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LAWS ON ENFORCEMENT PROCEDURE IN BOSNIA AND HERZEGOVINA: COMPLIANCE WITH THE EUROPEAN HUMAN RIGHTS STANDARDS

Abstract

Laws on enforcement of Republika Srpska and Federacija BiH limit or completely prohibit enforcement against the state debt. It should be noted that the notion of the state for the purpose of this paper includes not only federal or federal unit authorities but also local self-government, public institutions and state-owned (controlled) enterprises. These limitations on enforcement concern every object of enforcement. I argue that such rules of enforcement limitation do not fulfill the requirement of lawfulness developed by the European Court of Human Rights, because they are vague and non-predictable and they put an excessive burden on enforcement creditor within the meaning of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, I argue that it is necessary to harmonize the terminology within the legislation; to give more specific guidelines for determining whether some property can be the object of enforcement; to clearly stipulate that the only competent authority to determine whether or not certain enforcement can be carried out is the court. The aim of the proposed solutions is to harmonize national legislation with the ECHR and to reduce the possibility of state abuse of rights.

Keywords: enforcement procedure, lawfulness principle, quality of law, Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights.

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1. Introduction

Enforcement Procedure Act of Republika Srpska² (hereinafter: EPA RS) and Enforcement Procedure Act of Federation of Bosnia and Herzegovina³ (hereinafter: EPA FBiH) favour the state and entities related to it as enforcement debtors because they prohibit or limit enforcement on every object of enforcement.⁴ Thus, a collection of state debts can be hindered not only by refusing to pay the debt voluntarily but also through an enforcement procedure.

The paper will examine whether the restrictive provisions of EPA RS and EPA FBiH are clear and precise enough and sufficiently predictable and therefore in accordance with the *lawfulness* principle developed by the European Court of Human Rights (hereinafter: ECtHR). Thus, first, it needs to be explained which are the requirements that need to be fulfilled in order for a domestic law to be considered as law in the context of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). Subsequently, certain restrictive provisions of EPA RS and EPA FBiH will be analyzed and I will try to come to the conclusion whether they are in accordance with the ECtHR's lawfulness concept. My assumption is that the contested provisions do not meet the requirement of mentioned concept and impose a disproportionate burden on enforcement creditors. On this point, I have to say that I have not been able to find any scholar publications or case-law⁵ regarding this problem. Thus, I will suggest how the enforcement legislation should be amended in order to be in line with the human rights standards within the Council of Europe (hereinafter: CoE).

² *Official Gazette of RS [Službeni glasnik RS]*, no. 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13, 98/14, 5/17.

³ *Official Gazette of FBiH [Službeni novine FBiH]*, no. 32/03, 33/06, 39/06, 39/09, 35/12, 46/16.

⁴ State structure of the Bosnia and Herzegovina (BiH) is complex. It is consisted out of two *sui generis* federal units ("entities") *Republika Srpska* and *Federacija Bosne i Hercegovine* and one administrative unit *Brčko District*. The District is jointly administered by entities. Competencies and jurisdictions between the BiH, entities and the District are divided. Therefore, in addition to the laws on enforcement of entities, two other laws on enforcement exist in BiH: Law on Enforcement Procedure before the Court of Bosnia and Herzegovina and Enforcement Procedure Act of Brčko District. These two acts do not contain such limitations on enforcement against the state and therefore, shall not be the subject of this paper.

⁵ ECtHR is of the opinion that if some vague provision is clarified by the case-law, than the requirement of lawfulness is satisfied. See the case of *Cantoni v. France*, no. 17862/91, judgment of November 11, 1996, §§ 29-36, especially § 32 in which it is stated that the ECtHR must "ascertain whether in the present case the text of the statutory rule read in the light of the accompanying interpretive case-law satisfied this test at the relevant time".

