the state union. Previously it was supposed to be applied in both republics of the state union, but Montenegro resisted implementing it in its territory.³³

²⁸ The Badinter Commission, set up in 1991 under the auspices of the EU Peace Conference in The Hague, concluded that certain greater ethnic groups that were not in favour of being ascribed a minority status in newly proclaimed states (those being Kosovo Albanians, and the Serb population in Bosnia-Herzegovina and Croatia) were entitled to all the rights afforded to national minorities and ethnic groups as well as human rights and fundamental freedoms accorded to individuals under international law, but the right to secession was denied. Claire Gordon, “Synthetic Report on Conflict Settlement and the role of Human and Minority Rights, and Country Specific Reports on Bosnia-Herzegovina, Croatia, Kosovo, Macedonia and Serbia”, at <<http://www.eurac.edu/mirico>>, 18–20

²⁹ The Constitutional Law on the Rights of National Minorities, Official Gazette of the Republic of Croatia No.155/ 2002. Compare also Antonija Petričević, “Croatian Constitutional Law on the Rights of National Minorities”, 2 *European Yearbook of Minority Issues* (2004), 607–629.

³⁰ For more information on the change of the ethnic picture in Croatia as a consequence of the 1991–1995 war, see Siniša Tatalović, “Constitutional Dimension of Socio-cultural and Territorial Pluralism in the Balkans. The Case of Croatia”, *infra*.

³¹ See Law on Election of Representatives to the Croatian Parliament – consolidated version, Official gazette 76/2010. Changes of the Electoral Law foresees that the Serb minority has a special voting mechanism that assures at least three MP seats but gives them a chance to get the fourth seat. The Serb electoral lists will be running in all electoral districts, but each party with a single list (the Electoral Law prescribes that political parties or independent list must have a special list for each and one electoral district). The other national minorities (in the text of the Constitutional Law on the Rights of National Minorities they are referred as those constituting less than 1.5% of the population) got a double voting right which they should be able to exercise in a special minority electoral district, that is applied nationwide, as well as in the electoral district of their residence. All those Constitutional Law and Electoral Law amendments have been subjected to the Constitutional Court review, since even some minority associations claim their unconstitutionality. See Branko Smerdel, “Što se grbo rodi, usud ne ispravi: Ustavni sud pred izazovima pozitivne diskriminacije”, 5952 *Novi informator* (2011), 3.

³² The Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006.

³³ Snježana Vučić, “Serbia”, Emma Lantschner, Joseph Marko, and Antonija Petričević (eds.), *op.cit.*, 275–295.

The constitution adopted in October 2007 defines Montenegro as a civic country, comprising Montenegrins, Serbs, Bosniaks, Albanians, Muslims, Croats, and others as citizens of Montenegro.³⁴ The official language is Montenegrin, but Serbian, Croatian, Albanian, and Bosnian are in co-official use. The Law on National Minority Protection (Minority Law) was passed in May 2006. The law includes a number of provisions that allow ethnic minorities to assert their rights, influence policy in accordance with their interests, and obtain proportional representation in national and municipal assemblies. However, in spite of the initial euphoria of Montenegrin national minorities, who perceive the law as a means of accomplishing their better integration in society, shortly after the referendum for the country's independence, the Montenegrin Constitutional Court declared articles of the minority law that allowed for double voting rights in parliamentary elections for national minority members unconstitutional (Articles 24 and 25). As a result, the new Montenegrin Constitution, adopted in October 2007, specifically states that the issue of minority proportional representation in the parliament will be resolved through the application of affirmative action (in Article 79(9)), allowing for amendments to the minority law. In addition to this provision, the constitution guarantees a set of rights and liberties to "persons belonging to minority nations and other minority national communities" and prohibits forceful assimilation" (Articles 79 and 80).³⁵

After Kosovo declared its independence on 17 February 2008, its parliamentary assembly officially adopted the new constitution on 15 June 2008, declaring Kosovo "an independent, sovereign, democratic, unique and indivisible state". It proclaims that "[t]he Republic of Kosovo shall have no territorial claims against, and shall seek no union with, any State or part of any State." Drawing upon recommendations of the UN Special Envoy to Kosovo Marti Ahtisaari, the constitution also includes an entire chapter spelling out the rights of and provisions for Kosovo's minority groups,³⁶ including a guarantee of political representation in parliament.³⁷ Besides a constitutional guarantee of co-official status of the Albanian and Serb languages (Article 5), the Law on the Use of Languages³⁸ promulgated in 2006, assured co-official status of those two languages and co-official status to Turkish, Bosnian, and Roma minority languages at the municipal level if a language is spoken by 5% of the population of a municipality. However, the application and implementation of the law still remains inadequate.³⁹ The Law on Promotion and Protection of the Rights of Communities and their Members in Kosovo⁴⁰ passed in 2008 is supposed to enhance the minority regime in this country. The law envisaged the creation of the Consultative Council for Communities within the Kosovo president's cabinet, which was put in place in September 2008. This body is supposed to act alongside the prime minister's Office for Communities. Nevertheless, in spite of numerous institutional developments, the status of national minorities has not improved significantly in Kosovo, to a great extent

³⁴ The Constitution of Montenegro, Official Gazette of Montenegro No. 1/2007.

³⁵ Marko Kmezić, "Montenegro", in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 253–273.

³⁶ The constitutional chapter "Rights of Communities and Their Members" prescribes detailed list of the rights of the inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo. The constitutional wording avoids calling such groups 'national minorities' but refers to them as 'communities'. (Articles 57–62).

³⁷ Article of the Constitution prescribes that 20 of the assembly's 120 seats shall be reserved for minorities, each of whom are guaranteed a respective minimum number of seats as follows: the Roma community, one seat; the Ashkali community, one seat; the Egyptian community, one seat; and one additional seat will be awarded to either the Roma, the Ashkali, or the Egyptian community with the highest overall votes; the Bosnian community, three seats; the Turkish community, two seats; and the Gorani community, one seat (Article 64(2)).

³⁸ Law No. 02/L-37 on the Use of Languages.

³⁹ Organization for Security and Co-operation in Europe, "Implementation of the Law on the Use of Languages by Kosovo Municipalities", at <http://www.osce.org/documents/mik/2008/07/32145_en.pdf>.

⁴⁰ More on the implementation of the Law see I Humanitarian Law Center—Kosovo, The Beginning of Implementation of the Law on the Promotion and Protection of Rights of Communities and Their Members in the Republic of Kosovo, December (2008), at <http://www.hlc-rdc.org/uploads/editor/izvestaj_prava%20zajednica08_ENG.pdf>.

because of the high number (250,000) of refugees and internally displaced persons (IDPs) who are still expected to return to their pre-war homes. The Roma, Ashkali, and Egyptian communities are still largely underprivileged and subject to de facto discrimination in education, social and health care, employment, and housing, and in general face very difficult living conditions.⁴¹

The Albanian Constitution⁴² prescribes coexistence with minorities a fundamental responsibility the state has to care about. The constitution also stipulates the equality of minorities, assuring them the right to freely express, without prohibition or compulsion, their ethnic, cultural, religious and linguistic belonging. They have the right to preserve and develop it, to study and to be taught in their mother tongue, as well as unite in organizations and societies for the protection of their interests and identity. (Article 20)

In addition to those constitutionally guaranteed minority-related rights, minorities have the right to study and to be taught in their mother tongue.⁴³ In its latest opinion, the Council of Europe Advisory Committee on the Framework Convention concluded that “the Albanian legislative framework needs to be completed and made sufficiently clear *inter alia* with regard to minority language use in relations with administrative authorities, place names and topographical indications and broadcasting in minority language.”⁴⁴ In addition to this, the Advisory Committee commented that the institutional framework for minority participation in public affairs needs to be revised: a better articulation of minority interests should be supported, promoting minority self-organization and a governmental sector that consults national minorities on issues affecting them should have decision-making powers.⁴⁵

The Romanian Constitution⁴⁶ proclaimed Romania to be a sovereign, independent, unitary, and indivisible nation state that recognizes and guarantees the right of persons belonging to national minorities to the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity. This country is the homeland to almost one and a half million ethnic Hungarians and, according to some estimates, equally as many Roma, alongside some other smaller ethnic groups. The constitution also assures national minorities the right to receive education in their mother tongue and to use their language when communicating with public administrators (Articles 32(3) and 120(2)).⁴⁷ Finally, it contains a guarantee of parliamentary representation for organizations of citizens belonging to national minorities that fail to obtain the required minimum number of votes for representation in parliament.⁴⁸ Nevertheless, experts assess that the constitutional guarantee is still insufficient to tackle broad needs of numerous Romanian minorities.⁴⁹ Although a draft

⁴¹ The Opinion of the Council of Europe Advisory Committee on the FCNM (ACFC/OP/II(2005)004) March 2, 2006, at <<http://www.coe.int/t/dghl/monitorings/minorities/>>. For more on the up-to-date situation of minorities in Kosovo, see Arben Hajrullahu “Kosovo”, in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 341–358.

⁴² The Constitution of the Republic of Albania was approved by Law No. 8417, on 21 October 1998 and went through a referendum on 22 November 1998. The constitution was proclaimed by decree No. 2260 on 28 November 1998 by the president of the Republic of Albania.

⁴³ Law No. 7152 of 21 June 1995 on the Educational System. For extensive analysis of minority rights in Albania see Michaela Salamun, “Albania”, in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 211–251.

⁴⁴ The Opinion of the Council of Europe Advisory Committee on the FCNM (ACFC/OP/II(2008)003), December 1, 2008, at <<http://www.coe.int/t/dghl/monitorings/minorities/>>.

⁴⁵ *Ibid.*

⁴⁶ The Constitution of Romania, Official Gazette Part I, No. 233 of 21 November 1991, amended and consolidated by Law No. 429/2003.

⁴⁷ See the Election Law No. 373/2004.

⁴⁸ *Ibid.* Article 62.

⁴⁹ Sergiu Constantin, “Romania”, in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 139–165.

supplementary law on the status of national minorities has been proposed almost a dozen times since 1993 by different minority groups, none have received sufficient support to be adopted.⁵⁰

Whereas the Bulgarian Constitution does not establish Bulgaria as a nation-state, it does prescribe Bulgarian as the only official language and forbids autonomous territorial formations (i.e., any form of territorial autonomy). It proclaims equality of all citizens and forbids “privileges or restrictions of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status, or property status.”⁵¹ The right of minorities to receive an education in minority languages is not explicitly recognized in the constitution, but in the educational legislation there is a provision that enables “pupils whose mother tongue is not Bulgarian to study their mother tongue in municipal schools.”⁵² In the absence of a minority-specific piece of legislation, minority ethnic communities (Armenians, Aromanians, Jews, Roma, Russians, Turks, and Vlachs) are in a position to rely on the provisions of a few normative arrangements that ban discrimination or assure the right to education in minority languages at the municipal level or on certain provisions of the Law on Religion.⁵³

A constitutional proclamation of nation-states across the region in certain cases led to the violent uprising of the so-called state-forming minorities (e.g., Serbs in Croatia, Albanians in Macedonia—ethnic groups numerically inferior but historically too important to be left aside in the constitutionally defining moment of the [new] country). The “fear of becoming a minority,” which was misused as an ethnic mobilization agent, was perpetuated in the years following the ethnic conflict’s termination and became a “fear of being a minority.”⁵⁴ In other words, minorities that ask to be recognized as ‘state-forming minorities’ in the Western Balkan countries are not only reluctant to be simply treated as (any other) minority, but require a broad integrational framework that allows for their political participation, along with the rights permitting a substantial cultural autonomy.

The consolidation of nation states that had been ongoing since the early 1990s in former communist federations resulted in differing outcomes. Some authors argue that it was precisely ethnic diversity in the countries emerging from the Yugoslav federation that was a trigger for the ethnic conflicts, claiming that a peaceful dissolution of the Czechoslovak federation can be explained by greater homogeneity of the two countries that came into being following the dissolution.⁵⁵ In other words, the ethnic mobilizers were striving for ethnic homogenization, which was perceived as a guarantor of long-term stability and peace. Indeed, as a result of the ethnic conflicts that were taking place across the region in the 1990s, the degree of diversity across the region has been significantly reduced.⁵⁶ The Balkan peninsula is today less ethnically diverse than it was 20 years ago, to a great extent, because of unsuccessful return processes that had followed the termination of the conflicts and the cementing of ethnic divides in the postconflict societies.⁵⁷ Insisting on the right to return, the international community has attempted to restore the pre-war ethnic picture and to rectify the ethnic cleansing effects. Nevertheless, in more than a decade after the violent conflicts have been

⁵⁰ D. Christopher Decker, “Recent Developments in Romania on the Draft Law on the Status of National Minorities: Déjà Vu All Over Again?,” 4 *European Yearbook of Minority Issues* (2004/05), 671–694.

⁵¹ The Constitution of the Republic of Bulgaria, State Gazette No. 56, 13 July 1991.

⁵² Article 8(2) of the Law on National Education, State Gazette No. 86, 18 October 1991.

⁵³ Law on Religion, State Gazette, No. 129, 29 January 2002.

⁵⁴ Compare Dejan Jović, “Fear of becoming minority as a motivator of conflict in the former Yugoslavia,” 5(1–2) *Balkanologie* (2001), 21–36.

⁵⁵ Jacques Rupnik, “Eastern Europe: The International Context,” 11 (2) *Journal of Democracy* (2000), 115–129, 118.

⁵⁶ Florian Bieber, “Less Diversity—More Integration: Interethnic Relations in the Contemporary Balkans,” 31–32 *Southeastern Europe* (2008), 23–38, 25.

⁵⁷ *Ibid.*, at 26–27.

brought to an end, the return of refugees and IDPs remains a political problem and in some cases even security concerns. The achievement of the return process so far can be assessed as limited, if not even disastrous, because nearly half a million people, mostly ethnic minorities, continue to live throughout the region as refugees and IDPs.⁵⁸

3. Minority Rights in Practice: Still Far from Fully Achieved Normative Framework

The EU pressure exerted through political conditionality that encompasses request for the respect for and protection of minorities has resulted in legislative guarantees of Southeastern European countries in line with international standards, with guaranteed equality, freedom to express minority national identity, freedom to use minority language and script, and cultural autonomy. Though the EU has insisted in stricter minority rights standards than those applied in the (old) Member States, the transformative power of the pre-accession period has resulted in a number of normative and institutional solutions for the accommodation of national minorities. For example, co-official status of minority languages has been assured in several countries at the national level (e.g., Albanian in Macedonian, Serbian in Kosovo), and the use of minority languages (particularly at the municipal level) is guaranteed. In addition, education in minority languages is often foreseen, and minorities can publish in their languages and often also broadcast television and radio programmes. Assurance of political representation makes minority groups more likely to accept integration into society and give up secessionists' claims. Legislative provisions in place in Croatia, Montenegro, and Kosovo assure political representation of minorities in the parliament and in the government, allowing for some kind of consociational arrangements to emerge. A trend that assures that minority positions are heard even at the lower levels of governance is assured in various minority-specific or consultative interethnic bodies assigned with a capacity to co-define minority-related (local and regional) policies.⁵⁹

The right to non-discrimination, strongly embedded in EU law, is also relevant to minority protection. Indeed, as a result of EU enlargement, Southeastern European states that had undergone the accession process put in place comprehensive antidiscrimination legislation pursuant to the requirements of the Race Equality Directive. In Bulgaria the directive entered into force in January 2004,⁶⁰ in Romania, back in 2000.⁶¹ Kosovo was the first among the Western Balkans countries to put forward its antidiscrimination legislation in 2004,⁶² whereas it was passed in Croatia in 2008,⁶³ in Serbia in 2009,⁶⁴ in Montenegro and Macedonia in 2010⁶⁵. Such legislation bans direct or indirect discrimination on the ground of ethnicity and prescribes that all public services should provide equal treatment (in the fields such as health, housing, social care, education, culture, etc.). In other countries, in the absence of a comprehensive antidiscrimination code, discrimination is incriminated by their criminal laws. Although it is not possible to speak about a common model of minority pro-

⁵⁸ *Ibid.*

⁵⁹ Such councils are to be established according to the minority laws of Croatia, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo. Nevertheless, in spite of the fact that the legislation of Bosnia and Herzegovina and Montenegro foresee a formation of consultative minority bodies, those have not yet been put into place. See Florian Bieber et al., *Inter-ethnic Bodies at Local Level* (Friedrich Ebert Stiftung, forthcoming 2009).

⁶⁰ Magdalena Kouneva, "Minority Governance in Bulgaria" in Konrad Adenauer Foundation/European Centre for Minority Issues, *Minorities in Democracy* (2004), 36–39.

⁶¹ Anti-discrimination Law (Ordinance No. 137, 2000).

⁶² Anti-discrimination Law No. 2004/3.

⁶³ Anti-discrimination Law, Official Gazette No. 85, 2008.

⁶⁴ Anti-discrimination Law, Official Gazette No. 22, 2009.

⁶⁵ Anti-discrimination Law, Official Gazette of Montenegro No. 46, 2010; Anti-discrimination Law, Official Gazette No. 50, 2010.

tection across the region,⁶⁶ this article asserts that certain resemblance in normative arrangements and their (non-)implementation can be recognized. Namely, minority legislation across the Western Balkans region is obviously made on the blueprint of the FCNM, and the majority of the countries have additionally adopted a special piece of legislation assuring a minority-rights regime alongside their constitutional guarantees: the Law on the Protection of Rights and Freedoms of National Minorities and the Charter of Human and Minority Rights and Civil Liberties was adopted in Federal Republic of Yugoslavia in 2002 and was later inherited by Serbia; the Croatian Constitutional Law on the Rights of Minorities was passed in late 2002; in Bosnia-Herzegovina, the Law on the Protection of Rights of Members of National Minorities was passed in 2003; Montenegro adopted the Law on Minority Rights and Freedoms in advance of its referendum on independence in 2006; and finally, the Law on Promotion and Protection of the Rights of Communities and Their Members in Kosovo and the Law on the Advancement and Protection of Members of Communities (which are smaller than 20% of the population of Macedonia) were both passed in 2008.

However, there are several factors that are hindering implementation of the existing minority-related legislation. Namely, a substantial gap exists between the (advanced and exemplary) normative framework for minority protection and the actual situation of minorities. In the previous enlargements of the EU, it has been documented that conditionality had changed government policies and state institutions, but it had less effect on the changes of bureaucratic implementation and public attitudes.⁶⁷ A similar conclusion might be applied for Southeastern European countries. The first reason for delayed or improper implementation of the legislation in those countries lies in the overly ambitious objectives set by it and the lack of related financial resources needed for its implementation.

Another hindering factor in the realization of minority rights relates to the “considerable reluctance of governments to implement the existing minority rights frameworks”, because minority-rights legislation was “part of local consultative process, but largely based on the international obligations of the countries.”⁶⁸ As a consequence of this, a true commitment to the implementation of the international minority standards was often missing, particularly at the local or regional level, at which problems that appear in the exercise of minority rights are particularly noticeable. The absence of political will at the local level and the manifestation of nationalistic or chauvinistic behaviour by (local) policy makers, accompanied by financial difficulties and the problems these countries are facing, all have a direct impact on the implementation of minority rights, particularly those pertaining to the realization of full and effective equality in the field of employment, schooling, housing, ensuring a basic infrastructure, etc.⁶⁹ In conclusion, the inadequate implementation of existing legislation determines the actual level of minority protection in Southeastern European countries.

The lack of reliable statistical data on the actual size of minority groups hampers the development of policies in the area their protection and inclusion. It also hinders access to basic social and economic rights, both the Advisory Committee and the European Commission (EC or the Commission) have been reiterating repeatedly a need to collect reliable data on the size and situation

⁶⁶ Compare Marta Zorko, “Geopolitičke odrednice i zaštita prava etničkih manjina u Jugoistočnoj Europi”, 8 (3–4) *Međunarodne studije - časopis za međunarodne odnose, vanjsku politiku i diplomaciju* (2008), 98–115, at 106, and Ružica Jakešević, “Modeli i mehanizmi zaštite prava etničkih manjina u Jugoistočnoj Europi”, 8 (3–4) *Međunarodne studije - časopis za međunarodne odnose, vanjsku politiku i diplomaciju* (2008), 116–139, at 118.

⁶⁷ Guido Schweltnus, “Looking Back at Ten Years of EU Minority Conditionality vis-à-vis Central and Eastern European Candidate States”, 4 *European Yearbook of Minority Issues* (2004/05), 321–340, at 324.

⁶⁸ Florian Bieber (2008), *op.cit.*, at 30.

⁶⁹ Compare, e.g., the Second State Report on the implementation of the FCNM of Bosnia and Herzegovina, the Opinion of the Advisory Committee on the First State Report of Croatia, Opinion of the Advisory Committee on the First State Report of Montenegro, etc.

of minorities. Inadequate data and information regarding the actual number of minority members often serves as an excuse for the authorities not to implement minority rights in practice. Sometimes this occurs because of the lack of a recent census of population, such as in Bosnia and Herzegovina and Kosovo, sometimes because of the existing legislation on the protection of personal data that forbids an employer to ask for the ethnic background of an employee.

Another hindering element to the realization of minority rights might be detected in the inadequacy of international monitoring.⁷⁰ The reporting system set up by the FCNM lacks the enforcement tool, causing considerable delays in the submission of the state reports on the implementation of the convention in those countries. This inefficiency is rectified by the possibility given to nongovernmental organizations to prepare and submit unofficial so-called shadow reports on the implementation of minority rights in countries. Minority rights are given quite limited importance in the EU progress reports of the Western Balkans (potential) candidates, but only recently the EU emphasized that conflict resolution and reconciliation should be priorities for the region.⁷¹ Although assessing the accession process, the EC progress reports are perpetuating the emphasis on bigger minorities. Namely, the EC predominantly scrutinizes political representation of so-called state-forming minorities, overlooking the inclusion of other smaller ethnic minorities in access to judiciary, public administration, or decision-making processes at all levels of governance. Smaller minorities, i.e., minorities *stricto sensu*, are looked at by the EU exclusively from a socioeconomic perspective rather than one of political inclusion.⁷² Out of the minorities *stricto sensu*, the EC progress reports are continuously dealing for the most part with so-called socially excluded groups (Roma, Ashkali, and Egyptians), warning that those ethnic communities continue to face discrimination, poor living conditions, and limited access to education, social protection, health care, housing, and employment in all of the countries concerned.⁷³ Such a practice is similar to Central and Eastern European enlargement conditionality, in which the Roma minority has been given the predominant amount of attention.⁷⁴

Among the key findings of the progress reports on the (potential) candidate countries in the last couple of years are requests by the Commission to pay further attention to minority rights, especially to refugee return and to the enhancement of the implementation of laws and policies. Further a country advances to the EU integration, the minority rights scrutinizing becomes more rigorous and detailed. This was particularly true in the Croatian case, where the Commission has been meticulously developing criteria to be fulfilled. Croatia has been repeatedly warned that it should improve the promotion of minority rights, including refugee return, if it wishes to complete the work on the benchmarks set out in the negotiating chapter that deals with judiciary and fundamental rights.⁷⁵

The Commission indeed acknowledged that progress made with regard to minorities in the Croatian EU accession process, emphasizing importance of a continuity of commitment to the rights of minorities. However, the Commission shed a light on particular problems minorities continue to

⁷⁰ Florian Bieber (2008), 31.

⁷¹ See e.g. Croatia 2006 Progress Report, COM(2006) 649 final, at 12; EC, Croatia 2007 Progress Report, COM(2007) 663 final, at 15, EC, Croatia 2008 Progress Report, COM(2008) 674, at 14.

⁷² See Snježana Bokulić and Galina Kostadinova, "Pushing for Change? South East Europe's Minorities in the EU Progress Reports" (2008), at <<http://www.minorityrights.org>>.

⁷³ More on the EC's treatment of the Roma in Central and Eastern European countries' accession processes in Peter Vermeersch and Melanie H. Ram, "The Roma" in Bernd Rechel (ed.), *Minority Rights in Central and Eastern Europe* (Routledge, London and New York, 2008), 61–74.

⁷⁴ Guido Schweltnus, *op.cit.*, 327–329.

⁷⁵ European Commission, "Enlargement Strategy and Main Challenges 2008-2009" (COM(2008) 674 final), 5 November 2008, at 11. See also European Council, decision of 12 February 2008 on the principles, priorities, and conditions contained in the Accession Partnership with Croatia and repealing Decision 2006/145/EC, Official Journal L 042 , 16 February 2008, 0051–0062.

face i.e. difficulties in the area of employment for all minorities, particularly for the Serbs and difficult living conditions among the Roma. With respect to equitable representation of minorities in state institutions, the Commission requested implementation of legal provisions and programs in place “with more determination”, as well as assurance of adequate monitoring of measures undertaken to fulfill this criterion. Croatia was additionally asked in 2010 to “encourage a spirit of tolerance towards the Serb minority”⁷⁶ and protect potential victims of discrimination on the round of the minority origin. Finally, the Commission has continuously insisted on a sustainable refugee return, as a means of rectifying the exodus of the Serb minority from mid-1990s. In the absence of such a conditionality policy, the return process would not be as substantial as it has been in the last decade.⁷⁷

Macedonian legislative developments in the field of (co-official) languages and on the advancement and protection of the rights of the non-majority ethnic communities were praised by the Commission. The Commission in numerous occasions acknowledged further progress in achieving equitable representation of the non-majority ethnic communities in Macedonian public administration.⁷⁸ This candidate country was nevertheless warned that “the authorities need to make further efforts to promote integration of the ethnic communities of the country, particularly in education”⁷⁹ by creating ethnically mixed classes and that it should more efficiently address the concerns of the smaller ethnic minorities, i.e., minorities *stricto sensu*, particularly the Roma minority. Roma require special concern, cause the Commission in 2009 warned that action plans foreseen in the framework of the Decade of Roma Inclusion are implemented slowly and that the administrative capacity of state institutions in charge of the Roma require strengthening. Similarly to other Western Balkans countries, the Roma in Macedonia continue to face very difficult living conditions and discrimination.⁸⁰

Bosnia and Herzegovina has been warned it should take further steps to improve the implementation of the Law on the Protection of Rights of Members of National Minorities, and to change the state level Constitution in order to allow access of minorities to all political functions. For the time being only members of the constituent peoples can be elected to a tripartite presidency, the House of Peoples, and in the Upper House of Parliament.⁸¹ Separation of children within schools along ethnic lines was an matter of Commission’s concern in 2009. Despite an increase of financial resources for the implementation of the Roma strategy, the Commission considers this minority continues to face very difficult living conditions and discrimination.⁸²

Montenegrin progress on strengthening the framework for minority protection (e. establishment of minority councils) has been praised in a couple of latest progress reports, but it was also warned that “most implementing measures, including distribution of funds, have still to be put in

⁷⁶ Commission of the European Communities, “Enlargement Strategy and Main Challenges 2010-2011, (COM(2010) 660), 9 November 2010, 31-32.

⁷⁷ Commission of the European Communities, “Enlargement Strategy and Main Challenges 2009-2010”, (COM(2009) 533), 14 October 2009, 37.

⁷⁸ Commission of the European Communities, “ (2010), 44.

⁷⁹ European Commission (2008), at 38. See also European Council, Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC, Official Journal L 080, 19 March 2008, 0032–0045.

⁸⁰ Commission of the European Communities (2010), 44.

⁸¹ European Commission (2008), 25–26. See also Nedo Miličević, “Politika participacije nacionalnih manjina kao faktor sigurnosti u procesu globalizacije (s posebnim osvrtom na stanje u Bosni i Hercegovini)” in Siniša Tatalović (ed.), *Etničke manjine i sigurnost u procesu globalizacije* (Centar za sigurnosne studije/Politička kultura, Zagreb, 2007), 142–161. Compare also Joseph Marko, “Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina”, 4 *European Diversity and Autonomy Papers* (2005), at <<http://www.eurac.edu/edap>>.

⁸² Commission of the European Communities (2009), 31.

place.⁸³ The Roma strategy that was passed in 2008 requires implementation, although the Commission acknowledged “steps that have been taken to improve the situation of the Roma, Ashkali and Egyptian communities”⁸⁴ that nevertheless still face very difficult living conditions and discrimination.⁸⁵ The Commission has warned that the framework for minority protection is not fully harmonized, because the Law on Minority Rights and Freedoms has not yet been brought into line with the Constitution in part dealing with minority representation.⁸⁶ Legal provisions addressing status of refugees from Bosnia and Herzegovina and Croatia need to be implemented. Montenegro is also requested to properly solve the status of displaced persons from Kosovo who still often lack certain economic and social rights.⁸⁷

Although the Commission assessed that minority rights in Serbia are generally respected, it noted back in 2009 that the legislation regulating minority councils—i.e., a form of minority self-governance—was not been adopted.⁸⁸ In 2009, the Commission found that the legal framework providing for minority rights to be in place and that the Law on National Minority Councils has been adopted. In late 2010 the Commission reported about the first elections for the National Minority Councils held but warned they are yet to become operational.⁸⁹ Besides, in 2009 the new antidiscrimination legislation was praised as a positive indicator of minority rights promotion. Since Serbia is facing difficulties in managing needs of diversified regions, the Commission underlined several hindering issues in 2009 (e.g. requirement to adopt a new Statute for Vojvodina, where a number of ethnic communities traditionally coexists; need to restructure the Government Coordination Body for Southern Serbia, where there are several municipalities with the Albanian minority; and to contend with outbreaks of violence in the region of Sandžak, where the Muslim/Bosniak community dwells). However, in 2010 the inter-ethnic situation in Vojvodina has been assessed as stable since the Statute and of the Law on Determination of Competencies were adopted, providing for an extensive autonomy of the province in the areas of local finances.⁹⁰ Numerous refugees and internally displaced persons in Serbia are faced with many obstacles in exercising their social rights, and Serbia has been continuously requested to effectively cope with this shortcoming. In 2010 the Commission advocated for further substantial efforts in addressing the issue of the status of refugees and internally displaced persons. Serbia has been also requested to assure proper implementation of the national strategy for the improvement of the status of the Roma, since this minority continues to endure very difficult living conditions and discrimination.⁹¹

The Commission acknowledged that the Albanian legal framework dealing with human rights and the protection of minorities is broadly in place, but that further efforts are needed to improve the enforcement of existing legislation.⁹² In 2010, the Commission again warned the legal framework on minority protection needs to be further developed and clarified to enable all minorities to fully enjoy their cultural rights. It acknowledged that some steps have been taken to improve

⁸³ European Commission (2008), 44.

⁸⁴ Commission of the European Communities, (2009), 50.

⁸⁵ *Ibid.*

⁸⁶ Commission of the European Communities (2010), 50.

⁸⁷ *Ibid.*

⁸⁸ European Commission (2008), 50.

⁸⁹ Commission of the European Communities (2010), 50.

⁹⁰ *Ibid.*, 50.

⁹¹ Commission of the European Communities (2009), 57.

⁹² *Ibid.*, 24.

the situation of the Roma, but assessed that the implementation of the Roma Strategy was slow since the Roma minority continues to face very difficult living conditions and discrimination.⁹³

The 2009 Enlargement Strategy has also noted progress that has been made in the area of minority and cultural rights legislation in Kosovo, but nevertheless emphasized that “further efforts by the government are required for the protection and integration of all minorities.”⁹⁴ In 2010, the Commission similarly considered that the legislation dealing with minority rights and the protection of minorities “provides a highly protective environment for minority and cultural rights” but “these are not adequately guaranteed in practice.”⁹⁵ The Commission requested “further efforts” of the Kosovo institutions to ensure minority rights, “including determined steps to integrate all of Kosovo’s communities.”⁹⁶ The Commission clearly warned it requires cooperation of the Kosovo government, the Kosovo Serb community and the Serbian government in making the Kosovo Serbs to embrace and recognize common institutions. Finally, the Commission also underlined necessity to achieve greater progress with respect to reconciliation between communities and to return of refugees and internally displaced persons in Kosovo.⁹⁷

Similar to the Western Balkans (potential) candidates, two new members states, Bulgaria and Romania, have been similarly scrutinized vis-à-vis minority protection in advance of their accession.⁹⁸ In the case of these two countries, the Commission monitored the realization of the minority rights predominantly of larger, numerically significant ethnic communities (such as Turks in Bulgaria and Hungarians in Romania, as well as the Roma in both of those countries). It has been documented already in the fifth enlargement wave that EU conditionality on minority protection had not significantly improved political strategies or effective implementation of minority rights-related laws in the new member states.⁹⁹ The same might be concluded for the (non-)advancement of minority rights in the case of Bulgaria and Romania. However, it is more likely that second generation conditionality in respect to the protection of minorities in the remaining Southeastern European countries—i.e., the Western Balkans—might prove to be more effective. Primarily because the Commission has been developing and improving monitoring mechanisms in the previous two enlargement waves, and the “European engagement on behalf of minorities in the Western Balkans can be seen as a further evolutionary step which makes the Union’s conditionality approach in the area of minority protection more outspoken and visible.”¹⁰⁰

⁹³ *Ibid.*, 25.

⁹⁴ Commission of the European Communities, (2009), at 57.

⁹⁵ *Ibid.*, 64-65.

⁹⁶ *Ibid.* See also Emma Lantschner, “Protection of Minority Communities in Kosovo: Legally Ahead of European Standards; Practically Still a Long Way to Go”, 33 *Review of Central and Eastern European Law* (2008), 295–341.

⁹⁷ *Ibid.*

⁹⁸ Bozhana Stoeva, “Bulgaria” in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, at 119–123.

⁹⁹ James Hughes, Gwendolyn Sasse, and Claire Gordon, “EU Enlargement and Power Asymmetries: Conditionality and the Commission’s Role in Regionalisation in Central and Eastern Europe”, 49 *Working Paper* (2003) at <<http://www.one-europe.ac.uk/pdf/w49hughe-sassgord.pdf>>. Compare also James Hughes and Gwendolyn Sasse, “Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs”, 1 *Journal on Ethnopolitics and Minority Issues in Europe* (2003), at <http://www.ecmi.de/jemie/download/Focus1-2003_Hughes_Sasse.pdf>, and Guido Schweltnus, “Looking Back at Ten Years of EU Minority Conditionality vis-à-vis Central and Eastern European Candidate States”, 4 *European Yearbook of Minority Issues* (2004/05), 321–340.

¹⁰⁰ Gabriel von Toggenburg, “The Protection of Minorities at the EU-level: a Tightrope Walk Between (Ethnic) Diversity and (Territorial) Subsidiarity” in Emma Lantschner, Joseph Marko, and Antonija Petričušić (eds.), *op.cit.*, 83–115, at 89.

4. Conclusion

The above analysis demonstrates that constitutional guarantees on the principle of equality of all citizens in constitutions across the Southeastern European region are often accompanied with a ban on discrimination on the grounds of ethnicity or belonging to a national minority. The position of minorities is also enhanced by a constitutional guarantee on certain minority-related rights along additional normative framework that assures minority rights. In several countries (Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, and Serbia), in place supplementary legislation elaborates on a set of minority rights, containing a detailed list of the minority rights that should allow for a realization of cultural autonomy, political participation, and representation in the administrative and judiciary .

This article attempted to underline that national minorities claim different rights, depending on a size of their group. Numerically significant minority groups have been pacified in a majority of the countries concerned only after they were granted a status of a co-titular nation and offered a chance to actively participate in the political decision-making processes at the national level. Smaller minority groups, on the other hand, being numerically insignificant and not forming a threat to a stability of the country, are in a position of enjoying the rights pertaining to cultural autonomy: the right to use minority language in education and to foster cultural distinctiveness, to maintain cross-border contacts with a kin-nation, etc. States analyzed here indeed are often more prone to assure the (at least partial) realization of minority rights of the minorities *stricto sensu*, because this is less costly and serves as a good record track in the realization of the international minority-rights standards. The exception is, as also demonstrated above, inadequate and still discriminatory treatment of historically deprived Romas, Ashkalis, and Egyptians, who still continue to be socially excluded across Southeastern Europe.

As a result of nation-building processes in the early 1990s that were followed by ethnic conflicts, ethnic diversity across the region has decreased. It has decreased additionally as a result of an unsuccessful refugee return process. Existing minority legislation should therefore not only allow for the preservation of minority identities and the assurance of proportional political participation in decision-making processes but also contribute to the rectification of (ethnic) homogenization. The domestic impact of Europe on the minority rights protection regimes remains limited throughout Southeast Europe. Part of the reason for a weak transformative power of Europe can be traced in Tanja A. Börzel words. She claims that in the countries of the region “secessionist movements, unsettled borders, ethnic tensions, deficient state capacity and/or strong clientelistic networks have severely compromised the transformative power of the EU”.¹⁰¹ The above analysis reveals that advanced normative frameworks on minority protection in the Western Balkans countries can only be effectively used if accompanied with thorough implementation and support of political actors at all levels of governance, which still is not a case in majority of the countries analyzed here.

¹⁰¹ Tanja A. Börzel, “When Europeanization Hits Limited Statehood: The Western Balkans as a Test Case for the Transformative Power of Europe”, in Arolda Elbasani (ed.), *EU Enlargement and Europeanization in the Western Balkans* (Routledge, London, 2013), 173–185, at 174.

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DIFFERENT MODELS OF CONFLICT MANAGEMENT. COMPARATIVE OVERVIEW OF EXPERIENCES IN CIVIL LAW AND COMMON LAW COUNTRIES

Besnik ÇEREKJA*

Abstract

1. *Conflict management models in European countries.*-1.1 French experience - 1.2 German experience. -1.3 Austrian experience - 1.4 Belgian experiences – Italian experience. 2. *Conflict management models in Anglo-Saxon countries* - 2.1 Introduction - 2.2 Origin of ADR instruments in the USA - 2.3 Canadian experience -2.4 Northern American experience of the state of Minnesota - 2.5 Northern American experience of the state of Vermont. 3. *A brief analysis on use and effects of "reports about victimization" in legal orders of common law countries* 4. *Conclusions.* 5. *Bibliography.*

Mediation programs between victims and perpetrators for a broad category of criminal offences were prevalent during the last thirty-forty years in Northern Europe and in Northern America.

Among the so-called mediation programs (VOMPS) and reconciliation programs (VORPS), Umbreit and Warner Roberts¹ introduce an extensive body of criticism, especially in terms of their application in England. For that purpose, the authors define mediation between the victim and perpetrator as a process of conflict resolution (referring in particular to the conflict emerged from the criminal offence) which takes place in cooperation with one or more agencies of juvenile criminal justice system.

From a legal perspective, according to this approach mediation may be foreseen either in pre-trial mediation or in post-trial mediation: in this framework, a crucial component is involvement in a system which does not envisage the obligatory criminal prosecution.

From a perspective linked with enforcement, the British model also foresees the so called indirect form of mediation in which the victim and perpetrator are separately contacted by the mediator until an agreement is reached. Such a methodology is also applicable in the USA by the term of "reconciliation"².

A latter stage provides for the monitoring of results achieved from mediation (Umbreit, Warner Roberts³).

In the USA, "restitution" represents an additional sentence and the so called indirect mediation is defined, as we have mentioned above (Umbreit, Warner Roberts), as "reconciliation" between the parties.

Further, far from merely financial compensation or indemnification, which is still the final purpose of mediation activity, we should dwell on reconciliation between the parties. In this case, mediation is not any longer only a means but the purpose of an activity including the establishment and operation of a context in which perpetrator and victim have met and confronted in relation to the deviant action⁴ which is a key element of their involvement.

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¹ *"Mediation of criminal conflict in England: an assessment of Service in Coventry and Leeds"*, Centro per la Giustizia Riparativa e la Mediazione, Minnesota, U.S.A., 1996. See La mediazione penale, op. cit., p.12.

² In the context of the study, we will specifically handle these techniques and modalities of their application.

³ See the previous note.

⁴ G. Scaldaccione, A. Baldry, M. Scali: "La mediazione penale", Milan, 1998, pp. 12 et seq.

1. Conflict management models according to experience of European countries

1.1 French experience⁵

France is a country where mediation is provided for in its legislation as a real alternative. In this country, according to the law amending criminal procedure code on 4 January 1993, article 6, the Prosecutor of the Republic is authorized to decide, after a preliminary agreement with the parties, to launch a mediation procedure for the purpose of "...repairing the damage caused to the victim, to put an end to the conflict caused due to violation and contribute to the perpetrator's rehabilitation". The positive outcome by mediation, which is closed with a written agreement, is a sufficient ground for the Prosecutor to dismiss the case, while the mediation activity for juveniles is delegated to external associations (with the justice system) dealing with juvenile matters⁶.

In general terms, following an overview of other countries, we observe that process suspension and mediation are also possible in Denmark, Norway and Sweden. In Sweden probation is equaled to a sanction, a ground for which the consent of the concerned party is not required⁷.