2. Law quality according to the Strasbourg court's case-law

Legal rules should govern our behaviour and our rights and duties should be based on laws in order to avoid the state arbitrariness. This is the fundamental principle of the rule of law. Not only should our behaviour be regulated by law, but such a law should be of a certain quality. This is the view of the ECtHR and it has established certain conditions that every national law should fulfil. We should bear in mind that *law* refers to all types of legal rules: statutes, acts, bylaws, customary rules and even rules derived from a case-law can be regarded as a law.⁶

I will briefly explain these conditions. At first, the law should be accessible.⁷ Second, law should be clear enough, i.e. legal rules should be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"⁸. Naturally, an absolute clarity is not possible, because legal standards⁹ are unavoidable, but in that case, there should be certain guidelines for the application of the law in question.¹⁰ The third quality concerns the non-arbitrariness. Namely, it is possible that law provides a broad range of powers for state authorities, which can lead to arbitrary actions. The ECtHR concluded that "domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention"¹¹. Thus, if a domestic law provides certain discretion for authorities, at the same time, it "must indicate the scope of any such discretion conferred on the competent authorities"¹².

⁶ Cf. S.Greer, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg 2000, 16. Cited according to the V.Beširević et al., *Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda*, Službeni glasnik, Beograd 2017., 230, fn. 979; D.Поповић, *Европско право људских права*, Службени Гасник, Београд 2012., 282; D.Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, Oxford University Press, Oxford 2014., 506.

⁷ *Sunday Times v. United Kingdom*, no. 6538/74, judgment of April 26, 1979, § 49. This requirement is in the vast majority of cases satisfied, since acts and statutes are being published in official gazettes of the states.

⁸ Ibid.

⁹ Legal standard implies a concept which appears in certain legal rule and changes its own meaning depending on each specific case. It does not provide for a complete freedom to the entity which is obliged to apply it, i.e. it does not imply arbitrariness. The entity has to apply legal standards in accordance with objective criteria. Cf. *Pravna enciklopedija* (gl. redaktor Borislav T. Blagojević), Savremena administracija, Beograd 1979., 1050-1051.

¹⁰ See more in D.Harris et al., 507-508.

¹¹ *Liu Liu v. Russia*, no. 42086/05, judgment of December 6, 2007, § 56.

¹² Ibid. See, also D.Harris et al., 508.

3. Legal framework of the limitation of enforcement against the state

Several articles of the EPA FBiH and the EPA RS limit or forbid enforcement against the state or an entity controlled or financed by the state. Those articles are 79a, 117a, 137a, 138 (3) – (6), 187a of the EPA FBiH and articles 7 (3), 166 (7) of the EPA RS.

By simply looking at mentioned articles, we can conclude that the limitations relate to every method and object of enforcement. The purpose of such limitations is (or should be) to enable the state and all state-related entities to carry out public interest activities. Essentially, there are two interests at stake – the interest of an individual (enforcement creditor) and the public (general) interest. Priority is given to the public interest by providing the higher degree of protection to the judgment debtor (the state). Otherwise, it might be impossible or extremely difficult for the state to perform public interest tasks and there would be the instability of public finances.¹³

Abovementioned provisions did not exist at the time of enactment of the EPA RS and the EPA FBiH in 2003. They have been created through the legislative amendments.¹⁴ Apparently, over the time, the legislators' opinion changed and they concluded it is needed to set restrictions on enforcement against the state. The protection of the state as enforcement debtor is not *per se* disputable. Protection of private persons as enforcement debtors to a certain degree is common in European legal systems.¹⁵ Nevertheless, as it will be seen, it is disputable whether such protection of the state is solely intended to preserve the unhindered performance of the public interest tasks and the maintenance of financial stability or to preserve the state's comfort.

¹³ Cf. decisions of the Constitutional Court of Bosnia and Herzegovina, no. AP-2110/08, § 50; no. AP-1879/16, § 38.

¹⁴ Enforcement limitations against the state debt are not completely new in our legal tradition. Enforcement procedure legislation during the time of the SFRY stipulated some similar limitations. See A. Daupović *et al.*, *Komentari zakona o izvršnom postupku u Federaciji Bosne i Hercegovine i Republici Srpskoj*, Savjet Evrope, Evropska komisija EU, Sarajevo 2005., 24-28; B. Poznić, *Gradansko procesno pravo*, Savremena administracija, Beograd 1980., 440-443; S. Triva, V. Belajec, M. Dika, *Sudsko izvršno pravo – opći dio*, Informator, Zagreb 1984., 171-177; B. Popović, V. Ristić, *Priručnik za praktičnu primenu Zakona o izvršnom postupku sa komentarom, sudskom praksom, obrascima i registrom pojnova*, Privredna štampa, Beograd 1981., 176-192; N. Srećković, D. Lukić, *Priručnik sudskog izvršnog postupka*, Pravno ekonomski centar, Beograd 1986., 305-319.