The initial mediation experience in France dates back to early 80's. This is an achievement due to initiative of magistrates of the District Prosecutor's Office of Valence di Grenoble, in cooperation with some of associations operating in aid of crime victims.

Until 1993, in absence of a legal act in the field of criminal-juvenile mediation and beyond, to legitimate the application of such mechanism, the Prosecutor's Office and associations formally signed conventions at a local level. Most of those conventions were foreseen in article 40 of the criminal procedure code-including the principle of potential criminal prosecution-legal remedy in which they may base the implementation of mediation procedure. The conventions set forth implementation modalities, evaluation criteria of results obtained from the meeting and conditions in respect of which mediation had to be completed.

After more than eight years of experimental efforts at a national level, mediation was institutionalized through an ad hoc discipline, which became effective through a series of normative acts at different efficiency rates. The first one was Ministerial Circular of 2 October 1992, to be followed by article 6 of Law No. 93, dated 4 January 1993, entitling the Prosecutor of the Republic to decide about the opportunity to refer to mediation instrument, and the Decree of 10 April 1996 was the final instrument in this respect.

The effectiveness of those normative acts made possible the formalization of two main mediation models, more specifically:

a) déléguée (delegated) mediation from the Prosecutor's Office to associations in aid of the victims = In France the Prosecutor's Office has entrusted most of mediations to the Associations in aid of Crime Victims or Judicial Control Associations. In these cases, the mediator should provide safeguards about the competence, independence and impartiality. Regarding its establishment, the Ministerial Circular of 1996 sets the guidelines, demonstrating the importance of a specific preparation either in legal or psychological field.

⁵ Data and information about French experience are cited from the study of BONAFE' - SCHMITT: *La médiation pénale en France et aux Etats - Unis* (CEDEX, Paris 1998) and the study of FAGET *La médiation. Essai de politique pénale* (Erès, Paris 1997).

⁶ Cited from "Ipotesi di attuazione di programmi di mediazione nell'ambito del D.P.R. 448/88", a document drafted under auspices of the Central Office of Juvenile Justice, Rome, 2000, p. 3.

⁷ F. Palomba: "Il sistema del nuovo processo penale minorile", see quotation in page 401.

The scope of application of this specific mediation model consists of only petty criminal offences, mainly focusing on family conflicts, neighborhood conflicts, acts of mutual violence– including insults, libels, beating, slight injuries etc.

b) retenué mediation realized in the framework of Maisons de Justice = Since '90s, retenué mediation models were developed in parallel to *déléguée* mediation model, i.e. models directly administered by the judicial authorities. The most representative example of this model is precisely from Maisons de Justice et de Droit but also from Antennes de Justice di Grenoble (further included in Maisons).

Maisons were established in 1990 upon the initiative of the Prosecutor of Republic, Marc Moinard. Thirteen structures called Maisons were created since 1991, which designed a new model of participation of the judicial institution in the social development policy of the outskirts of urban areas characterized by a high rate of criminality, degradation and social insecurity.

One of inspiring principles of Maisons which was never heard before, was certainly the one of “neighborhood justice”, apt to render the most accessible and effective justice to people, in order to affirm its presence in those quarters. On one hand, the ultimate goal is to provide an alternative response, unlike the traditional coercive one which in fact increases the rate of recidivists and on the other hand to introduce the clear absence of intervention of justice, this being capable to virtually cause recidivism such as the so called street crimes and lastly, to enhance the sense of injustice among victims.

A general belief is that justice should continue to be rendered in the institutions of justice but under less traditional criteria (a bit more differently from the traditional ones). Actually, a Ministerial Circular of 1996 manifested the will to judicially challenge any form of criminality, thus to prevent a waiver of criminal prosecution, which makes criminal justice unreliable and therefore obliges the Prosecutor’s Office to change their intervention models.

Criminal mediation, waiver of prosecution, damage compensation by juveniles, rather than reference to criminal law, constitute an ambitious penal policy, specifically, introduction of “flexible measures” with an extremely broad scope of content. In each case, those measures represent a unifying factor of social connection and are clearly incorporated in a unit oriented to citizens’ access to justice.

Maisons activity has firstly become part of new public policies and is defined as a “third option” along with the waiver of prosecution and a relevant option to fight in particular, petty delinquency, to highlight the repair function of damage and prevent recidivism. It is worth mentioning from the outset that Maisons project was not supported by some sectors of the Magistrates and by public opinion. Criticism was based on presumption that seeking a justice “very close” to the daily life might cause the loss of meaning of judicial processes, concurrently promoting their orientation to the “social” aspect. A large number of magistrates argued and deemed that Maisons projects were not a capable instrument to find an equally new approximate and remote balance of justice with the social world but a risky disruption of the “justice institution” unity.

1.2. German experience⁸

In Germany the first experimental projects of criminal juvenile mediation started in 1985. Since the end of '80s, about twenty projects were in place within the country, some of which being adult-oriented.

We should stress out that mediation projects adopted in the Federal Republic of Germany did not consider the private sector, thus privileging only the penal field. Those projects were basically implemented with cooperation of Juvenile Courts while either social assistants or police operatives helped with the selection of cases to be handled.

The year 1990 marked a more general application in Germany when, following the entry into force of the new legislation on juveniles, mediation was legally formalized either as an educational measure or an alternative adopted by the prosecutor.

The amending law on juveniles equaled mediation to an "educational" measure to the extent that paragraph 10 of the system of juvenile law, among obligations regulating the life of young people, provided that the juveniles "shall attempt to reach an agreement with the victim"⁹. Therefore, for the purpose of waiver of prosecution the evidentiary commitment of the guilty to reach an agreement with the victim or damage compensation, is crucial.

However, we should emphasize that the main feature of mediation process is not damage compensation but a mediation meeting, with active and voluntary participation of perpetrator and victim.

As already mentioned, the new German juvenile legislation entered into force by the end of '90s. Apart from the introduction of a new normative act called "ambulatory", that new legislation attributed to mediation a legal value either as educational or alternative measure. During preparatory studies, priority is given to positive results achieved from experimental programs taken place in the early '85s. They attach special importance to the victim's conditions and "provide a more appropriate and successful solution than traditional sanctions, to the conflict generated from the criminal offence between the victim and perpetrator". Therefore, the lawmaker attempted to prioritize the "repairing" aspect of criminal offences committed by young people from 14 to 21 years of age.

Such a normative development has been quite positive and effective, if we consider experiences gained from experimental projects which were too premature.

⁸ The author we have referred to in respect of mediation in German legislation is D. DOLLING *Tater-Opfer-Ausgleich in Deutschland*, (Forum Verlag Godesberg, Bonn 1998).

⁹ Paragraph 10 reads:

(1) They are obligations and bans regulating the juveniles' lives, thereby favoring their education. No obligations shall be foreseen, which cannot be claimed in view of the young people's lives. In particular, the judge may order the juvenile:

1. *to abide by domicile-related orders;*
2. *to reside in a household or house;*
3. *to accept a specific job position;*
4. *to carry out a specific work;*
5. *to be subject to remedies and supervision of a specific person (a special assistant);*
6. *to attend a social training course;*
7. *to attempt to reach an agreement with the victim (penal mediation);*
8. *to abandon meetings with specific persons and to not visit entertainment venues or bars;*
9. *to attend meetings where lectures on road traffic education are given.*

(2) After the consent of custodian or legal representative, the Court may oblige the juvenilia to be subject to therapeutic treatment with the assistance of experts or through disintoxicating medication. If the juvenile has turned sixteen years of age, his/her consent is also required."

The present German law and especially juvenile law broadly envisage the repair of damages and mediation. The prosecutor in juvenile justice may waive prosecution against juveniles as perpetrators, if educational measures¹⁰ are adopted in the meantime.

For that purpose, the reform of 1990 expressly equaled mediation to a re-educational measure. In this context, it is worth stressing that lawmaker (in the light of Austrian model)¹¹ also sought to evaluate the commitment of juvenile perpetrator in reaching an agreement with the victim or otherwise referred as a method of damage repair. Accordingly, the juveniles with whom the victims do not cooperate, is not disadvantaged. Practically, in most of damage compensation processes a decision of non-initiation proceeding is reached due to the low degree of guilt (based on clause § 45 of JGG, the juvenile law or clause § 153 of StPO, criminal procedure code). Based on the same elements required for the Prosecutor, the juvenile judge may waive prosecution of the juvenile, thus making his further attempts to reach an agreement with victim, be considered and taken into account.

A characteristic of criminal juvenile justice in Germany is the possible ordering of mediation for the guilty, provided for as a separate provision (see clauses §§ 15, 10 of JGG).

The provisions in question became effective since October 1990, to be widespread in the Federal Republic of Germany.

Introduction of penal mediation as a sanction is fairly criticized being contrary to the fundamental principle, according to which the parties attend mediation process upon their own will, exercising their free choice.

However, as a rule the order to reach an agreement with the injured party is issued only when the perpetrator¹² has shown readiness.

In Germany, when not developed within the justice system (*Jugendgerichtshilfe*) – mediation projects were always applied in cooperation with the Juvenile Prosecutor's Office or Juvenile Court. Therefore, most of cases are subject to a selection process by social assistants of *Jugendgerichtshilfe* or the Juvenile Prosecutor's Office. Additionally, in many cases the police authorities are involved in selection of cases to be handled, such as the Braunschweig project, starting from 1986¹³. Yet, the selection is firstly made at the level of Prosecutor's Office (for juveniles). Some projects such as those of Cologne and Reutlingen provide for mediation at judicial level, either prior to the request for trial or afterward, but in each case before the initiation of judicial review. In Cologne the mediation procedure is sometimes attempted in the course of judicial review.

The criteria required and established in the German practice are as follows:

- Clear confession of facts and circumstances, a prerequisite to ensure that mediation shall not prejudice the rights of defense of the suspects or to put it differently, basic traditional principles of a fair legal process¹⁴.
- The so called "irrelevance" clause. Mediation is taken into account only in cases when, by the end of trial, not guilty verdict may be rendered under the ground of "fact irrelevance" (a similar

¹⁰ § 45 II JGG (*Jugendgerichtsgesetz*: e law on juveniles).

¹¹ See clause § 7 of Austrian JGG on the comment of which we may refer to the text of B. Trummer-Kaufmann: "Esperienze di mediazione in ambito austriaco: suggerimenti, modelli, metodologie, strumenti", in *La mediazione nel sistema penale minorile*, see p. 149 et seq.

¹² F. Dünkel: "La mediazione in Germania", in *La mediazione nel sistema penale minorile*, see pages 120-121.

¹³ The police provides some questionnaires to be further sent to *Jugendgerichtshilfe* and the Juvenile Prosecutor's Office; in this way, mediation is not rendered any longer difficult due to a potential proceeding; even in Reutlingen the police is required to identify mediation cases (in agreement with the Juvenile Prosecutor's Office).

¹⁴ This is a shared feature of almost all normative realities.

aspect with the provision made in paragraph b) of article 388 of the Criminal Procedure Code of the Republic of Albania, envisaging the case of not guilty verdict by the Court as “the fact is not provided by law as criminal offence”).

- The victim is generally perceived as personally injured party. In the sense of meeting of persons with persons, as a confrontation of the juvenile with the victim, mediation excludes application in cases of criminal offences such as thefts in shopping malls, contraventions committed in breach of road traffic code provisions, without causing damages in people or things and so on. In special cases the owners of small shops or representatives of institutions (nurseries, kindergartens or other public institutions) may be involved in the mediation process.
- Free will of either the guilty or the victim. The condition of *sine qua non* is the consent of either the guilty or the victim, reached without exercising any kind of pressure. Apparently, free will appears suspicious if we view it from the perspective of perpetrator as the latter faces the option of either participating in mediation procedure or be subject to a criminal process. Therefore, it shall not be referred to as a free choice in the positive sense but in particular, as in Austrian law, with regard to the “conscious remorse” in criminal offences against property or wealth (see clause § 167 of StGB), due to absence of external coercions, elements other than the perpetrator’s will.

Inter alia, in the Federal Republic of Germany, the practice has shown that a further delimitation only due to specific violations has not much sense. In particular, a wrongful one seemed the attempt to limit mediation only to petty criminal offences or contraventions (other than crimes). Even crimes such as violent robbery up to sexual crimes may sometimes be resolved by mediation. However, reportedly similar cases represent as a maximum 5-10% of all mediation cases.

Even in cases of recidivists, mediation seems to be relevant. Hence, the twenty first Congress of Juvenile Judges (21^o Deutscher Jugendgerichtstag) held in Göttingen in September 1989, made clear that a practical trend had emerged to extend mediation not only to “petty” criminal offences but also to “serious” ones (for instance, personal injuries with serious consequences, theft with serious consequences, violent theft and in some isolated cases, even sexual crimes).

In Germany, mediation may be also applied in cases of recidivists to the rate of 25-30 % of recidivist juveniles participating in mediation procedures; in fact it transpires that mediation is repeatedly applied for the same juvenile¹⁵.

Finally, we may admit that in Germany damage repair policies were highly supported either by the “conservatives” who become the victims’ spokespersons or by proponents of “penal abolitionism” who see in mediation the favorite remedy sustaining the theory of “privatization of conflicts”.

1.3. Austrian experience

Restorative justice policies in the Austrian justice system were translated into a model of penal mediation with a broad scope of application, the so called extrajudicial mediation, oriented to either adults or juvenile perpetrators. Furthermore, it is not limited, as in the case of Germany, to facts linked only with the individual victim. Indeed, extrajudicial mediation foresees that “victims of crimes who may be eligible for mediation may be legal persons or legal entities considered as anonymous subjects and peripheral in their relations with juveniles”¹⁶. The initial mediation projects began in the mid ‘80s. Extrajudicial mediation started to apply in Austria since 1985 (ATA)¹⁷. Initially conceived as an experimental model, a project to be further applied in some Judicial Circuits such

¹⁵ F. Dünkel: “La mediazione in Germania”, in *La mediazione nel sistema penale minorile*, see pp. 127-128.

¹⁶ For Austrian experience see: B. TRUMMER – KAUFMANN, *Esperienze di mediazione in ambito austriaco. Suggestimenti, modelli, metodologie e strumenti*, in *La mediazione nel sistema penale minorile*, L. PICOTTI (Padova, CEDAM 1998), p. 158.

¹⁷ *Außergerichtlicher Tatausgleich*.

as Vienna, Salisburg and Lienz, it became part of law (or code) of juveniles (JGG) since 01.01.1989 in clauses §§ 7 and 8. Since then, it is regularly applied on a nationwide scale.

In view of development of extrajudicial mediation (ATA), cooperation between social and juvenile justice assistants has been fundamental. There was a common and universally-accepted belief that a deviant behavior had to be followed by a prudent reaction. As a result of that practice, after about one year of experiments (1984), the Prosecutor became the key interlocutor in those cases.

Penal extrajudicial mediation was the first measure adopted in Austria in criminal matters, focused on the victim's interests.

Penal mediation may be initiated either by the Judge or Prosecutor, save the offence of murder, where the juvenile law expressly provides that the Prosecutor cannot be the one to launch the initiative.

No formal confession is required for the initiation of a mediation procedure but it is sufficient that an investigated person be ready to assume liability for the offence committed and to attempt to properly fix possible consequences, in particular by compensating the damage caused (according to his/her own available remedies). Both the injured and investigated person cannot be forced to consent to mediation procedure and in each case, to reach a dismissal decision as provided by clause § 6 of JGG, it is sufficient for the investigated juvenile to demonstrate that he/she agrees to deliberate the case with the injured party and compensate the latter. Clearly, until a positive mediation outcome is reached, both parties shall be required to be ready to find a conflict resolution. The social assistant has the duty to offer guidelines and mediation.

More specifically, regarding the right of juveniles, case dismissal may be reached provided that:

1. Criminal offence is punishable only by penalty and/or up to five years of imprisonment;
2. Criminal offence is not related to actions which have caused the person's/victim's death, the event circumstances should be clear and degree of guilt be low;
3. The punishment shall not be necessary for the prevention of repeated possible criminal acts in the future by the guilty juvenile;
4. Furthermore, when the Prosecutor has not initiated the extrajudicial mediation procedure but has brought the case for trial, the Court may encourage, ex officio or upon the parties' request, an extrajudicial conflict resolution, still prior to judicial review.
5. Finally, there is an option of reducing the sentence rendered by virtue of the first instance decision, which becomes non-appealable by the prosecutor's office when the sentenced person pledges to compensate the caused damage as a consequence of the criminal offence.

The Austrian juvenile law (JGG) delegates the extrajudicial mediation procedure to persons and services that are active in social field. Practically, only collaborators and institutions participating in the Association of Probation Service and Social Work (Verein für Beëährungshilfe und Soziale Arbeit) are entrusted with such responsibility. When mediation produces a positive outcome, the Prosecutor, based on a report of Social Services, may waive prosecution against the juvenile. Undoubtedly, the criminal justice is the one to decide if mediation (ATA) has achieved the desired purpose or not. In practice, there are very rare cases of change of opinions and if any, it is always possible to have moments of reflection and debate over different perspectives.

As provided by clause § 8 of JGG, the Judge may be the one to initiate mediation procedure (ATA). In this connection, the necessary conditions are a moderate guilt degree and punishment shall not be necessary to prevent the defendant from committing other acts provided as crimes¹⁸.

Social assistants but also the psychologists and legal experts with special qualifications may act as mediators.

Development of mediation procedure:

The prosecutor's office/prosecutor examines the report filed and deems if the case may be resolved by employing the mediation procedure. In cases of criminal offences directly reported to the Court, the procedure may be instituted upon the initiative of the Judge. Frequent and regular contacts between the prosecutor and the mediator, and direct exchange between them shall ensure a continuous adaptation and update of selection criteria, in line with the legal and socio-political needs and new developments within the scope of extrajudicial mediation procedure (ATA).

After consideration within the group of mediators, the case is entrusted to one of them. For special cases (as for instance, crimes committed by criminal gangs, sexual crimes etc), two mediators shall be responsible.

Firstly, conversations are made with each of the parties separately.

Receiving an initial contact with the defendant via a written letter has proved effective.

During the first meeting with the defendant, it is established if there is really an interest to resolve the conflict by extrajudicial remedies or if the case should be brought to the court. In the same case, information is provided about the mediation (ATA) and eventual possibility to undertake the relevant procedure.

Mediation often resolves cases in which the real course of facts does not seem clear. In fact, before the public security authorities the suspects often deny or minimize their responsibilities regarding the incident/actions, subject to criminal offence.

In these cases mediation has proven to be effective in the same way as when the person under investigation had admitted guilt before the police authorities.

A possible explanation may be the fact that investigated person attempts to deny guilt, to attribute it to other persons and avoid criminal liability. Thus, the option for an extrajudicial case resolution significantly enhances his/her readiness to assume guilt/responsibility.

If there are ambiguities from legal point of view (regarding the criminal proceeding or the amount of damages, subject to compensation etc), it is advisable to refer to a lawyer for information. Experience has shown that persons who have referred to a lawyer for legal advice, during mediation appointments prove to be more competent and active, more satisfied and ready to reach an agreement. In each case, legal advice is provided out of the mediation structure. The injured party is also extended a written invitation to participate and be informed of the content of mediation.

During the mediation process another confrontation is made between the guilty and offence he/she has committed but in this case, in presence of the injured party/victim. An attempt is made to reach a shared understanding of facts, subject to criminal offence, and of motives that have led to its commission.

Further, explanations are furnished in handling similar situations or approaches of peaceful settlement of conflicts.

The process is closed by a written agreement between the concerned parties.

¹⁸ In addition to the requirements provided for in clause § 7 of the Austrian JGG.

Civil agreements with the parties are drafted in view of damage compensation. Further, the mediator must ensure a perfect agreement from the legal aspect.

Further, proper verification is made if the agreement is respected or not. The pecuniary obligations are often discharged via an ad hoc opened bank account and made available for that purpose by the mediation unit, which hereby checks the compliance of agreement¹⁹.

In the end of actions in presence of which the conflict is deemed resolved, a final report is produced to be sent to the Prosecutor or the Court, which provides a broad description of the position of parties to mediation procedure, the agreement reached and its enforcement modalities. If necessary, other information is included as for instance, notwithstanding the commitment of investigated person, the reason why no agreement or compensation amount could be reached. This additional information is provided, upon request, when judicial process before the court should continue.

Finally, we stress the fact that when a case foresees all aspects for an extrajudicial mediation settlement and the Prosecutor or Judge refuse to consider such option, the parties shall be entitled to file an appeal against this decision. Such a provision to supply the parties with an instrument capable to recognize them “the right” to mediation is not applicable in any other European countries.

1.4. Belgian experience

Since October 1990 seven districts of Ghent Appellate Court initiated pilot penal mediation projects, in order to introduce in the system a more rapid response and information to criminality, to offer greater attention to the victims and strengthen the community trust in justice system.

Upon the proposal of federal government, on 10 February 1994 the Parliament approved a law governing mediation procedures, which may be applicable to adults for whom the Prosecutor may claim a sentence term to not exceed two years of imprisonment. Therefore, the Belgian legislation established mediation within the scope of criminal/penal system.

The law conditions the waiver of prosecution with a series of requirements, among which the damage repair or compensation, community labor service to not exceed 120 hours or adoption of rehabilitation measures (regarding medical treatment) against the perpetrator.

A peculiarity of this system is a mediation magistrate judge appointed by the Office of Prosecutor of the Republic, responsible for identification, supervision and assessment of results achieved in the concrete case. The role of mediation assistant is fulfilled by a social assistant who follows all mediation stages one at a time. Coordination and support of the latter as well as the development of repair policies are provided by two mediation advisors, who first of all should have proper competences and criminological knowledge. In each case it is the mediation magistrate judge who, by the end of a “formal mediation session” closes the mediation “hearing” with the attendance of perpetrator, eventually assisted by a defense counsel and the victim.

It must be reiterated that in Belgium, the direct meeting between the guilty and the victim is very rarely verified, preferring instead the restitution of object or damage compensation. Only when mediation fails, the mediation magistrate judge may oblige the guilty to appear before the Court, thus initiating criminal prosecution.

Due to a too early monitoring process, it is reported that 93% of mediation cases are closed with the waiver of prosecution. Further, the 1994 law provided for the recourse to mediation procedure only in cases of low social risk offences, a project initiated in Lovanio since 1993, oriented

¹⁹ The comparison is drawn from “Esperienze di mediazione in ambito austriaco: suggerimenti, modelli, metodologie, strumenti”, Bernhard Trummer and G. Kaufmann in *La mediazione nel sistema penale minorile*, L. Picotti, see pages 149-159.

to a broader policy and leaving open the option to be also applicable in cases of medium and high social risk perpetrators. In fact, this alternative allows the assessment to what extent such a practice concretely affects the decision making process and the repair model may influence the criminal/penal system.

The available statistics show that for these types of crimes, in at least 50% of cases, mediation is closed with a written agreement, also including a progress report and status of meeting conducted in the course of mediation procedure.

1.5. Italian experience

First of all, we should stress the fact that unlike other European countries, only in recent years extrajudicial mediation in Italy has become subject to concrete reflection, study and application exclusively for juveniles and some territorial areas²⁰.

In fact, since 1995 in Turin, Bari, Milan, Trento, Venice, Rome, Catanzaro, Salerno, Cagliari and so on, upon the initiative of Courts, initial experiences of penal mediation started to be implemented for the respective juveniles, when groups of local promoters responded to the invitation of the Central Office for Juvenile Justice to experiment the introduction of this mechanism. The first serious difficulty encountered by those groups is linked with the fact that in Italy, the principle of "enforceability of criminal prosecution" under article 112 of the Italian Constitution, is in force. Consequently, the penal mediation procedure was applied only in those cases provided for in articles 9, 27, 28 of the Decree of President of the Italian Republic, with No. 448/1988 ("Provisions of criminal process against juvenile defendants") and article 564 of the Italian Criminal Procedure Code, as amended and re-formulated in article 555 of the Italian Criminal Procedure Code.

Article 9 allows the prosecutor and/or court to receive necessary, in order to assess the importance/risk of facts/acts and personality of the investigated person /defendant by the experts' opinion²¹.

Based on these elements, the prosecuting authority asks from the Mediation Office an opinion about the potential initiation of mediation procedure, starting with a meeting between the perpetrator and victim, an opinion to be furnished after the assessment of concrete case on the basis of a set of pre-defined criteria. The judicial authority encourages mediation in the stage when it deems most appropriate, with all care and discretion required on a case by case basis. In these circumstances, the procedure provided for in article 9 meets a requirement of the operators of mediation field, the one of prompt response to an adverse situation generated from the conflict. Furthermore, "this preliminary activity produces a dual final result, the one of the most appropriate evaluation of the personality of juvenile perpetrator, who is hereby faced with actions (subject to trial) he/she has carried out and enforcement of judicial decisions"²² under less bureaucratic modalities.

²⁰ Regarding the adults, a very interesting option of recourse to mediation is provided by article 29 of the Legislative Decree No. 274 of the year 2000 ("Disposizioni sulla competenza penale del giudice di pace") citing as below: "When the criminal offence is handled by a complaint of the injured party, the judge shall encourage reconciliation between the parties. In this case, if he/she deems necessary to favor mediation, the judge shall adjourn the hearing to a period not to exceed two months and if necessary, may claim the assistance of public or private authorities present in the territory, which carry out mediation procedures".

²¹ Article 9 cites: "The prosecutor and judge may receive information about the personal, family, social and environmental situation of the juvenile, in order to check the responsibility and level of responsibility, to assess the social impact of facts, subject to charge, and take penal and potential civil measures deemed appropriate to be applied in the concrete case. For the same purposes, the prosecutor and judge may receive information from persons who have had contacts with the juvenile and listen to the opinion of experts, without adopting any formalities in this regard".

²² Document of Central Office for Juvenile Justice, dated 1/4/1996.

Based on the rationale of article 27 of D.P.R. No. 448/1988²³, we should recall that “low risk of committed acts” and “non-recidivist” criminal behavior by the juvenile, may acquire in some contexts a profound social and individual significance. Those contexts sometimes assume the presence of a deeper conflict than the one expressed by the deviant behavior, a conflict which may be aggravated, if “not handled”. Therefore, it is crucial that experts take into account and assess the effects that repetitions of deviant behavior, though articulated by apparently riskless acts, might have from the perspective of relation between the guilty and victim. Accordingly, mediation may constitute a different response and represent a useful instrument for the dominance of provision, allowing the management of residual situations still not handled by social services and affording another opportunity to the juvenile to face his/her disruptive behavior²⁴. When it is about mediation, the typical normative remedies we may refer within the scope of D.P.R. 448/1988, are available in article 28, providing for that the Judge for Pre-trial Investigation and the trial judge may “order fixing of crime consequences and encourage mediation of the juvenile with the victim/person injured by the criminal offence”²⁵.

Article 28 introduces by a full title the “repair example” in the criminal process for juveniles. It is not excluded that meeting between the parties may be realized during the probation service, however it is crucial to observe modalities, remedies, time required for each of them, thus preventing the application of different working methodologies.

After the reform on the Sole Judge, article 564 of the Criminal Procedure Code²⁶, as repealed, already replaced with article 555 of the Criminal Procedure Code, provides another mediation option, this time provided for the juvenile criminal justice. In particular, article 564 of the Criminal Procedure Code granted the Prosecutor the right to be delegated to the Judicial Police, to attempt mediation between the accuser and the accused. The interest under article 564 derived merely from the fact that such provision would “[...] cover a wide range of criminal offences which were mainly encouraged by juveniles such as personal slight injuries and damages”²⁷. It was about a kind of extension to the adults’ criminal law, exclusively of those provisions characterized by criminal actions handled by complaint, of the possibility to employ reconciliatory procedures for conflict resolution. Article 555 of the Criminal Procedure Code²⁸ makes the mediation attempt compulsory, changing the institutional stakeholder: without the Prosecutor as a party to the process but the Judge, who, in

²³ The first paragraph of article 27 cites: “During pre-trial investigation, if low risk of actions committed and the fact that person is not a recidivist is established, the Prosecutor shall ask the Judge to decide about the “non-initiation of case due to fact irrelevance”, when the continuity of criminal process would have an adverse impact on the juvenile’s education”.

²⁴ Supposedly, there is a form of mediation after the decision on the case non-initiation due to fact irrelevance. In fact, if they have not referred to any form of mediation before a decision is rendered and conflictual elements are still present, the court may invite the parties to refer to the Mediation Office and further refer/report about the meeting outcomes.

²⁵ Paragraphs 1 and 2 of article 28 cite: “After listening to the parties, the court may rule the process suspension by interlocutory ruling, when it deems necessary to assess the juvenile’s personality at the end of evidence provided for in the second paragraph. The process is suspended for a period not to exceed three years, when it is proceeded for criminal offences punishable by life imprisonment or up to 12 years of imprisonment, in other cases for a period not to exceed one year. During that period the statute of limitation deadlines are suspended. By the same decision, the Court entrusts the juvenile to the juvenile services administered by the justice system, to carry out, also in cooperation with local services, potential rehabilitation and supporting activities. By the same decision the court may provide guidelines in respect of the potential compensation of damage caused by the offence and promote mediation between the parties, victim/injured party-juvenile perpetrator”.

²⁶ Article 564 of the Criminal Procedure Code cited: “In case of criminal offences handled by complaint, even before conducting an investigative activity, the Prosecutor may summon the accuser and the accused to appear before him/her, in order to establish if the accuser is ready to drop the charge and the accused if he/she is ready to consent to the waiver of criminal report, informing him/her of the right to be assisted by a defense counsel”.

²⁷ Document of Central Office for Juvenile Justice dated 1/4/1996.

²⁸ The third paragraph of article 555 of the Italian Criminal Procedure Code cites: “For criminal offences handled by complaint, the court shall establish if the accuser is ready to drop the charge and if the accused is ready to consent to the waiver of criminal report”.

capacity of mediator, acts as a third party such as to potentially guarantee impartiality for the parties involved in the conflict.

2. Models of conflict resolution in Anglo-Saxon countries

2.1. Introduction

To date, we have seen how restorative culture, although in different ways, is part of the legal tradition of European countries. Actually, this experience is extended to the five continents, making sure to distinguish those territories featured by a higher sensitivity to restorative culture from those which, vice versa, show some care for application of extrajudicial instruments of conflict resolution.

Regarding the topic of criminality, the Xth US Congress outlined a key framework about the level of attention to requirements for restorative justice. An initial indication was that while Europe, Oceania and common law zone is characterized by a profound knowledge of restorative instruments, other legal fields pose a non-homogenous interest.

- In the African continent, orientation to mediation represents a “return to origin”, namely the use of typical ways of simple prevalent societies to prevent revenge. In those countries we face a clear trend of referral to restorative justice and in general to the instruments of alternative dispute resolution, as a counter-trend to progressive centralization of criminal justice.
- Asiatic zones and regions of Pacific show refrained enthusiasm to restorative, although they agree on encouragement of similar approaches. In official documents presented by the United Nations, the restorative justice objectives seem to be the second by importance immediately after diversion, consisting of minimization, reduction of imprisonment sentences and identification of alternative sentences of non-coercive character. Those objectives remain secondary in relation to the development of educational programs for the whole population.
- In the Middle East it is reported only a slight trend of governments to promote “reconciliation”, which is perceived not as a “non-coercive” measure, however within the sanctioning underlying principle of classical type.
- Latin American and Caribbean territories prove to be open to restorative justice, which is manifested with the commitment to adopt and enhance the use of ADR models (Alternative Dispute Resolution), thus encouraging supporting programs for the crime victims. Let us now dwell on the main existing experiences in Anglo-Saxon countries, where mediation of all forms, criminal, cultural, educational and family one, has been used for a long time and achieved significant results.

2.2. Origin of ADR instruments in the United States

Modern prevalence of A.D.R instruments in the United States dates back to early '70s, mainly determined by utilitarian motives connected with the so-called phenomenon of litigation explosion. During the period between 1970 and 1980, the number of civil cases brought to the US courts was more than quadrupled. Above all, they were complex cases taking a long time and requiring high management cost, factors which undermined global competitiveness of producers involved therein and who were obliged to attribute those costs to end consumers.

There were different causes of deterioration of the conflict management public system: above all, the largest and unexpected increase of state lawmaking process, until that time left under the contractual self-regulation of the parties. Secondly, unpredictability of decisions taken by popular juries, impact and possibility of manipulation of which was too high, thus influencing the

so-called “processual truth”. Finally, substantial increase of the number of legal professions which became a social issue caused the stagnation of many sectors of civil justice.

According to relevant statistics, 95% of judicial processes are already closed with an agreement of transactive character (parties agreed to resolve the conflict by consenting to mutual payments and obligations), often failing to initiate a judicial review. The Americans had realized that normal procedures to refer to the Court were often slow and complex to produce effective results as the latter an agreement was reached (if any), the higher would be the whole procedure costs.

Alternative Dispute Resolution mutually eliminates or however, significantly minimizes expenses for judicial investigation. The US experience shows that 80% of information required for a dispute resolution may be received by spending only 20% of costs required for the termination of an ordinary judicial process, namely, for a decision taken by the Court.

In this regard, we should mention the “added value” constituting of control the parties may exercise on procedure and its outcomes. The parties have often referred to “alternative” justice, when they have realized that with “normal” justice they would have lost any potential control over the final decision outcome.

That is why the US society is the most conflictual one from judicial perspective. The justice operators are growingly oriented to prospects in which “alternative” and “traditional” models coexist. It is sufficient to believe that the initial “A” of the acronym A.D.R does not any longer mean “alternative” but simply “adequate”, with the circumstance and type of conflict posed for resolution.

2.3. Canadian experience

In Canada the basic prototype of mediation between the perpetrator and the victim from the so-called “0 case” is a very simply oriented “embryonal form” of mediation (in 1974 in Ontario) and without respecting those which would further become basic rules for the management of mediation meetings.

From that point, reconciliation programs between the victim and perpetrator have been substantially developed, particularly at theoretical level, suffering positive changes which have expanded the range of conflicts to be potentially resolved.

Even in Canada, during initial years of application, the focus on victim’s rights was too limited while concentration was higher toward the realization of re-educational purpose of the perpetrator. Currently, we shift from mediation theories in the narrow sense of Family Group Conferencing (namely, the dialogue extended to family groups”) of Sentencing Circles (namely, “community meetings to determine the appropriate sentence term”) to Community Policing (activities which aim at conflict resolution by the community).

A distinguishing feature of Canadian movement is that they have progressively claimed to bring justice closer to the community as many small communities which may be integrated in the social environment only by respecting and preserving their traditions, are present within the territory. This would explain the success of the so-called Sentencing Circles - “community meetings to determine the appropriate sentence term”, thus attributing a guide role to the community elderly people, to evaluate for the purpose of punishment of those behaviors harming the interests of community or of some of its members²⁹.

²⁹ According to the general model the Canadian Sentencing Circles foresee the presence of judge, parties and respective families and of some community elderly people, to formulate non-binding recommendations for the *Proportioning Court*. However, this option is not risk-free: the first one is related to a reduction of safeguards for the accused and furthermore, recommendations about the type and sentence term are given in absence of guidelines and without respecting the minimum safeguards of a “due legal process”.

Even in diversion policies at police level, a typical aspect is that community support is always requested and evaluated, thus decentralizing institutional intervention. Finally, rather than attributing a value to mediation process between the victim and perpetrator, the Canadian restorative justice is characterized by the fact of attaching a central role to the community, either in search of conflict resolution, or to develop a “preventive” activity of conflicts, strengthening social communication.

Considering the history and legal order directly stemming from Common Law Countries, it is clear that mediation in Australia, along with the probation service, have been widely and directly applicable.

2.4. Northern-American experience of the state of Minnesota-USA

Since 1985 the Mediation Center in Minnesota began to handle cases brought from the Courts of Minneapolis and Saint Paul-capital of Minnesota. This model structure is similar to the general one but we should highlight two aspects:

- a. Regarding the modalities of mediation management, there is a trend in Minnesota to employ a “non-management” style and fully evaluate the will of parties to formulate a restorative (indemnifying) proposal;
- b. As for the crimes to be subject to mediation, there is no objective limit in excess of which, one cannot refer any longer to the mediation procedure.

In particular, use of mediation procedures to resolve a conflict that has emerged from a very serious violent crime, is one of the main program characteristics in Minnesota by which an attempt is made to offer the victims, upon request, the possibility of a “*tête-à-tête*” meeting with their aggressor. Referring to cases of serious crimes, mediation is not considered any longer as diversion for the perpetrator but as a possibility by which the victim may elaborate feelings of anxiety and insecurity, as a consequence of the violent act³⁰.

In the field of penal mediation, either for high social risk crimes or moderate or low social risk offences, the mediator’s qualification is raised as an issue. In Anglo-Saxon legal orders the trend is shifted to a non-professional “voluntary” mediator, thus enhancing the perception of mediation as something practically different from the typical justice. Vice-versa, European civil law legal orders are oriented to a professional mediator, specially qualified to carry out this duty.

Researches conducted in Minnesota to control the effectiveness of mediation programs between the perpetrator and the victim, distinguish three different types of investigations:

- a. Regarding the level of parties’ satisfaction, from the very beginning crime victims have shown a high level of satisfaction about the results achieved from the restorative model;
- b. In respect of mediation effectiveness, data and information are a bit disputable. In fact, there still remains to clarify if a restorative program compliant in each aspect should be considered effective or an agreement compliant only in terms of its main components may be considered as such;
- c. Finally, evaluation investigations conducted via interviews with groups of perpetrators and victims attending the mediation process, had the purpose to confirm the correctness and equality of the agreement reached by the end of mediation procedure.

³⁰ Clearly, with the increase of the offence risk level, the mediation process becomes more complex, takes a longer preparatory time, implies the presence of subjects other than mediators, such as psychologists or psychiatrists medicating the victims.

2.5. Northern American experience of the state of Vermont – USA

The Reparative Probation Program promoted by the Department of Corrections of Vermont is structurally a suspension of imprisonment sentence enforcement and probation, as provided for in article 59 of the Albanian Criminal Code, following the amendments made in 2008 by Law No. 10023.

In general terms, we may admit that these types of measures “do not replace” but during the whole duration of probation period, “overshadow” the sentence rendered for the commission of criminal offence. Although being part of this group of measures, the Reparative Probation Program of Vermont differs from the traditional scheme in terms of objectives and authority ruling about the type of “evidence” which the perpetrator shall be subject to. This instrument attempted to reach a combination between the juvenile’s educational needs and two fundamental objectives of restorative justice, i.e. a real protection of victims and wider involvement of the community in conflict resolution. In fact, this component may be fully accomplished only in the state of Vermont, if we consider the fact that community is part of justice “administration” with a decision-making and controlling function, in each case within the criminal process safeguards.

Reparative Probation Program was set up to administer cases of moderate and low risk juvenile and adult delinquency (especially in reference of crimes against property). In its structure it fully corresponds to probation. Once the decision is rendered, the convict shall appear before the Correctional Community Office, which consists of five or six citizens taking part in the community where the offence was committed. By the end of a series of meetings, an agreement is formalized to include issues of restorative program which the guilty should follow within a period of 90 days. If it verifies the completion of damage repair process, the Office shall ask the Court to decide about case dismissal, otherwise, the guilty shall be brought before Criminal Court for the purpose of punishment enforcement.

3. A brief analysis about the use and effects of “victimization relations” in legal orders of common law countries

“Victimization relations” are designed in accordance with a heterogeneous model and are applied in different stages of the process by many legal orders of common law countries. In fact, they refer to those relations of the USA, like Australia, New Zealand, Canada and England but also civil law states such as Austria.

“Victimization reports” may be used by becoming part of the criminal process:

- a. Upon the victim’s initiative;
- b. Upon the initiative of Probation Office;
- c. Upon the initiative of Prosecutor’s Office, Prosecutor.

This is a mechanism whose legitimacy to be inherent part of the criminal process, is highly disputable since it highlights the issue of content and limitations of victim’s rights within the scope of criminal process. In fact, a question arises about the extent to which the victim is entitled to be consulted and informed about participation in the process. It is not easy to provide a clear answer to this question, however it is possible to analyze the issue of “relations” from three different perspectives:

- a. From the victim’s perspective = the “report” causes to victims a higher level of satisfaction on the criminal/penal system as it allows them to attract the attention of Judge about real harmful effects as a consequence of the offence. However, there is a risk of reducing trust in the system

- as attracting attention on personal experience as a victim increases expectations of the right of protection from the system.
- b. From the perspective of the Prosecutor's Office-Prosecutor = submission of the "report" in investigation file has been highly opposed either because the Prosecutor does not deem it an adequately credible instrument, or because of the potential prejudice of discretionary power since the victim's statement reduces chances of the charge or sentence negotiation in case of sentence application upon the parties' request or as termed in Italian "patteggiamento" (an agreement about the sentence term, made between the prosecutor and the defendant/his/her defense counsel, as provided for in the legislation of some countries).
 - c. From the perspective of the Proportioning Judge = From an entirely practical viewpoint, the impact of "victimization reports" on court's discretion regarding the establishment of a proportional criminal sanction to the risk of perpetrator's acts, is higher when the respective court file includes limited news or circumstances about the crime and its upcoming consequences. However, in addition to the positive fact that it is necessary for the Court to know as many details as possible about offence consequences to the victim or perpetrator's behavior after the offence, it is also true that it may be risky to allow the victim to express his/her view about the sentence term against the guilty.