¹⁵ Cf. Н.Бодирога, *Теорија извршног поступка*, Правни факултет Универзитета у Београду, Београд 2012., 211-221.

4. Limitation on enforcement against the state according to the EPA FBiH

4.1. Limitation on enforcement against monetary funds on bank accounts of FBiH, cantons and local self-government

One of the curiosities of the Bosnian legal system is Art. 138 (3) – (6) of the EPA FBiH. It limits the enforcement against monetary funds on bank accounts owned by FBiH, cantons and local self-government. State debt can be enforced by this method only to the amount envisaged by the budget for a certain year. Amendments of EPA FBiH from 2016 stipulate that minimal amount of money needed for this purpose shall not be under 0,3% of the whole budget.

Since I wrote about this enforcement limitation in details in one of the earlier publications¹⁶, the following text will only briefly outline the essence of the problem. First of all, the state has not calculated its total debt for the purpose of enforcement proceedings.¹⁷ This implies that we do not have a reliable statistics whether the enforcement against the state would endanger the public finances.¹⁸ Despite that, the state has decided to which amount the enforcement against its' monetary funds on bank accounts can be done. This means that the legislator in FBiH envisaged the minimum amount of 0,3% of the budget arbitrarily. It is therefore important to calculate the total debt, precisely because the amount of the debt will be crucial for deciding whether there is a public interest in limitation of enforcement against the state and to what extent the limitation is necessary.

Furthermore, the current rules do not provide information when could creditors collect their claims, and they can only to speculate when they will realize their rights. This unpredictability is contrary to the aforementioned lawfulness principle.¹⁹ Therefore, the state should provide every creditor with the information on the state debt and on the number of all creditors in other enforcement procedures, in order for a creditor to be able to foresee when his/her/its claim will be discharged.

It can be concluded that Art. 166 (3) – (6) is not in accordance with the ECHR because it does not possess one of the required qualities of law – the predictability.

¹⁶ I.Popović, *Ograničenje naplate u izvršnom postupku na teret budžeta u BiH, Sveske za javno pravo*, br. 28, 2017, 62-72.

¹⁷ Cf. decisions of the Constitutional Court of Bosnia and Herzegovina, no. AP-2110/08, § 54; no. AP-1879/16, § 42; no. AP-1473/16, § 23.

¹⁸ I.Popović, 65.

¹⁹ *Ibid*, 66. See in particular the case of *Amat G Ltd and Others v. Georgia*, no. 2507/03, judgment of September 27, 2005, §§ 61-63.

4.2. Enforcement limitations on real and movable property owned by FBiH, cantons or local self-government

EPA FBiH prohibits enforcement on real property owned by entities, cantons, local self-government or public funds (*javni fondovi*) regardless of the purpose of such real property.²⁰ I argue that if some real property is not used to perform public interest tasks or is not used primarily for this purpose, there is no reason why would it be exempt from enforcement. For instance, even today, certain state-owned residential facilities are rented or being used by employees and, therefore, not used for performing public interest tasks. This kind of real property should not be treated the same as a real property which is used for public functions (e.g. headquarter of the ministry of interior affairs).²¹

Since the state owns a lot of real property, current legal framework excessively favors the state as the enforcement debtor in relation to other judgment debtors and places excessive burden on the enforcement creditor within the meaning of Art. 1 of Protocol 1 to the ECHR²², because it additionally and unjustly makes the debt recovery more difficult. Therefore, these provisions should be amended in a way that they limit enforcement only on the real property which is *necessary* for performing activities of public interest, because of the essence of enforcement limitation, as said before, is to preserve the public functions, not the comfort of the state and its' employees.

It should also be noted that it is stipulated that the court will decide in each case on the prohibition of enforcement on the described real properties.²³ Nevertheless, the court does not have much to decide, because the prohibition refers to all real property. Thus, the role of the court is minimized and its decision will be purely declarative.