4. Conclusions

In summary, this is an overview of mediation practice in Common Law countries and there is a clear difference between them and Civil Law countries, including Albania. While the interventions in respect of juveniles in those countries are characterized by interdisciplinarity of action and furthermore, developed out of judicial system, the opposite occurs in Common Law countries. In the latter, initiative is a right of the judicial system or else referred as *sua longa manus* (except cases of cooperation with social systems of territorial services). I am not sure if I managed to introduce a general and special, clearly structured framework in order to establish and provide an understanding of mediation and the way how it is applied. Such a new approach to confront juvenile delinquency is rich in opportunities and future developments, especially in those countries where it has been traditionally applicable.

All this comparative excursus highlights the fact that restorative justice is a "very large container of theories", capable to maintain different and separate systems and only some of them prove to be exportable/applicable in countries other than the countries of origin.

In particular, we may admit that restorative justice is implemented "due to the high level of conformity facing the ideals of a higher degree of legal civilization it manages to manifest"³¹. This occurs as we are growingly helping with the progressive increase of demand for a broader protection of victims, for a community-oriented administration (on part of the community) and social management of conflicts, marginalization of the intervention of criminal justice in juvenile field, reduction of social conflicts and strengthening of a collective sense of security.

³¹ E. GRANDE, *Imitazione e diritto: ipotesi sulla circolazione dei modelli* (Turin, Giappichelli 2000), p. 99.

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EQUALITY AND NON-DISCRIMINATION PRINCIPLE IN THE CONTEXT OF THE CROATIAN MEMBERSHIP IN THE EU

*Snjezana VASILJEVIĆ**

Abstract

The modern equality law is facing a crisis of their own methodological and conceptual understanding, and there is the challenge of the application before the national courts. The principle of equality is considered as the highest value in the Croatian Constitution. The question is how such principle is being neglected despite the existence of advanced antidiscrimination legal framework? Further research is needed to reveal if such situation depends on the circumstances in society or it might be result of inappropriate legal framework; insufficient implementation of laws, or are they pushed out by socio-economical factors? This paper is an attempt to provide some thoughts and answers to these questions.

Broken system of values as an introduction

Following the break-up of the former Yugoslavia, the demographic and ethnic structure of the Western Balkans changed.¹ In Croatia, the first anti-discrimination standards were adopted at the beginning of the last decade however to date their application has not produced significant results. Following the Declaration of Independence, the Croatian Constitution recognized the existence of new minority groups who had become minorities by the Declaration.² These groups had to adapt to their new minority status as well as their new nationality. The national identity suddenly changed its previous historical structure, from Yugoslav to Croatian. In these turbulent circumstances and in the process of disintegration of former Yugoslavia (SFRY), followed by periods of conflicts and war, women's rights were overshadowed in a period of a decade and a half. Given this fact, in all these countries the status of women in political life resulted in a very low representation in the parliaments, governments, local governments, public activities and other political decision-making structures. Aspiration for developed and strengthened civil society in these countries and implementation and harmonization of European law (fr. *acquis communautaire*) in legislation of potential candidates for EU membership, introduced the need for overcoming the socio-cultural stereotypes, which clearly suppressed institutional efforts.

Women have long been underrepresented in public and political life in Croatia. This is sometimes considered as the legacy of the former socialist regime. Although the Yugoslav state

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¹ The story began with the Croatian War of Independence. The war was fought from 1991 to 1995 between Croat forces loyal to the government of Croatia—which had declared independence from the Socialist Federal Republic of Yugoslavia (SFRY). In Croatia, the war is primarily referred to as the Homeland War (*Domovinski rat*). In Serbian sources, War in Croatia (*Rat u Hrvatskoj*) is the most commonly used term. In case of Croatia, there were some traditional minority groups who had existed in Croatia prior to independence in 1991. Today, more than fifteen years after the end of the wars of Yugoslavia's dissolution, the 'Balkan question' remains more than ever a 'European question'. In the eyes of many Europeans in the 1990s, Bosnia was the symbol of a collective failure, while Kosovo later became a catalyst for an emerging Common Foreign and Security Policy (CFSP). In the last decade, with the completion of the process of redrawing the map of the region, the overall thrust of the EU's Balkans policy has moved from an agenda dominated by security issues related to the war and its legacies to an agenda focused on the perspective of the Western Balkan states' accession to the European Union, to which there has been a formal political commitment on the part of all EU Member States since the Thessaloniki Summit in June 2003.

² *Declaration of Independence of the Republic of Croatia*, 25 June 1991. Available at: <http://www.sabor.hr/Default.aspx?art=15680>.

was arranged on the principle of equality, which primarily equalized men and women as members of the working class, in which the “Yugoslav working class did not lose the sight of the fact that the division of labor and the working abilities is based on gender differences, the myth of socialist equality for women moved woman away from the western feminist project and its insistence on the differences. “Instead of expressing respect for the dignity and equality of women as persons, such a policy could be more interpreted as an expression of scorn and contempt for women.”³ Immediately after the Second World War, formal-legal treatment of genders is established through implementation of the socialist political system in the former Yugoslavia, as well as in other countries in the Western Balkans. In the period 1944 – 1990, common gender equality was proclaimed, expressed by the common election rights. Before the break-up of SFRY, Croatian women had the benefit of equal rights under the law. Although quotas ensured women were represented in State and Republic legislatures, and despite being represented in parliaments, unions and even the various organs of the Communist Party, women in the SFRY enjoyed very little real political power, which was vested in the few – male – elite members of the party. Despite the existence of a vibrant women’s movement in the SFRY, the fall of Communism also witnessed a decline in women’s political participation. This decline was in part a result of the patriarchal processes established by the wartime nationalist groups and it was largely perceived as a backlash to the Communist legacy.⁴ Re-strengthening of patriarchy in the SFRY took place in the early eighties, characterized by repeated requests to enlarge the family and anti-abortion campaign. This period can be seen as the last phase of “communist patriarchy” during which women, even in urban areas, lost their employment and emancipation. This strategy no longer had anything to do with the trend in Western countries, where already at universities introduced women’s studies and gender studies. Instead of studying and assuming research positions, degradation, destruction and uninhibited expressed misogyny marked the period of the nineties, while at the same time the most European countries were united in their diversity.

This paper represents an analysis of the current antidiscrimination framework in the EU with a special focus on Croatia, as the new Member State. The process of disintegration left serious consequences for all Croatian citizens but particularly to minority women who are still dealing with history ghosts. Antidiscrimination provisions and policies are not adequately put into practice, and the consequence is unequal position of women at European market. In the Western Balkans, the protection of fundamental rights is still a burning issue.

Discrimination without tears

In the Western Balkans countries the most persuasive model of discrimination is gender and ethnic discrimination (Vasiljevic, 2011; 2009). In literature, this concept is described as double, multiple or intersectional discrimination (Crenshaw, 1991; Moon, 2006; Schiek & Lawson, 2011). In traditional conceptions of race and gender discrimination, certain specific problems or forms of discrimination faced by marginalized women are rendered invisible. When it comes to discrimination on the basis of gender and ethnicity, it is important to point out that despite the existence of good laws; many key areas for the improvement remain marginalized. This is the main criticism of the present efforts to achieve complete equality. At the first glance, one of the most important areas is most certainly education on all levels, which is still ridden with stereotypes. Education about discrimination is chronically lacking on the level of high-school and university education. To a great extent,

³ Knežević, Đ. 1994. „Mi“ nasuprot „Ja“ ili problem političkog identiteta u feminističkom, odonso ženskom „pokretu“ u Hrvatskoj, Kruh i ruže br. 1.

⁴ Leaković, K. 2004. *Political Party Quotas in the Croatian Social Democratic Party*. IDEAS:International Institute for Democracy and Electoral Assistance.

high-school and university education remain segregated according to gender and even ethnicity.⁵ Another grave problem is the lack of recognition of discrimination as such. These facts open up a space for further discussion. The lack of advanced education and raising awareness among lawyers is a serious obstacle for implementation of antidiscrimination norms. In the meantime, the European legislature has already developed a system of legal norms and judicial practice, which makes their implementation easier.

The accession countries in the Western Balkans have adopted much of the legislation required in the EU accession process, but that this legislation is in many cases not being effectively implemented. The Committee on Human Rights and Gender Equality in its Report⁶ stresses the need for women in the Western Balkans to take a prominent role in society through active participation and representation in political, economic and social life at all levels. It also points out that advancing towards women's equal participation in decision-making at all levels of government (from local to national, from executive to legislative powers) is of high importance. The Committee notes with concern that the population in most countries is not fully aware of the existing legislation and policies to promote gender equality and women's rights and that such awareness rarely reaches the vulnerable or marginalized members of society, especially Roma women. Therefore it is necessary to foster awareness through the media, public campaigns and education programs in order to eliminate gender stereotypes and promote female role models and women's active participation in all paths of life including decision making. It is also disappointing that women remain under-represented in the labor market as well as in economic and political decision-making. Women's employment rates in the Western Balkan countries remain very low and for that purpose it is important to reduce the gender pay gap and ensure equal pay for equal work for both sexes, to assist women in reconciling private and professional life, to secure better working conditions, lifelong learning, flexible work schedules and creating an environment which stimulates female entrepreneurship.

The lack of statistical information on gender equality, especially on violence against women is the biggest obstacle in developing future gender equality strategies and monitoring mechanisms for suppression of multiple discrimination, such as Roma women, lesbian, bisexual or transgender women, women with disabilities, women of other ethnic groups and older women. Women play an essential role in stabilization and conflict resolution, which is crucial to reconciliation in the region as a whole. Unfortunately, gender-based violence and verbal abuse remain present in the Western Balkans countries. Even 30 % of the victims of cross-border trafficking in human beings in the EU are nationals of the Western Balkans countries, whereas women and girls comprise the bulk of the victims detected. Therefore gender equality, awareness-raising campaigns, and measures to combat corruption and organized crime are essential in order to prevent trafficking and protect potential victims. It is necessary for the Western Balkans countries to improve their records on prosecution and punishment and support local initiatives to address the root causes of trafficking, such as domestic violence and limited economic opportunities for women. It is also necessary to adopt legislation and policies that ensure universal access to reproductive health services and promote reproductive

⁵ *Case of Oršuš and others v. Croatia* (Application no. 15766/03), ECtHR, Judgement of 16 March 2010.

⁶ Cornelissen, M. 2013. *Report on women's rights in the Balkan accession countries* (2012/2255(INI)) of 4 April 2013. Committee on Women's Rights and Gender Equality. <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0136&language=EN>.

rights, and to gather systematically data that is necessary to promote the situation of sexual and reproductive health.⁷

Generally, there is a lack of the comprehensive policy on implementation of gender equality concepts and standards. Even though equal opportunities politics as a reform politics has a long tradition in Western Europe, Scandinavia, North America and Australia, it would be possible to argue that the formerly socialist countries of Central and Eastern Europe did have some policies and mechanisms designed to promote women, but most of them lost legitimacy with the fall of the communist system, with only groundwork for these mechanisms lingering today.⁸

Western Balkans countries dealing with the same consequence of literally adopted European antidiscrimination norms. The lack of full understanding of the basic concepts of equality, compounded by misinterpretations of their meaning, neglecting the case law of the European Court of Justice, has led to the creation of legal concepts full of gaps. The possible consequence of such a wrongdoing is non-implementation of recently adopted antidiscrimination norms due to reason that judges and national machineries responsible for its implementation will not know how to apply certain rules. This leads us to the classical conclusion that in the absence of understanding basic norms they usually stay only on the paper and never used in practice.

European antidiscrimination law

One can notice that the European anti-discrimination concept lost its primary purpose, since the antidiscrimination model is dominated by purely individualistic approach that does not solve the problem in the form of structural social discrimination of marginalized groups in society, and therefore excludes the implementation of specific (positive) measures that are primarily needed to correct certain social inequality. On the other hand, paradoxically, 'hacking' on the lines of gender identity, has led to certain "vulnerable" groups are not interested in the problems of other social groups that are experiencing similar experiences (e.g., feminist organizations do not deal with issues of racial or ethnic minorities, the LGBT community is not involved in issues of other minorities), forgetting that often experience discrimination can be manifold.

In academic circles, this is called a hierarchy of equality.⁹ Are some more equal than others, it is a legitimate question in a human rights debate on constitutional guarantee of equal rights protection of individual characteristic? However, if the law protects an individual, is it possible to assert claim against society in general or only against a named discriminator? In every case, victims of discrimination have to show that they were victimized and intentionally discriminated against.¹⁰

The equality and non-discrimination principle is the core principle of the internal market of the European Union. Moreover, it is considered as the highest value in all human rights interna-

⁷ Nowadays, the matter of contraception and abortion is misused by the influence of the Catholic Church. Undermine access to contraception by eliminating government funding of it; eradicate sex education so that young people don't know how to use contraception effectively; and the limited access to the medical services of abortion so that women cannot safely and legally terminate all those unwanted pregnancies is the general atmosphere in the current political framework. For that reason, many women are refused by their medical doctors, to access information and services on contraception and abortion. Čulić, M. 2013. *Doctor refuses to provide contraception and institutions are silent!* Available at: <http://www.libela.org/vijesti/3989-lijecnik-odbija-dati-kontracepciju-a-institucije-sute/>. Accessed: 16 July 2013.

⁸ «Equal opportunities politics can be defined as a politics or endeavour to introduce measures that could diminish structurally conditioned discrimination against some social group – in this case women; these measures may pertain to various areas, such as employment, public and political participation and education, and/or may endeavour to change inadequate legislation that incorporates the elements of institutionalised and structural discrimination.» Everson, supra n. 8 at 16.

⁹ Bell, M. 2008. *Racism and equality in the European Union*, Oxford: Oxford University Press.

¹⁰ Freeman, A.D. 1978. „Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine”, 62 *Minnesota Law Review*, pp. 1049-1119.

tional agreements. The European system of basic human rights has three levels: the Council of Europe, the system of the Organization for Security and Cooperation and the system of the European Union. There is a certain interaction between the three frameworks, which will be discussed below. European human rights system is most developed regional system. It was created in response to the massive human rights violations during the Second World War. Human rights, the rule of law and pluralist democracy are the foundation of the European legal order. European Economic Community, which was established in 1957, was not dealt with political issues such as human rights. However, in the 80-ties, with the political integration of Europe towards the EU, human rights and democracy are becoming key concepts of a single European legal order. The main role in this change has the Court of the European Union and within this Court, the Court of Justice (hereinafter: CJEU), which has strengthened its jurisdiction over human rights by performing from the "common constitutional traditions of the Member States"¹¹ and international agreements to which member States are parties, such as the European Convention on Fundamental Rights and Freedoms (ECHR), which was ratified by Croatia in 1997.¹² The principle of equality and non-discrimination was of particular importance in European Community law and nowadays uplifted to the level of general principles. Since the eighties, European Community has developed human rights policy in its relations with third countries, which is reflected in the so-called Copenhagen criteria from the 1993 to open the countries of Southeast Europe.¹³ The same year, with entering into force the Treaty of Maastricht, the modern European Union emerged. Primary and secondary European law on equal opportunities between women and men has developed over the past thirty years in order to eradicate gender pay gap and gender discrimination in working conditions and social security. Over the years, the practice of the CJEU has helped in the interpretation and implementation of the legal framework for gender discrimination. Today, equality between women and men is recognized as one of the key objectives of the EU in the inclusion of the gender dimension in all activities of the Union.

Building on the experience of the EU in the fight against discrimination on grounds of sex, in the mid-nineties consensus was made for regulating other forms of discrimination in the European Union, including in the European primary and secondary legislation. The result of this process is the inclusion of a new Article 13 within the Treaty of Maastricht. Furthermore, the Amsterdam Treaty strengthens the existing provisions on the protection of human rights in the Treaty on European Union (Article 6 and 7) by introducing a set of principles on which the Union is founded ("freedom, democracy, respect for human rights and fundamental freedoms and the rule of law"), giving CJEU powers to guarantee the respect of these principles by the European institutions, and in anticipation of sanctions in case of violation of the fundamental principles of the Member States.¹⁴ The Article 13 of the Amsterdam Treaty, broadened the scope of the prohibition of discrimination by adding more protected characteristics to the existing list: sex, race, ethnicity, ability, age and sexual orientation. Suppression of discrimination became an integral part of overall development priorities of the European Union. This was reflected in efforts to create a "European Bill of Rights". In 1999 the European Council proposed that a "body composed of representatives of the Heads of State and Government

¹¹ C-4/73 *Nold Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491.

¹² European Convention on Human Rights, NN, MU, br. 6/99.

¹³ More about *Copenhagen criteria* available at: http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm.

¹⁴ Art. 13 of the TEU: 1. Without prejudice to other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251. Treaty establishing the European Community (consolidated version 1997), Official Journal C 340 of 10 November 1997. Dostupno na: <http://eur-lex.europa.edu/en/treaties/index.htm#founding>.

and of the President of the Commission as well as of members of the European Parliament and national parliaments” should be formed to draft a fundamental rights charter. The draft charter was adopted on 2 October 2000 and it was solemnly proclaimed by the European Parliament, the Council of Ministers and the European Commission on 7 December 2000.¹⁵

The Charter of Fundamental Rights of the European Union enshrines certain political, social, and economic rights for EU citizens and residents into EU law. It was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. However its then legal status was uncertain and it did not have full legal effect until the entry into force of the Treaty of Lisbon on 1 December 2009. Following the entry into force of the Lisbon Treaty the fundamental rights charter has the same legal value as the European Union treaties. Thus the Charter becomes a powerful weapon in the fight against discrimination. The principle of non-discrimination enshrined by the Charter builds on the Article 13 of the Treaty on EU and represented the basis for further development of the EU antidiscrimination legislation.

Adoption of the Article 13 is a reflection of the growing recognition of the need to develop a coherent and integrated approach to combat discrimination. The European Commission has decided to give effect to the powers set forth in the Article 13 and in 1999 adopted a package of proposals. This led to the unanimous adoption of the key directives in 2000 aiming at providing effective legal protection against discrimination including multiple discrimination.¹⁶ The Racial Equality Directive prohibits direct and indirect discrimination, as well as stating that incitement to discrimination based on ethnic or racial origin. It covers an area of employment, training, education, social security, health care, housing and access to goods and services. It also prohibits multiple discrimination. However, the CJEU and national case law consider discrimination solely on the basis of the single axis approach.¹⁷ The single axis approach analyzes discrimination on the basis of each of the grounds for discrimination separately. Imagine that we are in the same case the victim of discrimination based on gender and also members of some of the vulnerable and marginalized groups. The courts would probably not have taken into account the fact that discrimination occurred on two or more different basis.¹⁸ Much of the existing literature exploring multiple discrimination criticized the single axis approach from a legal perspective (Moon, 2002; Vasiljevic, 2009; Schiek and Lawson, 2011). Directives as acts of European secondary law, unlike the regulations, do not replace national norms with European norms. On the contrary, the way directives are transposed is through the internal law of each member state. National law must be adapted to the extent necessary to achieve the purposes for which the directive in the first place and it was adopted, but that does not mean that each Member State has the same standards. In this sense, the directive has extremely federal character, because it allows simultaneously unity, as well as differences between the EU and its Member States. In the integration, which consists of various components - the state and the people who have many different characteristics: different history, cultural heritage, climate, language, and therefore the habits, needs and desires, it is not surprising that it was the directive which represents an extremely convenient tool for “unity in diversity”; which is the motto of the European integration.

¹⁵ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), available at: <http://www.refworld.org/docid/3ae6b3b70.html> [accessed 30 July 2013].

¹⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

¹⁷ Vasiljević, S. 2011. *Similar or different: Discrimination in the European Union and the Republic of Croatia*. Zagreb: Tim Press.

¹⁸ Schiek, D. & Lawson, A. (eds) 2011. *EU Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination*, Ashgate.

After the expiry of the implementation period, regardless of whether the state has implemented the Directive or not, the national court must interpret national law, whether adopted before or after the directive, and whether adopted specifically to implement the directive or not, in accordance with Directive.¹⁹ If the state does not implement the directive, individuals can directly invoke their subjective rights before national courts if the legal norm defined by the Directive is clear, precise and unconditional. This directive creates a subjective law that national courts are obliged to protect. The national court must apply the directive and are exempt from the application of national law norm that it is the opposite. Further development of legislation on gender equality has used some of the novelties that were presented by the Racial Equality Directive and the Employment Equality Directive. It is important to emphasize that these directives have significantly raised the level of protection against discrimination throughout the European Union. As a result, when we talk about the legislation in this area, the EU has developed one of the most advanced legislative frameworks in the world. Directives require significant changes to the national legislation in all Member States, even in those countries that have comprehensive anti-discrimination legislation.²⁰

In some countries this has included the presentation of a completely new approach to anti-discrimination legislation and policies based on individual rights. Member States shall complement its own legislation on gender equality in the light of the general Equal Treatment Directive²¹, the Directive on equal treatment in employment and occupation, and the Racial Equality Directive. The Racial Equality Directive is broader in its scope because it covers other areas outside of the labourmarket such as education, social security, access to good and service. This led to the adoption of national laws covering discrimination on grounds of sex amongst other grounds for discrimination. Moreover, the new Directive was adopted introducing the principle of equality between men and women in the access to goods and services and their provision.²² Finally, the political decision introduced a new comprehensive directive on the introduction of the principle of equal opportunities and principle of equal treatment for men and women in employment.²³ The Directive for the first time in many member states presented the protection against discrimination on the basis of certain grounds. Directives require the introduction of new definitions and legal concepts. They also led to the establishment of new specialized equality bodies, as well as the implementation of the powers of certain existing bodies. Deadlines for transposition of the Racial Equality and Employment Equality into national law passed, however, the correct implementation of the directive into national law does not exhaust the possibility that natural and legal persons in the national courts refer directly to the individual rights guaranteed by the directive. This will be possible when the directive is properly implemented in national law, but the application of national law does not achieve the result prescribed by the directive.²⁴

¹⁹ Rodin, S. i Čapeta, T. 2008. Učinci direktiva Europske unije u nacionalnom pravu: s izabranim presudama Europskog suda u punom tekstu i komentarom, Zagreb: Pravosudna akademija.

²⁰ Espin, E. 2005. *Burden of proof in Council Directives 2000/43/EC and 2000/78/EC, working paper*. Available at: http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/2005_Espin_EN.pdf

²¹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269/15, 5.12.2002.

²² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004.

²³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006.

²⁴ The deadline for transposition of the Directive 2000/43/EZ expired on 19 July 2003. The deadline for transposition of the Directive 2000/78/EZ expired on 2 December 2003. Some Member States have used the possibility to request an additional period up to three years to adopt provisions relating to discrimination based on age and disability, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325.

All Member States have adopted a unique and comprehensive anti-discrimination framework. Also, there is a visible and positive trend of single equality bodies dealing with all grounds of discrimination set out in the directives. Such bodies are not “invention” of the European Commission, because in some countries, was established much earlier (UK, Netherlands, Sweden). However, in the EU, except in the mentioned countries, there was a joint decision of the Union on the establishment of uniform anti-discrimination body united in their efforts to combat racial discrimination as a reply to the “crisis” in Austria when the extreme right came to power. Austrian crisis was fertile ground for the adoption of the Racial Equality Directive and the incarnation need to establish effective and independent mechanisms at Member State level. The establishment of such bodies, the citizens are offered a cheaper and faster alternative to resolve discrimination complaints, as well as promoting and raising awareness of how NGOs and individuals to strengthen the collective awareness of the dangers of discrimination and the need to develop a culture of equal opportunity and non-discrimination. Unfortunately, this kind of institutional protection of human rights is still underutilized.

Window through which the protection of fundamental rights was entered into the anti-discrimination legal framework is development of general legal principles of the European Community. Constitutional traditions of the Member States also entered the legal system of Community law,²⁵ and CJEU is attributed special importance to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) but not in terms of actual incorporation, because the CJEU implies only legal acts of the Union. CJEU monitors the legality of the actions of the EU and in an indirect way examine violations of fundamental rights. When it comes to discrimination, both courts seek to coordinate jurisprudence and the CJEU in its practice often refers to the judgment of the ECHR. The CJEU has also been clear that EU law takes precedence over all other claims of international law and the decisions of other international tribunals.²⁶ Although the European Union has not yet acceded to the ECHR, the Convention is often a source of inspiration for the CJEU when designing the fundamental principles of EU law.²⁷

The CJEU has held that the substantive fundamental rights provisions of the ECHR themselves express and reflect existing general principles of EU law. And this line of CJEU case law is now reflected in the terms of Article 6(3) of the Treaty on European Union (TEU) which states that “fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. As general principles, the claims of fundamental rights are binding on the EU institutions, and on the Member States when acting within the sphere of EU law.²⁸ The CJEU holds itself out to be the European Supreme Court, finally and authoritatively interpreting – at least for the EU Member States – the provisions of the ECHR when its provisions arise within a field also covered by EU law. And the range of EU law is vast. The result of this CJEU jurisprudence is that, in relation to in fundamental rights issues falling within EU law, the Member States of the EU are to regard themselves are simultaneously bound by two different masters: both the CJEU (under and in terms of the EU Treaties) and the ECtHR (under and in terms of the ECHR). But these two European courts are not always standing on the same position. They used to have different interpretation of the following issues as: the existence and extent of the privilege against self-incrimination under ECHR, art 6(1); whether business premises are covered

²⁵ The ECJ’s landmark case *Nold v Commission* of 1974 (Case 4/73 *Nold v Commission* [1974] ECR 491, § 13) where the Court held that the rights set out in the European Convention on Human Rights were protected by the Community legal order.

²⁶ See *Kadi & Al Barakaat International Foundation v Council and Commission* (C-402/05 P & C-415/05 P) – compare, however, *Kadi v Commission* (T-85/09) at paras 115-21.

²⁷ *Küçükdeveci v Swedex GmbH & Co KG* (2010) **C-555/07**, [2010] IRLR 346.

²⁸ ECtHR, *Chaplin v. the United Kingdom*, No. 59842/10, 4 September 2012. ECtHR, *Eweida v. the United Kingdom*, No. 48420/10, 4 September 2012. ECtHR, *Ladele v. the United Kingdom*, No. 51671/10, 4 September 2012; ECtHR, *McFarlane v. the United Kingdom*, No. 36516/10, 4 September 2012.

by the ECHR, right to respect for private life (Art 8); whether the protections of ECHR, could be prayed in aid in relation to the dissemination of information relating to the availability of abortion in other States (Art 10); and whether sexual orientation was a prohibited ground of discrimination under reference to ECHR (Art 14).

This burning issue creates confusion in national legal orders and places the courts of the Member States in a difficult position. The existence of two distinct means of reference to fundamental rights, either under direct reference to the ECHR or under reference to the general principles of EU law, creates the possibility of conflict for national courts between competing fundamental rights considerations and interpretations.

Institutional and legal breakdown: the case of Croatia

The principle of equality is considered as the highest value in the Croatian Constitution. The question is how such principle is being neglected despite the existence of advanced antidiscrimination legal framework? Further research is needed to reveal if such situation depends on the circumstances in society or it might be result of inappropriate legal framework; insufficient implementation of laws, or are they pushed out by socio-economical factors? This paper is an attempt to provide some thoughts and answers to these questions. Croatia has created gender equality norms aiming at promoting equal opportunities for men and women, which do not offer much in practice for their citizens. They can be described as “gender-sensitive” norms but are only gender-sensitive in terms of offering a general framework for action combating gender discrimination. Unfortunately, they offer nothing more. For example, the direct discrimination for pregnant women in practice has not been changed; the quota system did not produce any improvement in increasing political participation of women; multiple discrimination still stays invisible, etc. The recent referendum of insertion of definition of marriage into Croatian Constitution, held on December 1st 2013, showed that the Croatian society still walk on the edge of traditional values. Majority of citizens (65, 87%) voted for the insertion of the definition of marriage into the Croatian Constitution., whereas 33,51% voted against.

The issue of concern here is whether a European approach to anti-discrimination policy is different from the one existing in Croatia? The both are characterized by so called double approach, identifying discrimination as both the discrimination and dignity harm. Concerning the current equality legal framework in Croatia and the state of implementation of European Union directives, the answer is positive. Anti-discrimination policy shaped by national governments in Croatia has been proven to be inefficient and lacking important monitoring and evaluation mechanisms. Specialized bodies constructed for that specific purpose have not been consistent and effective in implementing measures defined by existing legislation neither proven to be coherent with the recently adopted European standards. Even though there is a growing tendency of forbidding all grounds of discrimination by the single act, just legislative anti-discrimination measures do not work in Croatia. Equality cannot be realized without positive duties and proactive strategies. There is more interests in policy making, aiming at eradication of stereotypes and promote equality as a human right but just legislative anti-discrimination measures do not work in Croatia. One of the reasons for a “negative” implementation of the EU law is misunderstanding recently adopted concepts and standards, the lack of political will to support implementation of these legal norms, the lack of statistics and case law in the field of discrimination. Although the Croatian legislation has become richer for the new anti-discrimination standards, certain consequences of rapid technical harmonization (actually the speed of written laws) still remain. After more than five years after the entry into force of the comprehensive antidiscrimination law, there are a small number of final court judgments which prove their effectiveness, and that the newly adopted standards into practice have been completely

implemented.²⁹ Furthermore, the case law often refers to discrimination without sufficient explanation³⁰ or there is no evidence suggesting the existence of discrimination.³¹ In practice there is an increasingly common problem of not recognizing what discrimination is and what is not and some prosecutors often subsumed under discrimination every different treatment, ignoring the existence of protected characteristics.³²

The need for improvement of the women status and achievement of greater gender equality, imposes the need of consistent implementation of gender equality legislation, achieving greater participation of women in all aspects of political and economic sphere, through the introduction of quotas, a strategy of social and national mechanisms, that should contribute to overcome existing stereotypes and prejudices for the place and role of women in all spheres in society. In Croatian case that process is very slow and complicated due to different reasons. In 2002, Croatia adopted the Constitutional law on the Protection of Ethnic Minorities³³, which is not completely consistent with the recently adopted Antidiscrimination Act.³⁴ The first Croatian GEA was adopted in July 2003 but in January 2008 the Constitutional Court decided to nullify it because of infringement of constitutional procedures required for its entering into force within the Parliament. The new GEA entered into force on 15 July 2008. According to the new wording of the GEA, some improvements have been made but the issue of its implementation still remains. One of the serious deficiencies is the application of the gender quota system. The Gender Equality Act in its Article 15 obliges political parties to make candidate lists with the presence of 40% of men and women. However, there is no sanction if the political party refuses to obey this legal obligation. The Croatian Democratic Party is a positive example of creating the organizational statute, which stipulates the obligation of increasing the number of women up to 40% (Gender Equality Act, 2008). Gender quotas more often regulate the proportion of women candidates in one or more political parties, whereas minority quotas tend to quotas are more likely to elect women with working class backgrounds and women without a university education. Theoretically, political parties and minority organization care about women and want to include them in the work of political parties and the active political life. But in practice it does not work. During the last local elections in 2013, the number of women on candidate's lists has increased for 4% in comparison with results in 2009. Paradoxically, the number of elected women for County Councils has decreased from 23% to 21%. Even though, the Gender Equality Act of 2008 stipulated sanctions (in the amount of maximum 50.000 Kunas) for violation of the „quota“ representation of 40% of women on candidate's list, no sanctions were imposed during last local elections. The reason for the „silent“ discrimination is the different interpretation of the quota definition incorporated into the GEA 2008. The official interpretation of the Croatian Government is that the third elections cycle start sin 2019 for the parliamentary elections considering that local and parliamentary elections constitutes two separate electoral institutes, whereas women CSOs and Ombudspeson fr Gender Equality provided the opposite interpretation claiming that the first electoral cycle starte din 2009 with local elections in 2011 and the third cycle is considered the local elections in 2013.³⁵

²⁹ Decision of the First Instance Court in Rijeka of 3 October 2011, No. P-15/2010.

³⁰ Decisions of the Croatian Supreme Court, VS RH REVR 554/07-2 of 3 October 2007; VS RH REVR 617/06-2 of 11 January 2007.

³¹ Decisions of the Croatian Supreme Court, VS RH REVR 829/07-2 of 14 May 2008; VS RH REVR 850/07-2 of 31 January 2008.

³² Decisions of the Croatian Supreme Court, VS RH REVR 787/07 of 23 January 2008; VS RH REVR 22/07-2 of 4 April 2007.

³³ Constitutional law on the Protection of Ethnic Minorities, *Official Gazette* 155/02.

³⁴ Antidiscrimination Act, *Official Gazette* 85/08, 112/12.

³⁵ *Sudjelovanje žena u lokalnim izborima 2013. godine na regionalnoj i županijskoj razini*, Zagreb: CESI, 2013. Available at: http://www.cesi.hr/attach/_s/sudjelovanje_zena_u_lokalnim_izborima_2013_godine_na_regionalnojzupanijskoj_razini.pdf (25.11.2013).

National antidiscrimination perspectives

Women represent the majority of unemployed persons and the unemployment rate of women is highest in Eastern and Central Croatia. In addition, women are also over-represented in poorly paid jobs and it is more difficult for them to get a promotion. They work on fixed term contracts more often than men and are additionally burdened by the bulk of domestic work (Galic & Nikodem, 2009). Discrimination is still widely spread in the Croatia.³⁶ Indirect discrimination is a far more frequent form of discrimination in which discriminating effects result indirectly from seemingly neutral legal norms, criteria or practice.³⁷ However, in reality, such seemingly neutral and legally correct norm, criterion or practice leads to or could lead to a person or a group of persons being discriminated against on a prohibited basis of discrimination.³⁸ For instance, if women dominate among employees who work part time, the difference in wages based in the difference of time that an employee works would have the effect of different wages between the sexes. Women usually face such discrimination when employers keep them on part-time contracts, refusing to sign new work contracts in the case of pregnancy or childbirth. In this case, a neutral legal norm of the Labor Act, regulating the termination of work for a specific period of time, has the effect of prohibited discrimination on the basis of gender.³⁹

Women's dignity is not specially considered in debates on discrimination. It is important to emphasize that as the promotion of equality between men and women throughout the EU is one of the crucial tasks of the EU, according to Article 8 TFEU, the EU shall aim to eliminate inequalities, and to promote equality between men and women. The obligation of gender mainstreaming reiterated also in Article 29 of the Recast Directive, means that both the EU and the member states shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities. Moreover, the CJEU has held that the principle of equality is one of the general principles of EC law.⁴⁰ The principle of equality corresponds to the Aristotelian conception of equality and precludes comparable situations from being treated differently, and different situations from being treated in the same way, unless the treatment is objectively justified.⁴¹

In the wilderness of equality norms, national courts are struggling with the interpretation of discrimination and the protection of the dignity and the very formal weapon when it comes to discrimination, reducing it to a specifically stated legal basis.⁴² For example, in cases of non-discriminatory harassment national courts are trying to eliminate this deficiency referring to the concept of dignity, which in this case is the legal basis for compensation.⁴³ However, in cases of sexual harassment, discrimination remains hidden. Usually, women are keen to claim that they are victims of

³⁶ Decision of the Constitutional Court No. U-I / 2273 / 2001. <http://sljeme.usud.hr:81/usud/praksaw.nsf/Ustav/C1256A25004A262AC-1256FA30031B2B6?OpenDocument>.

³⁷ The Grand Chamber of the European Court of Human Rights, *Stec and Others v. the United Kingdom* (application nos. 65731/01 and 65900/01). Available at: http://www.coe.int/T/D/Kommunikation_und_politische_Forschung/Presse_und_Online_Info/Presseinfos/2005/20050905-448-GH-UK.asp.

³⁸ Potočnjak Ž. (Ed.) *Radni odnosi u Republici Hrvatskoj (Labor relations in the republic of Croatia)*, Zagreb: Zagreb School of Law, p. 55.

³⁹ The 2007 report of the Ombudswoman for Gender Equality. Available at: http://www.prs.hr/docs/rh_prs_izvjesce_2007.pdf.

⁴⁰ Cases 117/76 and 16/77 Ruckdeschel [1977] ECR 1753.

⁴¹ For more details see: The concept of Equality and Non-discrimination: a Practical approach, European Network of Legal Experts in the field of Gender Equality, http://ec.europa.eu/justice/genderequality/law/index_en.htm, last accessed 15 June, 2013.

⁴² Decision of the Municipal Court in Zagreb of 10 April 2012, No. 25 Pr-35/10-19.

⁴³ Rijeka County Court upheld the decision of the trial court, which found that "the plaintiff was harassed in the workplace thus violated her rights and dignity, honor, reputation, physical and mental health. Decision of the County Court in Rijeka of 23 November 2011, No. GZ-4371/2011-2.

psychological harassment at the workplace, rather than sexual harassment. However, the first and only last instance ruling on discrimination based on sexual orientation confirms there is light at the end of the tunnel.⁴⁴

Conclusion

In conclusion, the European equality legislation does not have yet a clear concept of discrimination. The pursuit of harmonizing discrimination provisions on the level of the EU provides a challenge, for several reasons. In most national legislation, provisions forbidding discrimination can be found in many different laws. The totality of provisions is often complex and not transparent. The lack of a systematic and generally accepted legal theory of discrimination reveals that discrimination provisions in the Community law flow from different directions. The significance given to different sources of law varies between Member States. Moreover, the style of writing laws varies, as well as the law-drafting process. These difficulties have produced a hierarchy of equality where the right to non-discrimination is thorough and well established in some areas, but weak and fragmented in others.

The Croatian case shows that antidiscrimination policy shaped by national governments has been proven to be inefficient and lacking important monitoring and evaluation mechanisms. The example of Croatia shows that there is a lack of court decisions to protect the right of individuals at the normative level.

It might be concluded that the Croatian equality law has not reached the era of rationalization, which means that “the war is not over”. The easiest way to make the problem of gender discrimination go away is by announcing that it has been solved by the legislative framework.

⁴⁴ County Court Varaždin, No. Žs Zg Gž-5048/12-2), 9 July 2013.

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THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN ALBANIA

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Abstract

This theoretical and practical part is related to the analysis and studies of the contractual obligations under the private international law.

This work is divided into three parts, where respectively, the first part deals with the general part of the contractual obligations; the second part deals with the specific contracts, which are actually found also in a general regulation under law No. 10428, dated 02.06.2011 "Private International Law"; and the third part deals with the international and national jurisprudence aspect.

This work as based on the ex-positio sinkronik system aims at giving a minimum contribution in the application of the international private law and clarifies the omission, collision and legal problematic aspects in practice.

At the end of this work, there are our conclusions which serve as a deduction over the analysis and studies done to this part of the private international law.

Keywords: contractual obligations, private international law, contractual freedom, international Jurisprudence

Autonomy Criteria of the Will under the Private International Law

In the doctrine of the obligations law, there exist some constitutional principles which are formed with the passing of centuries from different authors, who are absolutely necessary and well-searched for the existence of this law. One of these principles is the autonomy principle of will (**lex voluntatis**). This principle makes one of the fundamental principles of the private law. Appearance of such principle in the obligatory law consists in the contractual freedom and non-formal character of the judicial actions¹. Contractual freedom means that every party on the contract is free to define not only with whom it wishes to enter in contractual agreement but also the content of the contract. This principle is sanctioned from Article 660 of the Civil Code², which defines that the parties on the contract define freely its content, within the established limits from the legislation in power. So we can conclude that it is noticed that the contractual freedom may be limited only by law. What also comes out of it is that even the contractual freedom, like any other freedom in the field of civil law, for as long as it is exercised in an organized government society, cannot by *apriority*, be completely absolute and unlimited. The freedom and autonomy of the privates comes out in a double-folded aspect: in a negative and positive aspect, which we shall analyze, because such analysis will help us in the autonomic sense of the contractual will on the international law.

Contractual freedom and autonomy in the negative aspect, shows that no one can be taken away his/her own belonging, or he/she is obliged to execute obligations in favor of others *against* or *despite* his/her own will. As a principle, every person is obedient to his own will and he is not obliged, but only when law allows such a thing, from the will of others. In this negative meaning, contractual

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¹ Right of Obligations and Contracts. Prof. Dr. Ardian Nuni etc., Pg. 11. Tirana 2008.