The situation is slightly different when it comes to the movable property because enforcement is prohibited “only” on capital assets (*stalna sredstva za rad*) of the FBiH, cantons, local self-government and public funds.²⁴ What exactly, the capital assets are is not, unfortunately, elaborated and it is an example of another vague notion within the EPA FBiH. Case-law has not

²⁰ Art. 79a of the EPA FBiH.

²¹ It was considered that the state owned residential facilities were not exempted from enforcement during the SFRY. See in B.Popović, V.Ristić, 178.

²² Assessment of an excessive burden is the part of proportionality test, which the ECtHR uses to determine whether the right to property was violated. Cf. V.Beširević *et al.*, 652-653; P. van Dijk, G.J.H. van Hoof, *Teorija i praksa Evropske konvencije o ljudskim pravima*, Müller, Sarajevo 2001., 595-598; C.Harland, R.Roche, E.Strauss, *Komentar Evropske konvencije o ljudskim pravima prema praksi u Bosni i Hercegovini i Strasbourg*, Sarajevo 2003., 358-364.

²³ Art. 79b of the EPA FBiH.

²⁴ Art. 117a (1) of the EPA FBiH.

decided upon this issue and therefore, it cannot help us to clarify this notion. The concept of capital assets is primarily an economic concept. It includes *all* property and rights (not just movable property) which are being used for a longer period of time by an enterprise for its business (e.g. buildings, cars, all kinds of tools and machines).²⁵ Thus, it is illogical to use this concept for stipulating the enforcement limitation on movable property. Further on, this implies that enforcement is prohibited on all movable property which is *used* for a longer period of time by the state and state-related entities for their work, not the movable property which is *necessary* for that work. For instance, if some car is used by certain executive authority, it cannot be the object of enforcement, no matter if the car is necessary for carrying out the authority's tasks. Once again – a very broad scope of limitation which does not serve the aim of enforcement limitations (preservation of the public finances)!

4.3. Limitation on enforcement against shares of FBiH, cantons or local self-government in business enterprises

New limitations on enforcement against the state were added by last amendments of the EPA FBiH in 2016. They put an absolute prohibition on enforcement against shares of the state in any enterprise.²⁶

As argued for enforcement on state-owned real property, it is unclear why all shares are exempted from enforcement. I do not see how this is aimed at the preservations of public interest tasks. For instance, let's say that FBiH owns 80% of shares in some company. Amount of the enforcement creditor's claim is 15% of the value of the whole shares. In case of enforcement, the state would still be the major shareholder with 65% of shares. Thus, enforcement would not endanger the functioning of the state or its interest in the certain enterprise. This example proves that this provision's amendments are necessary. The scope of the provision should be reduced in a way that the enforcement should be allowed as long as it does not jeopardize the status of the state as a major shareholder, otherwise the state would not be able to control the enterprise. Thus, the state would still be a major shareholder and enforcement creditor's claim would be settled in whole or, at least, partially.

What if the state has less than 50% of shares in an enterprise? Then, this provision does not make sense. As the minority shareholder, the state cannot independently control and manage the enterprise. The primary role of such share is the acquisition of a dividend. In that case, there is no

²⁵ <https://www.investopedia.com/terms/c/capitalasset.asp>, November 18, 2017. See also N.Nikolovski, *Osnovna sredstva za rad – pojam i podjela* available at: <http://www.ets-becej.edu.rs/files/Osnovna%20sredstva-pribavljanje.pdf>, November 18, 2017.

²⁶ Art. 187a of the EPA FBiH.

reason to keep the enforcement limitation. In the case of the existence of certain enterprises of special interest for the state and whose equity capital should not be changed, although the state is not the major owner,²⁷ then records should be made of such companies that would be exempted from enforcement.

During the enactment of these amendments, the FBiH Government said that the *rationale* of this article is to protect the FBiH property. The Government argued that courts in FBiH constantly order the annotation of pledge over the *whole amount* of shares of state-owned enterprises, regardless of the amount of debt. In that way, *unnecessary* annotations of a pledge²⁸ deny and limit the FBiH's right to use its property, concluded the Government.²⁹ I find that the only meaningful argument from the Government's reasoning is that in courts' practice, the pledge is being established over *all* shares, regardless of the amount of state debt. If it is indeed so (is it not strange why the FBiH Government has not submitted or specified any such court's decision as the proof of its arguments!?), then such a practice can be avoided by adding a simple provision that pledge can be established only against the part of the shares which is needed to settle the debt.³⁰

5. Limitations on enforcement against the state according to the EPA RS

Art. 7(3) of the EPARS stipulates, similarly as the EPA FBiH, limitations on enforcement on the certain real property and movable property owned by RS, local self-government and state-owned companies. Still, between EPA RS and EPA FBiH, there is a difference in this regard – EPA RS excludes from the enforcement only the property which is necessary for carrying

²⁷ E.g. enterprises established on the basis of foreign investments and co-owned by foreign investor and the state.

²⁸ I have to say that establishment of the pledge is not *unnecessary* as argued by the Government. There would have been no annotation of a pledge, if the state had settled its debt on time. The only thing that may be unnecessary is the *extent* of the annotation of pledge, if it is established against the *whole amount* of shares. The annotation of pledge *per se* (as the part of the enforcement procedure) is, certainly, necessary for the debt recovery.

²⁹ See *Explanation of the Draft of EPA FBiH Amendments from 2016*, 4-5. The Explanation available at: http://www.parlamentfbih.gov.ba/dom_naroda/bos/parlament/propisi/El_materijali_2016/Zakon%20o%20izmjena%20i%20dopunama%20Zakona%20o%20izvrsnom%20postupku_bos.pdf, 20.11.2017.

³⁰ It should be noted that this kind of provision already exists in Art. 65 of the EPA FBiH which stipulates that enforcement to satisfy a monetary claim shall be decided and enforced for the *amount necessary* to recover the debt. Thus, in the case of excessive establishment of the pledge over shares, the state, as the enforcement debtor, can, already, file an objection, or appeal, invoking the violation of Article 65 of the EPA FBiH. Therefore, the whole argumentation of the Government has no point.

out public interest tasks. Does it mean that EPA RS is compatible with the ECHR's standards? The answer is, still, no, bearing in mind arguments which have previously been raised against similar provisions of the EPA FBiH³¹, even though the scope of enforcement limitation is narrowed. Namely, the requirement of lawfulness is still not fulfilled, because, it is not prescribed at all *who*, on the basis of *which criteria* and *how* is to decide which property is necessary for the performance of public interest activities.

Since enforcement limitations are prescribed by the rules of enforcement procedure, it is logical that this issue shall be decided by the court. Nevertheless, it is unclear whether the court has an absolute discretion in terms of assessing whether something is necessary for activities of public interest. If, for instance, certain executive authority declares some real property as the property necessary for performing activities of public interest, is the court limited by such a declaration? If so, the court's hands are, *ab initio*, tied.

Further, it is not clear how this decision will be made. It is not envisaged whether the court shall invoke Art. 7 (3) *ex officio* or only upon the objection of the enforcement debtor; or whether the special hearing shall be scheduled for solving this issue or can the court decide without any hearing. All of these doubts and questions are completely legitimate, because of Art. 7 (3) does not provide answers and there are no guidelines in case-law³² or in scholar papers to clearly determine the content and meaning of the above-said provision. It is for these reasons, that this provision does not fulfil the requirement of lawfulness required by the ECtHR.³³

One should notice that Art. 7 (3) exempts from an enforcement not only real property and movable property, but also *rights* of RS, local self-government and state-owned enterprises. Linguistic interpretation of this provision implies that *all types of rights* come under this provision since no particular rights are stipulated. Application of the mentioned provision can lead to two problems. First, the relation between Art. 7 (3) and Art. 166 (7) is not clear. Art. 166 (7) stipulates that general rules of enforcement against monetary claims are not to be applied on enforcement against monetary funds on bank accounts of the RS, local self-government or state-owned enterprise, which are *needed for* (not *necessary* as prescribed by Art. 7 (3)) performing public interest tasks. Therefore, it is not clear whether Art. 166 (7) is just the concretization of Art. 7 (3) in the sense that it clarifies that claim (right) to monetary funds on the bank account is just one of the rights mentioned in Art. 7 (3) or it stipulates that the right to monetary funds on bank account may be subject to different enforcement limitation rules. Second, monetary funds are *res fungibles* and monetary

³¹ *Supra*, section 4 of this paper.