² Civil Code of Republic of Albania.

autonomy is present in the general concept of the contract such as: an agreement to *dare, facere* or *praestare* a judicial wealth agreement³.

In the positive aspect, contractual freedom and autonomy shows that privates may through an act of their will, create, change or deplete a wealth agreement. Under the function of this aspect, the parties have the right to choose between the different types of contracts that are more adaptable to their goal, to define freely the content of the contract, as well as they may have a *atypical* contract.

A consequence of the principle of the will autonomy is that a good part of the norms of the rights over obligations are of a *ius dispositivum (non-obligatory)* but oriented character, in the sense that the parties through agreement may define different regulations from those that are foreseen in them⁴.

After analyzing in a general way the concept of the will autonomy from the obligatory law viewpoint, now let's focus on the international aspect of this substantive principle.

Under the international law, the basic problematic over which it has developed even different doctrines, it has been that which law will be applicable and accepted in order to regulate the contractual obligations. Such a doctrine is positioned in three groups, where some support the law on the place where the contract is signed (*lex loci actus*), some others the law on the place of its execution (*lex loci solutionis*) and others the law of the parties will (*lex voluntatis*).

If we are to analyze the Albanian legislation, more specifically law No.3920, dated 21.11.1964, in Article 17 of it, it's sanctioned the right of participant parties in a contractual judicial agreement (with foreign elements) to choose the law which will judicially regulate such agreement. Further, the disposition defines that "the chosen legislation from the contractors is applicable only if for such cases there comes out clearly the will shown from them. Thus, there derives a prevalence of this principle against other principles, such as that of the common nationality of contractors and that of the birthplace or execution of the contractual obligations⁵. But it must be mentioned that this will has as its only limitation, its own judicial norms imperative to the state in the territory of which is foreseen that a contract is signed or executed.

New legislation, so law No. 10 428, dated 2.6.2011, explicitly foresees this principle under **its Article 45**⁶. *Da lege lata*, the leagla clause implements under its *corpusin* the principle *lex loci contractus*. The parties showing their will in the form foreseen under *lex specialis*, may define the applicable law for all the *in omnibus* contract or for a special part of it (singular). If there comes out from the will expressed from the parties that there is a jurisdiction foreseen for solving disputes that come out of the contract, it is supposed that the law of that country is chosen for the contract adaptation. It derives from the latter that in such situations it will be applicable the *lex fori*. Disposition defines the substantial conditions that an agreement must have, in order for it to be valid and proper for the parties' will, to be expressed in it. One among such conditions is also finding out explicitly and in a written way, while choosing the law. So parties must specify in a special statutory clause such fact into their contract. The parties by consensus and through bilateral agreement among them may agree that at any time the contract is regulated by another law, different from the one defined at the beginning of the contract, and that such a change if done after the signing of the contract, does not violate *ad vaeditatem* and *ad substanciam* the contract or the rights of third people.

³ Private Law, Francesco Galgano. Pg. 229, "Luarasi" Publishing House, 1992.

⁴ Right of Obligations and Contracts. Prof. Andon Sallabanda. 1962.

⁵ Maks Qoku, "Private International Law", Pg.260, 2013.

⁶ Law No.10 428, date 2.6.2011 "Private International Law".

Regulatory Law of the Contract Transformation

In order to firstly analyze the contractual transformations, we think that it is of great importance to clarify the transformation of the contract. What do we mean by transformation?

Civil Code and the obligation and contracts doctrine gives us numerous examples regarding this issue, but for methodological reasons we shall analyze the *cedim* institution as one of the most typical cases foreseen by our civil legislation, and also foreseen under Article 53 of the law for private international law. At first, we shall deal with the doctrinal aspect of such notion and then later we shall see which law is applicable in case of a legal collision.

It may happen that the rights and obligation pass on from one person to the other, and may be changed because of the **universal or particular succession**⁷. In the case of *universal succession*, the transition of rights and obligations of the creditor or debtor from one person to another is done in general, through a single action in relation to his whole wealth or part of it. A cause for something similar may be for example the joining of some commercial societies. In such cases, the wealth of one party is transferred in total to the third one, including his own assets and else. On the *particular succession*, the rights and obligations of a defined obligation agreement are transferred from one of the parties to a third person, through special actions that are detached from the other part of the creditor or debtor's wealth. In this aspect, we may find ourselves in front of credit *cedim* or under-taking the obligation, which are dealt with in another matter and are not actual object of this theme.

We can conclude that synthesis is a new judicial action, which again has a contractual nature and that it will undergo its regulatory law, which in turn means that from the effects viewpoint, as well as from the *ad valeditatem*, it will undergo the law of the main contract⁸.

If we shall make a *strictu sensu* interpretation, focusing only at the law we are studying, we must then focus on **Article 53**⁹ which deals with the legal substitution. From the technical legislative viewpoint and from the viewpoint of the logical rules of syntax and morphology, the disposition is not very clear. The basic idea that is transmitted concerns all those cases, whereby on the basis of a contractual obligation, the creditor has the right against the debtor, and a third person is obliged to clear the credit or has already cleared it under the fulfillment of this obligation, law, which regulates the obligation of the third person to clear the creditor, then the *mutatis mutandis* is being applied even for the definition of the measure and cause of why the third person has the right to exercise against the debtor the same rights the creditor had against the debtor, **according to the law that regulates their relationship**.

International Jurisprudence

1. Preceding Comments Summarized for the Jurisdiction of the Court in this Aspect

1.1 After years of silence, for more than 10 months the European Justice Court gave two separate decisions in relation with the interpretation of the Convention¹⁰ of Roma 1980, over the law on employment international contracts. In the meantime that the Roma Convention is not the main source of the private international legislation for the obligations within the European Union; it was in fact substituted by Regulation No. 593/2008¹¹, Article 8, which contains new special dispositions

⁷ Obligations and Contracts, Mehdi J. Hetemi. Tirana, Luarasi.

⁸ Civil Law, Obligations, Gerard Leiger. Papirus, 2008.

⁹ Law No.10 428, dated 2.6.2011 "Private International Law".

¹⁰ *Convention on the Law Applicable to Contractual Obligations*, Roma, 19, 1980, in *G.U.U.E. C 334*. 30, 2005, pg. 1 (consolidated version).

¹¹ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on application of law for contractual obligations (Rome I), in *G.U.U.E., L 177* July 4, 2008.

on employment contracts; anyway, the decisions of Koelzsch¹² and Voogsgeerd¹³ have an indisputable, material importance for two reasons:

At First, Roma Convention dispositions are applicable in all closed contract prior to 17 December 2009¹⁴, and **secondly** both the criteria of the relation interpreted from the Court, in relation to the decisions we are talking about, are assimilated by the new Regulation even word for word (this is regarding the business place criteria of the business, through which the employee is employed) or with changes through which the Court aimed exactly at “reconcile” itself with (usual work place criteria). Therefore the detailed review of Article 6 of the Roma Convention may be used as the guidelines for the application of Article 8 of the Roma I Regulation.

The fact that, not earlier than 2011 the Court decided for the first time to address the issue of interpretation of Roma Convention, regarding the issues of employment contracts (even though it was since 1991¹⁵ which that was in power) may be explained with the late introduction to enter in power of two protocols signed in Brussels in 1988, which give jurisdiction to interpret the above-mentioned Convention¹⁶.

1.2 The need for a uniform interpretation of the dispositions of the private international legislation in Roma Convention has always been confirmed from the Italian authors¹⁷ and has always been one of the strongest arguments to support the need to transform the Convention in a Regulation of the European Union¹⁸. Reading of the *Koelzsch* dhe *Voogsgeerd* decisions confirms the stability of such position, putting out front the contribution of the efforts of the Court, in order to clarify the issue of the international convention’s employment, may also serve to achieve a greater assurance of the legislation, in regulating the private legal agreements between countries in Europe.

2. Importance that the Court attributes to the Basis for Jurisdiction regarding the Employment Contracts

2.1. The two already mentioned decisions are more than consistent with the flow that the European Union has chosen to create an organic system of norms for the coordination of legal systems, which is considered as a standardization of the basis for jurisdiction and rules for decision recognition, as well as an adaptation of common, interconnected criteria for the identification of law that is applied in cases that introduce common elements with a series of different legal systems. In the meantime, now that many initiatives from the EU lawmakers based on the new competences according to Article 81 TFUE¹⁹ contain important structural elements for the construction of an Euro-

¹² ECJ, 15 March 2011, Case C-29/10, *Heiko Koelzsch v. Etat du Grand-Duché de Luxembourg*.

¹³ ECJ, 15 December 2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*.

¹⁴ This what in fact Article 29 of the Regulation (EC) 593/2008 foresees.

¹⁵ Italy has already now implemented Convention in 1984, through law No. 975, of December 18, 1984.

¹⁶ Article 6 of the first protocol (89/128/CEE), in both interpretative instruments took effect on 1 August 2004. On 6 October 2009, the Court exercised its jurisdiction for the first time, trying an interpretation of Article 4 of Roma Convention. cf. Case C-133/08, *ICF*, in *Raccolta*, pg. I-9687.

¹⁷ Like it is for ex. R. Luzzatto, *L'interpretazione della convenzione e il problema della competenza della Corte di giustizia delle Comunità*, in T. Treves (edited by), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padua, 1983, pg. 57 et seq.

¹⁸ In this viewpoint, look at the Commission’s Green Paper «on the conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization», Brussels, 14 January 2003, COM(2002) 654 final, pg. 15.

¹⁹ Based on this disposition, the Union «will develop the judicial cooperation in civil cases that have cross-border implications» that may be applied by approving some measures that aim at guaranteeing the, among others, «compliance of the rules in power in the Member States, regarding the conflict of laws and jurisdiction» (Art. 81, No. 2, Letter c). Norm, which corresponds with Art. 65 of TEC-it (ex-Art. 73 M presented by the Amsterdam Treaty in 1997) in this way, gives to the Union the special jurisdiction to approve, now through common legislative procedures, its international private uniform system of the law, annulled Art. 220 of the original Roma Convention has given, for such purpose, the international convention dispositions between member states. Brussels Convention of 1968, as well as Roma Convention of 1980 used in Art. 220 (Later Article 293) of TEC, as their regulatory foundation: are in regard to the effects produced in this last norm (which was not officially annulled up to the Lisbon Treaty) from entering into power of the new EU competences for judicial cooperation in civil cases.

pean and private international legal system, Koelzsch and Voogsgeerd decisions show the potential that the Court has in the harmonization and stability of this new system²⁰.

This is true according to at least two perspectives. From this viewpoint, the Court has been indirectly answering the suspicions that come from the immediate application, in the EU legal system of Roma Convention and of the new Regulation No. 593/2008, offering an evaluative system of interpretation for the first, which precedes the new dispositions of the Roma Regulations I²¹, and may unify the conflict of legal systems in the field of employment contracts. From another viewpoint, the Court gave shape to the principle of continuity between the work to unify the international procedural civil law of EU (starting back from the Brussels Convention of 1968²²) and to unify the international private laws over obligations.

A similar principle has been already confirmed in the Preface of the Roma Convention²³ and it discovered itself later in the osmotic relationships of this Convention and the version that was followed by the Brussels Convention, which in its 1989 text, established new special basis for the jurisdiction of the law on employment, inspired directly from Article 6 of Roma Convention²⁴ and later confirmed by Brussels Regulation I²⁵. In the *Koelzsch* decision, adapting the position that the *Attorney General* expressed in his extended arguments²⁶, the Court re-confirmed the position expressed already on the first decision by interpreting Roma Convention²⁷ and declared that by interpreting Article 6, paragraph 2, a) of this Convention, it cannot take into consideration its jurisprudence over similar notions to Article 5,1 of Brussels Convention, again in relation to the employment legislation²⁸. By doing so, the Court tests its capacity to contribute actively, by creating a convenient interpretative relationship, for the unification of the international procedural law and the legal systems conflict of the EU into an organic legal system that may manage all cross-border cases.

The Court favors such Interpretation “oriented toward the core” of Conflicts of Legal Articles.

Hermeneutic work of the Court in regard to the notion of “the place where the employee regularly does his job” according to Article 5 1) of Brussels Convention, which as we have seen in the *Koelzsch* decision, was widened exactly with the similar expression of Article 6 of the Regulation

²⁰ For a authoritarian reflection over the interpretative role of the Court regarding cases that are included in the so called «freedom, security and justice field».

²¹ I mean both of them, a wide interpretation of the criteria of the permanent place of work and in the great reduction of the sphere of the application of the country criteria, where the worker is engaged.

²² Brussels Convention over the Competences and application of decisions over the civil and commercial cases, Brussels, 27 September 1968, in GUCE C 27 of 26 January 1998, pg. 1,.

²³ «High Contractual Parties (...) concerned to continue in the field of private international law, the issue of joining rights, which is already done within the Community, especially in the field of jurisdiction and application of decisions (...): cf. Roma Convention Preamble, cit. in point 1.

²⁴ Cf. Art. 5, No. 1 of Brussels Convention, changed by 26 May 1989 Convention, related to the acceptance of the Kingdom of Spain and that of the Republic of Portugal.

²⁵ Regulation of the Council (EU) of 22 December 2000, No. 44/2001, related to jurisdiction, recognition and execution of judicial decisions in civil and commercial cases, in GUUEL 12, pg. 1.

²⁶ «The place where the worker usually does his job» in compliance with Art. 5, No. 1 of the Brussels Convention, accepting that that was comparable in analogy, with the respective criteria of the relation held in Art. 6, No. 2, Letter a) of the Roma Convention, based on both such systematic and theological interpretation. According to the *General Attorney's* thought, this result will not be excluded either from a literal interpretation or a historical interpretation of the disposition being mentioned: cf. the conclusions of the *General Attorney*, Verica Trstenjak, introduced on 16 December 2010, Case C - 29/10, section 52-81, not published yet in *Raccolta*, but ready on the internet page of the Court: <http://curia.europa.eu>.

²⁷ Cf. ECJ, 6 October 2009, Case C-133/08, ICF, cit., Paragraph 22.

²⁸ Paragraph 33 of *Koelzsch* Decision.

593/2008, and is a clear manifestation that the Court favors the development of the so-called “fundamental methods” of solving conflicts of laws in system²⁹ of the international private legislation of EU.

In particular, the Court’s interpretation gives a central role to the deeply fundamental objectives that the authors of Roma Convention have followed during the compilation of the connective criteria. In this case, these purposes must protect the employee as the weak contractual party, and more specifically, in order to guarantee that where possible, the rules of protection of the government employment, where the employee does his/her own economical and social duties, will regulate the contract and be applicable in the contract (look at *Koelzsch* decision, sec. 40 and 42)³⁰.

In the decisions signed, the principle of *favor laboris*³¹, which is the reason for including Article 6 in the Roma Convention, furthermore acts not only as a criteria for the interpretation of key words that express the connective criteria in Letter a) and b) of paragraph 2 of the norm under discussion, but overall as an instrument for the coordination of both criteria, not any more as an alternative objective³² but in a very hierarchal way (*Voogsgaerd* decision, paragraph 34). It is exactly here, where we can see the second final step that the Court undertook during the interpretation process of the Article 6 paragraph 2 of the Roma Convention.

This evolution in the interpretation is based on two considerations. In one of them, the mechanical identification of the law applicable over the employment contract based on the spatial position of the service of the employee, is already unpleasant, because of some professional ciphers which stay at a grey area, as they continue work in a series of countries, and it is still possible to identify an initial relationship (meaningful, according to the terminology used from the Court: *Koelzsch* decision, paragraph 44) with one of them.

Secondly, since 1980, the importance of the aim for the protection of the employee as a weak party in the relationship, has changed in the EU system: you can no longer find an expression in the international conventions, even though they are sought and accepted by member states, but it is recognized in many secondary norms (including here Regulation I of Brussels and Roma) and corresponds with a value which is declared exactly in the legal system of the European Union

Both decisions therefore express an evolution in a perspective that is meaningful in the gradual reconstruction of the international private legal system of the European Union, which is actually being elaborated. In regard to the traditional method of Savigny, which is based on the spatial localization of the relationships⁴⁵, “the fundamental method” mentioned earlier for the coordination of legal systems is gaining grounds, in which the end followed by the law-makers before the compilation of the connective criteria must, where possible, over-reign even during the interpretation and application of the norms over conflicts of laws.

Such new perspective made the Court to confirm that the criteria for the right kind of job “must be given a wide interpretation” (*Koelzsch*, paragraph 43) which includes cases where the employee does his job more than a state itself, being that the judge may use the case circumstances

²⁹ For the reconstruction of the genesis of the «material» method of the conflicts of laws from the American authorities of the case, according to the author, this method makes one of the different instruments for the coordination between the used systems now in the context, from the European conflict of the legal systems, cf... P. Picone, cit, pg. 487 and pg. 489.

³⁰ Less obvious, but not least based upon, is the qualification on the direction of the material objectives of the law-makers of the Union, of the harmonization of the forum and IUS, which the *General Attorney* Trstenjak, uses as the basis for its teleological of Art. 6, paragraph 2, a) of Roma Convention (along with the conclusions of *General Attorney* Verica Trstenjak, cit., Paragraph 80 et seq.) and which is concretely connected to the principle of continuity between the work of the union in the private sector of the international law.

³¹ For a deeper exploration of the evolution and actual state of the favor principle for employees in the Roma Convention, and now, in the Regulation No. 593/2008, are referred, including extra bibliographic information, of the many studies by the part of R. CLERICI

³² In the sense that the application of one or another criteria is based on the objective fact that work is done in only a State (letter a) or in a series of states (letter b), according to a mechanical identification of the place of relationship.

to identify the State in relation to the work done (same place, paragraph 44). Thus, the *Voogsgeerd* decision, made perfect the interpretative work, giving the national judges, clear instructions as how to proceed in the construction of cases that include the employment contracts.

The Role of the closest Relationship Criteria in the Work Contract

On the other side, it is more likely that relevant factors according to the Court, with the aim of fulfilling the relationship criterion for a regular employment or the place of business that employed the employee, could have suspicions that may not be important, or they might demonstrate that the work relationship is more closely related to a legal system than those who they refer to.

In such case, the judge may consider other elements to assure that the law in power in the State where the case is relevant, according to the last sub-paragraph of the Article 6, paragraph 2 of the Roma Convention (*Voogsgeerd* decision, *paragraph 51*) is applied for the contract. In his conclusions, the *Attorney General*, emphasizes how the logical basis for the last criterion of Article 6, paragraph 2, is to give the judge a certain *flexibility* for the application of Roma Convention, the flexibility of which is sought to preserve the principle of favoring an employee, and of all cases where the employee voluntarily decides the place of business in a state with laws that are less sharp for the protection of the employee.

For the (fundamental) purpose of protecting the employee as a weak party of the contract, the Court once more gives priority to the logical line of thought that national judges must follow, making it as such that they apply laws that give more protection to the employees.

Conclusions

Going through a deductive-synthetic process, we may conclude over some important aspects that have been introduced in this theoretical and practical work over the contractual obligations, regulated according to the "International Private Law" of the Republic of Albania.

Initially this work dealt with the autonomy principle of will, as a substantial principle which makes the *corpus* of the regulation of contractual obligations, in *stipulations* that the parties make to each-other in order to create, change or destroy a certain judicial relationship. Like other ways to get involved into the relationship of parties, we also treated the criterion of common nationality, and that of the place of the conclusion of the contract, as well as the principle of regulatory law for the transformation of the contract.

A special place was given to the synthetic analysis of special contracts which are so indispensable, because in such contracts are reflected the general principles covered in the first Chapter of this work.

In a chronological line it has been shown the clausal part (jurisprudence), as a constructive part, absolutely indispensable and well-sought in order to fulfill the analytical framework of the obligations in this aspect.

This work has been analyzed in two aspects, in that national and that international one, analyzing the decisions that are important for that law.

At the same time, the same methodology *mutatis mutandis* has been followed even in the historical part, which we didn't deal with separately, but it was rather included into different parts of this work, by analyzing certain moments that are distinct from the law which is actually in power and has substituted the previous law of year 1964.

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PART TWO

CONSTITUTIONAL LAW

THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE AND THE NATIONAL (CONSTITUTIONAL) COURTS AND THE CONCEPTS OF SOVEREIGNTY IN THE EUROPEAN UNION: IN OR OUT THE SHADE OF THE WESTPHALIAN PARADIGM?

Karolina RISTOVA-ASTERUD*

Abstract

The article analyses the jurisprudence of the ECJ and the national (constitutional) courts of EU's member states on the issue of sovereignty in the EU, with a particular view on how it influences the understanding of the nature of the EU polity. It argues that the jurisprudence of both ECJ and the national (constitutional) courts are decisively shaped by the so-called Westphalian paradigm on sovereignty. However, although this paradigm serves as a common judicial denominator, it does not necessarily lead to identical understanding of sovereignty in EU by the both levels of courts, and thus leading to different conceptualizations of the nature of the EU polity.

Keywords: courts, EU, jurisprudence, sovereignty

Introduction

At the core of the public, political and legal debate on the nature of the EU polity is the debate on the conceptual (re)defining of sovereignty in the European integration, especially in terms of the established concepts of state and popular sovereignty. How these concepts are interpreted and evolving in the EU context is causally intertwined with the institutional design and the functioning of the EU. In this article I take the position that in this respect, a crucial contribution comes from the ECJ and the national (constitutional) courts of EU member states. I will present the key developments in the jurisprudence of both ECJ and national (constitutional) courts regarding sovereignty in the EU. My main assertion is that the common denominator of the jurisprudence of both levels of courts is the so-called Westphalian paradigm, which represents a historical and intellectual *acqui communautaire* on sovereignty for the EU judicial circles. Then, I will turn to analyzing the implications of the Westphalian paradigm to the particular understanding of the issue(s) of sovereignty by the courts. I'll argue that the Westphalian concept of sovereignty, although serving as common jurisprudential denominator, does not necessarily lead both levels of courts in the EU to the same understanding of sovereignty with respect to where it lies and how it is or should be embodied. Finally, I'll address these jurisprudential differences in terms of their particular implications on defining and understanding the nature of the EU polity, especially in terms of the three perspective avenues of political and legal formatting of the EU that they have helped shaping: supranational *sui generis* polity (ECJ), *de lege lata* international intergovernmental polity or *de lege ferenda* (federal) European statehood (national constitutional courts).

1. The jurisprudence of the ECJ and the supranationalisation of sovereignty in the EU

The EU treaties as primary sources of EU law do not give a clear-cut picture of the (legal) nature of the EU polity apart from its legal capacity (Article 47 TEU). It is ECJ with its jurisprudential doctrines on the supremacy and the direct of the EU law that has more paradigmatic contribution

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in this respect. Firstly, in 1963 in its decision in *Van Gend en Loos*¹, ECJ interpreted that the EC/EU law had not only imposed obligations on natural and legal persons in the member states, but it had also conferred them with rights that could be invoked before national courts (Direct Effect Doctrine). In elaborating its legal reasoning, the Court emphasized that: a.) the EC/EU law is a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals; b.) that the preambles of the EC/EU treaties do not call upon only on the (governments of) the member states, but also of their “peoples” who are represented in treaty-established institutions, such as the European Parliament, and, thus, the EC/EU treaties are not only treaties among the member states but also among their peoples. In the following years, the judicial activism of the ECJ has further developed this doctrine as a doctrine of both vertical effect (*vis-a-vis* member states) and horizontal direct effect (*vis-a-vis* other natural and legal persons) of the EU primary and secondary law, apart from the directives that are capable of only vertical direct effect because of the need to transpose them into the national legal system first (Hix, S. 121-122). As a “compensation” for the lack of direct horizontal effect of the directives, the ECJ has developed an additional doctrine of “state liability” for any violation of the EU directives.²

However, it is hard to imagine any legal effectiveness of the direct effect without supremacy of the EC/EU law over the national law of member states in case of conflicting legal norms. The founding treaties did not entail such a “supremacy clause”, and again it was up to the judicial activism of the ECJ to formulate one. Surely, one year after formulating the direct effect doctrine, the Court in 1964 in the case *Costa v. ENEL*³ has introduced the principle of supremacy of the EC/EU law. In this case, the legal reasoning of the Court went as following: a.) in contrast with the ordinary international treaties, the EC/EU treaties created its own legal system has become an integral part of the legal systems of the member states and which their courts are bound to apply; b.) by creating a Community of unlimited duration, with its own institutions, its own personality and its own legal capacity and with real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights in certain limited fields, and thus have created body of law which binds both their nationals and themselves.; c.) the integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the treaties, make it impossible for the states to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity; d.) from all these observations presented above, it follows that the law stemming from the EC/EU treaties which represent an independent source of law could not, because of its special and original nature, be overridden by domestic legal provisions, without depriving it of its character of Community law and without the legal basis of this law being called into question.

From the legal reasoning of the ECJ it is quite clear that the doctrine of the supremacy of EU law is implicitly drawn from the “transfer of powers” from the states to the EU. However, over the decades of development of the EU law, it becomes ever harder to talk about “limited fields” to which the Court had referred in the *Costa* case far back in 1964. Moreover, in its subsequent jurisprudence over the years, ECJ has made it clear that the supremacy clause refers to both primary and secondary EU law, as well as the “general principles of EU law” (Hix, S. 123). In addition, in *Costa* ECJ uses more ambitious language to qualify the nature of the legal order of the EU: “new legal system” that is “independent source of law”, and with “special and original nature.” This legal approach of ECJ culminates

¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) E.J.C. 1.

² C -69/90 *Francovich I* 1991 ECR I-5357.

³ Case 6/64 *Costa v. ENEL* (1964) ECR 585.

in 1986 with the ECJ's judgment in *Les Verts*,⁴ in which the founding treaties are referred to as "constitutional charter." Moreover, ECJ's jurisprudence was further advanced with subsequent development of the concept of "external sovereignty" of EU (beginning with the ERTA judgement of 1971)⁵, the concept of obligatory internal enforcement of EU law by member states, including by means of state coercive powers⁶, and by asserting its role of supreme judicial arbiter in conflicts of vertical allocation of powers between the EU and the member states in the application of the principle of subsidiarity, most notably in the judgement *Germany v. European Parliament and Council* of 2000.⁷

2. The jurisprudence of national (constitutional) courts on sovereignty in the EU: the question of Kompetenz-Kompetenz

The jurisprudence of ECJ did not encounter any challenge for a considerable period of time, neither from the governments of EU member states, nor from the national (constitutional) courts. In fact, the requests for preliminary opinions of ECJ by the national courts as key instrument of the supranational court to ensure uniform application of the EU law (as well its supremacy!) has been and still is the most used competence of the supranational court. The most illustrative example for respecting the ECJ's doctrines is the courts of Netherlands and Belgium. Netherlands is a prime example of an EU member state with no "sovereignty pretensions" and absence of any frustrations from the incursions by the ECJ. It is noteworthy to mention though that the Dutch constitution has no article on sovereignty, and that in 1953, an explicit constitutional amendment was introduced, guaranteeing supremacy of international over national law. Thereafter, only the national parliament can decide on the constitutionality of international agreements in the process of their domestic ratification, and that cannot be challenged before any national court (articles 91, 92 and 94 of the Dutch Constitution). Moreover, many Dutch legal experts and judges are on the position that the EU law operates in the Dutch legal system directly on the basis of EU treaties, and it is not uncommon for the courts to refuse to apply national legal norms if they find them in discord with the EU law (De Witte, B. 351-366). In Belgium, in 1970 a constitutional amendment was introduced (article 34) in order to provide for a constitutional basis for the transfer of state competences to the EC/EU, but with no clear-cut definition of the relations between the domestic, international and EU law. One year after this constitutional reform, the Court of Cassation in its *Le Ski* judgment declared the primacy of directly effective provisions of international treaties, with jurisprudential narrative that very much resembled the ECJ's one in *Costa*. However, this judgment did not address the issue of conflict between the national constitution and an international treaty, a question that was raised a decade

⁴ Case 294/83, *Parti Ecologiste "Les Verts" v. European Parliament* (1986) ECR 1339.

⁵ Case 22/70 *ERTA* (1971) ECR 263. In this case ECJ declared that when concluding agreements with third parties, EC/EU has sovereign primacy over existing or future agreements of the member states with those third parties. It also asserted that this applies in all areas of EC/EU competences, not only to those explicitly enumerated in the treaties, effectively meaning that ECJ analogously had formulated new treaty-making powers for the EU in the international sphere, depriving member states of any unilateral action in the area of EU competences. This ECJ's jurisprudence was subsequently turned into EU primary law (article 47 TEU in correspondence with article 37 TEU and Article 3(2) of TFEU).

⁶ Case 205-215/82 *Deutsche Milchkontor GmbH v. Germany* (1983) ECR 2633; Case C-8/88 *Germany v. Commission* (1990) ECR I-2321; Case C-265/95 *Commission v. France* (1997). The legal reasoning of ECJ in promoting the internal coercion obligation for member states stem from the Court's interpretation of each of the founding treaties' articles that had instructed the member states to "take all appropriate measures...to ensure fulfilment of their obligations arising out of the Treaty", known also as "principle of loyal interpretation," currently expressed in Article 4(3)(2) of the consolidated version of TEU.

⁷ Case 376/98 (2000). The principle of subsidiarity was firstly formulated by the Maastricht Treaty of 1993, and then by the *Protocol on the application of the principles of subsidiarity and proportionality* of the Amsterdam treaty of 1997. Neither had provided for any implementation competence for ECJ or national courts. Despite this, the ECJ interfered with the referred and several other judgements, and asserted its role as an arbiter. In the dawn of the preparations of new treaty reforms by the Convention for Europe in 2002-2003, ECJ wanted to signal to the member states that they can place their fate in ECJ to "police" their competences conflicts with the supranational level, as it indeed had happened with Article 8 of the protocol with the identical name of the Lisbon Treaty of 2009.

later, in the 1980's before the newly established constitutional court, the Court of Arbitration. Although not as an explicit competence, this court took upon itself to decide whether parliamentary acts of assent to international treaties are compatible with the Belgium constitution in an *a posteriori* manner. So far, the Belgium constitutional court has been exercising this assumed jurisdiction only on "ordinary" international treaties, with a clear avoidance of the matter regarding EU treaties. In other words, in Belgian constitutional court's jurisprudence the issue is still not resolved in strictly formal legal manner, but in the same time this national constitutional court regularly asks for preliminary opinions from ECJ when it decides constitutional matters arising with connection to aspects of the EU law, which indicates that it would hardly take a position against the supremacy doctrine of the ECJ (*Id.* 356-358).

On the other side, the national (constitutional) courts of Germany, Italy and G. Britain took upon a different, more "sovereignist" approach, with the German *Bundesverfassungsgericht* leading legal battle against doctrine of supremacy of ECJ known as the battle of *Kompetenz-Kompetenz*. The German court very early after the ECJ's doctrines had been formulated, in its cases *Solange I* (1974)⁸ and *Solange* (1986),⁹ announced that it would accept the supremacy of the EU law only in the narrower sense of "primacy of application", but not in the wider and more general concept of "primacy of validity," thus reserving the right for a national constitutional review of EU law. Its *Kompetenz-Kompetenz* jurisprudence would fully develop in the process of constitutional review of the Maastricht Treaty and the Lisbon Treaty, i.e. respectively in its judgments *Brunner* (1993)¹⁰ and *Lisbon* (2009).¹¹ In both cases, the German Constitutional Court had declared that all the EU treaties ratified by Germany and their subsequent secondary legislation must be in compliance with the national constitution, and had argued that as long as the EU is only a *Staatenverbund* (union of sovereign states), though *sui generis* one, and as long as an entity is not transformed into a democratic (federal) state with its constituent *Volk* (*Demos*), any attempt of the EU institutions to grant themselves with the competence to decide over their competences would be considered illegal in the German constitutional law. Similar legal trajectory has been developing by the Italian constitutional court, which in a long period (1964-1984) has resisted the "monistic approach" of ECJ and regularly refusing to ask for its preliminary opinions. Only in 1984 in its *Granital* judgment, the Italian constitutional court had finally recognized the doctrines of ECJ, but only as "dualist concept," meaning that EU law enjoys supremacy because when it operates "national law must withdraw from the fields of competences occupied by the EU." Still, unlike the German constitutional court, the Italian one did not explicitly answer who has the *Kompetenz-Kompetenz* (Cartabia, M. 305-326). Finally, G. Britain with the advantage to enter the EC/EU 10 years after the ECJ's doctrines had been formulated, had accepted the direct effect upon joining EC/EU in 1973, followed by loyal implementation by the British judiciary (Schmidt, V.A. 81-87). As for the doctrine of supremacy of EU law, Britain, as a country with long tradition of parliamentary sovereignty and no written constitution, would become one of the locuses of opposition. That is, until 1990 when the House of Lords in a capacity of a supreme court in its judgment *Factortame*¹² had found a way to reconcile the parliamentary sovereignty with the supremacy of EU law. The legal reasoning was that by way of parliamentary ratification of the accession treaty to join EU, Britain had accepted to be part of the EU legal order, of which the doctrine of supremacy of EU law is one of the central pillars, and of which Britain was aware of upon joining the EC/EU. That in itself did not and does not violate the parliamentary sovereignty because the British parliament still has the right to put the accession treaty out of force and leave the EU.

⁸ BverfGE 37, 271.

⁹ BverfGE 73, 339.

¹⁰ BverfGE 89, 155, *Brunner v. European Union Treaty* 1 CMLR 57 (1994).

¹¹ BverfGE, 2 BvE 2/08 (2009).

¹² *Factortame v. Secretary of State for Transport* (1991) A.C. 603.

3. Concluding overview of the juridical concepts on sovereignty in the EU: in or out the shade of the Westphalian paradigm?

Ever since the Treaty of Westphalia of 1648, the modern idea of European statehood was understood as a stable political formation with an unchallenged, uniform, and one-dimensional *imperium* over defined territory and population. The political reality of this concept was intertwined with the intellectual legacy of the 16th - 17th centuries' political philosophy of Bodin, Hobbes, later followed by Hegel, J. Austin and C. Schmitt, and staying viable deep into the 20th century. In terms of the internal state sovereignty, the liberal political philosophy (Locke, Rousseau, Kant, Bentham, J.S. Mill, Weber), reinforced with the American and French revolutions of the 18th century, have been shaping the concept of popular sovereignty, variably centred in the individual, the *demoi* or the nation (Ristova-Asterud, K. 133-148). I will suggest that it is this powerful legacy of state and popular sovereignty, known as the Westphalian paradigm that has been shaping the jurisprudence on sovereignty in EU context of both EJC and the national (constitutional) courts. In short, the doctrine of supremacy of the ECJ and the doctrine of Kompetenz-Kompetenz of (some of) the national (constitutional) courts are variations of the Westphalian understanding of sovereignty i.e. yet again as an uniform and one-dimensional *imperium* over defined territory, however, with a different outcomes regarding the nature and the formatting of the EU as a polity. In the case of ECJ that kind of sovereignty is attached to the supranational level of the EU as a *sui generis* polity, while in the case of the national (constitutional) courts, it remains firmly connected to the form of traditional statehood, but in two variations: the first one is the *de lege lata* statehood of the existing EU member states with the EU consequently remaining only as an international intergovernmental organization/polity; the second one, *de lege ferenda* that places the sovereignty on the EU, but yet again only in a form of perspective (federal) European statehood.

The ECJ's doctrines of supremacy and direct effect of EU law are not explicitly doctrines about sovereignty in the EU. Indeed, according to some views, these doctrines should be taken only as creation of judicial and legal pragmatism governing the priority in case of conflict between the norms of the national and supranational legal orders in EU (rules of priority) (De Burca, G. 449-460). In other words, they should be looked at as an expression of a typical (European) lawyers' reflex to view the legal order as an hierarchical order, a reflex that can be subscribed to the European legal education and legal culture to always look for the Kelsenian "Grundnorm" or the Hartian "Rule of Recognition" as a initial validation for all the lower norms in the hierarchy of the legal norms – an intellectual legal exercise from which even the judges of the ECJ, as good students of the European legal traditions and schools, are not immune. This may be so to a certain extent. However, it does not fully explain the juridical narrative when it declares the EU legal order as "new legal order", "an independent source of law" that is "special and original" in its nature, and separated and distinct from the international law. I subscribe to the view that this choice of words, the EJC's insistence on "subjectivation" of the EU law with the doctrine of direct effect, taken together with the narrative that the EU treaties are not just treaties among states but also among the peoples of the EU, indicate to a more ambitious viewpoint of the ECJ. In the ECJ's juridical narrative the "European supremacy" is derived from the popular sovereignty, while the monistic supremacy of the international law is derived from the state sovereignty, which, unlike the "European supremacy," does not affect the traditional state sovereignty - in the case of traditional international treaties sovereign states are obliged by treaty law to which they willingly became parties of (*pacta sunt servanda*), while in the case of the EU law, in the area of the transferred competences, each member state is bound even by (secondary) EU law for which it might have voted against in the prescribed voting procedures. All this argumentation suggests that ECJ has embarked on building a jurisprudential doctrine of a *sui generis* legal order of a political formation that is *sui generis* – new and original European polity. I suggest that such

qualifications are not possible without the assumption of sovereignty, however tacit or muted, at least not in the legally trained minds as those of the judges in the ECJ. In the conceptual terms, the assumed sovereignty projected in the ECJ jurisprudence is one of legal sovereignty (EU treaties as Grundnorm that legally validates all the other legal norms in the hierarchy of law of the polity that is EU). Only by operating on the assumption that EU is a sovereign legal entity, could the ECJ formulate the doctrines of the supremacy and direct effect of the EU law as derivatives of that sovereignty, not other way around. Moreover, I agree with the viewpoint of some legal scholars that the ECJ is also not ignorant to the “political game of sovereignty” (Maduro, M.P. 502) by deriving its doctrines only from popular sovereignty, but also by insisting on its institutional dimension i.e. locating it in the EU institutions to which member states have transferred competences, as ECJ always uses the opportunity to remind them in its judgments. That in itself suggests the existence of a political polity established by political self-determination of the “peoples of Europe,” as well as gives us a concept of political sovereignty of the EU. In sum, the ECJ’s doctrine of supremacy is a Westphalian paradigm “going supranational.”

On the other side, the national (constitutional) courts with the jurisprudence of *Kompetenz-Kompetenz* clearly remain to defend the traditional version of the Westphalian paradigm of sovereignty. To them, the supremacy of the EU law is not a concept of sovereignty. It is not even a concept of transferred (parts of) sovereignty. It is only a concept of *operational* transfer for executing parts of the sovereignty that continues in its totality to rest in the state and her constituting *demos*. In other words, the supremacy doctrine can go as far as being understood as a transfer of so-called functional sovereignty. As mentioned, this approach does not preclude that in the future the EU may become sovereign, but that may happen only if it transform itself into a (federal) state. If not, it will only remain an intergovernmental international organization, a non-sovereign union of states, no matter how *sui generis* it is and may be.

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PART THREE

SUBSTANTIAL AND PROCEDURAL ASPECTS OF CRIMINAL LAW

CRIMINAL LAW ASPECTS OF THE GENETIC MANUPULATIONS (WITH SPECIAL REFERENCE TO BIO-WEAPONS AND CLONING)

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Abstract

The rapid scientific development in the area of biomedicine, particularly in the molecular biology and genetics contributed to inventions of new therapeutic technics and methods that in many cases are legally and ethical disputable. Several of them like certain types of gene therapies, therapeutic cloning etc., range within the so called "grey zone". Most explicit procedures of manipulations with human genes that constitute criminal offences are the genetic engineering of biological agents in order of production of bio-weapons and the reproductive cloning. The international instruments for human rights of the United Nations, Council of Europe, European Union etc., set up clear standards for several genetic related issues: there is a ban on production, stockpiling, research and use of bioweapons and also explicit prohibition on the reproductive cloning.

Following signature and ratification of the international acts, many countries worldwide criminalized the bio-weapons related acts in their criminal legislation. The situation with the reproductive cloning is less satisfactory, namely, many European countries still lack incrimination of cloning in the criminal codes, but some have it in the health legislation. The therapeutic cloning is still an open issue, although some countries criminalized it in absence of international standards and consensus on this matter.

Keywords: biological weapons, bio-warfare, criminalization, genetic engineering, law, reproductive cloning.

1. Introduction

The Human Genetics is part of the biological science that deals with the study of inherited characteristics in plants, animals and humans. There are other similar definitions according to which: it is a biological science of heredity and variation in living organisms,¹ it represents a science that studies heredity and variability properties of living organisms² etc. The word comes from the ancient Greek word "genetikos" derived from the word "genesis" meaning origin.

The genetic research and findings today occupy an important place in everyday life ranging from food issues such as the production of genetically modified plants and animals in order to increase food production, to the use of the human genetics knowledge for treatment of many diseases as well as for non-therapeutic and other actions on human genes.

Using numerous interventions and manipulations of genes today various diseases that have been considered incurable can be treated, but some of them can affect the characteristics of the future generations. The possibilities go even so far as through cloning, for example, human beings who carry the same genetic material as some others can be created or human beings belonging to

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¹ Griffith, A.J.H., Miller, J.H., Suzuki, D.T., Lewontin, R.C., Gelbart, W.M., An Introduction to Genetic Analysis, <http://ncbi.nlm.nih.gov/books/bv.fcgi?rid=iga.section.60>

² Трајковски, Владимир. Хумана генетика, Филозофски факултет, Скопје, 2005, p. 25.

a new breed can be produced - a new type of people under the concept of the creator of such a potential project. The actual study of hereditary material in humans may give insights and information about inherited diseases and how they transfer on future generations and preferences to anticipate certain situations and certain diseases that still would have occurred in individuals whose genes are examined in certain circumstances. Hence, it is clear that all manipulations and investigations of human genes must be regulated and strictly controlled and limited to the extent that will represent the optimal tool for treating humans and improve the quality of their health and life. These procedures should not be means by which the basic human rights would be grossly violated. If one imagines the scenario that the information about the illnesses that a person is expected to get in the future obtained on the basis of genetic tests becomes available to the public, then there is no doubt that such a person would be stigmatized and condemned in almost all communities: they may be rejected by the family, might lose their job etc.³

The following actions constitute the wide range of manipulations with genes that are relevant from a criminal justice perspective:

- Cloning (reproductive and therapeutic),
- The creation of biological weapons by means of genetic engineering,
- Gene therapies (somatic, germinal and embryonic)
- The procedures of the realization of the concept of "eugenics based on science" (determination of the reproductive rights of persons with mental disabilities etc.)
- Genetic tests and screenings and the dissemination of the results etc.

Within this paper the subjects of creation of biological weapons through genetic engineering and cloning will be further elaborated.

2. The creation and use of biological weapons and the criminal law response

2.1. Introductory remarks

The use of biological agents in warfare is known from ancient times. It is believed that during the 12th century BC, Hittite transported human and animal corpses to the territory of the enemy to cause epidemics. In 1346 in the army of Tartars plague appeared, and then the corpses were thrown over the walls of Caffa to disable the enemy. It is believed that those who fled the city caused the Black Death pandemic that spread across Europe causing death to 25 million people that were a third of the European population at that time.⁴ During the First World War, the German army created anthrax, glanders and cholera for biological warfare. Their soldiers infected the horses and other livestock before being sent to France with anthrax and glanders.⁵

Japan, in 1937 developed ambitious program to produce biological weapons named "Section 731" in Harbin, Manchuria, in which research and experiments were performed on war prisoners. The Department was closed in 1945. It is thought that about 3,000 people were subject to Japanese studies and were infected with anthrax, syphilis and other diseases, and autopsies were extensively performed to the deceased in order to notice the various changes that were caused by the biological agents in the human body.

³ Radišić, Jakov. *Medicinsko pravo, drugo preragjeno i dopunjeno izdanje*, Nomos, Beograd, 2008, p. 263.

⁴ USAMRIID – US Army Medical Research Institute of Infectious Diseases. *Medical Management of Biological Causalities Handbook*, fort Detrick Frederick, Maryland, 2004, p.2.

⁵ Ibid.

Among the recent cases of production or use of biological weapons is the negligent discharge of anthrax in Sverdlovsk, former USSR in 1979 when 70 people died. In 1992, President Boris Yeltsin officially acknowledged the accident. In 1994 in Japan, the Aum Shinrikyo cult released anthrax via aerosol from the top of buildings in Tokyo, and in 2001 in the USA, several letters with anthrax were sent through the mail.⁶

2.2. Categories of potential bio-terroristic agents

According to the Centers for Disease Control and Prevention of the USA, the potential bioterrorism agents are divided into three categories according to priority: A, B and C.⁷

Type A group includes the agents that have the highest priority because they pose a risk to the national security since they are easily disseminated or transmitted among people, have a high mortality rate and have high potential impact on public health. They require special action to alert public health and may cause public panic and social turbulences. The anthrax, botulism, plague, smallpox, tularemia, viral hemorrhagic fever, caused by Ebola and Marburg viruses, the arena virus etc. are categorized as type A bio-agents.

Type B is a group of biological agents that have a high priority and they are also easily transmitted. Their dissemination requires secondary measures and strengthening of the monitoring and diagnostic capabilities. In this group are the following diseases / agents: brucellosis, epsilon toxin, threats to food safety: Salmonella, Escherichia coli O157: H7, Shigella; glanders, melioidosis, psittacosis, Q fever, ricin toxin, staphylococcal enterotoxin B; typhoid fever etc.

Type C bio-agents represent the third highest priority and they could be improved through genetic engineering and used for mass dissemination in the future because of their availability, ease of production and dissemination, and potential for high mortality and major health impact. This group includes Nipah virus, hanta viruses, etc.

There are four biosafety levels that the laboratories should meet primarily to prevent contamination and the spread of dangerous agents especially during their examination. In the category of highest biosafety level – 4 are the the arboviruses, arenaviruses and filoviruses such as Ebola and Marburg virus, Lassa virus and others.⁸

2.3. The criminal justice response to the threat of biological war

The global response to the threat of biological warfare consists in criminalizing acts of creation, purchase and sale, transportation, research and use of biological weapons, and increased number of preventive actions and strategies. This process began in 1972 with the adoption of the UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972 and in force since 26 March 1975.⁹ The idea for the creation of the Convention was the action towards complete disarmament, in particular of the different types of weapons for mass destruction: chemical and bacteriological - biological weapons.

⁶ Riedel, Stefan. Biological warfare and Bioterrorism: a historical review, Proc (BaylUniv Med Cent). Oct 2004; 17(4): 400–406.

⁷ Centers for disease Control and Prevention, Bioterrorism Agents /Diseases by Category, <http://www.bt.cdc.gov/agent/agentlist-category.asp>

⁸ Деаноска-Трендафилова, Александра. Казненоправни аспекти на генетските манипулации, PhD Diss., University Ss. Cyril and Methodius, Faculty of law, Skopje, 2010, p. 47-64.

⁹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, available on:http://www.un.org/disarmament/WMD/Bio/pdf/Text_of_the_Convention.pdf.

The Convention prohibits not only the production, development and stockpiling, but also the transfer and assistance, encouragement or inducement of other countries or acquiring another way for producing of biological and chemical weapons, toxins, equipment etc.

Due mainly to its implementation, as well as the adoption of other international documents - resolutions, declarations, recommendations, conventions etc., appropriate incrimination were introduced in the criminal codes around the world.

The Albanian Criminal Code, for example, in the article 232 incriminates dissolution of substances hazardous to health and life of humans and animals in the air, soil or water with intent to seriously disrupt public order or cause uncertainty in public. This offence is punishable with imprisonment from 10 to 20 years. Article 234 incriminates the very production of military weapons - chemical, biological, nuclear, weapons with nuclear or toxic basis with the intention of carrying out acts of terrorism. The prescribed punishment is a prison sentence of 5 to 15 years.¹⁰

The Austrian Penal Code criminalized the production, development, import, export, transport across the country, purchase, possession, transfer or assisting another person in these acts of nuclear, biological and chemical weapons. The imprisonment sentence is of 1 to 10 years duration.¹¹

The Criminal Code of Bosnia and Herzegovina under Article 193 - a incriminates the preparation, improvement, manufacture, procurement, storage, sale or offering to purchase, intermediation in the purchase or sale or otherwise direct transfer of another, possession or transport of chemical or biological weapons or any other means of warfare that are prohibited by the rules of international law. These actions are punishable by imprisonment of 1 to 10 years. Para. 2 of the same article provides for criminal liability of a person who in time of war or armed conflict orders to use chemical or biological weapons or manners or means of warfare that are prohibited by the rules of international law. The prescribed sentence is imprisonment of at least 3 years. Para. 3 provides for imprisonment of at least 5 years or long term imprisonment sentence if the execution of the offense of the previous two paragraphs results in death of one or more persons or in serious consequences to the health of humans or animals or grave consequences for the environment.¹²

Croatia has fulfilled its international obligations arising from the Convention against biological weapons with its incrimination in the Criminal law of 2011 of the article 97 - Terrorism, paragraph 1, point 6. It stipulates that the person who in purpose of taking the acts of terrorism produces, possesses, acquires, transports, provides or uses weapons, explosives, nuclear, biological or chemical weapons or explores and develops nuclear, biological or chemical weapons, shall be punished with imprisonment of 3 to 15 years. This incrimination is systematized in chapter 13: Crimes against humanity and human dignity. The Article 331 - Unlawful possession, manufacture and delivery of weapons and explosives, positioned in the chapter of Crimes against public order provides for imprisonment from 6 months to 5 years for the person who prepares or improves, manufactures, procures, stores, offers for sale, sells or buys, mediates in buying or selling, possesses, transmits or transports chemical or biological weapons.¹³

The French Criminal Code treats the issue of biological weapons in the art. 421-1, in which the actions of creation, production, storage, storage, purchase or sale of toxic and biological weapons are considered acts of terrorism when it was done intentionally and individually or collectively aimed at serious disruption of the public order through intimidation or terror.

¹⁰ Criminal Code of the Republic of Albania, https://www.imolin.org/doc/amlid/albania_criminal%20code.pdf.

¹¹ Penal Code of Austria, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/BBCC514AA386A3C1257355003AA13D/\\$file/BWC_NID_Report-070912.htm](http://www.unog.ch/80256EDD006B8954/(httpAssets)/BBCC514AA386A3C1257355003AA13D/$file/BWC_NID_Report-070912.htm).

¹² Kivicni zakon Bosne i Hercegovine, http://www.advokat-prnjavorac.com/zakoni/Krivicni_zakon_BiH.pdf.

¹³ Narodne Novine. KaznenizakonRepublikeHrvatske, NN 125/11, 144/12, <http://www.zakon.hr/z/98/Kazneni-zakon>.

The Criminal Code of the Republic of Macedonia incorporates the basic provisions of the Convention against biological weapons aimed at criminalizing the production, stockpiling and use of biological weapons in several articles.¹⁴

The central incrimination regarding the biological weapons is in the article 407 - b: Abuse of chemical or biological weapons, according to which the actions of creation, development, production, procurement, stockpiling, sale, purchase or mediation in buying or selling, possession, transfer or transportation of chemical or biological weapons etc., may be punished with imprisonment from 3 months to 3 years. Issuing order for use of such weapons during the war or armed conflict is punishable by 1 to 20 years, and the qualified form of the offence (death of several persons) from 5 to 20 years or life imprisonment.

The art.407 - use of illegal means of combat also means consolidation with the legislative provisions of the aforementioned Convention, but in this incrimination the biological weapons are not explicitly mentioned. However, art. 407 - B is quite clear in this respect. The abuse of chemical or biological weapons is a crime against humanity and international law and in para. 1 contains the so-called alternative disposition of more than a dozen possible actions of perpetration of which is only one is sufficient to constitute the offence in actual case. The action of issuing order for the use of such weapons is subject to a separate paragraph with significantly higher sanction. Pursuant to the provisions of the art.100 - a, chemical and biological weapons and the means used for perpetration of the offence will be confiscated.

The amendments to the Criminal Law of 2008 and 2009, brought the issue of the biological weapons in connection with the acts of terrorism which is very real and logical correlation. Thus, the terrorist organization implicated in terrorism and terrorist financing in connection with the activities of manufacturing, possessing or trafficking in nuclear, biological, chemical weapons and other weapons and dangerous substances for the purpose of terrorism and the financing of such action for the terroristic purposes are punishable by imprisonment of at least 10 years or life imprisonment or of minimum 8 years prison sentence respectively.

3. The ethical, legal and criminal dimensions of the Cloning

3.1. Introductory remarks

The appearance of the cloning several decades ago has stopped the dilemmas about the existence of predictable boundaries about the gallop of biomedical sciences. It also presented the early era of the destruction of classical views and values related to life in general.

The main question that arises is what is actually cloning and what are the limits and the forms in which this procedure would get legitimate dimension?

By definition, the cloning is creation of genetically identical individuals or in other words, copying of more than 20.000 genes that exist in the nucleus of every cell of our body, disregarding the genes in each mitochondria outside the cell nucleus important for generating energy in the body.¹⁵ A simpler, but identical definition is the one of the Australian Academy of Sciences, according to which the cloning is production of a cell (organism) with the same nuclear genome as another cell (organism).¹⁶ There are two ways of creating genetically identical individuals. The first way is through the division of the embryo (a physical division into two or more parts before or during implantation in the uterus). So, it naturally occurs in the cases of two or more genetically identical

¹⁴ Тупанчески, Никола. Кривичен законик, интегрален дел, Скопје, 2014, p.383.

¹⁵ McLaren, Anne. Introduction to Cloning, Ethical Eye, Cloning, 2002, p. 9.

¹⁶ Поп-Јорданова, Нада. Медицинска етика, Скопје, 2003, p.55.

individuals - monozygotic twins. The second way is through the nuclear transfer, i.e. transferring the nucleus from one to another cell - cloning.

The technique of cloning includes extraction of the nucleus from an egg cell. That nucleus contains haploid number of chromosomes – 23. Instead of it, a body cell nucleus of the person cloned is inserted which contains diploid number of chromosomes – 46. Thus, the egg cell with the new nucleus, acts as fertilized and continues to multiply, gradually developing into a new organism. This procedure is performed in laboratory, strictly controlled environment with different stimulations in the entire process, electro-fusion or micro-injections etc.).¹⁷ In fact, the procedure is still not completely clear and the nuclear transfer is successful in only 1% of cases! The case of the cloned sheep Dolly was the only successful of the 277 attempts.

3.2. Cloning: types and justification

There are several types of cloning according to different criteria:

- a. According to the type of organism, there is plant, animal and human cloning;
- b. According to the purpose, the human cloning is divided in reproductive and therapeutic.¹⁸

The reproductive cloning (cloning to obtain offspring, cloning of people) is generally prohibited.

Therapeutic cloning (so called because of its purpose) represents cloning of embryos to obtain stem cells that are used for treatment. Cloned lines of stem cells can be used by the transplant surgeons to treat: Alzheimer's, Parkinson's disease, heart attack, multiple sclerosis, ischemic heart disease, certain types of diabetes, etc.¹⁹ More descriptively, this procedure could be referred as "micro – transplantation", "transplantation in miniature". The most renowned are the stem cells from the bone marrow that produces red and several types of white blood cells,²⁰ the stem cells from the pancreas, liver, etc. Some scientists believe that the stem cells from the bone marrow can differentiate in muscle cells, liver cells, the neural stem cells from the subventricular zone into new neurons and so forth.²¹

The first dilemma and a problem that occurs in cloning in relation to the law is finding the answer to the question: whose child is the clone? This question is relevant to many areas, especially several legal branches: family, civil, criminal law etc. The legal institutes of inheritance, custody, property relations in obligation to testify in criminal law etc. are particularly related. According to *John Harris*, the clone created by cell nuclear replacement is actually a twin brother or sister of the donor of the nucleus and the genetic offspring of the parents of the donor nucleus. So, if one makes a clone taking nucleus genes from person A whose parents are B and C, then the clone is genetic offspring of B and C. But this is not so simple as it seems; things become more complicated if we consider the fact that the clone has the presence of mitochondrial genetic material, which is from the "mother" or a female to whom belongs the egg from which the nucleus has been removed and in its place was introduced somatic cell (person D). As one can conclude, the clone has a richer genetic "composition" (B + C + D), of his "identical brother" or "sister" who brings his parents B and C genes.²² The questions that necessarily impose after this, are superfluous to be discussed. Therefore, there is a global consensus on the prohibition of the reproductive cloning.

¹⁷ Gurdon, J.B., Byrne, J. *The history of Cloning*, Ethical Eye, CoE, 2002, p. 45.

¹⁸ McLaren, Anne. *Introduction to Cloning*, Ethical Eye, Cloning, 2002, p. 12-13; Same: Gurdon, J.B., Byrne, J. *The history of Cloning*, p. 44.

¹⁹ McLaren, Anne. *Introduction to Cloning*, Ethical Eye, Cloning, 2002, p. 12.

²⁰ Tudge, C. *Germany: Current legislation*, Ethical Eye: Biomedical Research, CoE, 2004, p. 17.

²¹ Kahn, A. "Therapeutic cloning and the status of the embryo", *Ethical Eye: Cloning*, CoE, 2002, p. 105.

²² Harris, John. *On Cloning*, Routledge, London, 2004, p. 5.

Problematic issue in this respect is the therapeutic cloning for which scientists believe may have been a miracle medicine. If an embryo is cloned from a healthy body cell of a person with specific disease and then the embryonic stem cells after their differentiation are implanted to the same person, there would be no danger of their rejection as a foreign body. This is so, because they are derived from embryos with identical genetic material and the person would be treated without this kind of risk. But one should not forget the fact that the surplus cloned cells developed to an embryonic stage, which are not destroyed, in proper environment would develop into a cloned human being. This turns the human beings and the life itself into instrument and spendable good. The future human being is also a human being, according to the saying of Tertullian "homo est et qui est futurus".²³ For these reasons numerous ethical objections and controversies rise about what is right and what is the status of the embryo.²⁴

The facts show that cloning is still quite unsuccessful and unjustified in many respects, furthermore, even if it would be ethically justified, it is not economically and medical favorable. As mentioned above in the text, it took 277 reconstructed eggs, 277 cloned sheep embryos, to get the cloned sheep Dolly. It is assumed that the success of the human cloning by using the present technical, technological and scientific knowledge and achievements, would take place in about 1% of the cases. About one third of the cloned mammals develop abnormality commonly called "Large Off - spring Syndrome".²⁵ Thus, Dolly (as the only officially cloned mammal) suffered several anomalies and diseases: overweight, premature aging, arthritis at an early age etc.²⁶

3.3. Criminal law response to cloning

Due to the dangers arising from cloning, it is prohibited in many international documents. Consequently, the Additional Protocol to the Convention on Human Rights and Biomedicine on the prohibition of cloning human beings, adopted in 1998, effective from 1 March 2001, explicitly prohibits any intervention aimed at creating a human being genetically identical to another human being, whether live or dead.²⁷ The Charter of Fundamental Rights of the EU also prohibits the reproductive cloning of human beings. As a result of these and other acts that explicitly prohibit reproductive cloning, many countries introduced incriminations on cloning in their Criminal or Penal codes. However, many countries still treat this issue in the health-care legislation and lack criminal code incriminations.

Cloning in Croatia is criminalized in the Penal Law, in particular in the Law on Amendments of the Penal Law of 2004. After the adoption of the new Penal Law in 2011, amended in 2012 and in implementation since 2013, the incrimination of cloning and altering the human genome is within the art. 108. The prohibition applies to the reproductive cloning and the prescribed sentence is imprisonment of 1 to 10 years, and for actions of changing the human genome - imprisonment from 6 months to 5 years.²⁸

The criminalization of the reproductive cloning is a consequence of implementation of the Additional Protocol on the prohibition of cloning to the Convention on Human Rights and Biomedicine. It was primarily systematized in the Chapter of offenses against life and body, but the leading

²³ Tertullian, Tertulliani Liber Apologeticus, <http://www.tertullian.org/latin/apologeticus.htm>.

²⁴ Schroten, E. Is human cloning inherently wrong? Ethical Eye: Cloning, Coe, 2002, p.95.

²⁵ Gurdon, J.B., Byrne, J. The history of Cloning, Ethical Eye, CoE, 2002, p.46.

²⁶ Campbell, K.H.S. Cloning Dolly, Ethical Eye: Cloning, CoE, 2002, p.59.

²⁷ Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings <http://www.conventions.coe.int/Treaty/en/Treaties/Html/168.htm>.

²⁸ Narodne Novine Kazneni zakon Republike Hrvatske, NN 125/11, 144/12, <http://www.zakon.hr/z/98/Kazneni-zakon>.

Croatian criminal lawyers disagreed with this systematization.²⁹ In the new Croatian Criminal law, this article is within the Chapter of offences against humanity and human dignity.

In Spain, the incrimination of cloning is placed in the Criminal Code and in particular within the Chapter of offences of genetic manipulations in art. 160, paragraph 3. The action of perpetration of this offence includes cloning and other procedures regarding the selection of race. The prescribed sentence is prison sentence of 1 to 5 years and prohibition of performing profession, duty, and public office from 6 to 10 years.³⁰

The French Criminal Code is modernized with the inclusion of cloning and other prohibited actions in the biomedical sphere with the Law No. 2004-800 of 06.08.2004.³¹

The Cloning is incriminated in the Chapter of Crimes against Persons, part 1: offenses related to eugenics and reproductive cloning. The punishable action constitutes undertaking of any procedure designed to cause the birth of a child genetically identical to another living or dead human being. The envisaged penalty is dramatically high compared to other jurisdictions – up to 30 years of imprisonment and a fine of 7,5 million Euros. If the action was perpetrated by an organized criminal group, the penalty is life imprisonment and 7.5 million Euros. The acts of advertising and calling for performing eugenic procedures and cloning are punishable with imprisonment of up to 3 years and a fine of 45,000 Euros.

The acts of conceiving through in vitro cloning for industrial or commercial purposes are sanctioned by imprisonment of up to 7 years and a fine of 100,000 Euros (art. 511-17 - Protection of the human embryo). The same punishment is envisaged for creation of in vitro embryos through cloning for purpose of research or experimentation (art. 511-18). Although there is no global consensus on the ban of therapeutic cloning, in France it is criminalized (art. 511-18-1) and is punishable with the same sentence as for the previous offence.

In Macedonia, the cloning was first criminalized in the Law on Bio-medically assisted fertilization with prescribed sanction of imprisonment of 2 to 5 years. With the amendments of the Criminal Code of 2014, these provisions were withdrawn and transferred (with some amendments) in the Criminal Code. The incrimination of the reproductive cloning is positioned within the Chapter of criminal offenses against life and body in art. 128 –a, that states: “Whosoever creates a human being genetically identical with another living or dead human being, shall be punished with imprisonment of 3 to 10 years”.

Furthermore, in art. 128-b - illegal genetic manipulations of fertilization, the creation of hybrids and chimeras is also incriminated.³²

²⁹ Bojanić I., Cvitanović L., Derenčinović D., Grozdanić V., Kurtović A., Novoselec P., Turković K., Posebni dio Kaznenog Prava, Prvo izdanje, Pravni fakultet Sveučilista u Zagrebu, Zagreb, 2007, p. 2).

³⁰ Queralt, Joan, J. Codigo Penal, Madrid, 2010, p. 98-99.

³¹ Spencer, John Rason. Penal Code of France, translation, University of Cambridge, <http://legifrance.gouv.fr>.

³² Тупанчески, Никола. Кривичен законик, интегрален дел, Скопје, 2014, p.125-126.

4. Concluding remarks

The development and the progress of the life sciences, undoubtedly changed human life in every sense of the word. The human life duration is extended and the quality of life significantly improved, many diseases are curable nowadays, because what represented science fiction in past is a science fact today. The development of the genetics seems to have crucial role in the innovation of new therapeutic methods and discovery of the secrets of the human life in its foundation.

The genetic engineering, for example, is widely used for increased food production, creation of medicines and vaccines, but it proved to be also applied for creation of artificial forms of life (bacteria etc.). It could be exercised in enhancement of the bio-agents for bio - warfare utilization. This was sufficient basis for activation of the alarm to the potential hazards. The international community spotted these threats decades ago and undertook preventive measures as well as legislative steps toward incrimination of the production, stockpiling, development, research of bio-weapons etc.

As the analysis has shown, from international level these actions manifested in the national legislations through incriminations prescribing imprisonment sentences of long duration.

Another procedure of genetic manipulation is the cloning. Appearing in the forms of reproductive and therapeutic, the cloning remains to be open issue in the medical, ethical and legal areas. The reproductive cloning was declared ethically and legally unjustified only a few years after its practical demonstration in cloning mammals. Once again the action took place in international level. Decades after reaching consensus on prohibition of human cloning, the countries worldwide criminalize it less rapid than it was the case with the bio-weapons. The therapeutic cloning is still disputable.

Although the above elaborated issues are not classic crimes, they have even higher destructive potential than the conventional crimes. Therefore, the society has to put the accent on the proactive and prophylactic dimension and the criminal law response should remain to be *ultima ratio* in the protection of the values of the humanity and the dignity, the rights and the freedoms of all people.

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BAIL, PRECAUTION MEASURES AND/OR HOUSE DETENTION: ANALYSIS AND RECOMMENDATIONS FOR THEIR MORE FREQUENT USE

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Abstract

The author of this article elaborates the advantages of the implementation of the less intrusive measures for the defendant's right to liberty. Particular attention is given to the bail, precaution measures and house detention as lesser measures in regards to the detention. From the author's analyses of these measures both on legal and on interdependent level several conclusions and recommendations can be delivered for their more frequent use. In addition author concludes that besides the amendments to the legal provisions there should be undertaken several practical steps which would emanate the benefits of combined use of these less intrusive measures in the practice by the Macedonian courts.

Keywords: bail, house detention, precaution measures, detention

1. Introduction

Measures for providing the presence of the defendant during the criminal trial can be considered as one of the most important procedural instruments for establishing the defendant's right to fair trial. Through these measures the basic procedural guarantees of the defendant that are deemed necessary for just and fair trial are implemented. However, having in mind their ambivalent nature these exact measures can be also perceived as obstacles for the above mentioned defendant's right if they are improperly implemented by the courts. For these reasons it is necessary for the court to act with due diligence and to be extra cautious while implementing these measures, and to strive towards their implementation only in the circumstances where they are absolutely necessary and by prioritizing the less severe measures in regard with the restraint of the defendant's right to liberty.

The same words regarding the implementation of these measures had been envisioned by the article 5, paragraph 3 of the European Convention of the Human Rights (ECHR), and Council of Europe's (CoE) Recommendation¹ where it is established that the measures for providing the presence of the defendant during the criminal trial must be implemented only in limited cases and only by respect of the principle of the legality.

Taking into consideration Macedonian Court's practice of the implementation of these measures, it is obvious that it is necessary to undertake additional legal reforms in order to redesign these measures aiming at empowering and strengthening of their, maybe, already known elements. This is essential since analyzing the court's practice the independents reporter would easily get the impression that these elements were often neglected or even forgotten by the courts. The conclusion can be drawn at the first glance since the predominant² or even the exclusive measure for providing the

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¹ Council of Europe, Recommendation, Rec (2006) 13.

² Buzarovska Gordana et al, Pretrial Detention – National Practice and International Standards, OSCE, Skopje, 2008, pp. 19. (in Macedonian).

presence of the defendant during the criminal trials in Macedonia is the detention, while the other measures for providing the presence of the defendant are used occasionally or even exceptionally³.

Even though, with the enactment of the new Code of Criminal Procedure in Macedonia, some of these problems were appropriately addressed, at least at legislative level, the impression still remains that there is additional space for further improvement of both the legal provisions and the court's practice.

Having in mind the abovementioned problems, in this article we would provide in-depth analysis of these less-intrusive measures and will depict their specific strengths and weaknesses in order to provide suitable solutions for their more frequent use. By stressing the specific advantages of the less-intrusive measures in comparison to each other we would be able to provide specific awareness to the courts while determining the most appropriate measure for providing the presence of the defendants during the trial which should eventually lead to reduced use of the detention.

2. Bail, precaution measures and/or house detention

Further analysis of the measures for providing the presence of the defendant during the criminal trial could lead to more clear depiction of the specific advantages of these measures, which at the end should lead towards their increased implementation in regard with detention. The additional explanations of these measures can reaffirm the most important aspects of these measures which ultimately should serve as less intrusive measures to the defendant's right to liberty and limit the extensive use of detention. By having clear vision of the advantages and disadvantages, and having cost-benefit analysis of these less intrusive measures in regard with the defendant's right to liberty, courts can have more tools for argumentation while implementing them during the trial as an instrument for providing the presence of the defendant.

For these reasons it is of essential importance to perform the analysis both on legal level, where the subject of analysis should be the legal provisions of the CPC which are regulating these measures, and on introspective level where each of these less intrusive measures should be critically observed in order to find their most suitable application in the specific court cases.

2.1. Analysis of the legal provisions of the CPC

The vast reform of the criminal justice system in Republic of Macedonia, in regard with the criminal procedure had finished with the enactment of the new CPC in 2010⁴, which had entered into power in December of 2013. The simple and at the first glance analysis of the provisions that are regulating the measures for providing the presence of the defendant during the trial results with the conclusion that the Macedonian legislator had in many aspects improved these provisions. It is also obvious that the legislator's intention was to improve the implementation of the less intrusive measures in practice with simultaneous reduction of the use of detention. However, it is also visible that the legislator had not performed detailed restructure of these measures, nor did show any capacity or "adventures spirit" for introduction of new and modern trends that are considered even as an evolutionary instruments that should reduce the implementation of detention. Instead of this, the

³ Poor usage of the bail was noted by: Misoski Boban, "Bail as a Measure for Successful Conveyance of the Criminal Procedure, unpublished PhD thesis, pp. 283-368, Skopje, 2013; see also: Misoski Boban, Right to Bail as a Derived Human Right From the Article 5 of the ECHR in Macedonia, SEE-LAW NET: Networking of Lawyers in Advanced Teaching and Research of EU Law post-Lisbon, Skopje - Saarbrücken, (151-161), 2013, pp. 158. Similar situation is noted also in Serbia, for these experiences see: Vladimir Kostić, Iz straha od osude javnosti, sudije ne prihvataju jemstvo, *Centar za istraživačko novinarstvo*, available at: www.cins.org.rs.

⁴ Official Gazette of Republic of Macedonia, No. 150/2010 and 100/2012.

Macedonian legislator had opted the safer way where he just made in-depth improvements of the existing provisions.

In this fashion, Macedonian legislator had remained with the same types of the measures for providing the presence of the defendant during the criminal trial. This means that the New CPC has the following measures: citation (as the least intrusive measure); ban for leaving the premises of the home; mandatory reporting to the duty officer (usually this officer is at the courts); temporary ban for leaving the state or traveling abroad; temporary ban of driving license; prohibition to attend specific premises, events or socializing with specific people; temporary prohibition of performing specific activities that can be connected with the perpetrated crime; bail; arrest; detention and house detention. Excluding the measures: bail, arrest, detention, house detention and citation, the remaining measures are having joint title, called - precaution measures.

Detailed analysis of these CPC's provisions points out that these measures are significantly improved, where this conclusion particularly goes to the provisions that are regulating the bail. Under the provisions of the new CPC in Macedonia, bail is considered as individual measure and it is not connected with the application of the detention, nor is it considered as its auxiliary measure. This means that bail now can be individually determined by the court if the court considers that there is serious risk of absconding of the defendant or if the defendant is threatening to finish or to repeat the already perpetrated crime or to commit another crime. Furthermore, it is also very important that under the provisions of the new CPC court can change the amount of the bail or to decide to increase or decrease it following the new factual situation of the criminal case. As additional improvement of the provisions of the bail can be considered the introduction of the possibility to withdraw the bail if the defendant fails to appear at the designated court hearing. However it still remains unclear under the provisions of the new CPC how should the courts react if the breach of the bail was not real absconding of the defendant, but just breach of the additional conditions (particularly the precaution measures) that were imposed together with the bail.

Additional provision that should be appreciated is the provision that strictly regulates the possibilities to return the bail to the defendant, where unlikely the previous CPC, in the new CPC provisions are clear and direct. This means that the bail can be returned to the defendant only in the cases when defendant was acquitted by the court or the court had rejected the indictment or the prosecutor had dropped the charges (art. 152 and 153).

Additional improvements of the provisions of the CPC can be seen within the provisions which are regulating the arrest, where the significant enhancement was made regarding the determining the arrest and short-time detention. These provisions had particularly increased the protection of the defendant's right to liberty with clear regulation regarding the authority in charge for executing of the procedure during the formal and informal questioning and arrest of the defendant (art. 157 - 162).

The introduction of the new precaution measures such as: prohibition to attend specific premises, events or socializing with specific people, and temporary prohibition of performing specific activities that can be connected with the perpetrated crime, cannot be considered as huge improvement, since in the comparative aspects these measures are almost considered as inevitable and must-to-have.

Something to praise in the new CPC are the provisions that are providing the possibility to connect or to join these precaution measures when court is implementing other, more severe, measure such as bail or house detention (art. 144)⁵.

⁵ See: Raine John W. and Willson Michael J., *Police Bail with Conditions, Perspectives on the Use, Misuse and Consequences of a New Police Power*, *British Journal of Criminology*, Vol. 37, No. 4, 1997, (593-607), pp. 598.

We can conclude that the above mentioned changes to the provisions that are regulating the measures for providing the presence of the defendant during the trial, by all means are headed towards fulfilment of the legislator's intention to increase the implementation of the less severe measures, and to reduce the use of detention.

Furthermore it has undertaken some substantive and significant, but not just "face-lift" improvements.

However the conclusion remains that there is still space for improvements, particularly with in the situations when the defendant does not comply with the additional conditions that are given together with the bail by the court.

Last, but not least important, is the conclusion that Macedonian legislator in order to improve the implementation of these less severe measures which are not overburdening the defendant's right to liberty must introduce additional and modern measures which are already known into the modern criminal justice systems, such as: electronic surveillance or electronic monitoring⁶, half-way-houses, bail hostels⁷, institutions for curing and preventing addictions⁸, banning for leaving the home at the certain period of the day, etc.

2.2. Interrelations among Bail, Protective Measures and House Detention

For the courts to properly implement the most suitable measure for providing the presence of the defendant it is of essential importance to know the specific attributes of each of the measures. This means that these measures can be properly implemented by the courts only if the courts are aware of their specific results and advantages. In addition to this courts must have specific knowledge regarding the characteristics of the measures for providing the presence of the defendant, under which they would decide in the specific case which measure is the least intrusive one, but at the same time to be ascertain that with this measure defendant will be present during the trial. This request to the courts is even more valued within the possibility for combining the less intrusive measures. It means that the courts must be aware of these specific characteristics of the less intrusive measures, in order to avoid the possible situation where by combining of these measures the court could create one set of conditions that could be even more severe to the defendant's right to liberty, apart from implementing one more severe measure.

For this reasons it is crucial to analyze the measures from several aspects, such as the level of the retribution from the one side, and the level of economic efficiency from the other side.

The first aspect is important since it depicts the measure's punitive aspects in regard with the defendant's right to liberty. The second aspect is important since it can help to the judges in to answering the question which measure is least expensive, but most effective into the specific situation. Answering to this question by the court usually is the most important one, since the court is often driven by one of the most important principles of the criminal procedure - the principle of the efficiency of the criminal trial.

⁶ See: Nellis Mike, The Electronic Monitoring of Offenders in England and Wales, Recent Developments and Future Prospects, *British Journal of Criminology*, Vol. 31, No. 2, 1991, (165-185), pp. 167. Buzarovska Gordana, Alternatives to Prison, NIP Studentski Zbor, Skopje, 2003, pp. 125-126. (in Macedonian).

⁷ See: Dhami Mandeep K., Conditional Bail Decision Making in the Magistrates' Court, *The Howard Journal*, 2003, Vol. 43, No. 1, (p. 27-46), pp. 39.

⁸ See: Hucklesby Anthea, Police Bail and the Use of Conditions, *Criminology and Criminal Justice*, 2001, 1, (441-463), pp. 452.

2.2.1 Bail and/or protective measures and/or house detention: analysis of the level of influence to the breach of defendant's right to liberty

Having into consideration of the defendant's right to liberty we can reach the conclusions that the bail, house detention and precaution measures are generally less intrusive in regard with the detention. However, in this situation the real question is how less intrusive these measures are, and are they equally less intrusive?

Having in mind only defendant's right to liberty it is easy to conclude that the least severe measure is the **bail**. The second measures should be the protective measures, while the last should be the house detention.

This division among these measures is done upon the limitations of the defendant's rights and acceptable and requested defendant's attitude. This is why the bail is considered to be one of the least severe measures, since by its level of limitation of defendant's right to liberty it is rightfully considered that the defendant completely is enjoying his personal liberty and the only limitation that this person has is the obligation to be present at a specific time and date at the court-house.

Only other limitation is that during the criminal trial this person cannot use the deposited financial assets. At the same time these financial assets are the only guarantee to the court that this person will attend the court hearings. This limitation might perform some additional burden to the defendant, but, since the defendant is indicted it is very unlikely that he would like to undertake some extensive financial transactions which might be at this time considered even as a crime or at least attempt to tamper justice. Other question is if the defendant wants to have financial transactions during the trial in order to perform "money laundering", but in this situation this defendant's activity cannot be characterized as voluntary and legally approved financial transaction, on a contrary, it is a crime.

Besides this limitation, the only other limitation to the defendant on bail is not to commit the same crime, nor to finish the stated crime, nor to repeat the already committed crime.

These are the reasons for support of the argument that the bail is the least severe measure from the above mentioned in regard with the defendant's right to liberty.

In regards with the **precaution measures** we can conclude that they are far more severe in limitation of the defendant's right to liberty than bail. This is due to the fact that if these measures are ordered by the court, than the defendant is more limited in regard with his liberty to communicate with other persons, to socialize with them, or to attend some specific locations or events, to travel, etc. These limitations in fact does not means that the defendant during the trial cannot leave the premises of the house, but in fact can make many difficulties in regards with his free will to exercise his daily routines, if they involve meeting or attending some of the above mentioned people or places. For these reasons it is believed that the precaution measures can produce more strict breach of the defendant's right to liberty than bail.

Furthermore the implementation of these measures is often not connected only with the court's request for the defendant to attend the court hearings or specific court proceedings. On a contrary, these precaution measures are often carrying far greater limitations to defendant's liberty, particularly in a way where they request some specific attitude or limitation of defendant's daily routine, even though the defendant is protected by the presumption of innocence during the effect of these bans and restrictions⁹.

⁹ Court Practice in UK had shown that sometimes the judges are unjustifiably add multiple conditions to the bail decision. For these reasons it is necessary to attend additional attention while determining the bail conditions. See: Hucklesby Anthea and Marhsall Emma Tackling Offending on Bail, *The Howard Journal*, Vol. 39, No.2, May, 2000, (150-170), pp. 153. Turnbull Sarah and Hannah – Moffat Kelly, Under These Conditions. Gender, Parole and Governance of Reintegration, *The British Journal of Criminology*, 2009, (1-20), pp. 4.

Interesting discussion can be raised in regard with the defendant's right to travel. This means that right to travel can be strictly limited with the precaution measures, particularly with the ban to leave the state, while within the bail as a measure this right is not forbidden as long as defendant obeys the court's hearing schedule. This is why sometimes the court can unite these two measures, and by that he would increase its level of persuasiveness and security that the defendant will attend the scheduled court activities. Unfortunately, it is possible to have the opposite situation where the court by joining these two measures can impose unnecessary and unjust strict position to the defendant. If the court do not have enough evidence in support of this position than this type of court decisions can easily be interpreted as a breach of the defendant's right to liberty. Because the right to travel abroad is defendant's right¹⁰, not a privilege, and court should consider limitation of this right only if it considers that this defendant's activity can be risk of absconding. Furthermore, only in those cases where the court can consider that the financial deposit doesn't entirely eliminate this risk, than the court can opt to put an extra limitation to the defendant by joining the bail together with the ban for leaving the state as a precaution measure.

House detention, rightfully is considered the most severe measure in regards with the defendant's right to liberty, since in this case the defendant is not allowed to leave the premises of the house during the trial. Leaving the premises of the house are only allowed if the defendant needs some medical attention or if this activity is necessary in some extraordinary situations to prevent some major damages to the property or to the defendant's life or health (art. 163).

Furthermore, CPC is also envisioning the possibility to control this measure by addressing electronic surveillance to the defendant's house.

Unfortunately, it is safe to conclude that the Macedonian legislator had completely missed the point while regulating this measure. Initially the legislator had omitted to mention that the house detention should be regulated only to specific defendants, usually the ones who due to their health condition, age, or pregnancy or maternity cannot cope with the detention facilities. In lack of these provisions it is still unclear which categories can be subjected to this measure, or if it is intended to general use, than our legislator had missed the opportunity to state why this measure is so peculiar in regard with the precaution measures, for example.

By having this legal ambiguity in the CPC, a situation is created where this measure is abused by the defendants since it is preferred by them as more lenient than detention.

Additional problem is the electronic surveillance, since this measure is not regulated within the CPC, but it is only mentioned. Our opinion is that the electronic surveillance should be regulated as individual precaution measure.