³² I have not been able to find a consistent or any case-law upon this issue.

³³ These arguments can be raised, also, against Art. 79a (2) of the EPA FBiH.

funds on a bank account are in their nature *inter partes* rights (claims)³⁴. Therefore, it is unclear which funds are subject to the limitation of Art. 166 (7) (funds *needed to* carry out public interest tasks). The problem gets bigger if all funds are being kept only on one main bank account and there is no special purpose account. Is it going to be possible to separate the funds on which the enforcement is allowed from the funds on which the enforcement is not allowed? It seems that this was the problem with the strike of the state-controlled railway company Željeznice Republike Srpske (hereinafter: ŽRS) employees. They tried to enforce their claims against the company on company's funds on two bank accounts. The RS Ministry of Justice sent a note to the court, requesting such enforcement to be suspended because those two bank accounts contain funds necessary to carry out activities of public interest. Ministry argued that RS Government donated certain amount funds to the ŽRS for the railway infrastructure maintenance and therefore required an activation of Article 7 (3).³⁵ Still, since these are the main bank accounts of ŽRS, how can the court divide funds donated for the infrastructure maintenance from the rest of funds on which the enforcement is permitted? This example shows us that vague provisions can cause a lot of problems in case-law.

The Constitutional Court of Bosnia and Herzegovina came to the same conclusion and stated that Art. 7 (3) is not clear enough because it does not prescribe *who* and in *which* procedure shall define more clearly which objects and funds are needed to carry out public interest activities or how shall funds for fulfilling a debt to creditors be provided for.³⁶

6. The legal path for solving the problem – clearer legal rules

Before I go further with the proposal for legislation changes, there is the question on which we should answer – do human rights standards arising from ECHR go so far that it is necessary to amend abovementioned national legislation? There is no doubt that ECtHR is not a fourth judicial instance and that an abstract control of legislation before it is not possible. Further, where are the limits of human rights standards arising from ECHR, especially if we bear in mind that legitimate people's representatives chose how to legislate an enforcement procedure?

I argue that it is absolutely justified and necessary to change the provisions on enforcement against the state. It would not be that

³⁴ On legal nature of bank accounts see in P.Miladin, Bankarski računi pravnih i fizičkih osoba, *Pravo u gospodarstvu: časopis za gospodarskopravnu teoriju i praksu*, 44/2005, 4, 146-148.

³⁵ See news report of the *Alternativna televizija*, available on <http://www.youtube.com/watch?v=bmw1C6dy6pQ>, July 15, 2017.

³⁶ Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP-774/03, § 395.

problematic if, for example, enforcement is only prohibited on state's real property, movable assets and monetary claims (except funds on bank accounts), which are *necessary* for carrying out the public interest activities, if on the other hand, there is an unhindered enforcement against monetary funds on bank accounts (state budget); or at least if the limitation on enforcement against the budget would be more reduced than it is the case now with the EPA FBiH. In the sense of the later, one can cite the example of Serbia that enables debt recovery through enforcement procedure of up to 50% of the total budget funds for the budget user (state-controlled entity). If funds for that user are spent, there shall be transfer from another appropriation to the appropriation of the user against whom enforcement is made.³⁷

Regarding the law quality principle (clarity, predictability, and non-arbitrariness) that has already been discussed, the provisions that create, or rather, try to create a legal standard, need to be supplemented to clearly define *who* and on the basis of *which criteria* decides whether some property or a right are necessary for carrying out tasks of public interest, and to *what extent* the enforcement can be permitted. It should be stipulated that the court is the only competent authority to decide whether certain enforcement can be done. Exemption from enforcement under these provisions should be limited on the property and rights *necessary* for carrying out public interest tasks and the burden should be on the enforcement debtor to prove that certain property should be exempted from enforcement. Also, a court should not decide on this issue *ex officio*, but only on the objection of the enforcement debtor. This method is partially stipulated by the EPA FBiH because it is prescribed that a court should decide in every case whether the conditions for enforcement limitation are fulfilled. Nevertheless, detailed instructions for court proceedings are missing and in the case of enforcement on real property, the court has nothing to decide on, because the all real property is being exempted from the enforcement. In this regard, the rules on the enforcement procedure of Croatia and Montenegro can be taken as an initial step, which prescribe that, based on the circumstances that existed at the moment of filing the motion for enforcement, it shall be estimated whether a certain property could be the subject of enforcement.³⁸