However, even with these legal gaps, the house detention is considered as the most intrusive measure in regards with the defendant's right to liberty since, if it is implemented properly than this measure only changes the venue of the detention, while it carries the same burden to the defendant. On the other hand, having on mind that this measure is not regulated as it supposed to be in Macedonian CPC, it is clear why it is highly popular. In addition to this, if this measure lacks official control¹¹, and if it is open to every defendant, as it is now under the provisions of the CPCP, than it is obvious that the defendants, while having this measure imposed during the criminal trial, practically enjoys the right to liberty without any constraints.

¹⁰ This was also stated by the ECtHR verdict in the case of *Stögmüller v. Austria*, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101358#{"fulltext":\["Stögmüller"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101358#{)

¹¹ See: Kaljdziev Gordan, Misoski Boban, Gruevska Drakulevski Aleksandra and Ilic Divna, *Judicial Efficiency in Dealing with Organized Crime and Corruption, Report from Monitoring of the Organized Crime and Corruption Cases in Macedonia, All For Fair Trials, 2013*, pp. 27. Available at: http://www.all4fairtrials.org.mk/Main_files/Korupcija_2013_ENG.pdf.

Additional benefit for the defendants while in house detention is that one day of house detention is equal as one day of prison, which is accepted by the defendants as reduction of the possible prison sentence.

2.2.2. Bail and/or protective measures and/or house detention: analysis of the level of efficiency

The analysis of the level of efficiency can be aimed in two directions. The first one is analysis of the cost of these measures for the state, while the second direction is the cost for the defendant.

In regard with the cost of these measures to the states it is obvious that the most expensive measures for the state are precaution measures. This is due to the fact that for the operationalization of these measures the state must include its state apparatus. This in particular includes men-power for putting into effect the bans and restrictions that are carried by these measures. It also requests the use of electronic devices and the logistical support from many state agencies, in order to control and supervise the implementation of these precaution measures.

Next in line is the house detention, since with this measure the cost for the state is only the court's time and resources while adjudicating this measure. Some additional cost can be performed if together with this measure, measures for electronic monitoring are implemented.

Finally, the cheapest, so to say, measure is bail. Furthermore, in the cases if defendant abscond this measure can actually produce income for the state. The actual costs for the state from implementing this measure, definitely is only at the stage while determining the amount of the deposited assets and in the situation of forfeiture of these assets, if defendant absconds. However, it is obvious that the financial gain for the state in these situations exceeds the costs of the state.

Having on mind the second direction we can face with complete opposite situation where the most expensive measure for the defendant is bail, since for the realization of this measure the defendant must provide certain financial amount. In addition to this, in comparative law it is even possible for the defendant to pay some extra fees in order to provide the bail, either to the court or to some other institution, such as the case with the Bail Bond Agencies in the USA¹². This means that the bail is not expensive measure only if the defendant does obey the court's request and do not abscond nor commits the crime.

It is needless to mention the price of the bail that is in the case of absconding, when the defendant or the third person, who had promised to pay the bail for the defendant, loses the deposited financial assets, since in this case these assets are considered as state gain.

Unlike the bail, the defendant's cost for the other measures is almost minimal. This means that for the realization of these measures defendant does not need to pay any money. All he/she need is to obey the state conditions and bans. Avoiding these requests imposed by the court might lead to some further financial loss of the defendant's property. But, this loss is not considered as direct loss as is the case with the bail. Since this loss can be only in the cases when the court will impose more severe measure to the defendant such as detention, as a result to the defendant's misbehave. This means that only in these cases the defendant could suffer for direct financial loss, since with the detention he/she cannot perform his/hers everyday professional activities. This is due to the fact that when these measures are imposed by the court to the defendants, the defendant can continue with his/hers normal life, particularly in performing professional activities, unless they are connected with the committed crime, or when they are banned by the court with the imposition of the precaution measure.

¹² See: Saltzburg, Stephen A. and Capra, Daniel J., *American Criminal Procedure*, West, 2000. pp. 872-873. See also: The Uniform Bail Bond Act, enacted by the National Association of Insurance Commissioners. Available at: www.naic.org.

3. Recommendations for more frequent implementation of the bail/precaution measures and/or house detention

Having in mind the poor implementation of the less intrusive measures by the courts, and taking into consideration of the performed analysis we can articulate several conclusions and key aspects that might support court's decision in implementing these measures, while at the same time reducing the implementation of the detention.

In this way it is worthy to mention the legislator's activity for strengthening the legal position of the less intrusive measures in protection of the defendant's right to liberty in regard to the detention.

However, not disregarding the fact that these legal changes are substantial and provide better starting point for further implementation of these measures, it is still obvious that the new CPC is missing some new effective and modern measures for providing the presence of the defendant during the trial.

At this occasion we consider the electronic surveillance or electronic monitoring as measures which should be implemented into Macedonian CPC, and not only mentioning them as a possibility for control of the house detention. Electronic surveillance and electronic monitoring should be addressed as individual measures, particularly having into consideration the benefits of their use, their importance¹³ and popularity in the criminal justice systems in USA and EU, both as individual measure, but also as an measure for support of the proper use of the other measures¹⁴.

It is also important that besides the introduction of these new measures, the legislator should also continue with the path for improvement of the existing measures. In this fashion it is absolutely necessary to regulate the house detention, in a way of reducing the possible situations and limiting the persons that would be eligible for this measure. This means that the house detention should be allowed only for the persons who has severe health problems or due to their age or pregnancy cannot cope with the conditions in the detention facilities¹⁵, by having this provisions house detention would receive its true legal nature, similar to the sanction house imprisonment¹⁶. In line of these arguments we can also use, for example, the Croatian experience where under the intervention of their Constitutional Court these amendments regarding the specific vulnerable groups that should be entitled to the house detention were amended and introduced to the Croatian CPC¹⁷.

Furthermore, it is absolutely important to enact provisions that would provide sanction in a way of executing the bail when the defendant will not obey the imposed precaution measures. This

¹³ See: Nellis Mike, *op. cit.* pp. 167.

¹⁴ See: Kennedy Michael, Truman Crispin, Keyes Simon and Cameron Angus, Supported Bail for Mentally Vulnerable Defendants, *The Howard Journal*, vol. 36, No. 2, 1997, (158-169), pp. 161.

¹⁵ See: Matovski Nikola, Buzarovska Gordana, Kaljdziev Gordana, *Kriminal Procedure Law 2-nd ed.*, Akademic, Skopje, 2011, pp. 272. (in Macedonian).

¹⁶ See: Kanevcev Metodija, New Alternative Measures in the Macedonian Criminal Code, *Macedonian Review for Criminal Law and Criminology*, Year 13, No. 2, 2006, (191-212), pp. 197-200; (in Macedonian). Buzarovska Gordana, Alternative Measures into the Macedonian Criminal Justice System, (213-232), pp. 225-227; (in Macedonian).

¹⁷ See: Law on Amendments of the CPC in Croatia, *Narodne novine*, No. 143/2012.

provision would empower the judges in future to be keener for combining the bail with the precaution measures and house detention with precaution measures¹⁸.

In order to increase the implementation of these less severe measures for providing the presence of the defendant during the trial it is also important to perform additional steps besides the legal reform. This would mean that there should be made additional training to the judges which would address the significance, the legal nature and the possible outcomes of the more frequent implementation of these less severe measures for providing of the presence of the defendant during the criminal trials. By addressing these issues to the judges they would become more aware of their benefits, and also of the extensive reach and consequences which can be gained with the use of these measures instead of the detention.

Finally, by fostering of the policy for combining the less severe measures for providing the presence of the defendant during the criminal trial, the judges would become more aware of the consequences of their combination and would become more apt to use these measures in regard with detention. This would result with the switch of the court practice and would make judges to be more open and assertive towards the real needs of the defendant, but simultaneously not disregarding the principles of the justice and not undermining the court's position and function.

As final remark in order to increase the implementation of the bail/precaution measures and or house detention we can use the USA¹⁹ or UK²⁰ experience where individual state or public-private-partnership institutions are obliged by the law to serve additional information regarding the defendant's personal situation, financial assets, his criminal record etc. Needles to mention are the facts that if the judges do operate with these information which construct the total profile of the defendant, than they would be more open towards implementation of the less severe measures for providing his/hers presence during the criminal trial. Since the opposite situation can only lead to increased incarceration of the defendants, simply because the judges could not cope with the burden of not having proper information for reaching their decision for imposing the most suitable measure for providing the presence of the defendant. The absence of these information would only lead to the situation where the judges would be only interested in providing the actual presence of the defendant, operationalized through imposition of detention, playing with the "safe side", and not paying sufficient attention to the fact that defendant's presence could be achieved with far lesser measures.

Instead of conclusion we can state that by combining of these above mentioned measures for providing the presence of the defendants during the criminal trials and by redesigning the use of detention, we can increase the justness of the criminal justice system, and make it more perceptive, accurate and more defendant oriented. These attributes would not only serve to the defendant's right to fair trial, but also would help to increase the perception of our criminal justice system as just and fair, and improve the public trust and confidence in it.

¹⁸ See positive aspects of combining these measures: Dixon David, Maher Lisa, Policing, Crime and Public Health: Lessons for Australia from the "New York Miracle", *Criminal Justice*, Vol. 5, 2005, (115-143), pp. 133-134; Also see the Interview with Judge Edward Karnes, where he states the positive aspects of combining the bail with other less intrusive measures for providing the presence of the defendant experienced through his practice as a Judge at 11-th Circuit Court in USA. Title: Bail Bond Confiscation, Presented at The Subcommittee on Crime, Terrorism, and Homeland Security Committee on the House Judiciary, eMediaMillWorks, Inc., Washington DC, 2002.

¹⁹ See: Hall Daniel E., *Criminal Law and Procedure*, 5-th ed., Delmar Cengage Learning, 2009, pp. 445.

²⁰ See: Hucklesby Anthea, *Bail in Criminal Cases*, The Handbook of the Criminal Justice Process, McConville Mike and Wilson Geoffrey, eds., Oxford University Press, 2002, pp. 115.

PART FOUR

ADMINISTRATIVE LAW

EFFECTIVENES OF ADMINISTRATIVE ORGANIZATIONS

*Dragan GOCEVSKI**

Abstract

The paper covers a theoretical review of the key principles of governance: effectiveness, efficiency and economics, followed by a methodological approach to evaluating organizational effectiveness of administrative organizations. The paper presents a followup study, to the doctoral dissertation of the author and focuses on evaluating the effectiveness of a particular government policy/measure "Visa liberalization". The question being answered is weather the introduction of biometric passports and the lifting of the visa regime for the citizens of Republif of Macedonia contributed to an increase in frequency and number of border crossing and/or weather it contributed positively to GDP.

Keywords: Economics, Efficiency, Republic of Macedonia, Visa Liberalisation, border crossing.

Introduction

As this paper is a followup study on the effectiveness of administrative organizations and policies, I find it adequate to breafly acquaint the reader on the contents and topis covered in initial research.¹ The study initially covered theoretical aspects of the effectiveness of the administrative organizations, methods for measuring and analyzing effectiveness, and analysis of the effectiveness of the administrative organizations in the Republic of Macedonia. The study focused on achievements of the theory of organization as a discipline related to the organizational effectiveness evaluation placing a narrow focus on organizations with public competencies. The research covered a case study analysis, where the author tested a working hypothesis: "The effectiveness of the administrative organizations in providing services and implementing policies depends on the general organizational capacities as well as the minimum consent of all stakeholders affected with the service or policy".

The theory and methodology of the research references to a range of relevant works and authors dealing with the issue of organizational effectiveness: Wholey and Newcomer (1989), Wholey and Hatry (1992), Quigley and Scotchmer (1989), Brandl (1988, 1989), Cohen (1993), and Wolf (1995). Kimm (1996) sets out useful conclusions from the Academy of Federal Project and Program Managers, Jones and McCaffery (1997) and Long (1994) deal with the development of specific / special criteria for evaluation of the implementation of the reforms of the federal departments for general and concrete programs; Gregory Gartner and S. Ramnarayan in *Organizational Effectiveness: An Alternative Perspective*" (1983), and Kishore Gawande and Timothy Wheeler, with the research of the effectiveness of the US coast guard in 1999. The following pages show an overview of the key principles of governance: effectiveness, efficiency and economy followed by a generally accepted methodology of measuring the effectiveness of organizations. The concluding sections will show a chronology of the implementation of visa liberalization in the Republic of Macedonia and an assessment of its outcomes.

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¹ Gocevski, Dragan. "Efektivnost administrativnih organizacija (eng..Effectiveness of Administrative Organizations)" PhD Diss. ., Ss Cyril and Methodius University 30.10.2012.

Principles of Effectiveness, Efficiency and Economy

The principle of efficiency refers to the expenses of the public administration in the creation of goods and services. Economically, effectiveness is defined in two ways: productive efficiency (measured by the average cost of production of goods and services) and as allocating efficiency (measured by the extent to which the economic system reflects the combination of products and services which reflects the preferences of the people expressed through their decisions in terms of consumption).²

One of the features of allocating efficiency is the principle of fair competition (which allows consumers to influence producers in their decisions about what will be produced), which cannot be implemented in certain public activities - the monopoly of public administration actually protects the interests of the wider public (such as, the central government, local government, etc.), whereas the measure of volume can be applied in most public services, such as education (number of students enrolled, etc.), health care (admission of patients, staff, medical equipment, etc.). However, this measurement is difficult to be applied in some public activities, such as tax collection. The problem is that the "products" of the public sector cannot be easily measured. This is confirmed by the arguments of Barzelay.³

The purpose of governance may be considered unique however the implementation of various government policies includes a multitude of different mechanisms, thus (Pavlovska et al)⁴ argues that there are multiple elements of governance⁵ as a process - administrative activities, which in their unity comprise the global functions of administration. Its activities also include: implementation of the established policy and execution of laws and other regulations and general acts, monitoring the developments and providing initiatives to address and resolve issues in various areas, resolving administrative matters, performing administrative or managerial supervision, drafting regulations and other general acts, and performing other constitutionally and legally established competences of the Assembly and the Government. Therefore, efficiency of the administrative bodies means maximum realization of the goals of the administrative bodies with minimal use of time, as well as human and material resources. That, in turn, means maximum effect on the implementation of the administrative procedures in the resolution of administrative matters, the exercise of administrative or managerial supervision, the analytical expert activities, the normative activities, etc.⁶

The principle of cost effectiveness refers to the cost reduction, i.e. the rational spending of the budget funds and the increase in the productivity of public bodies or services provided by public bodies, where citizens should receive a lower price only with higher quality.⁷ In general, the measurement results analyze how an organization uses the funds in a specific time period.⁸ In practice, these measurements gain their meaning through reports on the financial operations of a certain public body.

² Norman Flynn "Public Sector Management", SAGA Publications of London, Thousand Oaks, New Delhi and Singapore, 2007.

³ M. Barzelay, *Breaking Through Bureaucracy: A new vision for managing in government*, University of California Press, Berkeley, 1992.

⁴ Davitkovski, Borce, Pavlovska-Daneva Ana, (2011) Public Administration-Incentive or Obstacle to the EU Integration of Macedonia. In: *Anal of the Faculty of Law in Belgrade, Belgrade Law Review-Journal of Legal and Social sciences*, Belgrade, No.1, Year LIX pp. 386-400.

⁵ Governance in this context applies to the role of government agencies to create and implement public policies and conduct administrative procedures. In this paper this will be referred to as administrative function.

⁶ Management problems, Grizo and Davitkovski, Skopje 2001.

⁷ Heinrich, C.J. and Y.Choi Performance- Based Contracting in Social Welfare Programs, *American Review of Public Administration* 37, 2007.

⁸ Norman Flynn "Public Sector Management", SAGA Publications of London, Thousand Oaks, New Delhi and Singapore, 2007.

The principle of effectiveness, in fact, is a guarantee that the organization will achieve its objectives, that the outcome satisfies the broader public interest (for example, improving health services, building cultural facilities, reducing the crime rate, etc.).

Within the functional concept, the most important instruments for measuring the effectiveness of individuals are the outputs of their labors to be delivered - the manager who is responsible for a certain project or process would negotiate with the superiors what those outputs are and when they ought to be delivered. At the end of that period the persons involved in production of those outputs would be properly evaluated.⁹ The evaluation of the effectiveness of civil servants could illustrate the following: a possible alteration or modification of dysfunctional work behavior, exchange of managerial perceptions of employee work quantity, estimates of employee future potential, as well as recording of disciplinary offenses and distinctive behavior of civil servants.¹⁰ In addition, there are five basic models of civil servants effectiveness evaluation:

- Supervisors' assessment (the supervisor evaluates the work of subordinate);
- Self-assessment (individuals are evaluated independently through standardized forms, by writing a narrative report on their work or sending their finished product as proof of realization);
- Mutual assessment (employees who are on the same hierarchical position evaluate themselves - horizontal assessment);
- Subordinates' assessment (the subordinate employees assess their supervisors' efficiency)
- Group assessment (independent evaluators, most often prominent experts, evaluate the work of the entire unit by means of interviews or on-site visit).¹¹

Measuring organizational effectiveness and effectiveness of public policies

Most common methods of evaluating how effective i.e. how successful organizations are in achieving their goals is by measuring the changes they cause in their environment. For example, you can measure how successful the Ministry of Interior is in crime prevention by measuring the changes in the crime rate throughout a longer period of time, or measures to increase safety in traffic can be evaluated through the changes in the rate of traffic violations. Thus, one might say that administrative organizations have general goals that can never be truly achieved: there will never be a day for the Ministry of Health when there are no more sick people, but it must always strive to keep the levels of sick people at their minimum by monitoring the development of new illnesses and constantly proposing new measures and instruments to achieve this general goal of health care and disease prevention.

Due to a set of "favorable" circumstances public organizations are in a position where they can disguise individual projects and processes (instruments) and present them as organizational goals - thus, by publishing statistical reports they present numbers of finished internal processes and daily tasks and interpret them as achieved outcomes, whilst in reality they are simply outputs. This process is often abused because by performing many technical day-to-day tasks, administrative organizations do a lot and convince the public they are very busy and able to cope with many problems, even though they aren't really accomplishing much. However, this is a feature common only to the public administration, hence, we must emphasize this is only a misconception. For instance, the introduction of a new experimental drug is not a goal but an instrument, nor it is installing traffic cameras and imposing more fines to traffic offenders. However, these are only instruments

⁹ Heinrich, C.J. and Y.Choi Performance- Based Contracting in Social Welfare Programs, *American Review of Public Administration* 37, 2007.

¹⁰ Jay M. Shafritz, E.W. Russel, Christopher P. Borick, "Introducing Public Administration", Pearson Longman, sixth edition, 2009.

¹¹ Ibid.

for achieving general organizational goals, in this case having cheaper and more effective drugs that more people can afford and respectively, a decrease in the number of traffic offenders over a period of time following the installation of traffic cameras. Methods commonly applied in the process of measuring organizational outputs: time series graph, plot diagram, scattered plot diagram, frequencies, histogram, Gini Index, Index numbers, Discrete time series analyses and regression – discontinuity analysis.

So what else might impact organizational effectiveness? Dragan Gocevski argues that there are four categories of factors that directly affect organizational effectiveness, presented in the following diagram:

Paradigm model of organizational effectiveness¹²



Primary hypothesis: ¹³

Organizational effectiveness is the ability of an organization to achieve its general goals and tasks (organizational outcomes).

Administrative organizations are directly influenced by the approval of all relevant stakeholders (concerned parties) in the justification of the organizational goals and the organizations' operative readiness (physical resources needed to achieve its goals).

Visa Liberalization in the Republic of Macedonia

The late '90s and the period following the beginning of the new millennium was filled with a sort of "hysteria" popularizing the mythos of isolation for the citizens of the Republic of Macedonia. It was popularized that they didn't travel enough and that the country's economy was being held down by the visa regime imposed by the EU. It was loudly noted that one of the key benefits of EU

¹² Kishore Gawande and Timothy Wheeler, Measures of Effectiveness for Governmental Organizations, Management Science, Vol. 45, No. 1, Jan., 1999, pp. 42-58.

¹³ Gocevski, Dragan. "Efektivnost administrativnih organizacija (eng..Effectiveness of Administrative Organizations)" PhD Diss. , Ss Cyril and Methodius University 30.10.2012.

integrations was visa liberalization.¹⁴ Macedonia's official statement was that since visa liberalization was enacted it has brought a significant relief in terms of communications between people, improvement of a business environment, exchange of ideas, and promotion of collaboration in all spheres of social life between the citizens of the Republic of Macedonia and the EU (Schengen countries).

January 1, 2008 was the first formal step towards implementation of visa liberalizations, as the Agreement for Readmission between Macedonia and EU was signed. The Ministry of Foreign Affairs and Ministry of Internal Affairs formed Common Committees and Committees for Readmission which collaborated tightly with the European Commission. The Agreement itself was a transitioning mechanism that gave certain visa benefits to some categories of citizens, and was supposed to evolve into full visa liberalization. The dialogue for visa liberalizations between Macedonia and the European Commission was officially open on February 20, 2008 accompanied with the adoption of a Roadmap document with technical guidelines. November 28, 2008 the European Commission published an Initial Report on the implementation and fulfillment of the Roadmap, with a positive mark that Macedonia achieved success in all 4 block of criteria.

To verify its findings on Macedonia, during the period from January to March 2009, the European Commission ran assessment missions in Macedonia. On March 9, 2009 an expert bilateral meeting was held in Brussels confirming the initial findings.

May 18, 2009, the European Commission delivered an updated Report on Macedonia's success in meeting the criteria in the Roadmap, to all member states of EU. On June 11, 2009 it was accepted that Macedonia has successfully completed the dialogue for visa liberalization. The Council of EU gave political support to begin legal procedures to drop the visa regime for countries encompassed by the process on June 15, 2009. The Council encouraged the European Commission to submit a legislative proposal for the amendment of Regulation 539/2001 in the shortest time possible in order to enact a no visa regime by the end of 2009 for countries which fully met the criteria.

July 15, 2009 the European Commission adopted the proposal for abolishment of visas for citizens of Macedonia, Serbia and Montenegro starting January 1 2010. As far a formal proceeding go, November 12, 2009 the European Parliament adopted the resolution to abolish visas for the aforementioned countries with a large majority. According to the Resolution (on proposal by the Slovenian euro MPs) visa liberalization was to be enacted earlier, on December 19, 2009. On November 30, 2009 during the Swedish presidency, the Ministerial council for justice and home affairs adopted a Decision for liberalization of visa regime of EU toward the citizens of the Republic of Macedonia, through amendment of Regulation 539/2001. Starting December 19, 2009 traveling without visas became a reality to Macedonians.

Although border crossing was completely liberalized, certain criteria remained for prolonged stay and were conditioned by possession of biometric passports.

According to data, and statements by the Ministry of Foreign Affairs of the Republic of Macedonia over 200.000 Macedonian citizens crossed the borders of EU countries from December 19th 2009 until January 15th 2010.

It is the purpose of this analysis to test these claims as well as many other, that the visa liberalization brought many benefits (other than free and cheaper border crossing because citizens no longer had to bother with obtaining visas).

¹⁴ Ministry of Foreign Affairs, Visa Liberalisation Chronology, May 22, 2014 <http://www.mfa.gov.mk/?q=node/147>.

Effectiveness of Visa Liberalization in Macedonia

Initially, a desired goal of visa liberalization was to make border crossing from Macedonia to EU member states easier, and this was undoubtedly achieved. Since December 19, 2009 any person possessing a biometric passport could enter all but two EU countries without any additional traveling documentation.¹⁵ But this couldn't have been the only possible goal! It was an immediate output – a result of achieving technical criteria and a lot of favorable politics toward Macedonia at the time. The real outcome needed to be, that if people could travel without visas they would travel more often and that more people would travel. The second desired outcome, often popularized before visa liberalizations was that visa regime held down Macedonian economy, so one should expect that following the end of visas, Macedonian GDP should see an increase in growth – or if there even is a causal effect should see any change in GDP growth rate. This narrowed down the assessment of the effectiveness of visa liberalization to the following:

- An indicator that people are traveling more after December 19, 2009 – broken order in frequency, after biometric passports were enforced
- Detecting “possible” causality or correlation between the frequency of entrances/exits and GDP

If more people travelled after visa liberalizations, that should show in official statistics in the form of discontinuity in order. This means that there should be a visible change in frequency of border crossings shortly after December 19th 2009, which should climb either constantly or make a sharp climb and then continue at a more stable rate.

If the frequency of border crossing was already at a rise, than one should look of a sharper rise in frequency, e.g. if 1000 more citizens travelled year over year, after visa liberalization there should be an increase of at least 1500 at a constant rate year over year. To this I compared number of entrances and exits of Macedonian citizens in the period from 2001 until 2011.¹⁶

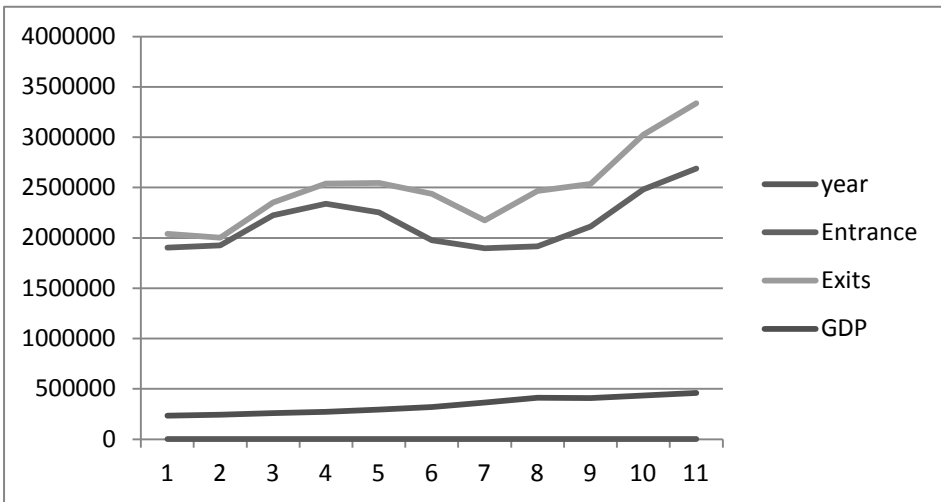
To see whether or not there is any causality or correlation between GDP and frequency of border crossing, in the same table/graph I included an overview of the GDP for the same time period. If there is a correlation of GDP and border crossing frequency we should see a similar rise or fall of the two on the charts.

¹⁵ Great Britain kept a visa regime, and Greece would offer a sheet of paper to annex the Macedonian passports, containing no mention of the constitutional name and crest of the Republic of Macedonia.

¹⁶ Official records are left blank for 2012 and 2013: Ministry of Interior Affairs <http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=602> missing data 22.5.2014.

Border crossing frequency¹⁷

year	Entrances	Exits	GDP (in million denars)
2001	1902924	2040643	233 841
2002	1926493	2003584	243 970
2003	2223095	2351059	258 369
2004	2339476	2539697	272 462
2005	2252577	2545843	295 052
2006	1977546	2437066	320 059
2007	1898356	2172714	364 989
2008	1916060	2466402	411 728
2009	2112032	2534791	410 734
2010	2480547	3025769	434 112
2011	2690183	3337484	461 730



As one can see from the provided (available) data, GDP was at a constant rise year over year, though relatively small. A larger rise in GDP can be seen in the period from 2005 until 2008, followed by a marginal drop and then rise again.

On the other hand, border crossing frequency shows a more cyclic pattern. 2001 to 2002 there is a short linger, followed by a rise until 2005, and followed by a drop till 2007, than starting to climb constantly at an uneven rate from 2008 till 2011. The provided data doesn't point to any correlation between GDP and border crossing frequency as border crossing dropped the most during the period of highest GDP growth rate and began rising again after the GDP growth slowed. This points that visa liberalizations or border crossing in general is directly linked to domestic economy as a whole, but could be linked to the individual welfare and a better indicator would be GDP per capita, which due to missing data could not be presented in the model above. Another deficiency of GDP per capita would be that it doesn't necessarily portray the true allocation of wealth in the

¹⁷ Ibid, <http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=445>, 22.5.2014.

nation. Also, GDP didn't appear to be affected by the introduction of visa liberalization in late 2009, as there is no sharp deviation in the data from 2010 and 2011.

What can we assess regarding the border crossing frequency? It has a cyclic pattern for reasons which cannot be explained by the provided model. It shows that people wanted to travel more years over year in general for most of the analyzed period. And following the enactment of the visa liberalization, we see a sharper increase in 2010, but not much sharper than was seen in 2003, which could indicate that something else affected this inclination. It is sad that there are missing data from 2012 and 2013, but from the available data one can only assume that visa liberalizations did make travel easier for those who already travelled but did not provide enough stimulation to people not prone to travel – or held back from traveling by other reasons. This doesn't mean that visa liberalization was completely ineffective as there was a rise in statistical data; it means that there are other factors more influential.

Yet another factor must be taken into account which might have influenced statistics for early 2010. The Ministry of Internal Affairs made a public announcement that every citizen had to change their personal identity cards by February 2010, and if they wanted to travel without visas they had to change their passports, which contributed to a micro spike in January 2010 as a large number of people suddenly changed their passports and left the country. This might explain the rise of over 30.000 border crossings in 2010 over 2009, but a much smaller rise close to 20.000 border crossings in 2011 over 2010.

Conclusions

What the research provided was that certainly effectiveness of organizations as well as policies is highly influenced by many factors – internal and both external. In the case of visa liberalizations is provided insight which opens more questions rather than answers. Is it plausible that people in Macedonia became more prone to travel as part of shift in awareness and attitude towards European countries which in itself meant they travelled more in the last decade? If so why did the frequency of border crossing suddenly drop in 2005?

Is it plausible that people only travel if they are economically fit, meaning either well (enough) situated for touristic spending or traveling on business? Unfortunately this cannot be proven or disproven by the provided model as there is a serious lack of accurate data in Macedonia of wealth distribution per capita – which would provide information if most of the data from border crossing came from the same people traveling more than once, rather than people going on tourism for holidays.

The model provided shows that there is little if any direct link between GDP as a whole and peoples traveling habits, regardless of visas and it certainly showed that visa liberalization didn't improve GDP growth. However, all of this could be affected by yet another external factor which is extremely difficult to incorporate in this or any model: 1) the effect of the European financial crisis on Macedonia and EU member states, 2) the effect this in return had on peoples traveling habits. Is it plausible that as domestic economies suffer, they shut down to foreigners? And could this be effecting GDP growth and traveling habits in way that would significantly diminish the effects of visa liberalisation? Unfortunately this will have to a topic for future research.

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REFORMS IN THE CLERICAL SYSTEM IN REPUBLIC OF MACEDONIA - NECESSITY OR NEED

*Elena DAVITKOVSKA **

1. Introduction

1.1 *Development of the administration system in the Republic of Macedonia*

The process of reforms in the administration system in the Republic of Macedonia can be divided into three phases, as follows:

1. The first phase until 1999 (some changes have been introduced in the organizational structure of the bureaucracy machinery, but in functional terms, the old terminology has been used for defining public servants or their equalization with all other employed persons)
2. The second stage from 2000, the status of civil servant has been regulated for the first time with the Law on civil servants 2000, as well as an attempt has been made the status of public servants to be regulated with the Law on public servants 2010 and
3. The third phase, with the implementation from 2015 година, is based on the two new regulations i.e. the Law on employment in the public sector and the Law on administration servants.

The basic pillars of the democratic civil society, the governance of the law as well as the respect of the civil rights in the Republic of Macedonia, have been established with the Constitution of the Republic of Macedonia since 1991. It was a great challenge for the Republic Macedonia as a former member of the Socialist Federal Republic of Yugoslavia, with a communist regime, i.e. the single-party system, dominant state ownership, over-employed bureaucratic system. In the system of the Socialist Republic of Macedonia there were different systems of categorization of the persons employed in the service of the state authorities. Thus, the term public servants has been introduced and started to apply for the first time with the Constitution in 1963, a year where it has been sought to align the position of the employees in the administration with the position of the employees from the employed in the economic sector. In 1989 began the process of "transition" with the adoption of the Law on state administration in 1990 of the Socialist Republic of Macedonia.

But, undoubtedly, the first step towards reformation of the political system of the Socialist Republic of Macedonia has been made with the Constitution of the Republic of Macedonia in 1991, where Macedonia has been established as independent, sovereign and democratic country.

But until 2000, the reforms of the public administration have been mainly based on constitutional rules, which, as such, are too general and their detailed legal elaboration has been required, but the Law on the Government and the Law on the bodies of the administration from 1991 failed to achieve that. In these laws, and in the stipulating secondary legislation, the status of "civil servant" was not legally regulated; rather, it was defined as "an employee working in the public administration". That is, certain changes have been introduced in the organizational structure of the bureaucratic machinery, but in functional sense, until 2000, the old terminology has been used for defining the public officials or their equalization with all employees.

In 1999 the Government of the Republic of Macedonia, with the adoption of the Strategy for Reform of the Public Administration, has tried to set the basis for building a second model of ad-

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ministrative system, and thus to build a new clerical system. Therefore, in 2000, as one of the pillars of the reforms of the public administration, the Law on civil servants has been adopted introducing a system of clerical employees for one part of the public administration staff (only the state administration), but implementation of the law indicated to some elements of the spoils-system in the process of recruitment of the staff in the public sector. The Law on civil servants is used and had been used as *Lex Specialis* regulation that regulates the status, the rights and obligations of the officials employed in the state and local bodies and in the other state bodies. For the first time the whole status of the public sector employees' status is governed with a special law - the Law on public servants from 2010, defining the scope of the public service, the common principles and fundamentals of employment rights and responsibilities, responsibility, evaluation, termination of employment, protection and deciding upon the rights and responsibilities, as well as the register of public servants. This law is part of the public law, unlike the legislation regulating the status of other employees in the public administration – the Law on labour. Pursuant to the new Strategy for reforms in the public administration which is concluded for the period of 2011 to 2015, in September 2014 the Parliament of the Republic of Macedonia has adopted the Law on administrative servants and the Law on the employees in the public sector whose application has suspensive effect of a period of one year, so the previously set out decisions from the Law on civil servants and the Law on public servants shall no longer apply starting from 02/05/2015.

2. Current legal framework of the administration system in the Republic of Macedonia (advantages and weaknesses)

a) Law on civil servants

As it was previously mentioned, the Law on civil servants (until 2015) has been used as *Lex Specialis* regulation setting out the status, the rights and obligations of the officials employed in the bodies of the state and local government and in the other state bodies.

The discrepancies of the Law on civil servants caused a number of its amendments which mainly referred to:

- Lack of legal stability of the administration system due to frequent amendments of the Law. In that direction, until present time the Law has been amended approximately 30 times (24 amendments and 6 decisions of Constitutional Court),
- The part with the salaries (these amendments have partially started applying in 2005 in the part of the basic salary, and the provisions concerning the salary's extras – system of career, have started applying in the recent years);
- The provisions of the Law on civil servants have applied on one small percentage of the employees in the public sector i.e. only to the employees from the classical state administration, 9000 persons in the state administration and 4000 in the local self-government, registered in the Register of civil servants in the Agency for civil servants (civil servants from the central and local administration with a total number of approximately 10 000),
- The scope of the Law, which significantly narrows it due to exemptions of the part of the existing civil servants from its scope. So, the first change exempted the civil servants employed in the National Bank of the Republic of Macedonia, then a series of laws have been adopted establishing new regulatory bodies the employees – public servants of which have also been excluded from the regulation of the Law on civil servants, although they perform activities which are undeniably determined with the notion of civil servants;

- The system of working positions versus the system of career (especially the amendments which refer to the assessment of work of the civil servants or their work for a period of 1 year has been replaced to 6 months which has facilitated 'sweep' the civil servant to be evaluated with an "unsatisfactory" two consecutive times or at least three times in the last five years. In 2006, the ruling political party has been changed. This resulted with numerous termination of the engagement of officials, which has been demonstrated with isolation at all levels of the public administration, which in 2007 led to disruption in the functioning of the administration. Time and expertise have been lost in the process of restructuring and during the large calculations of the public administration staff. According to the European Commission, all this contributed for increasing the congestion in the process of adopting laws and the Government has been deprived from valuable experts who could have ensured better preparation of legislation and timely implementation. For example, in the Secretariat for European Affairs 40 employees have been degraded which actually represents almost 2/3 of its permanent staff, based on their illegal appointment, a decision which was later upheld by the Civil Service Agency. The method used, and the period in which they perform degradation to some extent adversely affect the functioning of the Secretariat. But in 2008, the Agency for civil servants reported that in September 2008 a total number of 77 promotions have been performed, 38 of which in the Ministry of Economy. Report for 2010 – 2011 emphasizes: *It is still worrying that the public administration is continues to be politicized. Cases have been reported for replacement of trained professionals with people with limited experience in several institutions. Also, sometimes on the senior management positions, in absence of criteria for employment, staff has been engaged on temporary employment contract*".
- Introduction of probation work period (the person being employed for the first time in the civil service or civil servant being employed at a position of a higher rank than previously acquired, has an obligation to have a probation working period. For the selected candidates of the managerial and professional ranks, the probation period lasts 12 months, and the selected candidates for civil servants as professional-administrative staff and the civil servants being employed at a position of a higher rank than previously acquired, the probation period is six months in practice afterwards this person is immediately employed on permanent basis (although within a period of 6/12 months the candidate is considered to be on probation work and must take an exam 15 days before the expiry of this period, there are no cases recorded that a civil servant has not been such employed).
- In the segment of conducting the disciplinary and material responsibility (namely the Commission for the procedure is consisted of three members, including a managerial civil servant and two civil servants with a title of the same group of titles as a civil servant against whom the disciplinary proceeding has been initiated. The composition of the Commission is in accordance with the amendments to the Law on civil servants from 2010 which has replaced the member from the Agency of Administration, which questioned the objectivity of the Commission).

An attempt this Agency to be raise on the level of an independent authority, with new authentic competences, but actually it only set out different procedure for the selection of the Director of the Agency, which led towards the recent amendments resulting to be reduced to a level of an expert body. On several occasions the Agency has been positively evaluated by the European Commission and the civil sector of the Republic of Macedonia "as a bright spot in the darkness" within the framework of the implementation of the administrative reforms in the country. The multilateral cooperation in the process of performing the reforms in public administration which the Agency has established with the European Union, NATO, the Council of Europe, SIGMA by regular participation in updating the documentation in the process of EU accession, working meeting for the SIGMA mission etc, is of significant importance. Moreover, almost all international factors and national experts

emphasized the need to increase the powers of the Agency for civil servants, which would result with even greater success. Thus, for example, although according to the law all public authorities and organizations are obliged to submit to the Agency an annual report on the trainings for the civil servants, only of them fulfill that obligation. The Agency notified this in its annual reports, and gradually, with an assistance of the international cooperation, commenced an intensive implementation of training sessions. The report of SIGMA for 2007, one of the remarks referred to the fact that the Agency for civil servant (ACS) must have an integrated data related to all employments in the civil service. Despite the efforts of the ACS, the resources and the powers conferred have not been sufficient to enable the Agency to perform the functions in their entirety and as effective as it should be. The cooperation with the other bodies was generally more formal and inconsistent. The nature of the SCS requires that it must be dependant of the Parliament, and fragmentation of the management of the public service reduced its ability to act effectively in the policy making process and in the organization and development of human resources within the public administration. Basically, a large gap existed between the Agency for civil service and the central governmental bodies. In order to overcome that gap it was necessary to increase and strengthen the role of the Agency. This means that the scope of the Agency for civil servants (ACS) was problematic part due to the fact that is was not defined in details in the Law on civil servants. Therefore, in the short term, this definition had to be extended, had to cover all competencies and the executive power had to be increased, and on long term basis – the Agency should cover all non-political public employment. It achieved with the amendments introduced in 2009, which were favorably accepted by the European Commission. However, analyzes, reports and recommendations to the Agency instead being used to create a professional, transparent and open public service, free from the grip of political influences and pressures, upon proposal of the Government, the Parliament has adopted new amendments of the Law on civil servants which renamed the Agency into Agency for public administration with significantly reduced powers. For this legal decision, the experts indicate that the amendments of the Law on civil servants in 2010 which renamed the Agency into Agency for public administration although formally and legally has the same status as independent body with a feature of legal person, however its competences have been significantly reduced, therefore its existence is actually devaluated, and its most important responsibilities are transferred to the Minister for Information Society and Administration. So, the most important innovation in terms of organization of the public administration in our country, which unfortunately had a major impact on determining the status of the employees in the public sector, or civil servants was the establishment of the Ministry of Information Society and Administration by introducing amendments on the Law on organization and operation of the state administration in 2010, and the renaming the Agency for civil servants into Agency for administration with significant reduction of its powers in the Law on civil servants. In that period, the Law on public servants has been adopted but it did not imposed any factual changes in the practical and real regulation of the staff in the public sector (outside of government officials).