It is evident that provisions on limitations upon the enforcement against the state have a very broad scope, because they refer to every

³⁷ Art. 56a of the Law on Budgetary System, *Official Gazette of Republic of Serbia*, no. 54/09, 73/10, 101/10, 101/11, 93/12, 62/13, 63/13, 108/13, 142/14, 68/15, 103/15, 99/16.

³⁸ Art. 4 (7) of the Croatian Law on Enforcement, *Official Gazzete*, no. 112/12, 25/13 и 93/14 and Art. 27 (6) of the Montenegrin Law on Enforcement, *Official Gazzete of Montenegro*, no. 36/11, 25/13, 93/14.

method and object of enforcement. Even if they satisfy the principle of *lawfulness*, these provisions are not proportionate in the terms of Art. 1 of Protocol 1 of ECHR, because they put an excessive burden on an individual (enforcement creditor). The quantity and broad scope of these provisions give the final answer to the previously asked question – yes, the ECHR standards of human rights protection go so far that it is necessary to amend the laws on the enforcement procedure in RS and FBiH.

With regards to the conditions of clarity and predictability, it is necessary to use the same terminology, which is not the case currently. Namely, if we look more carefully, we will notice that legislators are using different words and phrases to limit the enforcement for the sake of performing public interest tasks: *necessary to* (*neophodno*)³⁹, *needed to* (*potrebno*)⁴⁰ or *serves to* (*služi za*)⁴¹ for performing public interest tasks. At first, we have to examine whether the words *necessary to* (*neophodno*) and *needed to* (*potrebno*) have the same meaning or have a different meaning in terms of the degree of “necessity” of certain property to perform public interest tasks. Two arguments indicate that these words are synonyms. First, linguistically, it seems that these words have the same meaning.⁴² Second, while the Constitutional Court of Bosnia and Herzegovina was assessing in one of its decisions whether Art. 7 (3) of the EPA RS is in accordance with the ECHR, it has replaced phrase *needed to* with the *necessary to*.⁴³ If these words (phrases) do not have the same meaning, then one of these two phrases (I would say *neophodno*) indicates at the higher degree of need for performing tasks of public interest. The third phrase – *serves to* (*služi za*), certainly does not have the same meaning as the previous two. It extends the privileged status of the state as enforcement debtor. If a certain property serves a particular purpose, it does not mean that it is necessary for its realization. This purpose can be accomplished without that property, but with more difficulties.

The above said indicates that only one term should be used. Between currently used words: *necessary to*, *needed to* and *serves to*, I find *necessary to* as the most appropriate solution. The reason is that this term would create a standard that exempts from enforcement only the basic property that the state uses in the performance of its public interest tasks, those that are essential and indispensable for those tasks.

Importance of clarity of enforcement procedure rules has been recognized by the Committee of Ministers of the CoE. In one of its recommendations, it states that “enforcement should be defined and

³⁹ Art. 7 (3) of the EPA RS

⁴⁰ Art. 166 (7) of the EPA RS.

⁴¹ Arts. 79a, 117a (2) and 137a of the EPA FBiH.

⁴² *Речник српског језика* (ed. M. Nikolić), Matica Srpska, Novi Sad 2011., 805, 973.

⁴³ Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP-774/04, § 395.

underpinned by a clear legal framework” and that “any legislation should be sufficiently detailed to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible”.⁴⁴

7. Concluding remarks

Poor public finances affect every aspect of our lives. Collection of the state debt is no exemption. Republika Srpska and Federacija Bosne i Hercegovine have created extremely broad limitations on enforcement against them and entities related to them. As seen throughout this paper, rules which stipulate such limitations are unclear and unpredictable and therefore cannot satisfy the lawfulness principle developed by the ECtHR. Also, the quantity of these limitations put an excessive burden on enforcement creditor in the sense of Art. 1 of Protocol 1 to the ECHR.