Concerning the competences of the newly established Ministry, it is interesting to note the fact that despite the huge number of responsibilities which by the nomotechnical transfer from the Agency for civil servants were assigned to the Ministry for Information Society and Administration, the legal text contains a provision stating that its responsibility is as well the “reform of the public administration.” This formulation is completely inappropriate, due to the fact that reform is a process that runs and completes, and therefore it cannot be permanent competence of one ministry. Comparatively, there are countries that have established special ministries which are competent for the public administration sector (of course without being fused with the information technology as a separate sector), such as France, Belgium, Luxembourg, Italy, Spain, Croatia, Slovenia and others. In other countries, independent bodies are established outside the Government and they are competent for the public administration. Such countries are the Czech Republic, Poland, Slovakia, Latvia.

In other countries, the public administration is under the competence of the Ministry of Interior or Ministry of Finance: Germany - Ministry of the Interior, the Netherlands - Ministry of the Interior and Kingdom Relations, Greece - Ministry of Interior, State Administration and decentralization, Ireland- Ministry of Finance, Denmark - Ministry of Finance, Portugal - the Ministry of Finance and State Administration. These legal amendments cannot lead towards creation of a small, professional, democratic, service-oriented public administration (more particularly - civil service), as defined in the Strategy for Reform of the public administration in 1999 and 2010.

b) Law on public servants – for the first time in the Republic of Macedonia

Concerning the Law on public servants, we can freely say that it has been and still is just a naked word on paper. The idea of the legislator was to unify all the important questions related to the status of employees in the public sector, creating foundations for unification of procedures for admission, promotion, appraisal, determining positions and salaries of all employees in the public sector can be defined as providers of public services. This goal failed to be implemented, primarily because the provisions of existing material regulations governing the status remained in force (i.e. according to the statutory terminology the work) concerning the public employees. Thus, no attempt is made to achieve compliance with the new Law on public servants, the Law on health protection, the Law on science, the Law on primary education, the Law on secondary education, the Law on university education, the Law on culture, the Law on pension and disability insurance, the Law on health insurance, the Law on capitally funded pension insurance, the Law on customs, the Law on the Public Revenue Office, the Law on civil aviation, the Law on broadcasting, the Law on energetic, the Law on prevention of corruption, the Law on protection of competition and a number of other laws which establish state institutions and organizations whose employees have the status of civil servants and public service providers. Another reason which led to a kind of devaluation of the Law on public servants consisted in its frequent amendment immediately after its adoption by the Parliament, and for the considerable number of decisions of the Constitutional Court, have abolished many legal decisions, which points to the fact that the legislation was insufficiently meticulously drafted by the proponent and uncritically adopted by the legislator. Also, the Constitutional Court had performed interventions in the Law on civil servants by adopting six decisions consisting of four repealing decisions and two annulling decisions.

3. Innovations in the administration system

Latest attempt to reform administration system through the adoption of the Law on administrative servants and the Law on employees in the public sector

As stated in the Introduction to this paper, in February 2014, the Parliament of Republic of Macedonia adopted the Law on administrative servants and the Law on employees in the public sector whose application has suspensive effect of one year, so previously exposed solutions of the Law on civil servants and the Law on public servants from 05.02.2015 will be withdrawn. Both new laws should constitute full legal framework for the status, rights, duties, ways of selection, promotion, remuneration, training, responsibility and employment termination of all employees in the public sector. They contain general principles for public sector employees, general rights, duties and responsibilities and termination of employment of employees in the public sector, rules for the mobility of employees in the public sector, as well as classification of the positions by group, subgroup and categories and levels which are regulated by *lex specialis*.

The classification of the positions in the public sector is defined as follows, shown in the table:

group I	administrative servants positions (civil and public servants)
group II	positions of servants with special authorizations, (10 subgroups in the area of security, defense and intelligence)
group III	positions of providers of public services (5 subgroups, work-related activities of public interest which are not of an administrative nature/facilities)
group IV	positions of assistant-technical people (5 subgroups, maintenance, security, conducting transportation and other ancillary and technical work which ensure smooth functioning of the institutions)

The new legislation stipulating for MISA for running Catalog of positions and Register of employees in the public sector which is serious positive step towards determining the exact number of employees in the public sector with a precise description of their jobs. Unfortunately, the preparation of the Catalog and Register is not performed in parallel with the preparation of legal texts of the two laws, which created a situation of having laws, but not the basic tool for their realization – the Catalog and the Register of the employees of public sector. Working positions will be recorded under code, group, subgroup and description of title. These two important documents, if prepared in time by MISA which is responsible for its preparation and further conducting, will contribute towards a full systematic list of working positions in the public sector, organized in groups, subgroups, categories and levels. Here, I would like to mention that unlike our country, in the Republic of Slovenia adoption of the legal framework for public servants went along with the decision of a special law for their salaries, as well as pre-prepared Catalog of working positions (all this accompanied by longtime but strong social dialogue between the government and the union), and the implementation of the new legislation went smoothly and efficiently.

According to the new classification of titles, there are four categories of administrative servants: A-secretaries; B-governing; C-professional administrative and D-assistant-profesional administrative servants. For category A, or civil and general secretaries, are appointed people of a certain mandate, it could be concluded that the category B or governing servants are the highest echelon of people who apply the rules of servant's status. For all of them, new employment conditions are provided which although legally called special competencies, represent common conditions that every servant in this category must meet: active knowledge of computer office programs, examinations for administrative management and knowledge of one of the three most commonly used European Union languages (English, French, German) which is proved by an internationally recognized certificate. These certificates are at the expense of the candidate for the appropriate position.

4. Temporary employment as a legal innovation

The employment according to the Law on employees in the public sector and the Law on administrative servants, as before, is based on indefinite time, with a decision or a contract of employment, depending on whether it is administrative or public servant.

The exceptions to this rule are the new legal provisions that establish foundations and methods for employment/servant relationship for indefinite time. Such employments are the following:

- Replacement of temporary absent employee (more than 1 month)/maximum 2 years
- Temporarily increased workload/maximum 1 year
- Seasonal work/maximum 1 year
- Contingency short works/maximum 1 year
- Working on a project / 5 years
- Filling of special positions (such as President of the country, Speaker of Parliament, Prime Minister, ministers, etc) in order to perform the work of special advisers/expiration of the mandate of the official.

The experiences of employment for a definite time have thrown serious negative shadow over the condition of public administration, so, the attempt to regulate legally this factual reality and establish order through the establishment of a legal framework, deserves support. Such was the picture of temporary employments in the past and today: in 2006 the Law on temporary employment agencies was adopted, and the number of part time employees in public administration grew worrisome; recruitment of people with temporary employment is not in accordance with the needs specified to the laws of civil and public servants which guarantee selection based on transparency and merit-based system; large number of people employed on definite time were employed on indefinite time in the third quarter of 2010. In other words, the establishment of servants employment on indefinite time, lasted (with many people in administration, ongoing) for many years, and the real purpose of such employment is nor increased workload, nor replacement of absent servant, but a rounabout entry of individuals for permanent employment in the service! This was also shown in the research of SOROS for the number of employees on indefinite time confirmed the abuse of these contracts, and the name of the survey was „A million-dollar question“. What is also worrying is the fact that in the process of collecting data for the number of employees in the authority of indefinite time, great number of the authorities, did not complied with the principle of transparency, i.e. the Law on free access to public information. For example, pursuant to the Law on temporary employment agency, a copy of every agreement for transfer of employee, the Agency of temporary employment shall submit to the labor inspection and the Employment Agency of Republic of Macedonia. This legal norm was in force when the NGO's report was adopted, i.e. in April 2010. But the Agency did not respond to their request. This is due to two things: either the Agency does not keep accurate records and does not have this information or have data but does not want to share. While civil society is trying to solve this dilemma, i.e. how to get information of public character which is regulated also by other law, i.e. the Law on free access to public information, the legislature, in accordance with the new amendments to the Law on temporary employment agency, takes away her responsibility, which further complicates the process of obtaining information about employment in this way. But, despite the temporary employment agency, this request for access to public information is not replied nor by the Government of RM nor specific Ministries, such as: Ministry of Interior, Ministry of Justice, Ministry of Finance and Ministry of Environment. Therefore, the criticism of NGO that 'money is spent on vain customers, or citizens', is fully justified. In accordance with the answers supplied by other ministries, the number of employees on indefinite time for 2010 looks like this:

1	Ministry of Health	28 employees
2	Ministry of Culture	19 employees
3	Ministry of Labour and Social Policy	27 employees
4	Ministry of Economy	8 employees
5	Ministry of Education	33 employees
6	Ministry of Transport and Communications	76 employees
7	Ministry of Defense	251 employees
8	Secretariat for European Affairs	386 employees
9	Ministry of Foreign Affairs	14 employees
10	Ministry of Local Government	2 employees
11	Ministry of Information Society	92 employees
12	Ministry of Agriculture, Forestry and Water Economy	207 employees
13	Total	1143 employees

For these reasons, we believe that there really was high time to perform the legal regulation of the manner and duration of temporary employment, employment in the administration to finally put an end to the current threats. Is it really going to happen depends on the way you interpret and implement the new legislation, particularly a provision that expressly allows without listing the conditions, criteria, etc. temporary employment, consent to move in permanently.

Also, the legal solution to form a kind of cabinets of top civil officials who will be temporarily employed several political advisers and so called cabinet servants who share the official mandate, is valid and meaningful. However, the impact of the current policy is not reduced even with the preparation and carrying such, eligible for all, situations. Thus, the number of cabinet advisers that is not determined does not fit the weight or importance of the public function which council positions are assigned, but starts from the people who occupy positions in the current time of the preparation of the laws. Thus, the most of these temporary employments, according to the latest legislation, follow the cabinet of the Prime Minister, and even then the President of the Assembly, his Deputies, the President of the country etc. Of these, I would say "minor," inconsistencies in the preparation of major legal acts can be seen even servility which is still dominant feature of the administration vis-à-vis political and party officials.

5. Old-new solutions

The scope of the Law on administrative servants is regulated in the expected direction: as always the number of „classic“ public servants remain exempt employees in „the most powerful“ public authority and institutions in the Republic of Macedonia: customs administration, tax administration, judiciary, public prosecution, National Bank, public audit, etc, but this time coupled with exemptions and inspection services, as well as the exclusion of classical administration employed in regulatory authority. The reasons are clear: employees of these institutions nor have, or desire to have uniform salaries with other public servants in the country, despite the budget, they have additional founding and of course, some of these institutions may not recognize the MISA nor factual, no formal power to his superior authority. Incredible but true, the servants employed in Parliament of Republic of Macedonia are not covered by the exemption of the Law on administrative servants, and they have the status of civil servants, unlike their counterparts employed in the judiciary and public prosecution. Reminder: The Parliament of Republic of Macedonia is the highest authority in the state!

6. Creators of personnel policies in the public sector

On the level of public sector institutions for coordinating the work of administrative servants are: Ministry of Information Society and Administration, Ministry of Finance, the Secretariat for the implementation of the Framework agreement and the Agency of Administration. In this part of the legal decisions have shifts of Law in order to strengthen the powers of MISA and reduce the importance of the Agency of administration, which despite its legal status (independent Parliament authority), realistically given the powers which the legislature allows, it comes down to the Administrative office of MISA. Thus, the start of the application of the Law on administrative servants, MISA, instead of Agency of administration will give consent for acts of systematization of working positions in institutions, in terms of compliance to job description of administrative servants to the Law and the Catalog of working positions in the public sector and give opinions on the methodology for planning employment in the public sector (a new requirement for all public authorities and units of local government). Also, MISA certifies professional examination for administrative management and organization unit for professional training of administrative servants which will formally be called Academy for professional training of administrative servants, and actually represents sector training within this Ministry. MISA is envisaged to cooperate with vocational, higher education and research institutions of the country and abroad and to hire experts from the relevant fields, network organizations, coordinates and implements generic, and specialized training is for employees in the public sector who do not have status of administrative servants, which will charge a fee! Up to now, neither in the country nor comparative, the executive expressed by the highest civil authority of the directorate – a Ministry obtained legal responsibilities of an educational institution.

On the other hand, the core competencies of the Agency of administration started conducting exams which administrative servants will take (more technical than substantive, since AA does not participate in any election questions, both in preparing the questions and in the evaluation), published advertisements for employment, maintaining records of candidate who supplied false evidence in the application. The only serious proper jurisdiction for the legal status of the Agency, which still remained in its authority, is conducting secondary proceedings on complaints and appeals of administrative servants. For this purpose, a secondary committee is formed, composed of a president and four members. Why so many members of the committee, nor why a five member committee, why not decided proponent of a three-member committee as always until now appeals are settled, what are the criteria for regulating the number of members of the commission and the criteria for their choice and so on, are some of the issues that are unresolved puzzle.

The innovation is that this time it is explicitly mentioned the Ministry of Finance as a factor that decides the coordination of administrative servants, a role which of course, always without explicitly mentioning, had this ministry, because even de jure and de facto, without his consent, it was and it is impossible every employment and promotion in the public sector. The Secretariat of the framework agreement provides giving consent for new employments, something that existed before, but was not explicitly stated in the Law.

7. Real innovations in assessment

The assessment of administrative servants is diversified from the previous methods of evaluation. Thus, administrative servants, except the secretary and cabinet servants must be evaluated annually and not later than December 1 of the current year. To specify, the types of grades look like this: „in particularly stands out“, if the servant has a value of 4,51 to 5,00, „outstanding“, if the servant has a value of 3,51 to 4,50, „satisfactory“, if the servant has value of 2,51 to 3,50, „partly satisfactory“, if the servant has a value of 1,51 to 2,50 and „unsatisfactory“, if the servant has a value of 1,00 to 1,50.

The consequences of poor evaluation are new to the Macedonian servant system, and beyond, because such experiences are neither known nor comparative. The new legislation predicted the last 5% administrative servants of the rank-list to:

- Employee termination if assessed with an „unsatisfactory“,
- Their salary is reduced by 20% for six months if assessed with „partly satisfactory“ and
- Their salary is reduced by 10% for six months if they are part of the last 5% of the rankings, and not assessed with an „unsatisfactory“ or „partly satisfactory“.

Our critical notes urge the first and third condition described in this listing from the negative effects assessment. Termination of employment automatically for unsatisfactory assessment on which most of subjectivism can depend on the superior, in our opinion, is a dangerous tool in the hands given the high assessors, particularly in the absence of a complete system of meritocracy in the administrative service. Also, it is difficult to find arguments to justify the decision by one of the five percent of the solid-rated servants, and is found at the end of the ranking, without any explanation will be confiscated at 10% of salary for six months consecutively. We are talking about people whose work and labor efficiency were evaluated with three best grades - „particularly outstanding“, „excellent“ and „satisfactory“. Thus, in a hypothetical situation in which, in an institution employees would be assessed as „particularly outstanding“ and „excellent“, however, by law, five percent of servants who received grades „excellent“ (which is extremely high in the hierarchy of grades) will have to pay a six-month reduction in their salaries!?

The administrative servant assessed with „satisfactory“ in two consecutive assessments, shall be terminated.

The assessment of the administrative servant carries the superior administrative servant or managing administrative servant, secretary or manager of the institution. The anticipated grades are from 1 to 5, but top 5 can be rated up to 5% of the employees of the institution. The annual assessment of the servant is composite and its composition consists of: 65% of the evaluator, 35% of the average scores of 4 other servants including 2 with the same title and 2 with lower titles. Given the aforementioned, it can be concluded that still remains in force the earlier decision by which the impact of the assumed, when assessing, is of primary importance and the total annual assessment of the servant depends primarily on the ratio of the decision of his boss. Of course, the fact that only 5% of all employed servants in one authority/organization can gain the highest grades, there is no other explanation, even less justification for this legal solution, but need the legislator and the applicant, on one hand to stimulate employees for good and efficient work, and on the other hand to save budget funds to reward those same good and efficient servants, which in itself is a contradiction. Or in other words: in order only 5% of the servants to be rewarded, there must be 5% of penalized employees in every institution, so that the sentences of those employees will compensate the reward to the others.

8. Concluding observations, dilemmas and recommendations

Based on this background, as a general conclusion could derive that some essential new reform change in the status of employees in the public sector were conducted either in 2010 with the establishment of the new Ministry of Information Society and Administration, nor dramatic reversal will occur after the entry into force of the Law on administrative servants and the Law on employees in the public sector, next year.

As before and after the entry into force of the Law on employees in public sector, the status of employees in public institutions, funds, public companies, regulatory authorities, etc., will be governed by specific material regulations in which only groups and subgroups listed in the men-

tioned Law, should be implemented. Formal adjustments actually occurred immediately after implementation of the Law, when a sitting Assembly of Republic of Macedonia execute amendments to around 120 separate laws (Law on higher education, Law on secondary education, law on primary education, law on science, law on culture, law on health care, etc.) in which an attempt is made to perform equalization categories of employees in the public sector up to now (for example, the Law on higher education was clearly and precisely defined – groups of academic titles of junior assistant to full professor) was regulated.

When it comes to civil servants, they are now covered by the new Law on administrative servants under which employees in so called classical administration employed in public firm, institution, funds, etc., equate their status with the current state servants, the scope of the Law on administrative servants will increase significantly adding the number of these employees.

The general conclusion from the analysis of the latest legal texts is stricter criteria for entry and advancement into administration compared with the existing Law on civil servants. Some previous special conditions (knowledge of foreign languages and computer skills) for certain positions, are becoming general conditions without which you can not acquire the status of a servant.

Our opinion is that although a sizeable harmonize laws with two basic laws for the regulation of the servant's status, in the absence of a single Catalog titles for public sector employees, significant difficulties in the implementation of a number of specific regulations are expected, because they must be operationalized with Regulations on organization and systematization of all organizational units, i.e. all authorities and organizations covered by the relevant laws.

Therefore, the preparation of the Catalog of working places/working positions of all employees in the public sector (about 150 000 with the temporary employment) along with these two laws, would have been of paramount importance, and simultaneously enacted Law on salaries of public sector employees in advance that you will know how much will cost the budget of the Republic of Macedonia each position and place of work individually. Pursuant to the Law for every working position points are set and the value of the point determines the Government for civil servants, and what about public founder?! Such actions and steps that you could follow, will truly represent the process of serious reforms in the Macedonian public sector. Our critical analysis is the foundation of the negative experiences of the past which speaks about the fact that after the adoption of the Law on civil servants, the section on wages did not apply more than 6 years! It should be borne in mind that the Law on civil servants, as emphasized in the Introduction, covers only 10 percent of all employees who receive salaries from the budget, and the newly enacted Law on employees in public sector refers to the additional 90% service providers in state of no Catalog, or predictable real asset for all of them.

The only possible recommendation to address this situation is devoting great attention to the need for education and training to those who need to implement these laws cover a myriad of civil and public agencies and organizations, especially in the absence of a separate institution for training these personnel (provided only sector training within MISA far as can be satisfied with the actual needs).

Hence, the implementation of these two basic laws and the provisions of special laws that are aligned with them, you will need to perform ministerial and selective (separately for classical civil servants, separately for service providers in education, science, culture, social security, funds etc.). It remains to be hoped that by early 2015 the difficult and laborious implementation of numerous laws, will be successfully completed.

At the very end, we enumerate several open issues that cause concern, but also some criticism in the professional and scientific community and yet there is no unified and generally acceptable answer:

First, as the Law on employees in the public sector will affect the current status of employees in public institutions, which is regulated by specific material regulations, or whether further these special laws, now amended, will substitute the provisions of the general regulation, specifically the provisions of the public sector employees?

Second, the question that causes the dilemma is what would the role of the Ministry of Information Society and Administration would be, in respect of employees of the public institutions. Namely, for some services (education, health, etc.) with the Constitution of the Republic of Macedonia the principle of competence and expertise is guaranteed, and in higher education autonomy of the status and position of universities is constitutionally guaranteed (and thus the employees too) under which implies autonomy of choice of staff in higher education. Would the MISA credentials mean nothing as a classic representative of the executive in relation to the employees at universities, endangering the constitutionally guaranteed autonomy of the university?

Third, if the new legislation is not performing distinction between employees in public and private institutions that leads to real favoritism or discrimination against both of them? In fact, regardless of the ownership structure of institutions, public and private, and mixed institutions performing activities or services of the same type, they are all providers of public services, and the status of their employees (who perform the same activities) yet it is differently governed. This problem will have to be quickly resolved (before the new solutions to be implemented) because it is a serious legal inconsistency and uncertainty.

Fourth, the experts ask the question whether the unification of working places (positions) in the public sector (public institutions, public firms, funds and etc.) will lose the specific nature of the activities they perform, especially because for performing certain public services there are specific material laws which require meeting the special working conditions that are difficult or starting out can not be unified. As the new legal provisions will be reflected in the evaluation, promotion, remuneration of these specific categories of employees, and the general legal status they currently enjoy?

Finally, after a detailed analysis of all the powers that are gaining MISA under two new laws, creating the impressions that it turns into „over-ministry“ which will be competent to decide on the status of all public employees, not just status of civil servants! We should not forget the possibility of de facto a serious overlap to happen of the new responsibilities of MISA with already established powers a number of other ministries such as the Ministry of Education, Ministry of Health, Ministry of Culture, etc.

As it can be inferred, there are many open questions that we tried to observe and hope that in the near future will receive appropriate responses in particular through the adoption of laws that need to operationalize these regulations.

All our efforts as researchers are directed towards realizing the basic task of modern administrative and legal thought in our country: the successful implementation of the legal and factual distinction between administration and politics, or between professional and political level, the administration will finally become a real service citizen service instead of ruling political elites.

9. Conclusions

In this article we attempt to solve a number of dilemmas:

How much the Law on employees in the public sector (LEPS) will reflect the legal status of some of those employees (university faculty, teachers, doctors etc) in the case when it is already regulated with the numerous substantial legal acts as the Law on high education, the Law on middle education, the Law on primary education, the Law on culture, the Law on health protection etc?

A dilemma is caused on the question of the role of the Ministry of the IT society and administration (MISA) in regards to the part of the employees in the public institutions. For example, the Constitution of the Republic of Macedonia guarantees the autonomy of the university that includes the autonomy of choice the university faculty and staff. The new competences of MISA as classical represent of the executive power vis-à-vis the employees in the universities may be considered as endangering the Constitution guaranteed university autonomy.

The next question arisen from the new LEPS provisions is the existing distinction between the public and private institutions even when they provide the same type of services. Namely, the services providers in the both private and public institutions are doing the same activities of public interest but still their legal status is regulated on quite different way with different legal acts. This inconsistency should be solved very soon, before the LEPS implementation started because it produces legal inequity and uncertainty between these categories of employees.

On the other hand, the expert public is wandering whether the unification of all job positions in the public sector will lead to loss of their jobs (activities) specific character. For some of these positions there is need of fulfilling very specific criteria defined by special laws.

On the end, according to all analysis of the new legal provisions an impression is made that the Ministry of information society and administration becomes an "over-ministry" authorized for the legal status of all employees in the public sector not only for the civil servants legal status.

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APPLICATION OF EU LAW TO THE ALBANIAN ADMINISTRATIVE SYSTEM. THE STATUS OF THE ADMINISTRATIVE ACT IN CONTRAST WITH EU LAW

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Abstract

The most fundamental part of the EU institutions activity is strongly connected with its norms application from Member State administrations. In fact, there is a European legal system which is integrated with the internal system of the State Members. In substance, most of the norms produced by the Union are of administrative kind. They establish administrative obligations toward European Union institutions from member states and their citizens.

This study is focused in the fundamental aspects of the above indicated rapport. Mostly it considers the system of validity/invalidity of the Albanian administrative act in contrast to the European Law.

Keywords: administrative act, EU Law, invalidity, rule of law.

1. Introduction to law sovereignty

Sovereignty, population, territory, independence, self-determination, the rule of law inside the national frontiers, have been the main characteristics of the State and of his internal legislative system. Any provision which is conforming to the national law system is to be considered as a valid ruling provision, ready to be executed by the competent authority. In the modern states things have changed a lot. The concept of sovereignty has been limited by a very wide external intervention to the national law system, imposing ways of producing legislation, validity and invalidity to internal norms, and even to the judicial or administrative procedures.

At modern times, the concept of extraterritoriality has become a very common element regarding most of the fields of law. As human rights are considered an international issue, with reference to most of the developed countries, international economical relations, as international trade, migrations, the fall of ideological borders and of economical ones, has interfered to the international relations¹. This new system of international communication between people and economies has required the statement of different international rules, which should be mandatory for the internal juridical systems of the countries. So international rules approved by the consent of state representatives are becoming now binding for the entire internal systems and its law subjects.

In these regards the belonging of sovereign countries to international organizations, has imposed them some sovereignty limits. So the decision taken by the international organization, even if it is contrary to the will of a member country, should be mandatory for all of them. Member countries have admitted this principle, but while operating, for sure they not always will be happy to execute some rulings which are not approved with their consent. According to the Albanian Constitution, the international law is superior in front of the domestic law but not constitutional laws. As provided by article 122 point 3, international organizations may produce legal norms which should be directly applied to the internal legislative system. So a valid international law ruling should be directly applied by the state internal organisms like: Courts and the Public Administration.

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¹ Karaj Asllan, "International conventions and their control", published in the "Legal Studies" journal, no.2, Tirana, 2005.

EU membership aspiration can actually bear significant EU-oriented transformations and adaptations in the Balkan domestic scenes. All this, by creating new prospects for the future regional role of the EU, and also allowing new considerations, concerning the region's place in the New European Architecture. Broadly speaking, the concept of Europeanization is reintroduced to refer to a set of processes through which the EU political, social and economic dynamics become part of the logic of domestic discourse, identities, political structures and public policies². However, the EU impact on countries with different politico-economic and social systems, more specifically on the post-communist European countries in transition, remains vastly unexplored. States that are not law-governed, market-oriented liberal democracies cannot be accorded full membership. The EU functions as a reference model for the modernization of the political, economic and social systems³ of the aspiring candidates in transition, and Europeanization becomes a series of operations leading to systematic convergence through the processes of democratization, marketing, stabilization and institutional inclusion⁴. In this regard the future European Union membership will require some internal efforts in order to directly apply its normative by internal institutions.

The domestic application of the EU legislative system will comport different issues which should be very carefully treated by the public administration and contracting private subjects. Government bodies must realize very well organized information network and an active by-ruling system which should prevent any possible legislation contrast with very strong economical consequences. All this will be concrete only in a few years, but should be considered since now by the field operators.

Even that actually the EU normative is not obligatory to be applied in the Albanian internal system; the next EU membership wouldn't be too far. From the first day of membership on this Supra-national Organization, the country should be able to directly apply the entire normative produced by the Communities and the following European Union system.

2. The Conflict of Laws

The contrasts between EU normative and the state internal one, has determined a very wide contrast in doctrine and jurisprudence regarding to each country internal normative and constitutional system. There should be a clear definition of the relation between two parallel legal systems, both applicable. The normative produced by European Communities (followed by the European Union normative) regards a very wide range of everyday life topics which usually are the main field of activity of courts and public administration in the member States.

Doctrine has realized that the relation between EU Law and the National Law is not similar with the usual relation between international law and national law⁵. In fact, the relation between the international system and internal system is resolved with a coordination relation among two juridical systems in a reciprocal autonomy. At the other hand the relation with EU Law and the member states is an integration relation, as all member states are in a reciprocal equal relation, and the communities system has the tendency to be integrated to the internal system. Usually the international law in itself is quiet or indifferent, about the ways how national authorities use to apply their

² Radaelli, Claudio. "Whither Europeanisation? Concept stretching and substantive change." Political Studies Association Annual Conference, London: 10–13 April 2000.

³ Ioakimides, P.C. "The extent and the borders of the European Space-New realities and challenges" in *The New European Space-Enlargement and the Geography of European Development*, eds. Andrikopoulou E. and Kafkalas Gr. Athens: Themelio, 2001.

⁴ Demetropoulou Leeda *Southeast European Politics Vol. III*, No. 2-3 November 2002 pp. 87-106, *Europe and the Balkans: Membership Aspiration, EU Involvement and Europeanization Capacity in South Eastern Europe*, Panteion University, Athens.

⁵ Draetta Ugo, and Nicoletta Parisi; "Elementi di diritto dell'Unione Europea – Parte Speciale, Il Diritto Sostanziale", Giuffrè, Milano, 2004.

international obligations in the internal State system. The result is the main important thing, so the realization of the aim the international norm had.

This distinction is very valid among the EU Law and the internal systems. Regulations, Directives, Decisions establish obligations and rights which act directly to the European citizens⁶.

From the other side, this strong connection between the national law and the EU law, is reinforced by the obligation determined by article 10 of the European Community Treaty, for the member states who have to realize "*all general or particular measures in order to realize the obligations deriving from the Treaty or established for the Community Institutions acts...., they should avoid any measure which may obstacle the realization of the treaty aims (honest collaboration obligation)*". For this rule should be applied a wide interpretation, as for the word "State" we should not intend the unity of the State central powers⁷. The Court of Justice of European Union has established that "*... it regards to all the member State authorities, of the central power of the State, the federal State authorities or other territorial authorities, to guaranty the respect of community law normative as defined by their powers...*"⁸. In other cases, the EU Court of Justice has specified that this obligation is valid for all organisms of the member States, including as to their power even the organisms with a jurisdictional functions or nature.

This principle approved form article 10 of the Treaty comes from the consciousness that the Communities system in different way from national systems doesn't represent a closed and self sufficient system, but, in order to be realized completely, it should be integrated with the System of member States. The close integration which consist between the communities system and that of member States, intends necessarily a system and a harmonization which is not always applied in the reality. So there are a lot of contrasts between instructions given by both systems. The solution of this contrasts results very important in the case when the communities' law decides in producing directly applicable norms for every member subject or citizen.

The European Court of Justice has imposed a more general obligation to administrative authorities of the Member States. When a national administrative authority finds that between a provision of national law and a directly effective provision of European law conflict exists - and so can not apply both provisions simultaneously - the authority is required to resolve this issue in favor of the provision of the European law. If possible, the administrative authority can achieve this by interpreting the provision of national law in the light of European law. However, if consistent interpretation is not possible, the administrative authority is obliged to set aside the provision of the national law which is incompatible and instead directly apply effective provisions of European law⁹.

We refer to this obligation, which is made clear by the European Court of Justice to both primary¹⁰ and secondary¹¹ European law legislation, simply for convenience, as "Costanzo's Liability."

⁶ Alkema Evert, "Channeling International Law into Domestic Legal Order – Some Practices and Constitutional Problems", in "Content and Meaning of National Law in Context of Transnational Law", edited by Henk Snijders and Stefan Vogenauer, Sellier – European Law Publishers, Munich 2009.

⁷ Bana Sokol, and Erjona Canaj; "European Union Law", (lectures set), Tirana, 2009.

⁸ Decision date 12.06.1980 "Germany against European Commission", of European Communities Court of Justice.

⁹ Refer to Case 103/88 Costanzo, 1989, ECR 1839; Case C-224/97 Ciola, 1999, ECR I-2517 and Case C-198/01 Consorzio Industrie Fiammiferi (CIF), 2003, ECR I-8055.

¹⁰ Case C-198/01 Consorzio Industrie Fiammiferi (CIF), 2003, ECR I-8055.

¹¹ Due to regulations, this requirement may come from its nature and character as set out in Article 288 TFEU (ex Article 249 EC); for the provisions of the directives that are directly effective and which are not implemented in a correct and timely manner. This was decided in Fratelli Costanzo Case.

3. The Adaption of the EU Legislation to the Internal Law System of Albania.

The effect of European law in the domestic legal orders is mainly carried out by the Member States. Their administrative authorities adapt the internal regulations and their national courts ensure the implementation of these norms. This leads to the so-called “*dédoublement fonctionnel - duplication of functions*” of national administrative authorities, since now their obligations not only are derived from national law, but also from European law. However, this matter does not directly influence the institutional structure of the member states, which as a rule remains intact. Member States must decide which administrative authority has the power to exercise the authority granted through the internal normative acts, in order to fulfill the obligations of the European Law.

As a principle, the European law requires the same what national systems ask to, the direct application of their normative. The basis of this “one on one rule” is contained at the Court of Justice decision “Van Schijndel”. The court refers that, in case the courts are obliged to examine questions of the national law, without that the parts raise them, the same the courts should do even for the European normative¹².

The direct effect of the EU normative should expand even at the effectiveness and validity of the administrative acts produced in contrast to the EU normative. **This contrast may rise in the case the administrative act is in contrast with the EU normative without a clear internal law provision in contrast with it, and even when there is a clear contrast.** In both case we have a contrast to the EU normative and subsequently there will be an administrative act which is infected of invalidity as contrary to valid law provisions, European or national law provisions. In fact this contrast between norms will characterize at the first line new conflicts on the legality of the administrative act and in extreme cases will include even cases of the rising of a new contest regarding full jurisdiction¹³. This evaluation should be organized as an analysis of the validity provided by the internal system for the administrative act validity, having as an application model, the effects given to an executing administrative act by the establishment as unconstitutional of a law by the Constitutional Court of a civil system country. In this case there should be considered even the consequences falling on the administration who has produced this act, including here even the obligation to produce a new valid act or the effects it may give regarding to the civil responsibility of the administration or its officials¹⁴.

Particular problematic may rise regarding to that form of EU normative as directives (Self Executing or waiting a transpositive law). If a directive or part of it is self executing, it enters immediately into force and will interfere directly to the administrative act validity. If it needs to be transposed by a transpositive law, it should not produce any effects, until it becomes a valid norm as provided by the national law system.

A different issue arises regarding to what happens to an internal normative which is contrary to the European Law. Is it definitely abrogated, is it inapplicable, and in case the EU normative is abrogated, should it be considered as a valid normative?

¹² Snijders Henk, “Interpretation of national rules for ex officio raising of points of Community law by national courts”, in “Content and Meaning of National Law in Context of Transnational Law”, by Henk Snijders and Stefan Vogenauer, Sellier – European Law Publishers, Munich 2009.

¹³ Pollozhani Bajram, Ermir Dobjani, Esat Stavileci, Lazim Salihu; “Administrative Law – Comparative aspects”, Asdreni, Skopje, 2010.

¹⁴ Greco Guido, “Argomenti di Diritto Amministrativo”, Milano, 2006.

4. Essential and Procedural aspects regarding the application of EU law and its effects on the validity of the Albanian Administrative Act.

Regarding the impact on the administrative acts, it means that the rule of law governing their issuance is not only a national rule of law. As a matter of fact, supranational law joins national law in granting administrative powers and regulating the administrative procedures, and administrative decisions content, in determining their legal effects and implementation. EU law does not need to be filtered or implemented by national law. It rules directly on the activities of national administrations. A national administrative act, which breaks the EU law, is invalid, no less and no more - than the one that breaks the national law. However, regulation by the EU's national administrative acts is stronger when the law is respected compared to when it is violated.

More precisely, EU law leaves more space to the national law in the procedural field than in the core field. Due to this, the invalidity grounds effect more than its consequences. As for the former, as already noted, the invalidity arises due to breach of EU law, as well as violation of national law.

As for the latter, it is still the national law that determines the consequences of the breach of EU law. This is mainly as a result of the EU support of the national courts, in their role as guardians of EU law, which expands the importance of national procedural rules. **In other words, it is up to EU law - and national one - to decide when an administrative act is invalid, but it is only the national law that defines what it means when the administrative act is invalid**¹⁵. This principle means that member states are free to regulate the consequences of violation of EU law, but to the extent. these consequences do not result in a lesser protection to EU law than the national one. On issues such as those related to periods to justify the violation of EU law and administrative power for not enforcing an administrative act contrary to EU law, the Court has repeatedly claimed that "*in the absence of Community rules governing a matter, the domestic legal system of each Member State must follow detailed procedural rules that govern the actions for the protection of rights which the individuals profit from the direct effect of Community law*"¹⁶.

Consequently, the legal regime that addresses internal administrative acts in conflict with EU law is the same as those in conflict with national law. In many European countries, it means a state of temporary production of legal effects. In other words, the act is not invalid, but it can be avoided. If this is the case, there is an obligation for the Member States to implement EU law, by removing their administrative acts in contradiction with it. This obligation is not very different from liabilities that might arise from international law and global regulatory regimes.

The direct effect of the European Union normative will extend to the effectiveness and validity of administrative acts which are contrary to community norms. This controversy will be expressed in two cases:

- a. In the case when the administrative act is in contrast with community norms without having a legal internal prediction which clearly regulates the case;
- b. In the case when the administrative act is in accordance with domestic law but the latter stands in contrast with community norms.

In both cases we have an incompatibility with the community law, and therefore will have an administrative act affected by the invalidity because it is contrary to the legal provisions in force

¹⁵ Galetta Ugo, "Procedural autonomy of EU member states: paradise lost? A Study on the "functionalized procedural competence" of EU member states – Procedural autonomy of the EU member states, lost paradise? A study on the functional procedural competence", Springer, Heidelberg, 2011.

¹⁶ Case C-312/93, Peterbroeck, Van Campenhout & Cie c. Belgium, Decision of 4th of December 1995.

according to Article 115 of Law no. 8485 dated 12.05.1999, "Code of Administrative Procedures": The invalidity of administrative acts, in the content of this code is presented in the following format: a) absolutely invalid administrative acts (acts issued in flagrant contradiction with the law); b) relatively invalid administrative acts (acts issued in violation of the law).

The expression "against the law" refers to the entire legal norms applicable to the Albanian state whether domestic or community origin and/or international laws or just internal laws? In fact the negative answer to this question and the narrow interpretation of the term "contrary to law", thus referring only to laws enacted by the Albanian Parliament, will bring down the effectiveness laying on the internal system of external sources of law. Giving a positive answer to the above question under the general principle of legality, the administrative act that stands in conflict with superior norms in force (including European ones) will be subject to invalidation system prescribed in the Code of Administrative Procedures and in other administrative laws.

This evaluation should be performed on the analysis of the validity provided by the internal system with respect to an administrative act by having as analog model, the application model of the effects on the applicable administrative act by the proclamation of a law contrary to the Constitution. In such a case, the administrative acts issued under the provisions of the law already declared unconstitutional, remain without a legal basis and therefore invalid. A question would arise whether these acts will continue to apply and if applied abusively, could they be contested. The outcomes will be different depending on whether we will deal with a normative or individual administrative act.

- a. In the case of normative acts (e.g. a decision of Council of Ministers, DCM) they actually remain undisclosed as invalid. Therefore, no competent body has established their invalidity due to their illegality during the Constitutional Court Judgment. In this context, it is the duty of the administration not to apply this normative act. Even though apart from the body that has issued it or the superior ones, other administrative bodies cannot take the responsibility of expressing or ascertain the act invalidity. In this situation what happens with this act? For the time being, it simply remains inapplicable until a new law (or even a new normative act) comes out to fix the problematic situation which has been created. While, in case the act is abusively applied by the administration, can the parties over which the consequences fall, contest the act implementation through legal proceedings? Meanwhile, given the evolution of legislation, and the establishment of Administrative Courts in Albania¹⁷, we will now see that the normative administrative acts even those of the Council of Ministers are judicable on their invalidity by a special panel of five members of the Administrative Court of Appeal.
- b. In the case of an individual act issued under a law already declared unconstitutional, the administration is the first that should not apply it, but in the case of an abusive application, the latter can be challenged in court by the interested parties as an act contrary to the superior norms in force.

Coming back to the issue of administrative acts which are designed and implemented in contrast to predictions of EU law, which will be their regime in relation to their validity and applicability. So what will happen to those administrative acts that are contrary to the directives, regulations or decisions of the EU - and what difference will have the following acts in relation to the fact of whether we will have to do with individual administrative or normative acts?

The validity of the administrative act forces each public administration body to rigorously respect the four essential elements, which will be addressed in detail below. They are:

1) *competence*;

¹⁷ Law 49/2012 "For the Organization and Functioning of Administrative Courts and Judgment of Administrative disputes" in the Republic of Albania.

- 2) *procedure;*
- 3) *compliance of the act with the law content;*
- 4) *compliance of the act with the law purpose.*

If in the first two points, we are dealing primarily with national internal legal provisions, the other two points in the case analyzed in this paper would be provided by community norms which as we have said earlier are integrated with our interior system.

In fact these acts whether normative or individual, at first place should have come into line with the EU law, by not applying the domestic law which remains inapplicable up to the moment that will be replaced by another law, adaptable with community acts, or there will a change in the EU legislation that will turn it to compliant with the EU law and therefore inapplicable again. In conclusion, **the law cannot be canceled or be declared invalid** (no one has the power to declare or contest it, apart from the lawmaker itself and the Constitutional Court).