It should be noted that the enforcement against monetary funds on bank account should be the easiest way to collect the state debt. Unfortunately, limitation of this enforcement method is the most controversial limitation of the enforcement against the state. The most recent decisions of the ECtHR against the BiH concern this issue.⁴⁵ In these cases, applicants have not been able to enforce judgments in their favour for years (between four and eleven years)⁴⁶. The ECtHR stated that there are already more than four hundred similar applications pending before it. Applicants cannot benefit from switching to another method of enforcement (e.g. enforcement of real property or movable property) due to the stipulated limitations on those methods as well. This indicates that enforcement against the state debt is one of the urgent problems in BiH and legislative amendments are needed.

If one summarizes all limitations prescribed by the EPA RS and EPA FBiH, it can conclude that we, the citizens of Bosnia and Herzegovina, are faced with the *phenomenon of an unlimited limitation on enforcement against the state*. This is certainly not in accordance with the ECtHR’s case-law and recommendations of the Committee of Ministers of CoE.

⁴⁴ Council of Europe Recommendation Rec (2003) 17 of the Committee of Ministers to Member States on enforcement, 09.09.2003. Cf. Н.Бодирога, 63-66.

⁴⁵ *Kunić and Others v. Bosnia and Herzegovina*, no. 68955/12 7270/15 7286/15 7316/15 7321/15 7325/15 7336/15 7408/15 7418/15 7429/15 19494/15 19501/15 19547/15 19548/15 19550/15 19617/15, judgment of November 14, 2017 and *Spahić and Others v. Bosnia and Herzegovina*, no. 20514/15 20528/15 20774/15 20821/15 20847/15 20852/15 20914/15 20921/15 20928/15 20975/15 21141/15 21143/15 21147/15 21224/15 21237/15 21239/15, judgment of November 14, 2017.

⁴⁶ *Kunić and Others v. Bosnia and Herzegovina*, § 30, *Spahić and Others v. Bosnia and Herzegovina*, § 30.

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ZAKONI O IZVRŠNOM POSTUPKU U BOSNI I HERCEGOVINI: USKLAĐENOST SA EVROPSKIM STANDARDIMA O ZAŠTITI LJUDSKIH PRAVA

Rezime

Zakoni o izvršnom postupku entiteta u Bosni i Hercegovini (Republike Srpske i Federacije Bosne i Hercegovine) ograničavaju ili u potpunosti onemogućavaju izvršenje u postupcima u kojima je država dužnik. Država se pri ovome gleda kao jedan širi subjekt, u koji se uključuju svi nivoi vlasti (entiteti, kantoni i lokalne samouprave, ali i neki drugi subjekti koji su pod kontrolom države). Takve ograničavajuće odredbe odnose se na svaki predmet i sredstva izvršenja (nepokretne i pokretne stvari, novčana potraživanja, dionice i sl.). Argumentuje se da one ne ispunjavaju uslov zakonitosti razvijen u praksi Evropskog suda za ljudska prava, prije svega zbog nejasnosti i nepredvidljivosti, ali da isto tako nisu srazmjerne u smislu prava na imovinu tražioca izvršenja zbog njihove brojnosti i obima dometa. Naposljetku, autor predlaže da se kroz izmjene i dopune uspostavi jasniji pravni okvir i daje prijedloge za početne korake za ostvarenje tog cilja. U tom smislu, izvršenje se može ograničiti samo na onim stvarima i pravima koje su nužne sa obavljanje poslova od opštег interesa. Dodatno, potrebno je ujednačiti terminologiju u zakonima, dati konkretn(ij)e smjernice za određivanje da li neka stvar ili pravo mogu da budu predmet izvršenja, jasno propisati da je jedino izvršni sud nadležan da određuje da li se može ili ne može provesti određeno izvršenje. Cilj predloženih rješenja je, pored usklađivanja zakonodavstva sa EKLjP i smanjenje mogućnosti zloupotrebe prava od strane države.

Ključne riječi: izvršni postupak, princip zakonitosti, kvalitet zakona, Konvencija za zaštitu ljudskih prava i osnovnih sloboda, Evropski sud za ljudska prava.