The administrative act comes with a flaw in its legality, while its legitimacy may infect the act even after its release, in case of release of such normative after the entry into force of the act. While laws are not applicable, the administrative act is affected by the regime of invalidity under our Code of Administrative Procedure. **So the fundamental difference between the administrative acts contrary to EU law and domestic laws contrary to the EU refers to the fact that acts are subject to internal legal system and the actual discipline in connection with invalidity and may be declared invalid. On the other hand, laws passed in violation of the EU law are not applicable and not void, since no one has the power to realize this.** The essential difference between a normative administrative act (e.g. a decision of the Council of Ministers), and a law contrary to EU law, would be if the act may be declared void by the Administrative Court of Appeal, the law remains inapplicable by the judge or local administration. In this context, an inapplicable law in case of an EU normative change can be recovered to applicable, while the relevant DCM has already been declared void by the court and shall already be non-existent.

Doctrine and jurisprudence are oriented towards recognition of a particular form of invalidity of the administrative act due to their contrast with the reference normative parameter¹⁸. Up to a certain point a doctrinal orientation unsupported by case law has come to the point that it has predicted that in the case of contrast, there should be a special type of community invalidity that assumes absolute invalidity of the act in contrast. This argument is based on the argument that such an act is not issued by the competent authority, i.e. it lacks the authority to issue acts with community content, given that it is issued on a law that is not applicable in itself. In this case the absolute invalidity would later bring consequences that our internal system provides, ranging from the judgment of primarily of the invalidity to the fall of any kind evaluation period of its invalidity.

¹⁸ Chiti P. Mario, "Diritto Amministrativo Europeo - European Administrative Law", 3rd Edition, Giuffrè Editore, Milano, Italy, 2008, pg. 545.

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CIVIL SERVICE IN ALBANIA - LEGISLATION AND MECHANISMS FOR PROTECTION OF CIVIL SERVANTS

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Abstract

This paper presents an overview of the Albanian civil service system, as organizational part of the public administration. This includes description of the features of this system, supplemented by an analysis of the current situation and issues of concern during almost two decades of applicability of this system in Albania. Furthermore, it presents the efforts of Albania in the framework of Stabilisation Association Agreement with the EU to bring the civil service legislation and institutional framework in line with the EU requirements. This Agreement has served as basis for several strategic documents to streamline the policies in various areas including that of public administration and civil service. In addition, particular attention is paid to recent legislative developments that have a direct impact on the structures, composition, functions and quality of civil service in Albania.

Keywords: civil service, civil servant, civil service reform, Civil Service Commission, Department of Public Administration.

1. Legal and Institutional Framework for the Protection of the Rights of Civil Servants

1.1 Origin of Civil Service Legislation

The civil service system is relatively new in Albania. Its origin dates back in 1996, when the civil service was for the first time regulated by law.¹ This law aimed at regulating the work relations of employees of the public administration, central and local, which are different from the work relation regulated by specific laws and the Code of Labour. Categories of civil service were wider than currently, including, certain political office holders.

1.2 Legislative Developments in Civil Service

In 1998 the Parliament approved the Constitution of the Republic of Albania, which has a specific article about civil servants.¹ The terminology used in the Constitution² differs from that of the law adopted in 1996. This is explainable given that the 1996 law on civil service was adopted at a time when it was the main Constitutional provisions that were applied, in which provisions civil servants are not mentioned at all.³ Another term, 'public official' is used in the Constitution and a qualified majority is needed for laws regulating public officials' status.⁴ Therefore, it seems that there is no unification of terminology even in the Constitution, with this broad term referring to all other public officials.⁵

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¹ Law no.8095, dated 21 March 1996, "On civil service in the Republic of Albania".

² Article 107, Law no.8417, dated 21 October 1998 "Constitution of the Republic of Albania".

³ Law no.7941, dated 29 April 1991, "On Main Constitutional Provisions", abrogated by Law no.8417, dated 21 October 1998 "Constitution of the Republic of Albania".

⁴ Article 107, Law no.8417, dated 21 October 1998 "Constitution of the Republic of Albania".

⁵ See "Constitutional Debates", Volume 1, pages 171, 255, 259, and Volume 2, 503-505, *Shtëpia Botuese P.S.H. 2015, 2006.*

Another law was approved in 1999, which addresses only the status of civil servants. It remained unchanged until it was replaced in 2014.⁶ The Civil Service Law (CSL) of 1999 provided for several important rights of civil servants including the right of protection by the State during the performance of duties. This law also established a key institution to safeguard the rights of civil servants - the Civil Service Commission.

1.3 Institutional protection of civil servants

The Civil Service Commission (CSC) has started to function in 2000.⁷ The Commission was composed of five members and has undergone only once a full renewal of commissioners' mandates. It was conceived as an independent institution, given that the nomination or dismissal of its members was voted in the Assembly and it exercised two competencies: **the monitoring of the management of the civil service** in all institutions that fall under the scope of the CSL, as well as **the solving of the complaints of the civil servants** against decisions of the State administration related to recruitment in the civil service system, probation period, promotion, lateral motion, performance evaluation, disciplinary measures and the rights of the civil servant.⁸ The establishment of the Commission as an administrative independent body aimed at ensuring stability in the public administration.

2. Issues of Concern in the Implementation of the Civil Service Legislation in 1999 – 2013

2.1 Recruitment in the civil service

According to the CSL of 1999 every Albanian citizen was entitled to apply for entering the civil service for as long as he has the legal ability to act, the necessary qualifications, education and professional experience, is in good health, has not been sentenced previously for any crime through a final decision and has not been previously dismissed from civil service for a serious disciplinary violation.

The CSL of 1999 stipulated that the recruitment was based on merits and carried out through an open competition. The Department of Public Administration (DoPA)⁹ was and still is responsible for the recruitment of civil servants and management of the civil service.

2.2 Discipline, Dismissal and Redundancy in Civil Service

The CSL of 1999 envisaged in detail the disciplinary proceeding of civil servants, dismissal and the declaration of redundancy. The disciplinary measures followed a progressive order, from a written warning to dismissal.¹⁰ A dismissed civil servant was banned from readmission in the civil service according to the CSL of 1999. The immediate superior used to be responsible of deciding for the disciplinary measures against their subordinate employees. The law envisaged that a civil servant could separate from the civil service for several reasons including resignation, retirement age, sentenced to imprisonment and restructuring of the institution.

⁶ Law no.8549, dated 11 November 1999 "Status of Civil Servants".

⁷ Decisions no. 437 and no. 437/1, dated 03 May 2000, of the Assembly of Albania on appointment of three members of the Civil Service Commission.

⁸ Article 8 of Law no.8549, dated 11 November 1999 "Status of Civil Servants".

⁹ It is the Human Resource Unit at the local level that carries out the same functions of the Department of Public Administration for the central level.

¹⁰ Article 25 of the CSL of 1999.

3. Problems faced in practice regarding the rights of the civil servants

The CSC has developed a rich practice regarding the protection of civil servants rights, pointing out in its decision making process that there are misinterpretations by State institutions which affect the rights of civil servants and the most worrying phenomenon is the failure to reinstate their rights when violated.

3.1 Complaints at the Civil Service Commission

The Civil Service Commission exercised its legal competences through decision-making, regarding the complaints of civil servants, within 30 days from the submission of a complaint. All State institutions were obliged under the CSL of 1999 to provide the relevant documentation to the CSC for the complaint under examination. All the decisions of the CSC were mandatory for the public administration institutions, central or local, and could be appealed at court.¹¹

Referring to the Civil Service Commission's annual reports 2002-2012, one can observe that civil servants mostly requested protection in relation to **work stability or return in office**, in the event the dismissal in the public administration proved to be not pursuant to the law and evidence. Complaints related to restructuring constituted also a wide group of complaints sent to the CSC, since restructurings was used as means to justify 'reform' in the civil service by every government since 2001.

Another considerable amount of complaints in front of the CSC related to frequent changes in job descriptions.¹² It would be in accordance with the spirit of the Civil Service Law that when a person wins a job in the public administration through competition, that person's job should be protected. The element which posed concern was the poor justification of the institution over the reason of the dismissal of civil servants. This is also confirmed by the judiciary which in cases when decisions of the CSC were appealed the Court of Appeal, the latter regularly upheld CSC's decision. Nevertheless, the enforcement rate of decisions in favour of civil servant has not been satisfactory.

3.2 Misuse of the Waiting List

In the cases of restructuring of institutions, or, dissolution or merger of some institutions, civil servants lost their jobs and they used to be registered in the waiting list managed by the DoPA and for 12 consecutive months benefited the salary. After this, the civil servant lost the status of civil servant. The CSC has noted in its annual reports that few civil servants were reappointed from the waiting list. In fact, every time State institutions want to announce job vacancies with open competition, the DoPA should initially consult the waiting list so to identify persons that fulfil the general and special criteria of the vacancy, so, that no one be excluded from the system.

4. Jurisprudence on Civil Service - Constitutional Court's Practice

In the situation of breaches of the CSL, let's consult the jurisprudence of the Constitutional Court.¹³ The Constitutional Court emphasizes that **"execution of a final court decision within a reasonable deadline should be considered as an integral part of the right to a fair legal process not only in terms of the Constitution, but also in terms of the European Convention for Human**

¹¹ Article 8, points 3 and 4 of the CSL of 1999.

¹² In the event the employee does not have the necessary competences in accordance with the new job description, he is given a 6 month time to comply with the new job description. The employee must be provided adequate training to assist him to comply with the new requirements

¹³ Decision no.1, dated 19 January 2009 of the Constitutional Court on "Finding of a violation of the right to fair legal trial as a consequence of the failure to execute a final court decision".

Rights”. In addition, the Constitutional Court underlines that no State body may question final court decisions. It reinstated the stand of the European Court for Human Rights, when pronouncing that a final court decision has to be executed when it is final.¹⁴

5. Commitments of Albania in the Framework of the Stabilization Association Agreement with the European Union

In June 2006, Albania signed in Luxemburg a Stabilization and Association Agreement (SAA) with the EU member States.¹⁵ The SAA consists of four pillars: political dialogue and regional co-operation, trade provisions concerning the progressive liberalization of exchanges, community freedoms, and co-operation in fields of priority, especially in justice and internal affairs.

The cooperation between the EU and Albania in the framework of the SAA with regard to the public administration focuses on the implementation of transparent and impartial procedures of recruitment, human resource management, and career development both in the central and local public administration.

The signing of the SAA is only the first step towards reforming the public administration, so that Albanian public administration standards meet the requirements of the EU. This process requires professional civil servants, who can guarantee independence, integrity, transparency, and the application of the principle of public services. These civil servants deserve at the same time to have their rights respected, protected and redressed by the relevant State bodies, when they are violated.

Regularly, the Progress Reports on Albania note, among others, that **“The Civil Service Law regulating public administration is in place, but it is not applied systematically. ... The absence of sound accountability mechanisms in public administration increases the opportunities for bypassing established procedures. ... Frequent replacements of civil servants are undermining the independence of the civil service and increase the opportunities for bribery of public officials. Overall, the public administration is continuing to stabilise, but the lack of transparency and accountability in appointments is endangering its independence.”**¹⁶ Thus, concrete work is needed by the Albanian institutions so that the Albanian public administration is considered sustainable and professional.

6. A new Law on Civil Service in 2013

Until May 2013 there have been two previous unsuccessful attempts to amend the Civil Service Law of 1999, but due to the fact that this kind of law requires a qualified majority to be approved the proposed amendments remained only proposals. It has been foreseen under the short term priorities of Albania to amend the Civil Service Law of 1999 during 2005-2006. The draft law on civil service in Albania was prepared based on the legal assistance of SIGMA/OECD and it was passed only on 30 May 2013, one month before the general election in Albania. Upon proposal of the opposition forces of that time the 1st October 2013 was proposed to be the date for the beginning of the effects of this law. The approval of this law is considered a fulfillment of one of the main priorities that European Union had imposed on Albania.

¹⁴ Case Ramadhi vs. Albania, European Court for Human Rights, dated 13 November 2007.

¹⁵ The Stabilisation and Association Agreement between the EU and Albania entered into force on 1 April 2009.

¹⁶ See 2008 Progress Report on Albania – “Public Administration”; accessed April 28, 2014, www.moi.gov.al.

6.1 Overview of the new Civil Service Law of 2013

This law aims at establishing a stable and professional civil service, based on merits, moral integrity, political neutrality and accountability.¹⁷ The underlying principles of the new law on civil servants are equal chances, non-discrimination, merit-based recruitment, transparency, professionalism and political impartiality. At first glance the new CSL is richer in articles in comparison to the CSL of 1999. Nevertheless, the new is a framework law and provides in thirty articles that secondary legislation should be approved by the Council of Ministers in order to further elaborate and provide detailed rules based on its provision.

Besides for preserving the principles and definition of civil servants of the CSL of 1999, it includes also several novelties. For example, it provides for the category of “special coordinator” that is an ad hoc temporary civil servant, who performs the duties of coordination, representing or steering institutional or intra-institutional working groups, and such duties are to be carried out under the authority of the Prime Minister or a Minister.

The new civil service law has a broader scope in comparison to the civil service law of 1999. It will apply to any civil servant who exercises public authority in a State institution, an independent institution, or in a local government unit, because it provides for an exhausting list of who is not a civil servant, meaning that all other categories of State employees are civil servants.¹⁸ According to this article is it concluded that employees of all types of local government units will be part of the civil service system.

In absence of an accurate official estimation¹⁹ on the increase of civil servants' number we can draw a certain conclusion – the number of civil servants working in State institutions of various categories (central, local and independent ones) will certainly increase.

Another novelty is that the new civil service law provides that the complaints of civil servants against State institutions will be addressed by the administrative courts.²⁰ The Civil Service Commission is dissolved and a Commissioner for the Supervision of Civil Service in all State institutions included in the civil service system is foreseen in the new civil service law. The specific law on the administrative courts provides that disputes related to labour relation will be ruled by the administrative courts based on the relevant legislation regulating the labour relations and these courts will adjudicate on lawsuits against the State institutions in the role of the employer.

Despite the new Law on Civil Servants provide for the establishment of the institution of Commissioner for Supervision of Civil Service, it is tacit with regard to which institution initiates the selection process and on any timeframe. So, after three months from the date the new Civil Service Law is effective, this institution does not yet exist.²¹

Furthermore, the new civil service law provides for the creation of the top level managers of civil servants referred to as the ‘TND’. Under the categories of the civil service law of 1999 the highest category of civil servant used to be the secretary general. This category with the new law is referred to as TND and in addition to secretaries general will include the newly created category of civil servant that of the special coordinator. The new CSL appears to have a twofold stand; on one

¹⁷ Article 1 of the Law no.152/2013, “On Civil Servant”.

¹⁸ Article 2 of the Law no.152/2013, “On Civil Servant”.

¹⁹ The Civil Service Commission estimates that from 7,000 the number of civil servants will increase to approximately 45,000. Interview with the Secretary General of the Civil Service Commission, April 2014.

²⁰ Law no.49/2012 “On the organization and functioning of administrative courts and adjudication of administrative disputes”.

²¹ The Albanian Parliament passed on 22 May 2014 two decisions; one for declaring the termination of the mandates of the four commissioners of the CSC and another one for opening the vacancy of the Commissioner for Supervision of Civil Service. It is expected that before the summer recess of the current Parliamentary session this Commissioner will be in office.

side it is open to new comers for civil service positions of the lowest level, while on the other side it is a closed system because for promotion to a higher level only those already in the system can apply.

According to the new law on civil service the DoPA will continue to exist and it will be a subordinate structure of the Ministry of Interior. In fact, the current composition of the government includes a Ministry of Innovation and Public Administration. The DoPA has expanded competencies because it will supervise the public administration institutions with regard to the implementation of the relevant legislation. Under the law of 1999 it supervised only the central administration institutions that are the ministries. By expanding the supervisory task of the DoPA the new civil service law creates an overlapping of tasks entrusted both with the DoPA and the Commissioner for Supervision of the Civil Service.

Furthermore, the new CSL establishes the Albanian School of Public Administration (ASPA). Currently, it comprises as personnel only the personnel inherited by its predecessor Training Institute of Public Administration (TIPA). The necessary secondary legislation for the functioning of the School has recently been approved, while its training curricula should be revised and eventually approved in accordance with this School's mission and vision for various categories of civil servants. The establishment of ASPA was listed among the objectives of the Cross-Cutting Strategy for the Public Administration Reform 2009-2013.

The new CSL aims at putting an end to the subjective practices observed during the 15 years of implementation of the previous civil service law. It provides for a different recruitment process with regard to entrance level, namely specialists' level. The CSL of 1999 provided for one competition for each vacancy, while the new CSL provides for the pool recruitment for lowest level of civil servants, namely specialists. The pool recruitment(s) will take place based on an annual basis estimation of number of civil servants of the same job category needed for the following year. Thus, hiring for specialist level will be based on open competition procedures which results will be valid for a maximum two-year period. If new vacancies arise during the validity period of the previous competition results the ranking of the participants will be respected in order to appoint them to the new vacancies arisen.

The new law on civil servants provides that civil servants of top management level should attend and successfully complete the long-term training at the ASPA. Until this is fully realized for the first group of top managers of civil service a national competition will be organized when vacancies for civil servants of this category arise. The entire competition process will be entrusted with a National Selection Commission – in itself a novelty introduced by the new CSL. This Commission will also be in charge to take decisions on disciplinary measures except for the 'reprimand' disciplinary measure. Thus, the decision making of the immediate supervisor in terms of applying disciplinary measures against his subordinates has been removed through the new law.²²

With regard to the rights of civil servants the new law on civil servants introduces **the right to strike**²³ which has explicitly banned under the CSL of 1999. On the other hand, the new civil service law has some restrictions if compared to the CSL on 1999. It provides that a civil servant pertaining to the top management level can not be member of a political party.²⁴ The new law on civil servants includes more detailed provisions on the transfer of civil servants by making also the distinction between the temporary and permanent transfer and when each of them applies.²⁵

²² Article 27, of the Law no.152/2013, "On Civil Servant".

²³ Article 35, of the Law no.152/2013, "On Civil Servant".

²⁴ Article 37, of the Law no.152/2013, "On Civil Servant".

²⁵ Articles 48 and 49 of the Law no.152/2013, "On Civil Servant".

The new CSL provides for different disciplinary measures and their effects in time as the respective provisions of both laws illustrate. Thus, it provides that the disciplinary measures are:

- a) reprimand;
- b) withholding up to 1/3 of the remuneration for a period up to six months;
- c) suspension of the right to any type of promotion, including the salary step, for a period up to two years;
- d) **dismissal from the civil service.**

The most severe disciplinary measure is the dismissal from service, but the positive novelty of the CSL of 2013 is that those dismissed can attempt to join the system through pool competition after seven years from their dismissal.²⁶

6.2 Expectations from the Civil Service Law of 2013

The new civil service law aims at specifying some blurred provisions of the CSL of 1999, such as the effects of a CSC's decision and at differently regulating certain aspects of the CSL of 1999 proven to be either costly for the State budget such as one vacancy one competition procedure, or subjective such as the selection of the winner of a competition procedure by the immediate superior of the future civil servant, not necessarily the first ranked in a competition procedure.

The dispute resolution mechanisms entrusted with administrative courts aims at putting an end to the mass non-enforcement of CSC's decisions by State institutions. The transformation of the Civil Service Commission to a Commissioner for Supervision of Civil Service reinforces its sole competence of supervision over State institution applying the civil service law because this Commissioner will be entitled to impose fines for cases of violations of civil service law, but also it will execute this role over a higher number of State institutions that will be included into this system.

A positive step is the establishment of the ASPA, which is seen as a fulfilled objective of the Cross-cutting Strategy for Reform in Public Administration. It will offer short- and long-term training for civil servants of all categories. Especially, top level managers should first successfully complete this school in order to preserve their position.

The new civil service law recognizes as the sole way to enter the civil service system the open pool competition for civil servants of specialist level. Only those of the executive level are eligible to enter a competition procedure for mid or high level positions in the system. Furthermore, the new civil service law does not recognize any other recruitment process for civil service positions as the practice has been. Up to now two parallel and at the same time conflicting recruitment types have applied. One was stipulated in the CSL of 1999 and the other one regulated Order of Prime Minister which allowed for recruitment through contracts based on the Labour Code for civil service positions. Despite being a secondary legislation in violation of the hierarchy of legal acts in the Republic of Albania, it has been widely applied by several State institutions based on the justification that the competition procedure envisaged in the CSL of 1999 is a costly and lengthy one.

Another important expectation from the new CSL is the possibility of former civil servants who have been dismissed to attempt and join the civil service system after seven years from dismissal. Under the CSL of 1999 it did not exist.

²⁶ Article 58 of the Law no.152/2013, "On Civil Servant".

7. Conclusions and suggestions

As elaborated in previous sections, the CSC has made efforts to adjudicate complaints of the civil servants against State institutions. Its annual reports highlight the fact that most of the decisions of the CSC, which were in favour of the civil servants, and against which the State institutions appeal by addressing the Court of Appeal, are upheld by the latter.²⁷ The lack of stipulated administrative punishments for non execution of the CSC's decisions has led to a high number of non executed decisions.

Albania is among those Balkan States that is on its road to integration into the European family. Thus, the bilateral co-operation between the EU and Albania focuses on the transparent and impartial recruitment procedures, management of human resources, career development in the public services sector both at the central and local levels. In fact, the SAA is the first step for the comprehensive reform of the Albanian civil service with the aim of attaining the standards set forth in the principles of the European administrative space. This implies the inclusion of professional civil servants, who guarantee the independence, integrity, transparency and the implementation of the principle of service toward the public. On the other, hand this obligation means that the Albanian State should strive to guarantee the rights of civil servants as stipulated in the relevant legislation, by putting in place the necessary mechanisms for the realization of such purpose. Currently, among the priorities of Albania is the strengthening of civil service so that it is able to afford the challenges ahead by correctly implementing the legislation on public administration and civil service.

While the new CSL was drafted with international support, it can unfortunately not be seen as a directly applicable piece of legislation, because most of the implementation of this new law will, to a considerable extent, depend on the secondary legislation which needs to be approved as soon as possible. Therefore, it remains to be seen whether the new civil service law and the pertaining secondary legislation will prove to be more effective than the one of 1999.

²⁷ The Annual Reports of the CSC over the years show a high percentage of the upheld decisions by the judiciary 80 – 90 %.

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CAN ELECTORAL COLLEGE BE CONSIDERED AS LAST ELECTIONS COMPLAINT RESORT IN ALBANIA?

Mirela P. BOGDANI*

Introduction

Elections processes are broad political engagement of citizens that in Albania occur every four years, being those parliamentary or local ones. Apart from expression of citizens' will for electing Members of Parliament or other local government bodies, elections involve also contradictions, disputes, dissatisfaction amongst political actors, independent candidates, voters, or other supporters. Elections disputes play a crucial role to electoral processes, elections result and to the overall level of democracy in a country, by guaranteeing as much as possible the application of international standards of elections management and elections disputes to electoral processes, and by ensuring the integrity of elections.

In Albania, elections disputes are handled in two stages, initially in **administrative** level, which is conducted by Central Elections Commission (CEC is the institution that administers the elections in Albania) and **court appeals** level which is carried out by Electoral College (EC is a judicial body composed of 8 Appeal Court Albanian Judges, selected by lot, for four years term, that eventually corresponds to each parliamentary election). The question that will be raised and discussed on this paper, will be related to a potential third complaint level, the one to Constitutional Court of Albania, and to the issue to what extent Constitutional Court could be involved in electoral disputes, pursuant to current Albanian legislation.

The paper will analyze in details the administrative and court appeal level of electoral disputes pursuant to Electoral Code of Albania, as regular levels for resolving electoral disputes. Furthermore, it will address the issues of the competence of Constitutional Court of Albania with regards to electoral disputes and its role on the process, played so far and the potential role in the future. These issues will be analyzed in the focus of international standards for electoral disputes and also in the focus of 'fair trial' principle set forth in ECHR (Art. 6) and Albanian legislation.

1. Administrative Review of electoral disputes

Albanian legislation, more specifically the Electoral Code¹, provides in a detailed and clear manner the right to administrative review of political parties and candidates supported by voters², for Parliamentary elections and local ones. It lists several situations of administrative complaint, from the pre-elections disputes until the termination of electoral process, and disputes of elections results. In this respect, the right to administrative appeal is fully granted to electoral subjects, as provided and required by international standards of elections guidelines³.

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¹ Albanian Electoral Code (*in force*), was initially approved by Law 10 019 (*December 2008*) and was amended by Law 74/2012 (*July 2012*).

² For more information see Part X of Electoral Code of Albania 'Administrative Complaint of the Decision of Elections Commissions', Art. 124 – 144. Translated version of Albanian Electoral Code could be found at osce.org/albania/14464?download=true.

³ See Resolving Election Disputes in the OSCE Area: 'Towards a Standard Election Dispute Monitoring System' Generic Guidelines for Elections Dispute Resolutions, General Principles, para. 1- 6.

1.1 Right to administrative complaint to CEC

The general rule is that the complaint for electoral disputes should be presented at Central Elections Commission (CEC) against the Decision of Commissions of Elections Zone Administration (CEAZ), which is the commission responsible for the administration and conduct of elections in the elections administrative zones (regional level). CEAZ main competence is to prepare and approve the aggregate table of elections result for each electoral subject in the elections administration zone⁴. The complaint should claim that legal interests of electoral subjects⁵ had been violated by the decision; the deadline is three days from the announcement of decision of CEAZ⁶.

Electoral Code had provided also another scenario that falls within the scope of administrative review – the situation where electoral subjects can present a claim at the CEC against the decision of CEC itself that had approved the aggregated table of elections results for an electoral zone⁷, within five days from the announcement of CEC decision.

Administrative review process, pursuant to Albanian legislation is also extended for pre-electoral disputes. In this regard, Electoral Code granted the right to complain to individuals and political parties, whose requests for registering as electoral subjects to CEAZ⁸ for local elections, had been refused.

1.2 CEC examination procedures – CEC as quasi-judicial⁹ body

Electoral Code provides the competences and the role of CEC as a highest permanent state body that administers the elections in national level, for examining the complaints presented for administrative review¹⁰. CEC has all competences to examine the case of the dispute presented; these competences are similar to judicial procedures for adjudication civil complaints by regular courts in Albania – this is the reason why these powers vested to CEC had designed it as a *quasi-judicial* body. CEC has the power to register the administrative complaints at a special register, to verify the completion of form and content of administrative complaint, to conduct the preliminary verifications, to take the formal decision for accepting the administrative complaint, to conduct administrative investigations, to notify the parties for the day of session of administrative complaint, to submit the claims and evidences from parties, to examine electoral materials, to allow parties rebuttals, and to take its decision after the examination of administrative complaints for electoral disputes.

2. Court Appeal of electoral disputes

Electoral Code of Albania also dedicates a special part¹¹ for Court Appeals against CEC Decisions. Electoral subjects have the right to appeal to Electoral College of the Court of Appeals in Tirana¹². As specified by EC, the appeal will be filed by electoral subjects, only against the CEC decisions

⁴ Art. 33/a and Ë of Electoral Code.

⁵ Pursuant to Albanian Electoral Code, Art. 2 'Definitions', 'Electoral Subjects are political parties, coalitions, and candidates proposed by voters, as well as the candidates for Mayor of local government bodies'.

⁶ Art. 124 of Electoral Code.

⁷ *Ibid* Art. 124/3 of Electoral Code.

⁸ Art. 33/f of Electoral Code 'CEAZ registers the electoral subjects and the candidates for the elections of local government bodies'.

⁹ For more information see the definition of *quasi-judicial* in law.cornell.edu/wex/quasi-judicial
- A proceeding conducted by an administrative or executive official that is similar to a *court* proceeding, e.g. a *hearing*. A court may review a *decision* arising from a quasi-judicial proceeding;
- A *judicial* act performed by an official who is either not a judge or not acting in his or her capacity as a judge.

¹⁰ Art. 127-144 of Electoral Code.

¹¹ Part XI of Electoral Code, Art. 145 – 159.

¹² Tirana is the capital of Albania. Court of Appeal in Tirana accommodates Electoral College judges on their activity on their *ad hoc* capacity when adjudicating court appeals of electoral disputes.

which affect their legal interests. In this respect, CEC is considered not only as *quasi-judicial* body, but also as first judicial instance for adjudicating the electoral disputes, since the appeal is presented directly to EC of Court of Appeals.

2.1 Court Appeal of electoral disputes to Electoral College; nature of CEC decisions to be complaint against

As specified by Electoral Code, the court appeal will be filed by electoral subjects, only against the CEC decisions which affect their legal interests. That means that court appeal will take place only after CEC decision taking procedure, in other words only after the administrative complaint procedure of electoral disputes had been exhausted before CEC. In this respect, there should be a formal decision of CEC to be challenged by electoral subjects to Electoral College.

Even in the cases when CEC fail to make a decision within the legal deadline, or it is not possible to reach its quorum, electoral subjects can file a lawsuit to Electoral College against CEC failure to make a decision; in such cases the College can not judge the case on its merits (since it has not the CEC competences and authority), but if it accepts the request, should compel CEC to take a decision¹³. There are some exceptions when CEC failure to take a decision could not be subject to court appeal to Electoral College – in these cases, CEC competences are considered strictly administrative and strictly related to electoral matters *per sé*, such as allocation of seats for each electoral zone, adjudication of complaints against the decision for approving the aggregated table of elections results tabulated by CEC, requests for invalidation of elections in one zone or the entire country and repetition of elections¹⁴. Actually this provision had been deeply discussed during elections and pre-elections procedures in Parliamentary elections¹⁵ in Albania during 2013, since it is considered very ambiguous clause, in violation with international standards of elections resolving disputes¹⁶ provided in OSCE countries.

Court appeal is granted also to individuals or political parties whose request to be registered as electoral subject had been rejected¹⁷ by CEC decision. This clause is related to pre-elections period and applies for both parliamentary and local elections.

2.2 Electoral College (EC) of the Court of Appeals in Tirana; composition, guarantees and procedures for examining the court complaint

Electoral College is a judicial body that was recently adopted at the new Electoral Code (2008), amended in 2012¹⁸. It was designed to ensure the court appeal review standard for electoral disputes, after they are considered at the administrative level by CEC. EC is composed of 8 Appeal

¹³ See Art. 145/2, of Electoral Code. For more information regarding CEC failure to take a decision and its interpretation, refer to Decision No. 35/2013 of the Constitutional Court of Albania that rejected the case to trial.

¹⁴ See Art. 145/2 and Art. 24/a,b,c,ç of Electoral Code.

¹⁵ See 'Final Monitoring Report of Parliamentary Elections 2013 in Albania', drafted by Coalition of Domestic Observers (CDO), 5.8 – Electoral College '... in some cases, there had been overlaps of Electoral College decision taking procedure over CEC competences, explicitly provided by Electoral Code.'. for more please see CDO website zgedhje.al/index.php?idart=59&gj=sh

¹⁶ See Election Disputes in the OSCE Area: 'Towards a Standard Election Dispute Monitoring System', II.C. Accessibility and Transparency, para. 13-18.

¹⁷ *Supra*, See part I.1. 'Right to administrative complaint to CEC', para. 2.

¹⁸ 'The Electoral Code was amended in July 2012, which improved the electoral framework overall. These changes addressed a number of previous recommendations of the OSCE/ODIHR and the Venice Commission. The legal framework generally provides a sound basis for the conduct of democratic elections. However, public confidence in the electoral process suffered because implementation and enforcement by all main stakeholders fell short in a number of respects'. For more info see Elections Observations Mission, OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, Parliamentary Elections of Albania, 2013 camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/062/EO_2013_06_24_Albania_parliamentary.pdf

Court judges, elected by lot by High Council of Justice of Albania and exercises its functions during the whole duration of a legislature of the Parliament, for four years. During this duty, EC judges are immune from disciplinary proceedings¹⁹.

EC starts adjudication of CEC decisions complaints after a lawsuit (Art. 153) is presented by electoral subjects at Court of Appeals in Tirana, which forwards the complaint and file to EC. Procedures before EC are similar and sometimes the same as civil proceedings before the common courts. Also, parties²⁰ at judicial examination proceedings at EC, are entitled to all procedural, rights²¹ provided by Code of Civil Procedures of Albania.

2.3 Nature of EC decision

After termination of procedures for examining the complaint against CEC decisions or failure to take a decision, EC can take the decisions to:

- compel CEC to take a decision,
- to judge the case on its merits, or
- to dismiss a case²².

Electoral Code provides that decision of EC *is final*, and no appeal might be filed against it (Art. 158/5). This provision is clear on its content that EC decision could not be subject to review or further appeal, but there had been two lines of legal discussions, due to different legal interpretations (considering the legal context) on how 'final' the EC decision can be?

One line of discussion is based on the fact that EC decision is final and that was considered more as a '*gentleman agreement*²³', mostly after elections of 2001 in Albania; during these parliamentary elections, there had been many disputes, and pursuant to the time being Electoral Law (2001) Constitutional Court had the power to review in last instance the decisions of CEC for elections – in this respect, during that time, Constitutional Court issued 59 Decisions for the final result of elections²⁴, which practically decided on 59 seat allocations. After these elections, political parties and other actors agreed that Electoral College would be the last instance to review electoral disputes in court appeal level, after the administrative complaint stage by CEC. The other line of discussion supports the fact that decision of EC is final *per sé*²⁵, but it could be appealed to Constitutional Court.

The question raised is can EC be considered the last complaint resort for electoral disputes in Albania? For this purpose let's analyze the Constitution of Albania, the Constitutional Court decision-making and reasoning and the legal critique on the matter.

3. Constitution, Constitutional Court and electoral disputes

3.1 Constitutional Court and its power to verify the election of MPs²⁶

As analyzed above, the electoral complaints cycle starts with CEC in administrative level and upon complaint is forwarded to EC for court appeal review. Also, EC decision is final and no appeal

¹⁹ See Art. 146-149 of Electoral Code.

²⁰ Electoral Subjects. For more info see *supra* - Footnote # 4.

²¹ See Art. 154-156 of Electoral Code.

²² See Art. 152 - 158 of Electoral Code.

²³ See Dobjani Ermir, 'Constitution, Elections and Constitutional Court of Albania,' Interview with former Albanian Ombudsman, Prof. Dr. Ermir Dobjani'. See also Decision 53/2013 of Constitutional Court, para. 26.

²⁴ See the publication of Constitutional Court Decisions, 'Electoral Process 2001'.

²⁵ Final for the purpose of execution '*finarium iudium*', not for the purpose of '*res iudicata*' – for more see Decision 2/2013 of Constitutional Court that rejected the case for trial, para. 10.

²⁶ *Abbrv.* of Member of Parliament.

might be filed against it²⁷. Meantime, Albanian Constitution provides that *'The Constitutional Court decides on issues related to the eligibility and incompatibilities in exercising the functions of the President of the Republic and of the deputies (MP), as well as the verification of their election'* (Art. 131/e). In this respect, whenever electoral subjects are not satisfied with the decision or the procedure of EC, can file a complaint to the Constitutional Court to verify the elections of MP-s, so Constitutional Court is considered last complaint resort for electoral disputes. It extends the effect only for parliamentary elections²⁸ (*verification of MP's election*).

Also, if we refer to Law²⁹ 'On the Organization and Functioning of Constitutional Court of Albania', it provides that *'Constitutional Court verifies the elections of Members of Parliament, upon the request of political parties or independent candidates, in application of Electoral Law in force'* (Art. 66/2 of the Law); *'Constitutional Court can reject the request or the annulment of CEC Decision'* (Art.67/1) – these provisions do not refer specifically to EC since the Law was approved on 2000 and Electoral Code was approved later on (in 2008 and amended in 2012), but the contextual interpretation of the provisions leads to the view that Constitutional Court can review the final decisions of elections administration processes (in that case EC decision) for the purpose of verification of MP elections.

3.2 Constitutional Court and adjudication of individual complaints for 'fair trial'

Elections are processes of international³⁰ and also national concern, especially with regards to elections procedures seat allocation, where complaint procedures are also included. Pursuant to 'fair trial' requirements of ECHR (Art. 6) and Albanian Constitution (Art. 42), the legislator had provided also the opportunity of individuals to address the case to Constitutional Court, which decides on *'the final adjudication of the complaints of individuals for the violation of their constitutional rights of due process of law, after all legal remedies for the protection of those rights have been exhausted'* (Art. 131/f of Albanian Constitution).

In this respect, individuals that allege a violation of their constitutional rights such as the right to be elected (Art. 45 of Constitution; passive electoral right³¹), can address the dispute for 'fair trial' alleged violations, to Constitutional Court after the all legal remedies had been exhausted – in our analyze *supra*, EC decision is final³², and this is considered the last legal remedy for electoral subjects; in this context, a court decision is necessary required to be final (EC decision) and consequently un-appealable to justify the requirement of 'exhausting of all legal remedies'³³, in order to complaint to Constitutional Court. By interpreting literally the Art.131/f, of Albanian Constitution, the Constitutional Court can exercises constitutional control to all final court decisions, being those EC decisions.

How do we interpret the Electoral Code clause, which provides that *'No appeal might be made against the EC Decision'* (Art.158/5)? In this case we refer to general principles of Albanian Constitution; first, to Article 116³⁴ that provides the hierarchy of normative acts, starting with Constitution as the highest normative authority; second, to the principle of appeal that 'everyone has the right

²⁷ *Supra*. II. 3. 'Nature of EC decision'.

²⁸ For more info see Decision 53/2013 of Constitutional Court that rejected the case to trial. para. 24&25.

²⁹ Law 8577/2000.

³⁰ Art. 3, Protocol 1 of ECHR provides 'Right to free elections' - echr.coe.int/Documents/Convention_ENG.pdf.

³¹ *'Ius honorum'- lat.*

³² Art. 158/5 of Electoral Code.

³³ See Sadushi Sokol, Former Member of Constitutional Court of Albania, 'Constitutional Court – Why was it self-excluded from electoral processes? – article published on June 2013 gazetatema.net/web/2013/06/11/gjykata-kushtetuese-pse-u-vetepershjtua-nga-procesi-zgjedhor/.

³⁴ Part VII of Albanian Constitution, 'Normative Acts and International Agreements', Chapter 1. For more info see osce.org/albania/41888.

to appeal a judicial decision to a higher court, except when the Constitution provides otherwise' (Art.43). In this regard, Constitution has a superior authority; even though Electoral Code provides that no appeal might be made against EC decision, is required that Constitution must be directly applied³⁵. Therefore Constitutional Court could be a potential resort, for electoral subjects (*political parties and candidates supported by voters*) for issues related to 'verification of MP election' for parliamentary elections (local elections are excluded) and also for alleged violation of '*fair trial/ due process of law*' (this can be extended also to local elections). It remains to electoral subjects to address the case to Constitutional Court to appeal against the EC decision. It remains to Constitutional Court of Albania to consider the merits of the complaint *mutatis mutandis*. This procedure leaves open the potential possibility of electoral subjects to address the case even to European Court of Human Rights for violation of '*fair trial/ due process of law*' (Art.6 of ECHR), after the Constitutional Court decision, since it will exhaust domestic effective legal remedies (Art. 13 of ECHR).

³⁵ See **Marbury v. Madison** (1803) – '*Supreme Court has the authority to declare that laws are unconstitutional. It declared that Judiciary Act of 1789 was unconstitutional*' and that '*Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply*' (5 U.S., para. 177-178 of the decision). For more info see supremecourt.gov/search.aspx?Search=marbury+madison+&type=Site.

4. Conclusions

Albanian legislation (Electoral Code) guarantees in details and in complete the administrative review of electoral disputes, at the level of Central Elections Commission. It also fully guarantees the court appeal level of judicial review of electoral disputes by Electoral College, as foreseen by international standards of elections and elections dispute resolution. Electoral subjects enjoy all legal instruments being those material and procedural, to satisfy their legal interest in administrative and court appeal level. Albanian legislation, especially Albanian Constitution leaves room for another judicial review of electoral disputes at Constitutional Court for 'verification of election of MP' that is focused only to parliamentary elections. Therefore EC is not the last domestic resort for resolving electoral disputes, but Constitutional Court is.

Albanian Constitution also provides the possibility that electoral subjects can address the case for alleged violation of '*fair trial*' clause during electoral disputes proceedings, after all legal remedies for the protection of rights have been exhausted (after the EC decision), at Constitutional Court. This issue can be addressed for parliamentary and local elections also. In such case the Constitution applies directly. If this thread of rights protection applies, electoral subjects can address the case also to ECtHR in Strasbourg, pursuant to Art. 6 of ECHR requirements.

5. Answer to the question

Electoral College cannot be considered the last resort for resolving electoral disputes in Albania. In domestic level, last resort is provided to be the Constitutional Court for verification of election of MP, and also for alleged violation of 'fair trial/due process of law' requirements (after all legal remedies have been exhausted). Even though Electoral Code explicitly provide that EC decision is final and no appeal might be against it, the Constitution prevails by guaranteeing to electoral subjects the right to address the case to Constitutional Court.

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